

U N I V E R S I T Y
o f
O T A G O



Te Whare Wānanga o Otāgo

Should unmarried cohabitants in Malaysia be entitled to the same legal protection as married couples when it comes to the division of property?

A Comparative and Theoretical Analysis.

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Abstract

Presently there is no statutory framework to protect the property interests of unmarried cohabitants in Malaysia. Moreover, Muslim cohabitants are not recognised at all within Malaysian law. By contrast, when a marriage ends, the parties to the marriage, whether Muslims or non-Muslims have clear statutory protection as regards their property rights within the Malaysian legislation. This is despite the fact that the two types of relationships may be identical in terms of their functions. This thesis offers a comparative analysis of the English and New Zealand jurisdictions, which do provide protection for cohabitants and their relationship property. In order to offer reform in Malaysia, the theoretical paradigm of functionality is assessed and presented, upon which a legislative model framework is presented. The framework is based on the theory of functionality, which means that when the functions in the relationship are same (between marriage and unmarried cohabitation), the property sharing outcome should be the same, irrespective of the status of the relationship. Malaysia operates a pluralist legal system, thus the legislative model framework presented within this work recommends that it should be applied to the Civil legal system only and not to be incorporated within the Malaysian Sharia Law, which deems unmarried cohabitation as a criminal offence.

Preface/Acknowledgements

During my internship attachment at the Kuala Lumpur Legal Aid Centre, I had the opportunity to meet unmarried cohabitants who visited the centre to obtain some advice on their legal rights. The experiences of dealing with cohabitants who practically have no legal rights in Malaysia have embarked my interest and passion towards this area of research. This thesis intends to challenge the big voices in Malaysia that has been denying and discouraging rights to cohabitants. The Law Faculty of the University of Otago, especially the knowledge and expertise of Professor Mark Henaghan (my primary supervisor) fitted well into this predilection. I would like to extend my heartfelt gratitude to him for the endless support and guidance, time-spent, the confidence he had in me and the inspiration he seeds into me in delving into my doctoral thesis. I am also grateful to my second supervisor, Associate Professor Margaret Briggs. She has been very helpful and always gives me new ideas when we bump into each other. I would thank her for all her detailed comments and also that she encouraged me to view the research from different perspectives.

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*This thesis is dedicated to my mother, Madam Saroja Sangodan;
my late father, Mr Karuppiah Narayanan; and
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Summary of Contents

Chapter One: Introduction

1. Background
2. The Research Methodology
3. Limitations of the Research
4. Arrangement of the Chapters

Chapter Two: The Theory of Functionality in Unmarried Cohabitation

1. Introduction
2. The Theoretical Framework of Functionality
3. Pro-Functionalist: 'Function' versus 'Form'
4. Pro-Formalist
5. The Diversity in Unmarried Cohabitation
6. Conclusion

Chapter Three: The Plurality of the Legal System in Malaysia: A Historical Contextual Analysis

1. Introduction
2. Historical Background
3. Malaysian (Islamic and Asian) Values
4. Malaysian 'Islamic' Values
5. Malaysian 'Asian' Values
6. Conclusion

Chapter Four: Law of Marriage and Cohabitation in Malaysia

1. Introduction
2. Property Law and Rights in Malaysia
3. Property Divisions for Married Couples and Unmarried Cohabitants
4. Conclusion

Chapter Five: Law of Marriage and Cohabitation in England

1. Introduction
2. Historical Background
3. Property Divisions for Married Couples and Unmarried Cohabitants
4. Related Jurisdictions
5. Conclusion

Chapter Six: Law of Marriage and Cohabitation in New Zealand

1. Introduction
2. Historical Background
3. The Statutory Framework
4. Property Divisions for Married Couples and Unmarried Cohabitants (De Facto Partners)
5. Conclusion

Chapter Seven: Recommendation

1. Introduction
2. The Proposed Statutory Framework
3. Case Study
4. Conclusion

Chapter Eight: Conclusion

Glossary of Terms

Malay terms in Malaysia

Adat:	Local customs and traditions.
Artikel:	Article (referred in legislation).
Bahagian:	Part or section.
Bumiputera:	The Malay race and aborigines of Malaysia.
Enakmen:	Enactment.
Harta sepencarian:	Matrimonial Property.
Lawan or lwn:	Against (referred in case law).
Ringgit:	The Malaysian currency.
Seksyen:	Section (referred in legislation).
Sultan (sultanate):	The Malay Ruler.
Temenggong of 'Johore' or 'Johor':	An official who maintains the law and order (commands the police and army).
Yang di-Pertuan Agong:	The King of Malaysia.
Sdn Bhd (Sendirian Berhad):	Private limited.

Term in New Zealand

De facto relationship:	For the purposes of the Property (Relationships) Act 1976 in New Zealand, a de facto relationship is between two persons (whether a man and a woman), or a man and a man, or a woman and a woman; who are both aged 18 years or older; and who live together as a couple; and who are not married to, or in a civil union with, one another.
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Term in England

Femme sole/Feme sole: A woman who had never been married or who was divorced or widowed, or to a woman whose legal subordination to her husband had been invalidated by trusts, a pre-nuptial agreement or judicial decision.

Islamic terms

Hadith: It is a collection of traditions containing sayings of the Prophet Muhammad which, with accounts of his daily practice (the Sunna), constitute the major source of guidance for Muslims apart from the Quran.

Hudud: Crimes against God (literal meaning: limit)

Ijma: Scholarly consensus on Islamic principles.

Ijtihad: The original interpretation of problem not covered within the Quran and Hadith.

Istislah: A norm employed by Muslim jurists to solve problems based on religious texts.

Khalwat: Man and woman found to be close in proximity to each other.

Liwat: Sexual relations between male persons.

Musahaqah: Sexual relations between female persons.

Qiyas: Analogical reasoning.

Al-Quran: The Islamic sacred book as dictated to Prophet Muhammad by archangel Gabriel and written down in Arabic.

Sharia (Syariah, Shariah, Shari'a): Islamic Law; system of duties.

Sulh: Amicable settlement.

Sunni:	The branch of Islam that accepts the first four caliphs as rightful successors of Muhammad.
Talaq:	Divorce.
Zina:	Fornication or adultery.

List of Abbreviations

AC:	Appeal Cases, United Kingdom.
All ER:	All England Law Reports.
CA:	Court of Appeal, New Zealand.
CDHRI:	Cairo Declaration on Human Rights.
CH:	Law Reports, Chancery Division.
CLJ:	Common Law Journal, Malaysia.
Cox Eq:	Cox's Reports, English Chancery.
CPA 2004:	Civil Partnerships Act 2004, England.
DLR:	Dominion Law Reports, Canada.
EGLR:	Estates Gazette Law Reports, United Kingdom.
EWCA:	England and Wales Court of Appeal.
FC:	Family Court, New Zealand.
FCR:	United Kingdom Court Reports.
FLR:	United Kingdom Family Law Reports.
FMSLR:	Federated Malay States Law Reports.
FRNZ:	Family Reports of New Zealand.
IFLFTA 1984:	Islamic Family Law (Federal Territories) Act 1984, Malaysia.
JH:	Jurnal Hukum (the 'Hukum' Journal), Malaysia.
JMBRAS:	Journal of the Malaysian Branch of the Royal Asiatic Society.
JSBRAS:	Journal of the Straits Branch of the Asiatic Society.
K & J:	Kay and Johnson.
LQR:	Law Quarterly Review.
LRA 1976:	Law Reform (Marriage and Divorce) Act 1976, Malaysia.
MCA 1973:	Matrimonial Causes Act 1973, England.
MLJ:	Malayan Law Journal, Malaysia.
MLJA:	Malayan Law Journal Articles, Malaysia.

MLR:	Modern Law Review.
MPA 1976:	Matrimonial Property Act 1976, New Zealand.
MWPA:	Married Women's Property Act, New Zealand.
NZAR:	New Zealand Administrative Reports.
NZFLR:	New Zealand Family Law Reports.
NZHC:	New Zealand High Court.
NZLJ:	New Zealand Law Journal.
NZLR:	New Zealand Law Reports.
P & CR:	Property, Planning and Compensation Reports, United Kingdom.
PRA 1976:	Property (Relationships) Act 1976, New Zealand.
PRAA 2001:	Property (Relationships) Amendment Act 1976, New Zealand.
QB:	Law Reports, Queen's Bench Division, United Kingdom.
RFL:	Reports of Family Law, Canada.
SCR:	Supreme Court Reports, Canada.
TOLATA:	Trusts of Land and Appointment of Trustees Act 1996, United Kingdom.
UDHR:	Universal Declaration of Human Rights.
UKHL:	United Kingdom House of Lords.
UKSC:	United Kingdom Supreme Court.
VA. L. Rev:	Virginia Law Review.
WLR:	Weekly Law Reports, United Kingdom.

Table of Contents

CHAPTER 1: INTRODUCTION	16
1.1 BACKGROUND	16
1.2 RESEARCH METHODOLOGY	17
1.3 LIMITATIONS OF THE RESEARCH	18
1.4 ARRANGEMENT OF THE CHAPTERS	19
CHAPTER 2: THE THEORY OF FUNCTIONALITY IN UNMARRIED COHABITATION	21
2.1 INTRODUCTION	21
2.2 THE THEORETICAL FRAMEWORK OF FUNCTIONALITY	23
2.2.1 AMY AND JACK - AN EXAMPLE OF A FUNCTIONAL COHABITING RELATIONSHIP	27
2.2.2 THE DURATION OF THE RELATIONSHIP	29
2.2.3 THE NATURE AND EXTENT OF COMMON RESIDENCE	32
2.2.4 THE EXISTENCE OF SEXUAL RELATIONSHIP	34
2.2.5 THE DEGREE OF FINANCIAL DEPENDENCE OR INTERDEPENDENCE	35
2.2.6 THE OWNERSHIP, USE AND ACQUISITION OF PROPERTY	37
2.2.7 THE DEGREE OF MUTUAL COMMITMENT TO A SHARED LIFE	38
2.2.8 THE CARE AND SUPPORT OF CHILDREN	40
2.2.9 THE PERFORMANCE OF HOUSEHOLD DUTIES	41
2.2.10 THE REPUTATION AND PUBLIC ASPECTS OF THE RELATIONSHIP	42
2.2.11 THE FORGOING OF A HIGHER STANDARD OF LIVING	42
2.2.12 THE GIVING OF ASSISTANCE AND SUPPORT THAT ENABLES THE OTHER PARTNER TO ACQUIRE QUALIFICATIONS, CARRYING ON OF HIS OR HER OCCUPATION OR BUSINESS	43
2.3 PRO-FUNCTIONALIST: 'FUNCTION' VERSUS 'FORM'	45
2.4 PRO-FORMALIST	53
2.4.1 RIGHTS TO COHABITANTS UNDERMINES THE INSTITUTION OF MARRIAGE	54
2.4.2 MARRIAGE IS A PUBLIC COMMITMENT	56
2.4.3 THE RIGHT TO RESPECT FOR INDIVIDUALISM	59
2.4.4 THE EXPECTATIONS AND INTENTIONS OF MARRIED AND COHABITING COUPLES	62
2.4.5 UNMARRIED COHABITATION AS FREEDOM	66
2.4.6 MORALITY	69
2.5 DIVERSITY IN UNMARRIED COHABITATION	82
2.6 CONCLUSION	86
CHAPTER 3: THE PLURALITY OF THE LEGAL SYSTEM IN MALAYSIA: A HISTORICAL CONTEXTUAL ANALYSIS	88
3.1 INTRODUCTION	88
3.2 HISTORICAL BACKGROUND	88

3.2.1 AN OVERVIEW OF THE MALAYSIAN SYSTEM	91
3.2.2 MALAYSIAN LEGAL PLURALISM: CIVIL AND SHARIA LAWS	93
3.3 MALAYSIAN (ISLAMIC AND ASIAN) VALUES	98
3.3.1 MALAYSIAN (ISLAMIC AND ASIAN) VALUES AND HUMAN RIGHTS	101
3.4 MALAYSIAN 'ISLAMIC' VALUES	102
3.4.1 MALAYSIA'S RESPONSE TO HUMAN RIGHTS IN LIGHT OF 'ISLAMIC' VALUES	111
3.5 MALAYSIAN 'ASIAN' VALUES	116
3.5.1 MALAYSIAN 'ASIAN' VALUES: INDIVIDUALISM VERSUS COLLECTIVISM	119
3.5.2 MALAYSIAN 'ASIAN' VALUES: EQUALITY VERSUS HIERARCHY	121
3.5.3 MALAYSIA'S RESPONSE TO HUMAN RIGHTS IN LIGHT OF 'ASIAN' VALUES	123
3.6 CONCLUSION	128
 CHAPTER 4: LAW OF MARRIAGE AND COHABITATION IN MALAYSIA	 130
4.1 INTRODUCTION	130
4.2 PROPERTY LAW AND RIGHTS IN MALAYSIA	131
4.3 PROPERTY DIVISIONS FOR MARRIED COUPLES AND UNMARRIED COHABITANTS	136
4.3.1 MATRIMONIAL PROPERTY DIVISION FOR MARRIED COUPLES	136
4.3.2 RELATIONSHIP PROPERTY DIVISION FOR UNMARRIED COHABITANTS	162
4.4 CONCLUSION	185
 CHAPTER 5: LAW OF MARRIAGE AND COHABITATION IN ENGLAND	 187
5.1 INTRODUCTION	187
5.2 HISTORICAL BACKGROUND	188
5.2.1 THE DEVELOPMENT OF THE STATUTORY FRAMEWORK	190
5.2.2 THE MODERN ERA	192
5.2.3 SAME- SEX RELATIONSHIPS	194
5.2.4 UNMARRIED COHABITATION	195
5.3 PROPERTY DIVISIONS FOR MARRIED COUPLES AND UNMARRIED COHABITANTS	199
5.3.1 MATRIMONIAL PROPERTY DIVISION FOR MARRIED COUPLES	201
5.3.2 RELATIONSHIP PROPERTY DIVISION FOR UNMARRIED COHABITANTS	205
5.4 RELATED JURISDICTIONS	222
5.5 CONCLUSION	224
 CHAPTER 6: LAW OF MARRIAGE AND COHABITATION IN NEW ZEALAND	 226
6.1 INTRODUCTION	226
6.2 HISTORICAL BACKGROUND	227
6.3 THE STATUTORY FRAMEWORK	229
6.4 PROPERTY DIVISIONS FOR MARRIED COUPLES AND UNMARRIED COHABITANTS (DE FACTO PARTNERS)	241
6.4.1 THE SITUATION BEFORE THE ADOPTION OF THE PROPERTY (RELATIONSHIPS) ACT 1976	242
	14

6.4.2 THE SITUATION AFTER THE ADOPTION OF THE PROPERTY (RELATIONSHIPS) ACT 1976	251
CHAPTER 7: RECOMMENDATION	259
7.1 INTRODUCTION	259
7.2 THE PROPOSED STATUTORY FRAMEWORK	260
COHABITANTS RELATIONSHIP PROPERTY ACT	260
THE PREAMBLE AND PURPOSE OF LEGISLATION	260
SECTION 1: MEANING OF COHABITATION	260
SECTION 2: MATTERS TO WHICH THE COURT IS TO HAVE REGARD IN DECIDING PROPERTY DIVISION	261
7.3 CASE STUDY	277
7.4 CONCLUSION	283
CHAPTER 8: CONCLUSION	285
BIBLIOGRAPHY	287
PRIMARY MATERIALS	287
CASES	287
LEGISLATION	291
SECONDARY MATERIALS	296
TEXTS	296
ESSAYS IN EDITED BOOKS	300
LOOSELEAF TEXT	303
JOURNAL ARTICLES	303
ENCYCLOPAEDIAS	313
SEMINARS, SPEECHES, LECTURES AND PAPERS PRESENTED AT CONFERENCES	314
OTHER SOURCES	315
INTERNET MATERIALS	315
NEWSPAPER ARTICLES/MAGAZINES	323
INTERVIEWS	327
PRESS RELEASE	327
REPORTS	327
BIBLE	328
AL-QURAN AND HADITH	328
HUMAN RIGHTS CONVENTIONS	328
APPENDICES	329

Chapter 1: Introduction

1.1 Background

There is no statutory framework to protect the property interests of unmarried cohabitants in Malaysia at the present time. Moreover, Muslim cohabitants are not recognised at all in Malaysian law. By contrast, when a marriage ends, the parties to the marriage, whether Muslims or non-Muslims have clear statutory protection as regards their property rights within Malaysian legislation. This is despite the fact that the two types of relationships may be identical in terms of their functions and the roles the parties play. According to the theory of functionality when two relationships perform the same functions, distinctions should not be made on the basis of their status and formality of the relationship. These functions and roles include, but are not limited to financial dependence and interdependence,¹ the acquisition of property,² the sharing of material and monetary support,³ home making and child rearing,⁴ and sexual relationship.

In Malaysia, a cohabitant who has contributed to a lesser financial degree, but who has made significant non-financial contribution is often economically disadvantaged when the relationship ends. For example if one of the partners was the breadwinner of the family, whilst the other partner is the homemaker, the latter would probably contribute less within the monetary sphere. This causes concerns when the relationship breaks down as clearly both parties have contributed to the relationship, but in different ways. In such situations, the financial support is lost and consequently the primary carer, who has not been working or earning income is exposed to economic deprivation as a result.

¹ Law Commission “Cohabitation: The Financial Consequences of Relationship Breakdown: A

² Ibid, at 47, para 3.20: In England, where there is no express declaration of trusts in the acquisition of property belonging to cohabitants, the law of implied trust and proprietary estoppel may be called to determine the respective entitlements to cohabitants.

³ Ibid, at 154, para 6.116: In the event of relationship breakdown, past loss of earnings incurred by an applicant who had undertaken child-care responsibilities would be counterbalanced to some extent by the financial support provided by the other party during the relationship.

⁴ Ibid, at 74, para 4.12: One commentator in the study commented that the lost employment opportunities of many cohabitants who undertake home making and child rearing is not fairly compensated by the English courts; Patricia Morgan *Marriage-Lite, The Rise of Cohabitation and its Consequences* Institute for the Study of Civil Society in New Century Schoolbook (The Cromwell Press Trowbridge Wilshire 2000): the research covers the outcomes of cohabitation to children.

Subsequently, this income shortfall may draw some negative impacts, such as loss of promotion prospects, downward occupation mobility, or depletion of skill on return after a gap.⁵ Moreover, in cases where the children were still dependent on separation, the parent who has been primarily responsible may need to engage in full-time employment, arrange and move to new accommodation, as well as continue to be involved in the sole child care responsibility.⁶

With regards to non-Muslim cohabitants the courts apply the principles of constructive trusts to remedy property disputes without any statutory guidance. Thus, a gap exists in Malaysian law and the purpose of this thesis is to fill that gap by presenting a model legislative framework. The model incorporates the strengths of legislation in other jurisdictions, which affords protection to cohabitants especially in relation to the division of relationship property. The framework is based on the theory of functionality, which means that when the functions in the relationship are same (between marriage and unmarried cohabitation), the property sharing outcome should be the same, irrespective of the status of the relationship.

1.2 Research Methodology

This thesis adopts a theoretical and comparative analysis to support the argument of equality, upon which the theory of functionality becomes operational.

The theoretical analysis draws on literature supporting a “functionalist” approach to the categorisation of relationships. A functionalist approach (which is discussed in-depth in chapter two) investigates the characteristics, conversations and conduct of

⁵ Katherine Rake (ed) *Women's Incomes over the Lifetime* (The Stationery Office London UK TSO, 2000) at 117.

⁶ Risman pointed to ‘the logic of gendered choices’, whereby existing institutional and cultural arrangements make it practical for many couples who do not have a strong preference for following a traditional division of labour, to nonetheless adopt these traditional practices.⁶ For example, on the birth of a child, the father’s higher income, and/or the mother’s greater opportunity for paid leave, part-time work may entrench them in a gendered breadwinner or home-carer position: Barbara J. Risman *Gender Vertigo: American Families in Transition* (Yale University Press 1998) at 29.

cohabitants in the relationship, by contrast to a formalist approach that gives weight to the legal status of the relationship. This approach is utilised within the law of other jurisdictions and this thesis is specifically concerned with how England and New Zealand apply this within their legal systems.

The comparative analysis in this thesis draws on legislation and case law from England and New Zealand, both common law jurisdictions like Malaysia and both taking different approaches to the treatment of cohabitants. However, despite the doctrinal differences in that there is variation in the degree to which cohabitants are given property entitlements in comparison to married couples, the courts in the three jurisdictions apply a theory of functionality, albeit to different degrees, to determine equal property division for cohabitants. For example, the courts in all three jurisdictions quantify the partners' contribution towards the relationship, examine the parties' conduct, the need and resources of the parties and other matters deemed necessary by the court.

Malaysian law adopts the formal approach as opposed to functional approach as regards to the relationship status of cohabitants, with the result that the relationship status of cohabitants is not recognised by legislation. Despite the lack of formal legislative recognition of functionality, the Malaysian courts have begun to identify, accept and apply a functionality approach.

1.3 Limitations of the Research

It should be noted at the outset that this research and the model presented within it is not applicable to Malaysians practising the Islamic faith.⁷ Cohabiting relationships within the Sharia legal system is deemed illegal. Thus, the model cannot be applied in that manner due to the limitations of the Sharia law of which is discussed in chapter three. However, a broad overview of the Islamic principles is important because Islam is the religion of the Federation of Malaysia and is embraced by the majority of the population. Moreover, an

⁷ Muslims are governed by the Sharia legal system, whilst non-Muslims fall within the ambit of the Civil legal system. This is reflective of Malaysia's pluralistic legal system.

analysis of Sharia law is significant to demonstrate that there are principles of equality within the Sharia law, which could be exported into the Malaysian Civil legal system especially as it pertains to the protection of cohabitants.

Further, the literature review illustrates that there is a serious lack of research concerning the situation of unmarried cohabitants and their rights to the division of relationship property in Malaysia. This may be due to the fact that unmarried cohabitation, particularly within Malaysian values (Islamic and Asian values as discussed in chapter three) is considered as a social taboo. Similarly, it should be noted that cohabitation under the Sharia law is a criminal offence. This may also explain the absence within national census statistics, which does not include a specific column relating to one's relationship status as a 'cohabitant'.

1.4 Arrangement of the Chapters

Chapter two investigates the functions of cohabitants within the cohabiting relationships and suggests that the relationship should be legally recognised based on the theory of 'functionality'. Scholarly debates both on the pro-functionalist and pro-formalist arguments are examined. This chapter also highlights the diversity in cohabitation and concludes that irrespective of the variety, cohabitants should be provided with equal legal rights as of married spouses.

Chapter three provides an overview of Malaysia, its historical development, the plurality of the legal system and Malaysian values. This is important because Malaysia is a multicultural society and in order to comprehensively understand the operation of the Malaysian legal system, a historical and analytical overview of the development of Sharia and Civil laws are discussed. This provides a basis and better understanding about why there is no formal recognition and thus, lack of legislation relating to the division of relationship property in cohabiting relationships. Thereafter chapter four presents a detailed analysis of the law of marriage in Malaysia, as well as an analysis of the rise in

case law which relates to cohabiting couples in relation to the division of relationship property.

Chapter five compares the legal position of married couples and unmarried partners in the division of relationship property, in the English legal jurisdiction. Both Malaysia and England, when considering cohabiting relationships and the division of property, adopt equitable constructive trusts as a remedy in such disputes. The research methodology necessarily dictates a much-needed comparative analysis between Malaysia and England in that both jurisdictions operate entirely different legal systems yet offer similar remedies in such disputes.

Chapter six discusses the laws of marriage and cohabitation in New Zealand, its statutory developments, and the legal situation involving cohabitants and the division of relationship property. An assessment is undertaken concerning the Property (Relationships) Act 1976 (“PRA 1976”). This includes an analysis of the situation in New Zealand before and after the introduction of the PRA 1976.

Chapter seven presents a model legislative framework to be adopted and applied in the Malaysian Civil legal system concerning the division of relationship property of unmarried cohabitants. The model presented within this thesis is informed by the legal discourses identified from the English and New Zealand jurisdictions. Chapter eight concludes the thesis.

Chapter 2: The Theory of Functionality in Unmarried Cohabitation

2.1 Introduction

*“Married and unmarried people who are living together share many values. Indeed, the similarities in the normative determinants of their behaviour may be greater than the dissimilarities.”*⁸

The central theme of this thesis is to argue that cohabitants should be treated the same as married couples, because the former relationship functions the same as the latter in the family institution. This chapter analyses in-depth the functions of cohabitants within their relationship. It concludes that couples in both marriage and cohabitation live their lives in much the same way. For example, there is clear evidence of financial dependence and interdependence in the cohabiting relationships (as similar to married couples), particularly where there are children.⁹ One of the partners may have to sacrifice their career and stay at home in order to take care of the children of the relationship.¹⁰ This homemaker is usually financially dependent on the breadwinner of the family, as he or she does not incur a personal source of income. Moreover, as with married spouses, cohabitants tend to buy properties and assets, while sharing material and monetary contributions to the household economy.¹¹ This could apply to childless cohabitants as well. They also provide emotional support for each other during the relationships.¹² Cohabitants and married couples alike adopt these functions. This matter is examined further in the following discussion. Accordingly, this thesis argues that cohabitants

⁸ M Maclean and J Eekelaar “Marriage and the Moral Bases of Personal Relationships” (2004) 31 Issue 4 Journal of Law and Society at 538.

⁹ The result from the survey conducted in England (research funded by Nuffield Foundation on 3000 respondents), showed that of those involved in the survey, 47 per cent had been living together for five years or more and 23 per cent over ten years: Anne Barlow, Grace James “Regulating Marriage and Cohabitation in 21st Century Britain” 67 Modern Law Review at 156.

¹⁰ Stuart Bridge (Law Commissioner) “Money, Marriage and Cohabitation August, Family Law” (2006) <http://lawcommission.justice.gov.uk/docs/Cohabitation_FamLaw_082006.pdf> at 642.

¹¹ Robert A. Moffitt, Robert Reville, Anne E. Winkler “Beyond Single Mothers: Cohabitation and Marriage in the AFDC Program” (1998) Demography 35 No 3 at [259-278].

¹² The courts considers the parties’ emotional support to prove cohabitation: Goran Lind *Common Law Marriage: A Legal Institution for Cohabitation* (Oxford University Press 2008) at 541; Lloyd T. Wilson Jr. “Loss of Consortium Claims by Unmarried Cohabitants: The Roles of Private Self-Determination and Public Policy” (1982) 57 Issue 4 Maurer School of Law: Indiana University Digital Repository at 613.

should be equally treated as married couples and that the matrimonial property regime should be extended to the former, when it pertains to the divisions of relationship property.

In New South Wales, Australia, ‘non- couple’ based relationship are recognised if cohabitants have been living together and made contribution to the relationship. This category is specified as ‘close personal relationship’. A ‘close personal relationship’ is a relationship between two adult persons (whether or not they are related by family), living together and when one or each of them provides the other with personal care and/or domestic support.¹³ However, this does not cover flatmates and paid carers. When the ‘close personal relationship’ breaks down, the partner could make a claim to the court to divide the relationship property. Nevertheless, it should be mentioned that this thesis does not cover the partners falling under such category. This research only investigates the issues of property rights pertaining to cohabitants living together as a ‘couple’.

Subsequently in this chapter:

1. An analysis is conducted as to the functions that cohabitants perform in a cohabiting relationship. The functionality features are extracted from the list of criteria set out in section 2D and 18 (partially) of the New Zealand Property (Relationships) Act 1976.¹⁴
2. There are debates supporting ‘functionality’ and/or ‘formality’ and this chapter argues that ‘functionality’ prevails over ‘formality’ for relationships recognition.
3. The diverse types of cohabiting unions will be addressed, however, it argues that regardless of the differences, the relationship between cohabitants and their ‘functionality’ should be recognised as the same as marriage.

¹³ Succession Act 2006 (NSW).

¹⁴ This list is similar to the Property (Relationships) Act 1984 (NSW) and ‘Molodowich’ test in Canada: the case of *Molodowich v Penttinen* 17 RFL 2d 376 (1980).

2.2 The Theoretical Framework of Functionality

This section analyses the theory of *functionality* and addresses the literature pertaining to cohabiting relationships and the division of property. The main functionalist theorists are George P. Murdock and Talcott Parsons. Murdock argued that on the basis of his studies, the main functions of family are: sexual, reproductive, economic, and educational functions.¹⁵ Parsons identified two functions: the primary socialisation of children, and the stabilisation of adult personalities in the population of society.¹⁶ However, early functionalist theories have been largely criticised for having not provided any alternatives to family. Namely, they have not considered other institutions that can also perform functions that are being fulfilled by family, for example, unmarried cohabiting relationships. For instance, the Social Action sociologists argue for the diversity of family structures (nuclear and based on marriage, nuclear and based on unmarried cohabitation, extended, lone parent and single sex families based upon civil partnership) and of behaviour within families.¹⁷

To observe the cohabiting relationship, an accurate analysis of how the cohabitation is built cannot be identified only from an external perspective. It is necessary also to examine the relationship from within and through a deep analysis. Among the essential matters to be considered are what do cohabitants expect from themselves and society? How do they live in the relationship? How do they deal with everyday life? What are their opinions about marriage? Are they interested to ever marry? Or, will they be together without ever getting married? How do they imagine their future? Are they committed to the relationship or actually not interested in it? Do they plan to have children? Are they planning to buy a house, or other property? Do they plan to share the property and other financial means?

¹⁵ Michael Haralambos and Martin Holborn *Sociology: Themes and Perspectives* (Collins Educational London United Kingdom 2000) at 509.

¹⁶ Ibid.

¹⁷ "Functionalism and "the" Family: A Summary" Earlhamsociologypages accessed on 16/02/2015 <<http://www.earlhamsociologypages.co.uk/functfamsum.html>>.

In an attempt to address these questions, the discussion adopts a ‘functional approach’. A functional approach means that the functions parties perform in marriage are similar to the functions that cohabitants perform in a cohabiting relationship. The functional approach investigates the characteristics, conversations, and conducts of cohabitants in the relationship. To examine the functions, the following shall feature the list of criteria set out in Section 2D and 18 of the New Zealand Property (Relationships) Act 1976.¹⁸ Among the essential criteria to prove the functionality are:

1. The Duration of the Relationship;
2. The Nature and Extent of Common Residence;
3. The Existence of Sexual Relationship;
4. The Degree of Financial Dependence or Interdependence;
5. The Ownership, Use and Acquisition of Property;
6. The Degree of Mutual Commitment to a Shared Life;
7. The Care and Support of Children;
8. The Performance of Household Duties;
9. The Reputation and Public Aspects of the Relationship;
10. The Foregoing of a Higher Standard of Living; and/or,
11. The Giving of Assistance and Support that enables the other Partner to Acquire Qualifications, Carrying on His or Her Occupation or Business.

¹⁸ This list is also similar to Property Relationships Act 1984 (New South Wales) and ‘Molodowich’ test in Canada. New Zealand’s Property (Relationships) Act 2001 is extracted from the Property Relationships Act 1984 (New South Wales). In the case of *Molodowich v Penttinen* 17 RFL 2d 376 (1980), Judge Kurisko of the Ontario Court used a list of factors to determine the existence of relationship between unmarried cohabitants. The list is as follows: (1) Shelter: did the parties live under the same roof? what were the sleeping arrangements? Did anyone else occupy or share the available accommodation?; (2) Sexual and Personal Behaviour: Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were the feelings toward each other?; (3) Services: What was the conduct and habit of the parties in relation to preparation of meals, washing and mending clothes, shopping, household maintenance and any other domestic services?; (4) Social: Did they participate together or separately in neighbourhood and community services?; (5) Societal: What was the attitude and conduct of the community towards each of them as a couple?; (6) Support (economic): What was the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc)?; (7) Children: What was the attitude and conduct of the parties concerning children?

It should be noted that the functional equivalence approach has been criticised for the extent to which it measures cohabitants' relationships against a norm of an idealised marital relationship.¹⁹ Indeed, it is even tempting to speculate how many marriages would fail to qualify as 'marriage-like' if they were subjected to similar scrutiny.²⁰ In her thoughtful dissent in the case of *Mossop*, Justice L'Heureux-Dube cautioned that functional definitions of family should not be used to establish one model of family as the norm:

The use of a functional approach would be problematic if it were used to establish one model of family as the norm, and to then require families to prove that they are similar to that norm. It is obvious that the application of certain variables could work to the detriment of certain types of families. By way of example, the requirement that a couple hold themselves out to the public as a couple may not, perhaps, be appropriate to same-sex couples, who still often find that public acknowledgement of their sexual orientation results in discriminatory treatment. It is also possible that a functional model may be used to subject non-traditional families to a higher level of scrutiny than (traditional) families who appear to conform more to the traditional norm.²¹

The functional equivalence approach is dedicated to how marriages tend to be, or how judges imagine marriages ought to be.²² Even on occasion, where a married couple fail to perform those functions, their matrimonial rights are still protected by the

¹⁹ Ontario Law Reform Commission *Report on the Rights and Responsibilities of Cohabitants* (Toronto O. L. R. C 1993) at 62; there is a danger that 'the idealized functional approach sets up a monolithic and mythical image of the marital relationship, against which all relationships are evaluated, Brenda Cossman and Bruce Ryder "Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms" (1993) Toronto: Ontario Law Reform Commission at 78.

²⁰ Brenda Cossman and Bruce Ryder "What is Marriage-Like Like? The Irrelevance of Conjugal" (2001) 18 Can J Fam L at 288.

²¹ *Mossop v Canada (Attorney General)* [1993] 1 S. C. R. 554 (1993) 100 D. L. R. (4th) 658; along the same lines, Justice Cory in *Egan v Canada* [1995] 2 S. C. R. 513 (1995) 124 D. L. R. (4th) 609 at para 169 noted that same-sex relationships need not conform to an idealized norm to qualify as conjugal.

²² Cossman and Ryder (2001), above n 20, at 290.

existence of a marriage certificate. This marriage declaration does not demand the presence of functions in the relationship. In spite of that, it seems ironic that cohabitants, who can prove their relationship functions, are still denied legal matrimonial rights due to their failure to acquire a marriage declaration.

Notwithstanding this shortcoming, the application of functionality could be resolved by giving discretion, flexibility, and diversity to the application of functionality. The list of factors to determine the functionality is not definitive as to whether a cohabiting relationship functions the same as marriage. It is not necessary to fulfil all the specifications in the list.²³ For example, cohabiting partners may be living together for 25 years, projecting mutual commitment to life and have children. However, they could pool their finances separately. Each partner could be financially independent. In looking at a more flexible and diversified approach, this couple shall fall within the scope of functionality, which is similar to some marriages. Apart from pooling their finances separately, they fulfil other important functions commonly embedded in the institution of family. Moreover, the functional criteria is not a checklist approach. Its real purpose is to guide the judge to determine whether the cohabiting couples who are contesting their rights and positions are functionally the same as married spouses.

In the following discussion, an example situation of Amy and Jack is used to support the claim that cohabitants perform 'functions' in the cohabiting relationship, as comprised in the list of criteria previously mentioned. This discussion shall support my overall argument for the thesis, which suggests cohabitants' functions are the same as married couples, and thus, the law should treat them the same when it comes to the division of relationship property. The discussion below of Amy and Jack will discuss in turn each of the above pre-requisite guidelines, which relate to the establishment of functionality.

²³ Property (Relationships) Act 1976 (New Zealand), s 2D (3): In determining whether two persons live together as a couple, no finding of the list of criteria (section 2D(2) of the Property (Relationships) Act) or any combination of them, is to be regarded as necessary and a court is entitled to attach weight to any matter as may seem appropriate.

2.2.1 Amy and Jack - An Example of a Functional Cohabiting Relationship

In 2004, Amy, 24 years old, was completing her degree in commerce at University of Otago, Dunedin. Jack, 29 years of age was starting his career as a Dentist at Dunedin Hospital. They were both friends for a long time until during a holiday in 2004, they got engaged. After the engagement they decided to live together. Thereafter, they rented a house in Dunedin. Since graduating in 2004, Amy was looking for a job. However, there was no job offer for at least six months. Jack on the other hand was comfortable in his job at Dunedin Hospital.

Both Amy and Jack opened a joint bank account to which both agree to contribute equally and from which they paid their outgoings. Nonetheless, since Amy was not working, Jack paid the rent for the house in North East Valley. He also supported Amy for her expenses, food and transportation.

In 2005, Amy was offered a scholarship to do her Masters of Commerce at University of Canterbury, Christchurch. As Amy needs to move to Christchurch to further her studies, she convinced Jack to relocate with her. Jack resigned from his job in Dunedin and moved to Christchurch with Amy. They rented a room in Christchurch. While Amy was continuing her studies, Jack was finding it difficult to find the most appropriate job relating to dentistry. During this period of unemployment, they lived (to pay for the room, food and clothes) with the scholarship money funded for Amy. After about four months, Jack was offered a part-time job at a Dental Clinic and accepted the offer, although it paid less than his previous job in Dunedin.

Later in 2006, Amy graduated and was offered a job as a company executive in Christchurch. At the same time, Jack was appointed as a full time dentist in the same clinic. Amy earns about \$50,000 per annum, whilst Jack earns \$85,000 per annum. As both are doing well in their career, some time in late 2007, they decided to buy a house. The house was priced at \$300,000.00. Both Amy and Jack contributed equally for the down payment of the house, which was 10 per cent of the purchase price. They paid

\$15,000 each. Since Jack was earning more than Amy, it was easier to apply for the bank mortgage under his name. Therefore, the house and mortgage were under Jack's name. However, both paid the monthly mortgage to the bank equally. Apart from that, Jack bought a car, worth \$15,000 for which he pays the monthly loan.

Amy furnishes the house and chooses the electrical items for the household use. She also bought antiques and paintings worth \$30,000, with the money pooled in their joint account. Both Amy and Jack share their part in household chores. Amy does the cooking most of the time while Jack helps her to do other chores over the weekend.

They consider marriage as an event to consider in the future. They do not have any critical or ideological aversion to marriage as an institution. Moreover, they have not chosen cohabitation as a relationship free from reciprocal and publicly taken obligations or duties. In Jack's words: 'if we even decide to get married, what does it change in our situation?' Whenever Jack attends any of Amy's functions with her family or friends, they consider both Jack and Amy as a couple. Jack's family and friends as well respond the same towards Amy. They see Amy as Jack's wife and respect their choice to commit to an unmarried cohabiting relationship.

After several years of cohabitation, in 2010, their first child was born. As it was difficult to work while having a new-born baby, both Jack and Amy decided that one of them would need to leave the job to take care of their child. Subsequently, Amy chose to leave her job and begin giving full attention to nurturing her family. She does every household chore from washing to cooking, laundry, gardening and making sure that Jack and their baby are living comfortably in their home. At the same time, Jack has set up his own specialist dental clinic and is able to support the family. Amy provided moral support for Jack to establish his own dental clinic. Although the earning potentials of the couple changed, they remain to pool and share the finances.

Both Amy and Jack have been living together for almost ten years until recently in 2014 they began to experience relationship breakdown. Jack has been very busy

running his dental clinic and spending less time with the family. This has been the reason for their on-going misunderstandings. Thereafter, they both decide to move on in different ways. Amy wants to have an equal right to the house they both live in. The house value has now increased to \$500,000.00. She also wants to have all the antiques and paintings, which are now worth \$40,000.00.

The following discussion analyses their relationship functions.

2.2.2 The Duration of the Relationship

The determination of the duration of the cohabiting relationship is a key feature to assess the functionality of cohabitants. The duration of the relationship could demonstrate the beginning of the relationship, the overall length and the terminating point. This duration period may determine whether the cohabiting partner would be able to claim for their right under particular legislation.²⁴

In proving the de facto relationship, it would require a movement from ‘going out’ as boyfriend and girlfriend to ‘living together as a couple’. It is crucial to prove the starting date of the cohabiting relationship. It may be easier to prove the date where the couple moved in together to the same house, but this is not essential. The process of becoming cohabiting partners could be on a gradual basis. Firstly, they move in together and then start to pool their resources, and further plan to have children and so on. The act to give up their separate residences and to start living together under the same roof could be the beginning of their intention to form a cohabiting relationship. In the situation given, Amy and Jack have been friends for some time until they became engaged in 2004. After Amy graduated and Jack begun his career as a dentist in 2004, they decide to live together at the same place. Since then to 2014, they have been living together until they

²⁴ For the context of New Zealand, Section 2D and 2E of the Property (Relationships) Act 1976 mentions that cohabitants who have been living together in New Zealand for three years are treated equally to married spouses; Section 1M(C) Property (Relationships) Act states that the relationship property shall be divided equally between the partners; Under section 18 of the Property (Relationships) Act, besides the financial contribution to the relationship, the non-financial contribution will also be given equal consideration.

experienced the breakdown in the relationship. They have been cohabiting for about ten years of duration in total.

The American Law Institute (ALI) proposed that, at least when it comes to the law of dissolution, couples who have been living together for a substantial period of time should be treated the same as married couples.²⁵ In general, ‘domestic partners’²⁶ are two persons of the same or opposite sex, not married to one another, who for a significant period of time, share a primary residence and a life together.²⁷ Couples are irrebuttably presumed to be domestic partners when they have maintained a common household, with their common child, for a minimum continuous (but unspecified) period of time, called the ‘cohabitation parenting period’.²⁸ Moreover, partners are rebuttably presumed to be domestic partners if they are not related by blood or adoption, and have a common household for a continuous (but unspecified) period of time called the ‘cohabitation period’.²⁹ If neither presumption applies, a party may still establish domestic partnership by proving that ‘for a significant period of time, the parties shared a primary residence and a life together as a couple’.³⁰ According to the principles laid down by ALI, the duration of the relationship is given importance to determine the unmarried cohabiting relationship. Apart from the duration of cohabitation, oral statements, commingled finances, economic dependency, specialised roles, changes in the parties’ lives, naming beneficiaries, distinctive relations, emotional and sexual intimacy, community reputation,

²⁵ American Law Institute *Principles of the Law of Family Dissolution: Analysis and Recommendations* Family Dissolution Principles, Chapter 6 (10 April 2000). ALI was founded in 1923 and has included many of America’s most influential judges, lawyers and law professors among its members since its founding.

²⁶ The term ‘domestic partners’ commonly used by American Law Institute to describe unmarried cohabitants.

²⁷ American Law Institute, above n 25, s 6.03(1).

²⁸ Ibid, s 6.03(2): the amount of time in the cohabitation parenting period is determined in the Principles (Principles of the Law of Family Dissolution: Analysis and Recommendations), but is to be set in a ‘uniform rule of statewide application’.

²⁹ Ibid, s 6.03(3): the amount of time in the cohabitation period is undetermined in the Principles (Principles of the Law of Family Dissolution: Analysis and Recommendations), but is to be set in a ‘uniform statewide application’.

³⁰ Ibid, s 6.03(6).

commitment or attempted marriage ceremony,³¹ joint procreation, childrearing or adoption and common household are considered as well.³²

In New Zealand, at the Parliamentary debates on the Property Relationship (Amendment) Act, which came into effect on 1 February 2001, opponents of the bill argued that a three-year threshold for a de facto relationship was appropriate. Ms Anne Tolley recommended five years stipulating that de facto relationships were more fragile.³³ National MP, Wayne Mapp as well argued that it is difficult to prove a de facto relationship because it is difficult to prove when the relationship began, hence suggested a five year period.³⁴

In spite of these arguments, the Property (Relationships) Act 1976 (PRA 1976) was introduced with a three-year duration threshold. This duration of the relationship is one among other criteria to determine a de-facto relationship.³⁵ If the couple has been living together for more than three years, they are eligible to be treated equally under the (PRA 1976). In situations where the cohabiting partners were living together for less than three years, the Court could still give an order for the property division, if there is a child out of the cohabiting relationship or when the applicant has made a substantial contribution to the relationship.³⁶ However, the length of relationship is not always a reliable measure. There are cases where people have been together for many years but have not been accepted as de facto partners for the purposes of Property (Relationships) Act 1976. For example, the case of *C v S*³⁷ demonstrates that a relationship of about 20 years was not accepted as a de facto relationship. The court decided that it was a mere

³¹ In chapter seven, the existence of a customary marriage would be considered to carry equal weight with marriages solemnised by law.

³² American Law Institute, above n 25, s 6.03 (7) (a)-(m).

³³ "Opponents lose row over de facto bill" *The New Zealand Herald* (14 March 2001) accessed on 26 June 2014 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=177110>.

³⁴ Ibid.

³⁵ Property (Relationships) Act 1976, s 2D(2)(a).

³⁶ Ibid, s 2E: De facto relationship of short duration is when the de facto partners have lived together for a period of less than three years. S 14A(2)(3) mentions that in case of relationship of short duration, an order cannot be made unless the court is satisfied that there is a child of the de facto relationship, or that the applicant has made a substantial contribution to the de facto relationship and that the court is satisfied that failure to make order would result in serious injustice.

³⁷ *C v S* (FC) Dunedin FAM-2005-012-157 28 September 2006.

‘affair’. The 20 years duration along with the emotional sharing was not sufficient to convince the court that it was a de facto relationship. The couple however, did not share the same residence or developed any financial interdependence. The court took into account the absence of these features.

Apart from New Zealand, cohabiting partners living in Australia for two years and more are eligible to claim for their rights after the dissolution of the relationship.³⁸ The English Law Commission has also prepared a report on the financial consequences of relationship breakdown. They recommended for cohabitants who have a child together to be automatically eligible to apply for financial relief without minimum duration.³⁹ In Canada for example, the province of Manitoba has adopted a similar position whereby the usual three-year requirement is reduced to one where the parties have a child.⁴⁰

Returning to the example scenario of Amy and Jack, they have been cohabiting for about ten years in duration. This duration represents functionality in the relationship along with other features that will be discussed in the following sections.

2.2.3 The Nature and Extent of Common Residence

The analysis of nature and extent of common residence includes both the quantity and quality of shared living, while referring to how much time is spent in living together. It is also important to look at the type of shared living arrangements. For cohabitants, the transition from being single to cohabiting is frequently a process rather than an event. The establishment of common residence is often spread out over a period of time. Initially, the couple will remain at separate residences. Then, after they begin to experience the relationship, some might immediately move in together to the same house. Several others will remain in separate residences and take more time to decide whether to move in. They also consider the suitability and compatibility of moving in to live with their partner. In

³⁸ Family Law Act 1975, s 4AA(2)(a): the Act requires the couples to demonstrate that they have lived together for at least two years.

³⁹ Law Commission, above n 1, at para 9.58.

⁴⁰ Family Maintenance Act c. F20 (Manitoba), s 1: Nova Scotia applies a two-year requirement (Maintenance and Custody Act 1989 (Nova Scotia), s 2(aa).

determining the beginning of the relationship, the courts in New Zealand have responded to this matter. In the case of *L v P*,⁴¹ a cohabiting relationship was held to begin on the date the parties moved to a common residence rather than the earlier date on which they agreed to live together. Further, in the case of *M v G*,⁴² the High Court upheld the finding of the Family Court that the relationship began when one party moved to Australia to live with the partner and not at the beginning of their sexual relationship.

Nonetheless, the absence of a common residence will not exclude cohabitants to be considered functionally the same as married spouses. A cohabiting relationship can still be proven even though the partners are residing at different addresses. In New Zealand, in the case of *W v W*,⁴³ a cohabiting relationship of 18 years was found to exist although the parties were living in separate addresses for the last eight years. The court contemplated other factors as well. For example, the partners spent three nights in a week together, shared finances and mutual commitment to a shared life.

Additionally, the courts shall give importance to the time spent living together or staying over at either partner's house. In the New Zealand case of *Scott v Scragg*⁴⁴ (upheld on appeal *Scragg v Scott*),⁴⁵ although very little time was spent in a shared residence and there were no shared finances, however, the partners were found to be living in a cohabiting relationship. To establish a de facto relationship, the court in this case has placed an extensive examination on the parties' conduct and expectations. The court has considered other functionality, such as the existence of a sexual relationship and the giving of assistance and support in building works (despite the absence of shared residence and shared finances). This matter reflects the discretion, flexibility and diversity in quantifying the presence of functionality within the relationship.

⁴¹ *L v P* [Division of Property] [2008] NZLR 401.

⁴² *M v G* [2012] NZHC 1798 BC201268137.

⁴³ *W v W* FC New Plymouth FAM-2004-043-891 25 July 2005.

⁴⁴ *Scott v Scragg* [2005] NZFLR 577.

⁴⁵ *Ibid*, at 1076.

In the example situation, there has been a transition from being single and deciding to move in together to the same residence. After the engagement, both Amy and Jack began to cohabit in their rented house in North East Valley, Dunedin from the beginning of 2006. Then, in the following year 2007, they moved to a rented room in Christchurch, as Amy started her postgraduate study at the University of Canterbury. Thereafter, since both Amy and Jack were working, they decided to buy a house in which they lived together until the breakdown in their relationship in 2014. Both Amy and Jack have been living together though have moved from Dunedin to Christchurch and from renting a house or room to buying their own. This couple have resided at the same residences from the beginning to the end of the relationship. They lived under the same roof for about ten years. Under the heading of nature and extent of common residence, Amy and Jack have undoubtedly proved their functionality in the relationship.

2.2.4 The Existence of Sexual Relationship

Sexual intercourse is one factor to determine a cohabiting relationship. The termination of sexual relations is as well, an important factor to determine the end of a particular cohabiting relationship. Nevertheless, it should be noted that cohabiting relationship may still exist without sexual elements. For example in New Zealand, in the case of *Horsfield v Giltrap*,⁴⁶ the partners of the cohabiting relationship were living for 23 years without the presence of any sexual intimacies. For religious reasons, they did not cohabit or have a sexual relationship. Nevertheless, the court decided that Ms Giltrap had made contributions to the relationship and therefore should be able to receive an equal share in the superannuation scheme.

In Canada, the Supreme Court has suggested that a relationship may be ‘conjugal’, or ‘marriage-like’,⁴⁷ even if the individuals do not have a sexual relationship.⁴⁸ According to Brenda Cossman and Bruce Ryder, considering a sexual

⁴⁶ *Horsfield v Giltrap* (2001) 20 FRNZ 404; (2001) 1 NZSC 40 at 541.

⁴⁷ The terms ‘conjugal’ or marriage-like’ relationship are popularly used to describe cohabiting relationship in Canada.

⁴⁸ Cossman and Ryder (2001), above n 20 at 273.

relationship as one among other conditions to determine cohabitation bears no relation to the achievement of legitimate state objectives and it is offensive because it requires cohabitants to disclose the details of the most intimate aspects of their lives to administrators or in public proceedings.⁴⁹ Such an inquiry constitutes an undue intrusion into personal privacy.⁵⁰

Regarding the example situation, both Amy and Jack have no ethical or religious abhorrence to an unmarried sexual relationship. They do not perceive sexual intercourse as an act to commit only after a formal or religious marriage union. While living together for a few years, they have been blessed with a child out of a normal sexual relationship. This matter indicates that Amy and Jack could fulfil the requirement of an existence of a sexual relationship to determine their functionality within the cohabiting union.

2.2.5 The Degree of Financial Dependence or Interdependence

The degree of financial dependence or interdependence is also relevant to determine the functionality of cohabitants. The lack of this matter shall not preclude a finding that partners perform relationship functions. Some partners may be financially dependent on their partners, while others could be financially independent and do not share their income. It is important to examine the level of interdependence and assess whether the parties share their financial resources. Partners could be pooling their resources into a joint account, where they pay their outgoings. Some may not pool their income into the joint account but take responsibility for different outgoings. For instance, one of the partners could be paying for the house mortgage, while the other partner could be paying for the car loan.

In New Zealand, in the case of *CMS v RBS*,⁵¹ the court held that the parties did not constitute a cohabiting relationship without any financial interdependence or sharing of

⁴⁹ Ibid.

⁵⁰ Ibid, at 298.

⁵¹ *CMS v RBS* FC Hamilton FAM-2007-918-139 11 March 2009.

any property. In comparison, in the case of *JFW v KWF*,⁵² the partners were considered as cohabitants although they maintained separate finances. Similarly, in *Lynskey v Donovan*,⁵³ separate finances did not preclude that the partners were living together in a cohabiting relationship. The degree of financial dependence or interdependence assumes some weight to prove the performance of functionality in the family. However, while adopting a more flexible functionality approach, even without this feature of functionality (financial dependency/interdependency), but with the presence of other types of functionality, such as the common residence, sexual relationship and a longer duration, the cohabitant's relationship could be proved to apply functionality in a broad-spectrum.

In the example situation given of Amy and Jack, the partners to the relationship have shown a great degree of financial dependence and interdependence. They have also made arrangements between them for financial support from each other. After the engagement, Jack and Amy decided to live together. They rented a house in Dunedin, for which Jack was paying the rent. Amy was unemployed and all her expenses were paid and supported by Jack. This matter demonstrates Amy's dependency on Jack. Apart from that, they also opened a joint bank account where they pooled their financial means together. Their action indicates the financial interdependence with one another.

Later, as Amy had to move to Christchurch to further her studies at University of Canterbury, Jack followed her and consequently he was unemployed for about four months. He was financially dependent on Amy who was supported by the scholarship fund. She was paying for the room that they rented, and for other necessities as well.

When both started their permanent jobs, they decided to buy a house, for which they paid an equal share of the deposit. This matter reflects their financial independence. They have been equally paying for the monthly mortgage, at least until 2012, when Amy has to leave her job to take care of their new-born baby. Since been unemployed, Amy was financially dependent on Jack.

⁵² *JFW v KWF* (2009) 27 FRNZ 535.

⁵³ *Lynskey v Donovan* HC Blenheim CIV-2006-406-293 2 November 2010 BC201065304.

Throughout the ten years of the relationship, both Amy and Jack have shown the constituents of financial dependence and interdependence to one another. Under this notion, they are functionally the same as married couples, whereby the latter are generally perceived to being economically interdependent, although not necessarily required to live so.⁵⁴

2.2.6 The Ownership, Use and Acquisition of Property

Haskey⁵⁵ reported that about one quarter of cohabitants responding to a larger statistical survey stated that they had moved into their partner's existing accommodation when the cohabitation began. The rest acquired new accommodation, either having previously lived in their own home or with their parents.⁵⁶ Regardless of whether these cohabitants are renting the property or buying their own, it is important to see whether the property is jointly owned or held in the name of one of the parties to the relationship. The title of the property could explain the legal entitlement towards the property.⁵⁷ In New Zealand for example, cohabitants who fall under the ambit of section 2D of the Property (Relationships) Act 1976 would be able to claim equal rights over the property, without holding the title of the property. Their non-financial contribution to the relationship will be given equal consideration to financial contribution.⁵⁸

The purpose of the property shall be examined, whether it was commonly shared for family purposes or kept aside throughout the relationship. The intention to own and

⁵⁴ Edward Stein "The Secrets of Law" in (ed) Ausin Sarat, Lawrence Douglas and Martha Merrill Umphrey *The Amherst Series in Law, Jurisprudence and Social Thought* (California University Press 2005) at 110: "[M]arried couples do not have to be financially interdependent but they qualify for the privilege. By contrast, 'domestic partners' need to be financially interdependent and able to prove their financial interdependence using a specified and limited number of methods."

⁵⁵ This survey was conducted in England: J Haskey "Cohabiting Couples in Great Britain: accommodation, sharing, tenure and property ownership" (2001) 103 *Spring Population Trends* 26.

⁵⁶ Gillian Douglas, Julia Pearce and Hillary Woodward "A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown" (2007) Report of a Research Study Funded by the Economic and Social Research Council, conducted jointly by Cardiff University and the University of Bristol at 15.

⁵⁷ Commonly, the person whose name is on the title holds the rights towards the property. In jurisdictions that recognises equal rights of cohabitants towards the property, the party whose name is not on the title could still establish the right over the property. In jurisdictions that does not recognise cohabitant's rights towards the property (in the absence of the name on the title of the property), there are other ways to prove entitlement to property rights, for example with the doctrine of constructive trusts.

⁵⁸ Property (Relationships) Act 1976, s 1N: All forms of contribution to the relationship are of equal value.

use the property on a common sharing basis could represent their intention to share and live together. In the example situation, Amy and Jack have been living together from 2004 to 2014. As previously mentioned, at the initial stage, they rented a house in Dunedin, which, they intended to use for common purpose, thereafter moving to Christchurch, they rented a room, for which the use was for common living purpose as well. Then they bought a house, but in Jack's ownership. Since Jack's salary was higher than Amy's, it was easier to apply for the mortgage under his name and subsequently the title of the property was under his name. However, both Amy and Jack have contributed equally to the down payment of the purchase price. They also contributed equally to the housing monthly mortgage, until Amy resigned from her job. The use, ownership, and acquisition of the house demonstrate their functionality as cohabitants in the relationship.

2.2.7 The Degree of Mutual Commitment to a Shared Life

The commitment to a shared life is an important moment in the perspectives of partners who cohabit because it signifies a deeper and more meaningful relationship. In the case of *Public Trust v Cornelius*⁵⁹ in New Zealand, despite the length of relationship of 20 years and shared residence, the respondent was in another relationship throughout the period. The court sees this as a lack of mutual commitment to a shared life with the appellant, and thus, no mutual commitment to a shared life could be proved.

Apart from that, there are ways to examine the degree of mutual commitment. For instance, cohabitants who share their life will likely to learn about their partner's:⁶⁰

- (1) Personal habits: cleanliness, desire to perform household chores, such as laundry, timeliness in paying bills, preparing to go out;
- (2) Tastes: musical preferences, hobbies, feeling about pets, friends; and/or
- (3) Intimate personal characteristics: personal hygiene, medical practices, prayer behaviour and religious belief.

⁵⁹ *Public Trust v Cornelius* (HC) Hamilton CIV-2007-419-1046 25 February 2009.

⁶⁰ Margaret F. Brining & Steven L. Nock "Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?" (2004) 64 LA. L. REV at 418.

Subsequently, they may begin to share the same interests, hobbies and habits. Through these varieties and tolerance, they demonstrate a shared choice and understanding. The acceptance of and tolerance to the above matters and repetition of everyday acts mutually validates a relationship found between partners, regardless of whether they are cohabitants or legally married.⁶¹

For example, the joint venture between cohabitants in picking furniture and electrical items demonstrates their short-term project, which does not mean mutual sacrifice (paying off a mortgage or a rent), but it is the shared construction of the home they live in. The furniture and electrical items that the cohabitants choose represents the couple's style, both the partners' preference, building the profile of compromises, which are behind every shared decision. In the ritual that founds a couple is sharing decisions, these are created in an incremental way (step by step) in everyday life, which becomes the main place where a loving relationship is created, and also where most decisions regarding their life, takes place. In the case example, Amy does the short-term project, such as the home furnishing and choosing the electrical items for household use. She also bought antiques and paintings from the money pooled in their joint account. There seemed to be no objection by Jack in that matter. It also shows the shared construction of the home they lived in.

In the studies conducted by Lewis, cohabitants and married spouses view their commitment in a wider presentation.⁶² For cohabitants, commitment was private in two senses: (1) it was theirs alone, and (2) did not involve state, church, community, kin or public ceremony. For married couples, public commitment is most important for relatives and kin, especially the parents, who then knew where the relationship stood and how they should behave as a result. Younger respondents (under 50 years old), whether married or cohabiting mostly believed that commitment came from within, from love of the other person and children, rather than any externally prescribed moral code. It was the fact that

⁶¹ Luca Martignani "‘All together now!’ Couples and the ontological problem of cohabitation as a form of life" (2011) *International Review of Sociology* 21 No 3 565 at [568-581].

⁶² Charlie Lewis, Amalia Papacosta and Jo Warin "Cohabitation, Separation and Fatherhood" (2002) Joseph Rowntree Foundation at 15.

they made a commitment which was the important thing and not the formal or legal form it took.⁶³ This study indicates that unmarried cohabitants are as committed as married couples.

There are different types of cohabitation and marriage, and both may show a range of commitments. While cohabitants may have different reasons for cohabiting, they show just as much commitments to their partnership when compared like with like, as married couples.⁶⁴

2.2.8 The Care and Support of Children

The care and support of children is another means of assessing the functionality of cohabitants within the relationship. The support given to children comprises financial and non-financial assistance. If cohabitants have children together, it is an indicator of a relationship, albeit not a determinative factor. For example, in the New Zealand case of *Public Trust v Cornelius*,⁶⁵ despite raising a child together, the Court of Appeal decided that the respondent lacked other features to show commitment to the relationship. The care and support of children thus does not necessarily prove a cohabiting relationship. The respondent was involved with another women, which included continued sexual intimacy, shared activities and attendance at family funerals.

If, however, either partner brings children to the relationship and care of those children is shared, and there is commitment from each of the adults to the children of the family, this could be a sign of a de facto relationship. For Jack and Amy, after the birth of their baby, Amy resigned her job, became a homemaker and provided care and support for the child. Amy's commitment to the family, along with the care and support provided to the child shows a degree of functionality within the relationship.

⁶³ Jane Lewis *The End of Marriage? Individualism and Intimate Relationships* (2001 Edward Elgar).

⁶⁴ Barlow, A., Duncan, S., James, G. and Park, A. *Cohabitation, Marriage and the Law: Social Change and legal Reform in the 21st Century* (2005 Oxford: Hart Publishing) at 74.

⁶⁵ *Public Trust v Cornelius* (HC) Hamilton CIV-2007-419-1046 25 February 2009.

2.2.9 The Performance of Household Duties

Housework is an essential part of living, regardless of the household structure (whether married or cohabiting). A majority of housework studies distinguish between different types of household tasks. On one hand, routine tasks, including doing laundry, cleaning up after meals, shopping for groceries and cooking. On the other hand, occasional household tasks, such as household repairs and yard care. Spouses who have cohabited prior to marriage appear to contribute to greater equality in the sharing of the housework and this is consistent with the suggestion that former cohabitants bring more egalitarian expectations and experiences to their subsequent marriages.⁶⁶

The performance of household duties among partners normally refers to the provision of domestic labour. Partners may apply a wide range of household labour arrangements. For example, one of the partners may be working (breadwinner), while the other is a full-time homemaker. Second, both partners might be working and equally share the division of house-hold labour. Third, both may be working, but one of the partners does more household chores than the other. The domestic arrangements could influence the financial and living arrangements of partners. For example, in a scenario where one of the partners fulfils all the domestic tasks, he or she is more likely to be not working, thus financially dependent on the working partner.

In Amy and Jack's situation, before having a child, both made arrangements to do household chores. Amy does them most of the time, while Jack assists regularly over the weekends. After having a child and subsequently becoming a homemaker, Amy does every house-hold chore, from washing to cooking, laundry, gardening and making sure that Jack and their baby are living comfortably in their home. This is a form of functionality projected in a cohabiting relationship.

⁶⁶ Jeanne A. Batalova and Philip N. Cohen "Premarital Cohabitation and Housework: Couples in Cross-National Perspective" (2002) *Journal of Marriage and Family* 64 at 743, 745.

2.2.10 The Reputation and Public Aspects of the Relationship

The reputation and public aspects of the relationship examines the outward appearance of the relationship. It shows the way that the parties hold themselves out in a public space as a couple. The public display of their affection, and the language and terms used to address or call for each other should be considered under this feature.

In the New Zealand case of *Scragg v Scott*,⁶⁷ despite residing together only intermittently and notwithstanding both parties had other relationships, the court concluded that “they presented to the outside world generally as a couple”, and thus, fall under the ambit of PRA 1976. Conversely, in the New Zealand case of *C v S*,⁶⁸ it was decided that if a relationship is carried on in a secret and does not have a public life, then that might be an indicator that the relationship has stayed that of landlord and housekeeper rather than a de facto relationship.

Since Amy and Jack have been cohabiting for about ten years, the public perception towards their relationship is apparent. Whenever Jack attends any of Amy’s functions with her family or friends, they consider Jack as her husband, although they were not formally married. On the other side, Jack’s family and friends responds to Amy in the same way. They recognise Amy and Jack as a couple. This reputation and public aspects of the relationship reveals the functions that the partners carry out in their relationship.

2.2.11 The Forgoing of a Higher Standard of Living

The forgoing of a higher standard of living is a medium to quantify the contribution of partners to the relationship.⁶⁹ This contribution could reflect the functionality of

⁶⁷ *Scragg v Scott* (2006) 25 FRNZ 942 [2006] NZFLR 1076 (HC).

⁶⁸ *C v S* (FC) Dunedin FAM-2005-012-157 28 September 2006.

⁶⁹ In the Property (Relationships) Act 1976, s 18(g): The forgoing of a higher standard of living was one among the other contributions to the relationship. The other features (section 18) are the care of any child of the relationship, or any aged or infirm relative or dependent of either partner; the management of the household and the performance of household duties; the provision of money, including the earning of

cohabitants. In the New Zealand case of *Browne v Everett*,⁷⁰ in addition to recognising the direct contributions of partners to the property, the court acknowledged the indirect contributions of the partners. In this case, the plaintiff's indirect contributions to support the defendant during adverse business times and her willingness to accept a reduced standard of living in order to ease the defendant's financial difficulties were given weight.

Similar to the given example, after Amy was offered a place at University of Canterbury to further her studies, she has to relocate from Dunedin to Christchurch. In order to continue living together with Amy, Jack had to resign from his job and moved to Christchurch with Amy. Thereafter, he was unemployed for about four months. He had forgone a higher standard of living, which he would have had if he was still employed as a dentist at Dunedin Hospital.

After a few months of living in Christchurch, he was offered a part-time job. The newer job was paying less in comparison to the pay in Dunedin. During this time as well, he had forgone the higher standard of living he had when living in Dunedin with a better-paid job. Jack's willingness to forgo better living conditions should be considered as a contribution to the relationship, which exemplifies his function in the relationship.

2.2.12 The Giving of Assistance and Support that Enables the Other Partner to Acquire Qualifications, Carrying on of His or Her Occupation or Business

The giving of assistance and support that enables the other partner to acquire qualifications, or carry on of his or her occupation or business is also an important characteristic when examining the functionality of cohabitants. In New Zealand, this

income, for the purposes of the relationship, the acquisition or creation of relationship property; the payment of money to maintain or increase the value of relationship property, or the separate property of the other partner; the performance of work or services in respect of relationship property, or the separate property of the other partner; the giving of assistance or support that enable the other partner to acquire qualifications, or aids in carrying on of his or her occupation or business.

⁷⁰ *Browne v Everett* [2003] NZFLR 542.

mode of assistance and support is regarded as a form of contribution to the relationship.⁷¹ In the case of *Lebajo v Lebajo*,⁷² in a marriage of short duration, the wife's sponsoring of the husband's entry into New Zealand on a permanent residency basis and conferring on him the advantages of marriage to a New Zealand citizen were held to be contributions to the marriage partnership. The wife's contribution was considered as "giving of assistance or support to the other spouse".

Under the ambit of this feature, there are a few instances that appear to show that Amy and Jack have assisted and supported each other during the course of the relationship. In Dunedin, while Amy was looking for a job and applying to further her studies, Jack was supporting Amy in her future plans, whilst also assisting her financially. Moreover, Jack supported her intention to move to Christchurch to further her studies to undertake a Masters degree in Commerce. At this stage, Amy was financially supporting Jack until he found a part-time job. While Jack was working, he tried to assist Amy as well with her living expenses and other necessities.

Amy has also given support and assistance to Jack. While she was home-making and taking care of their child, this enabled Jack to continue working to develop himself until opening his own dental clinic. The moral support given by Amy was helpful for his career advancement. In this case example, both Jack and Amy have shown a great amount of assistance and support to one another during their ten-year relationship.

To conclude, unmarried cohabitants demonstrate the same 'functionality' that is commonly associated with marriage. They often behave in much the same way as married couples, combining their efforts, making sacrifices for the relationship, developing the same levels of dependence, and sometimes, having or adopting children together.⁷³ They are not just individuals that live together, but often they are

⁷¹ Section 18(1)(h) Property (Relationships) Act 1976.

⁷² *Lebajo v Lebajo* [1994] NZFLR 665 affirmed at [1995] NZFLR 385.

⁷³ Barlow, Duncan, James, and Park, above n 64.

economically and emotionally interdependent,⁷⁴ share household and living expenses, and raise children together.⁷⁵ Among the other functions carried out by cohabitants are the ownership, use, and acquisition of property,⁷⁶ the degree of mutual commitment to a shared life, the performance of household duties,⁷⁷ and the reputation and public aspects of the relationship.⁷⁸

2.3 Pro-Functionalist: ‘Function’ versus ‘Form’

On 17 November 2009, the crossbench peer, Baroness Deech, delivered the Gresham College lecture, ‘Cohabitation and the Law’, in which she argued against giving new rights to cohabitants. She points out that:

Couples may be experimenting their relationship before taking it to marriage and therefore should not be imposed with penalties of a failed marriage... Cohabitation is not marriage, now or historically...⁷⁹

⁷⁴ Law Commission, above n 1, at para 5.82: The consultees agree that cohabitants are financially interdependent. David M. Smith and Gary J. Gates “Gay and Lesbian in the United States: Same-sex Unmarried Partner Households: A Preliminary Analysis of 2000” (2002) United States Census Data, A Human Rights Campaign Report 3: In United States, since the 1970’s, courts begun to recognize the concept of ‘functional’ family, thus acknowledge that partners with emotional and economic interdependence, though unmarried can be familial relationships.

⁷⁵ Katherine M. Forbes “Time for a New Privilege: Allowing Unmarried Cohabiting Couples to Claim the Spousal Testimony Privilege” (2006-2007) 40 Suffolk U. L. Rev 887 at 907.

⁷⁶ Law Commission, above n 1, at 22, para 2.16: The Law Commission recognises that property law and trusts of England are used to establish ownership of assets for cases involving cohabitants. There are many cases concerning the events to establish the interest that cohabitants possess in the property bought by either the partner or one of them, to the cohabiting relationship.

⁷⁷ Amanda Miller “The Gendered Work Orientations of Working and Middle Class Cohabiting Couples” <<http://paa2010.princeton.edu/papers/100122>> at 5: the scholar examined the couple-level work orientations of 61 working and middle-class cohabiting couples to determine how they ‘do gender’ through their work. As a group, all cohabiting women are disadvantaged in that they do much of the work expected of the wives, but receive few of the benefits that married women gain from their nuptials.

⁷⁸ Property (Relationships) Act 1976, s 2D: In New Zealand, in determining whether two persons are living together as a couple, several matters are taken into account. Among them are the duration of the relationship, the nature and extent of common residence, whether or not a sexual relationship exists, the degree of financial dependence and interdependence, the ownership, use and acquisition of property, the degree of mutual commitment to a shared life, the care and support for children, the performance of household duties, and the reputation and public aspects of the relationship.

⁷⁹ Baroness Deech of Cumnor “Cohabitation and the Law” (Gresham College) accessed on 15 September 2013 <<http://www.gresham.ac.uk/lectures-and-events/cohabitation-and-the-law>>.

Subsequently, the uniform extension of marriage-like legal rights to those who cohabit and perform marriage-like functions is still the subject of intense policy debate on which there is no real consensus.⁸⁰ In recognising the diversity of family arrangements, the debate of ‘function versus form’ shall be sketched first and the following discussion argues against the claim made by Deech on ‘formality’.

Generally, the relationship associated with ‘form’ is when there is a state endorsed contractual arrangement symbolising a public commitment, which is possibly life-long. On the other hand, ‘function’ is namely a joint venture, principally of sexual intimacy, companionship, emotional and financial support, care and assistance in everyday life, homemaking and child rearing.

From an empirical analysis of 50 interviews with cohabitating couples, conducted by Luca Martignani, comes the idea of a relationship whose intent is reciprocal care and assistance in everyday life.⁸¹ The interviewee views that both marriage and unmarried cohabitation are similar. For example:⁸²

Yes, let’s say that marriage is the regularisation of a situation. And, let’s put it this way, write down things that we (and many other people) are already doing. We’ve been doing those things for a long time already.

Let’s say it’s a possibility. It’s not ruled out, but by now we’re okay the way we are. And still, nothing would change in my opinion, there’s no difference between us and our married friends.

The modern family may be viewed as a system of social relations that serves three

⁸⁰ A. Barlow, G. James “Regulating Marriage and Cohabitation in 21 Century Britain” (2004) *The Modern Law Review* 67 No 2 at 143.

⁸¹ Martignani, above n 61, at [565-581]: research conducted by the University of Rome ‘La Sapienza’ on cohabitants with more than 50 interviews.

⁸² *Ibid*, at 569.

essential functions.⁸³ A family provides some level of (1) economic security,⁸⁴ (2) physiological support,⁸⁵ and (3) create and care for future generations.⁸⁶ The American Home Economic Association has suggested the following definition:⁸⁷

Two or more persons who share resources, share responsibility for decisions, share values and goals, and have commitments to one another over time. The family is that climate that one ‘comes home to’ and it is this network of sharing and commitments that most accurately describes the family unit, regardless of blood, legal ties, adoption or marriage.

The terms ‘sharing’ and ‘commitment’ are used to express the idea of interdependence. These forms of independence and interdependence characterises marriage and cohabitation, and both may or may not involve children. One of the most ancient and important functions of the family is to provide economic support and to control the use of property.⁸⁸ Generally, cohabitants do provide economic support and share their property with their partner. Other than sharing the property, they may also share family resources, responsibility and commitment to the relationship. This matter was discussed earlier in the example situation of Amy and Jack, whereby they have lived together and shared their property. They both paid for the property and continued to do so, until Amy resigned from her job. Within the ten-year relationship duration, they demonstrated an extensive form of economic dependence and interdependency. Therefore, as a cohabiting couple, Amy and Jack are able to fall within the definition above since they function the same as married spouses in the marriage union. Moreover,

⁸³ Joan B. Ellsworth “Prescribing Turns: An Alternative to the Marital Deduction for Unmarried Cohabitants” (1991-1992) 11 Va Tax Rev 137; Jane Flax “Contemporary American Families: Decline or Transformation?” (ed) Irene Diamond in *Families, Politics and Public Policy* (New York: Longman 1983) at 21, [26-28].

⁸⁴ Ibid, Ellsworth at 137, Flax at 21, [26-28].

⁸⁵ Ibid, Flax at 24: Flax classifies this social relation as “psychodynamics”, arising out of the individual’s need to structure and regulate her or his internal environment, thereby creating a complex internal world.

⁸⁶ Ibid, at 23: Flax classifies this relation as “reproduction”, which is rooted in the need of the species for “the production of new persons and transformation of the relatively unformed neonate into a well-behaved member of society.

⁸⁷ Ibid, at 8.

⁸⁸ Mary Ann Glendon *The New Family and the New Property* (Canada: Butterworth & Co 1981) at [100-104].

this couple could also fall within the definition of the modern family where there is no need for a legal tie of marriage to bond the relationship.

Edward Stein classifies a ‘positive functional factor’ to a relationship (cohabitation) that does not count as marriage under the traditional or bright-line definition of marriage, nonetheless treated like a marriage in some way or context by virtue of its functional considerations.⁸⁹ Under this approach, if a couple: (1) holds themselves out as married (although not all cohabitants do this); and (2) intends to be married, then they are counted as married because their relationship has certain functional characteristics, even though they were not married in the standard ceremonial manner.⁹⁰ The main feature of functionalism as an alternative to having full marriage equality as the ultimate goal is that it provides evidence that cohabiting relationships should be recognised if they satisfy the criteria.⁹¹ The list of criteria as previously discussed could be applied to illustrate this matter.

Functionalists acknowledge critics who oppose the legal recognition of non-traditional relationships such as unmarried cohabitation, regardless of their similarity to traditional family forms. Such critics place moral significance on the bonds of marriage and therefore feel that those without such bonds are undeserving of special benefits.⁹² However, according to functionalists, reliance on such bonds is an expression of unjustified biases against individuals in non-traditional families.⁹³ Further, some writers suggest that courts should grant legal benefits to adult relationships based on functional standards, such as whether they are “stable and significant”, instead of based on whether the participants in the relationships are formally married.⁹⁴

⁸⁹ Stein, Edward “Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism” (2010) *Law and Inequality: A Journal of Theory and Practice* 28 at 345, 368.

⁹⁰ *Ibid*, at 368.

⁹¹ *Ibid*, at 369.

⁹² Stacy Lynne Boyle “Marital Status Classification: Protecting Homosexual and Heterosexual Cohabitors” (1990) 14 *Hastings L J* 1029 at [134-135].

⁹³ Nancy D. Polikoff “This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families” (1990) 78 *GEO L J* at 459, [544-547].

⁹⁴ Advocates of functionalism argue that to the extent that these relationships exhibit the same characteristics as traditional relationships, it is unfair to deny them the same legal recognition as traditional

However, there is still an on-going debate about whether cohabitants are similar to married couples or rather different. There are paradoxical arguments for categorising cohabitants as identical to married spouses, and vice versa that cohabitants and married spouses are fundamentally different.

Heather Brook, a feminist, points out that certified marriage and unmarried cohabitation constitute performances that are more or less identical. “One has registered the union, and the other is not. One is brought into being in the first instance with explicit, instantly transformative speech and acts (and a sexual relationship), while the other tends to congeal as ‘marriage’ over time. Even so, neither is more or less authentic than the other.”⁹⁵

Chan notes that, “the symbolic public aspect of marriage is one, which nowadays appears less entrenched, with a growing preference (especially among the younger generations) to refer to one’s spouse as a ‘partner’, and a sense that the terms ‘husband’ and ‘wife’ may be out-dated. Given the perceived gap between legal doctrine and social reality, why should the law distinguish formal versions of adult domestic partnerships?”⁹⁶ Hence, in regulating cohabitation, it is appropriate to adopt a ‘functional’ approach rather than the ‘form’ they take.⁹⁷

By focusing more on the nature of a couple’s relationship and less on the institution of marriage, the testimony privilege would be available to more couples whose relationships serve the same function as marriage, even if the couple, by choice or because the law prevents it, is not married.⁹⁸ By looking at the features of a relationship, for example the emotional and financial commitment and entanglement involved, the mutual reliance for shelter, food, and health care and how the two people in the

families: David Meade “Consortium Rights of the Unmarried: Time for Reappraisal” (1981) 15 Family Law Quarterly 223 at [243-244].

⁹⁵ Heather Brook *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* (New York: MacMillan Press 2007) at [173-174].

⁹⁶ Chan, Winnie “Cohabitation, civil partnership, marriage and the equal sharing principle” (2012) Legal Studies 33 Issue 1 at 7.

⁹⁷ Barlow and James (2004), above n 80 at 154.

⁹⁸ Forbes, above n 75, at 907.

relationship have conducted themselves in their personal life, the functional approach to relationship recognition determines whether a relationship should get a benefit, typically associated with marriage.⁹⁹

The evolutionary perspective implies that marriage and cohabitation are gradually becoming more alike. This approach suggests that the differences between married and unmarried couples with respect to financial arrangements “will depend on the degree of institutionalisation of cohabitation, social policy and existing legal framework, as these factors define benefits and rewards associated with the decision to cohabit or marry.”¹⁰⁰ In societies where marriage and cohabitation have become ‘indistinguishable’, the differences between married and unmarried couples might disappear, or at least should be significantly weaker.¹⁰¹ Although cohabitants look, behave, and function very much like married couples, however, there are situations where they are ill-informed of the consequences of the law in the event of relationship breakdown. They give little thought to these factors in organising their relationship. Therefore, if the legal system does not provide protective laws for cohabitants, particularly in matters regarding their property, they will be left with a disproportionate share in the disposition of the property, specifically, after the relationship breaks down. However, if cohabitants are provided with automatic legal consequences, they would acquire rights and responsibilities related to the division of relationship property. Should the law and social policy support unmarried cohabitation: (1) the option to implement it shall be considered; and (2) the barriers to achieving this shall be removed. The former includes the need to create specific laws to protect the right of cohabitants to the division of relationship property. The latter includes eliminating laws on: (1) fornication;¹⁰² (2) sodomy;¹⁰³ (3) punishments

⁹⁹ Stein, above n 89, at 366.

¹⁰⁰ Dana Hamplova “One Pot or Two Pot Strategies? Income Pooling in Married and Unmarried Households in Comparative Perspective” (2009) *Journal of Comparative Family Studies* 40 Issue 3 at 358.

¹⁰¹ *Ibid*, at 359.

¹⁰² For example in Malaysia, any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit, or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination: *Syariah Criminal Offences (Federal Territories) Act 1997*, s 23.

¹⁰³ *Ibid*, s 25: for instance in Malaysia, any male person who commits liwat (sexual relations between male persons) shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand

for cohabitation¹⁰⁴ and (4) laws that justifies legal differences in children's treatment based on their parent's marital state.¹⁰⁵

New Zealand appears to accept that the law should adapt to new social trends, recognising that parenting and partnering outside marriage are contemporary lifestyle choices, which should be respected and regulated in a marriage-like way.¹⁰⁶ The courts and legislature have taken affirmative actions to support cohabitation, including establishing legal principles of equality between married couples and cohabitants. Equality offers the means to treat cohabitants with dignity and equal respect, while giving access to legal rights conferred on married couples. Since there has been a wide-ranging tolerance of modern social trends and an increase in unmarried cohabitation,¹⁰⁷ there is a new legal order which no longer focuses on heterosexual marriage, but reflects the plurality of couples' relationship styles.¹⁰⁸ An example is the law that allows same-sex couples to register their union or consummate marriage.¹⁰⁹

Therefore, a plurality of legal structure could be the mechanism to strike a balance between, first, providing legal protection for cohabitants, and second, to embrace the

ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination.

¹⁰⁴ Ibid, s 27: in Malaysia, any man who is found together with one or more women, not his wife, in any secluded place, or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

¹⁰⁵ In Malaysia, children born out of wedlock are considered illegitimate. For non-Muslims, the particulars of the father of the child will not be entered in the register of birth unless a joint application is made by the mother and the person claiming to be the father of the child: "JPN Soalan Lazim" National Registration Department accessed on 5 April 2014

<<http://www.jpn.gov.my/en/soalanlazim/birth?nomobile=false>>. For the Muslim illegitimate child, the child is considered born out of wedlock if born less than six months from the date of the mother's marriage to her partner: "Child born out of wedlock" Malaysian bar accessed on 5 April 2014

<http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=34300>.

¹⁰⁶ The Property (Relationships) Act 1976 treats married couples, civil union partners and de facto partners equally. Section 1N(c) mentions that all forms of contribution to the marriage partnership, civil union or de facto relationships are treated as equal.

¹⁰⁷ In 2006, 20 per cent of all men and women who were in partnerships were living in a de facto partnership. Among the partnered people aged 15-44 years, about 40 per cent were living in de facto relationships.

¹⁰⁸ Under the ambit of Property (Relationships) Act 1976, married couples, civil union partners and de facto cohabiting partners are all treated the same, with the exception of relationships of short duration of less than three years.

¹⁰⁹ In New Zealand, the Civil Union Act 2004 was introduced, which allows couples to register their union. Under the Marriage (Definition of Marriage) Amendment Act 2013, same sex couples could legally marry.

notion of personal autonomy. On protecting the rights of cohabitants, their functions within the relationship should be recognised, hence providing equal protective laws that are available for married couples. In embracing the principle of personal autonomy, they should be given the option to opt out of the protective legal scheme. Such plurality would aim to (1) balance the need for family law protection for cohabitants and (2) the right of the individual to choice and autonomy in the regulation of property rights. The law should be able to provide both options, specifically, to protect cohabitants with laws and policies, and at the same time giving the option to opt-out of the protective legal regime.

Under the ambit of equality, specifically formal equality, generally it is suggested that ‘like should be treated alike’. Since cohabitants are argued to be very similar to married spouses, they should be treated equally to the latter. There are two conceptual types of equality as identified by Glennon, namely, equality between relationships and equality within relationships.¹¹⁰ The former requires integration of the rights and treatment accorded to married couples and unmarried cohabiting couples. In this disposition, functionalists often argue that unmarried cohabiting couples have taken on many of the functions of marriage and thus, ought to be treated identically to married couples.¹¹¹ This thesis supports equality between relationships, precisely between married couples and unmarried cohabitants because couples in both relationships carry similar functions.

The latter type of equality looks to achieve equality between the partners in the relationship, and looks beyond the ‘form’ or ‘function’ of the particular relationship. In other words, equal treatment seeks to achieve fairness between those affected on relationship breakdown (fairness among the partners). Recent case law in England¹¹²

¹¹⁰ Lisa Glennon “The limitations of equality discourses on the contours of intimate obligations” in Julie Wallbank, Shazia Choudhry and Jonathan Herring (ed) *Rights, Gender and Family Law* (Routledge 2010) at 169.

¹¹¹ John Eekelaar *Family Law and Social Policy* (Weidenfeld & Nicholson 1978); Anne Barlow, Carole Burgoyne, and Janet Smithson “The Living Together Campaign: An investigation of its impact on legally aware cohabitants” (2007) Ministry of Justice Research Series 5/07
<<http://www.justice.gov.uk/docs/living-together-research-report.pdf>> at 8.

¹¹² *White v White* [2001] 1 AC 596 (HL): Lord Nicholls said that in all cases, regardless of the division of assets, a judge would always be well advised to check his tentative views on distribution of assets against the yardstick of equality of division. This was to ensure the absence of discrimination between the wage-

signifies a move towards genuine equality in the sharing of matrimonial assets between the parties on the breakdown of marriage.¹¹³ In applying Glennon's terminology, there is a marked shift towards equality within relationships (for married couples).¹¹⁴

To summarise, some academics argue that a functionalist (as opposed to formalist) approach to relationship ought to be adopted.¹¹⁵ They argue that unmarried cohabiting couples perform the role of married couples just as effectively, and there is no justification for their differential treatment. There is clearly a need for some form of legal protection for unmarried cohabiting couples.¹¹⁶ In the areas of asset distribution on relationship breakdown, the current law in Malaysia works as an injustice. This matter is discussed in chapter four.

2.4 Pro-Formalist

The 'functionality' theoretical framework has seen academic and professional protests as to its value within the arena of family law. Pro-formalists observe that:

1. The right to cohabitation undermines the institution of marriage;
2. Marriage is a public commitment;
3. The right to respect for individualism;
4. The expectations and intentions of married and cohabiting couples;
5. Unmarried cohabitation as freedom; and,
6. The importance of morality.

earner and child-carer, thereby recognising the non-financial contribution of the parent caring for children: *Miller v Miller and McFarlane v McFarlane* [2006] 2 AC 618 (HL): Their Lordships considered at length the general principle applicable to achieving fairness in the division of property following divorce application. Their Lordships agreed that the objective of fairness would be achieved, beyond consideration for the welfare of the children of the marriage, by reference to consider for the present and foreseeable financial needs of the parties, compensation aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage and the principle of 'equal sharing' although it was emphasised that the 'yardstick of equality' was to be applied as an aid and not as a rule.

¹¹³ Judith Bray "The Financial Rights of Cohabiting Couples" (2009) Family Law Journal 39 at 1151.

¹¹⁴ Glennon, above n 110, at 169.

¹¹⁵ Eekelaar, above n 111; Barlow, Burgoyne and Smithson above n 111 at 8.

¹¹⁶ Kelly Reeve "Engaging Law with Social Reality for the Legal, Protection of Unmarried Cohabiting Couples" (2012/2013) The King's Student Law Review 4 No 1 at 12.

However, this thesis argues against these formalistic arguments and stipulates that relationship functionality should prevail over formality. As a demonstration of this, the following section analyses each of the above arguments stipulated by the pro-formalists, and offer an explanation as to why that analysis is lacking in foundation. Similarly, within each section, a rebuttal argument is offered as to why functionality prevails over formality and addresses the importance to recognise cohabiting relationships.

2.4.1 Rights to Cohabitants Undermines the Institution of Marriage

In providing rights for cohabitants, one may argue that with such protection, this may lead to a symbolical weakening of marriage as an institution or natural society, and if one refuses an already existing form of regularisation, then why show preference for another similar form?¹¹⁷ Despite the decline of marriage in recent times, closer examination shows that the institution of marriage still earns respect from society.¹¹⁸ In a 2007 survey conducted by the Church of England on marriage, 51 per cent of unmarried young people (18-24) said that they aspired to marriage.¹¹⁹ In the same study, 86 per cent of married people and 64 per cent of unmarried people agree that, “despite the challenges, marriage is important to society”.

According to the interviewees from the analysis conducted by Luca Martignani, cohabitation does not represent an image of ideological refusal of marriage as an

¹¹⁷ Martignani, above n 61 at 572; S M Cretney “The Law Relating to Unmarried Partners From the Perspective of a Law Reform Agency, Marriage and Cohabitation” in (ed) J. M. Eekelaar, S. N. Katz *Contemporary Societies, Areas of Legal, Social and Ethical Change: An International and Interdisciplinary Study* (1980 Butterworth & Co (Canada) Ltd) at 365: treating marriage and ‘quasi-marriage’ alike might well be thought to devalue the institution of marriage, and thus, perhaps be unacceptable to public opinion.

¹¹⁸ In England, since 1981, the number of marriages conducted every year has fallen by a third: “Marriage rates in the UK” *The Guardian UK* accessed on 27 June 2014, <<http://www.theguardian.com/news/datablog/2010/feb/11/marriage-rates-uk-data>>. In New Zealand, across the whole population over a longer period, the general number of marriages has plunged from 45 marriages a year for every 1,000 unmarried adults in 1971 to 14 in 2006 and 12 in 2013: Natalie, Akoorie “I do’ makes comeback for young Kiwis” *The New Zealand Herald* (11 January 2014) <http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=11184504>. Recently, the decline of marriages in New Zealand was blamed on the rising costs: Iain Scott “Decline in Marriages” *Stuff.co.nz* (6 May 2014) <<http://www.stuff.co.nz/manawatu-standard/news/10013921/Decline-in-marriages-blamed-on-rising-costs>>.

¹¹⁹ “Marriage is good for society as a whole” accessed on 27 June 2014 <<http://www.yourchurchwedding.org/your-marriage/marriage-is-good-for-society-as-a-whole.aspx>>.

institution. The interviewees viewed the following:¹²⁰

I'm just saying this, but you commit yourself to love, respect, I don't know, the liturgy of religious wedding has never fully convinced me seeing it in a perspective of man-woman equality. I think that if I were a woman, I just wouldn't accept that.

As far as I'm concerned it doesn't really matter whether we are married or not. I believe that even if we decide to get married . . . what would be different from how things are now? It's all the same in the end, we would just spend money for one single day!

Yes, but if you say 'temporary' meaning it will lead to marriage, well, it's a chance, it depends on how we will feel and nothing will change anyway. In fact, it shouldn't be different. Behind marriage there are the same values that are behind cohabitation: sharing life.

The choice to commit in marriage is not a decision taken by one of the partners, but both the partners to the relationship. One may favour the marriage institution while the other partner may not prefer the marriage option. In the event of relationship breakdown or death of one of the partners, the importance emerges of acquiring rights within the relationship. Cohabitants in the breakdown of cohabiting relationship face the same consequences as married couples in the marriage breakdown.

As stated by Stuart Bridge:¹²¹

Often there has been a very long relationship, there are children of that relationship, and one of the partners has simply refused to marry

¹²⁰ Martignani, above n 61, at 569, 572.

¹²¹ Stuart Bridge also insisted that by giving rights to people who live together, certainly it does not undermine marriage: Joshua Rozenberg "Cohabiting law 'no threat to marriage'" *The Telegraph UK* (Jun 2006)

<<http://www.telegraph.co.uk/news/uknews/1519972/Cohabiting-law-no-threat-to-marriage.html>>.

throughout that relationship. At the end of it you have one person who is seriously disadvantaged and vulnerable (for example, the loss of rights to the property they lived together). At the moment, the law is letting them down.

The Rights of Women, a voluntary organisation in England, strongly believes that legal protection for cohabitants in the event of relationship breakdown will not undermine marriage and that marriage would continue to have particular religious, cultural, and social meaning.¹²² For example, partners who want to marry in a Church setting could still legalise their marriage union embedding the religious and cultural values. Although some may feel that giving cohabitants more rights would encourage more people to opt out of marriage, if laws are not reformed to catch up with the existing social trend,¹²³ more and more individuals will fall into a legal black hole and suffer accordingly (cohabitants without any legal recognition and protective family laws could suffer loss of property rights after the relationship breakdown).¹²⁴ Hence, the absence of law to redress the position of cohabitants after the relationship breakdown exposes its inability to recognise functionality within the relationship. If these functions are worthy of legal safeguards on relationship breakdown within marriage, it seems appropriate to extend the same rights to cohabitants to achieve legal cohesion and provide social justice, reflective of current social attitudes and trends.¹²⁵

2.4.2 Marriage is a Public Commitment

Another ground to justify pro-formalism is that marriage is a public commitment. “[I]n the marriage ceremony the public recognises and supports the couple’s reciprocal bond,

¹²² “Rights of Women” Response to Law Commission Consultation Paper No 179 Cohabitation: The Financial Consequences of Relationship Breakdown (October 2006)

<<http://www.rightsofwomen.org.uk/pdfs/consultation/cohabitation.pdf>> at 8.

¹²³ The increasing numbers of cohabitants in England and New Zealand is discussed in chapter five and six.

¹²⁴ Nigel Shepherd and Anna Heath “Common law misconception” (2010) Society of Trust and Estate Practitioners Journal <<http://www.step.org/common-law-misconception>>.

¹²⁵ Anne Barlow, Simon Duncan, Grace James and Alison Park “Family Affairs: Cohabitation, Marriage and the Law” accessed on 7 June 2014

< <https://ore.exeter.ac.uk/repository/bitstream/handle/10036/22732/barlow4.pdf?sequence=1>>.

and guarantees that (the couple's) ... commitment ... will be honoured as something valuable not only to the pair but to the community at large".¹²⁶ The couple who exchange vows "agrees to be subject to a complex set of behavioural expectations defining the roles of spouse and parent, expectations that will restrict their freedom and guide their behaviour in the relationship".¹²⁷ Henceforth, marriage is a public commitment and the marriage certificate proves the relationship.

Cohabitation on the other hand has to be inferred. Cohabiting arrangements rarely have a specific starting date and the relationship develops over the period of cohabitation. Some research has identified the phenomenon that cohabiting couples tend to 'slide into' rather than 'decide to' cohabit.¹²⁸ Cohabitation is also viewed to be an incomplete marriage because future choices to exit the relationship are flexible (if there are no legal consequences).¹²⁹ For instance, cohabitants may be uncertain of their intention within the relationship and could end it easily by separation. In this discourse, cohabitation is viewed as a second-rate family structure, characterised as fragile, informal, and lacking commitment.¹³⁰ This assumption is supported by reference to statistical comparisons, where on average, married spouses are less likely to break up, and marriages last longer than cohabiting relationships.¹³¹ This view seems plausible at first, but there is also

¹²⁶ Nancy F. Cott *Public Vows: A History of Marriage and the Nation* (Boston: Harvard University Press 2000) at 297.

¹²⁷ Elizabeth S. Scott "Social Norms and the Legal Regulation of Marriage" (2000) 86 VA L Rev at 1901, 1907.

¹²⁸ Scott Stanley, Galena Rhodes and Howard Markman "Sliding Versus Deciding: Inertia and the Premarital Cohabitation Effect" (2006) 55 Family Relations at 499.

¹²⁹ Martignani, above n 61 at 570.

¹³⁰ Duncan, Simon, Barlow, Anne and James, Grace "Why Don't They Marry- Cohabitation, Commitment and DIY Marriage" (2005) Child and Family Law Quarterly 17 No 3 at 388; J. Ermisch "Trying Again: repartnering after dissolution of a union" (2000) Working Paper of the Institute for Social and Economic Research University of Essex.

¹³¹ In the United States, nearly half of marriages break up within 20 years: Mike Stobbe "Move-in Before Marriage No Longer Predicts Divorce" (22 March 2012) accessed on 8 June 2014

<http://www.huffingtonpost.com/2012/03/22/movein-before-marriage-no_n_1372687.html>

In England, the national survey found that the average duration of cohabitation among current cohabitants was six and a half years with only one in five having been in the relationship for under a year: Anne Barlow, Simon Duncan, Grace James and Alison Park, Family Affairs: Cohabitation, Marriage and the Law,

<<https://ore.exeter.ac.uk/repository/bitstream/handle/10036/22732/barlow4.pdf?sequence=1>>. In New Zealand, 12 per cent of couples divorcing in 2010 had been married for four years or less. However, the common length of marriage duration was five to nine years (accounting for 24 per cent of all divorces in 2010), 10-14 years (19 per cent), followed by 15-19 years (14 per cent) and 20-24 years (12 per cent), and

research suggesting that the age of the partners to the relationship determines the stability of their relationship rather than the type of union, whether marriage or unmarried cohabitation.¹³² Cohabitants with plans to marry and those who are married show no significant difference in relationship quality and report greater stability and happiness, fewer arguments, tend to resolve conflicts non-violently, and report lower probability of separation than those who do not intend to marry.¹³³

There are also instances where cohabitants present themselves as husband and wife to the public, though they lack the literal public announcement of their relationship. They address their partners as husband or wives, to family and friends, for example in religious gatherings, shopping, recreational or children's activities, or even before the media.¹³⁴ Thus, the public's perception should also be considered. This can be termed as "the speech of the people", the public acknowledgement, or a belief in the community that they are husband and wife.¹³⁵ Unmarried cohabitants, who present themselves as husband and wives and are accepted as such by the public, are functionally demonstrating the same characteristics as married couples. In this disposition, Clive recognises that although marriage is a convenient legal concept for ascribing legal rights, it is not a necessary concept.¹³⁶ Cohabitants can also be ascribed with legal rights parallel to couples in the marriage union. The denying of equal protection perpetuates an inconsistent and unfair standard (since both married and cohabitants function in the same contexts).¹³⁷

only 2 per cent had been married for 40 years or more: "Marriages, Civil Unions and Divorces: Year ended December 2010" Statistics New Zealand (17 June 2011)

<http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces_HOTPYeDec10/Commentary.aspx>.

¹³² Duncan, Barlow and James, above n 130 at [388-389]; the married population is on average older than the cohabiting population; in 2000, only around 20 per cent of the married population was under 35, and just two per cent under 25. This compares with nearly 70 per cent under 35 and 20 per cent for cohabitants. The age at which partnership starts is one of the most powerful factors associated with subsequent breakdown; younger unions, whether married or not, are less stable in both emotional and structural terms.

¹³³ Brown, S. L. "Moving from cohabitation to marriage: effects on relationship quality" (2004) *Social Science Research* 33 at [1-19].

¹³⁴ Lind, above n 12, at 581.

¹³⁵ Ibid.

¹³⁶ Eric Clive "Marriage: an unnecessary legal concept" in John Eekelaar and Mavis Maclean (ed) *Family Law* (OUP 1994) at 186.

¹³⁷ Ibid.

However married couples, even though they may not have performed the functions commonly associated with a family or relationship are guaranteed matrimonial rights in the dissolution of the relationship. The existence of a marriage certificate supports this notion. By contrast, cohabitants who perform relationship functions are denied legal recognition or matrimonial rights. This is due to the absence of a legal document that confirms the relationship. It is an irony that despite cohabitants performing relationship functions (many even more apparently than married spouses) cohabitants are denied legal rights and recognition.¹³⁸

2.4.3 The Right to Respect for Individualism

The first wave feminism during the 19th century and early 20th century focused on gaining women's suffrage. Thereafter, the early 1960s to 1980s experienced the second wave feminism. It was mainly to advocate equal opportunities for women. Women had been perceived as wives and mothers and marriage was the only 'socially acceptable career' without any alternatives.¹³⁹ Therefore, feminists argue that spousal support is a sexist concept that has no place in a society in which men and women are to be treated as equals.¹⁴⁰ With increasing numbers of unmarried cohabitants, feminists confronted the idea of the extension of marital laws to unmarried cohabitants. Thus, unmarried cohabitation was conceived of as a choice of individualism and an alternative to marriage as an area of free regulation. Therefore, the legal regulation which applies to marriage should not be imposed on cohabitants.

Generally, individualism is a theory that upholds and protects the rights of a single person rather than groups of categories and has been described as:¹⁴¹

¹³⁸ However, this situation does not apply for the context of New Zealand, whereby de facto partners are protected of their rights under Property (Relationship) Act 1976. There are other countries, such as England and Malaysia that fail to recognise cohabitants' functions, thus, give importance to the status of the relationship, that is whether the couple is married or not married.

¹³⁹ R Auchmuty "What's so special about marriage? The impact of *Wilkinson v Kitzinger*" (2008) 20 No 4 Child and Family Quarterly at [493-494].

¹⁴⁰ J Hough "Mistaking liberalism for feminism: Spousal support in Canada" (1994) 9 No 2 Journal of Canadian Studies at [147-164].

¹⁴¹ R Deech "The Case Against Legal Recognition of Cohabitation" (1980) International and Comparative Law Quarterly 29 at 480.

- (1) The dignity of the individual;
- (2) Autonomy;
- (3) Privacy; and
- (4) Self-development.

From the feminist perspective, the concept of individualism encourages equality for women. This is because women will then be allowed to live according to their preferences without the interference of men. They do not solely play the role as wife or mother, but instead more than that, an individual needing to survive on their own and for their own benefit.

This autonomy approach postulates that those who cohabit have chosen not to marry and the law should therefore respect that choice, preserve their autonomy and not attempt to treat them as if they were married.¹⁴² Cohabitants shall not have legal rights and duties imposed on them because they have chosen not to marry and did not wish to be bound by the rigid code of rights and duties the law attaches to that status.¹⁴³ Cohabitants' choice not to marry is influenced by their knowledge of their rights and position. However, one of the flaws under this approach is presupposing that people are well educated, well informed, and able (in a position) to make choices about their identity, welfare, employment, and other matters.¹⁴⁴ Instead, the reality is often that people are still lacking the knowledge and expertise to make the most appropriate decision, and thus in reality, the law needs to protect them.

¹⁴² Michael D. A. Freeman and Christina M. Lyon *Cohabitation without Marriage An Essay in Law and Social Policy* (Aldershot, England: Gower 1983) at 189.

¹⁴³ Cretney, above n 117, at 365.

¹⁴⁴ "Cohabitation knowledge 'lacking'" Express & star.com (10 January 2014) <<http://www.expressandstar.com/business/uk-money/2014/01/10/cohabitation-knowledge-lacking/>>: The Co-operative Legal Services conducted a survey on 2000 Britons. Despite the fact that six million Britons are unmarried couples living together, 67 per cent of people do not know what legal rights cohabiting couples have. Further, about two thirds have incorrect perceptions about their legal rights concerning child custody, property or finance.

There are opponents to the theory of individualism. For example, Winifred Holland disagrees with arguments of autonomy and individual choice.¹⁴⁵ She points out that it is not obvious that unmarried couples have indeed chosen cohabitation to avoid the regulations associated with marriage.¹⁴⁶ In a large number of cases, there were couples who have drifted into cohabitation by the choice of only one partner, whereas without the agreement of the other partner who prefers marriage to cohabitation.¹⁴⁷ Besides that, most couples do not have a clear image at the beginning of a relationship, specifically on the obligations they are avoiding. In most circumstances, the original intention changes over time. Independence might become interdependence when there are children born in the relationship. Additionally, in cases of same-sex relationships in certain jurisdictions, arguments of choice are invalid since they do not have the choice between marriage and cohabitation.¹⁴⁸ For Malaysian context, there is no argument of choice for inter-religious couple, especially between a Muslim and a non-Muslim.¹⁴⁹

Holland generally rejects the idea of cohabitants signing a contract in order to receive the same rights as married couples. She claims:¹⁵⁰

It is preferable to put the onus on those who wish to avoid obligations rather than on those who wish to create them. The reality is that the lives of many cohabitants are intertwined, and we should assume that they have become interdependent once the criteria for cohabitants are satisfied. If one partner wishes to avoid such an obligation, the onus should be on that person to have a domestic contract drawn up so that they will not be going into the relationship with “eyes wide shut.

¹⁴⁵ Holland, Winifred “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?” (2000) 17 Canadian Journal of Family Law at [114-168].

¹⁴⁶ Modernization of Benefits and Obligations Act, S. C, 2000, c. 12.

¹⁴⁷ W H Holland “Intimate Relationships in the New Millennium” (paper delivered at the Conference, “Domestic Partnerships” held at Queen’s University, October 21- 23 1999).

¹⁴⁸ Holland, Winifred, above n 145: At the time this opinion was written in her article, there was no recognition to same-sex couples’ marriage in Canada. Later, same-sex marriage was introduced in 2005 within the Federal level in Civil Marriage Act, S.C, 2005.

¹⁴⁹ There is no specific law that allows inter-religious couple (Muslim and a non-Muslim) to consummate marriage. This will be discussed in-depth in chapter 4.

¹⁵⁰ Holland, Winifred, above n 145, at 133.

This matter is similar to the ‘opt-out’ regime in the New Zealand Property (Relationships) Act 1976 (PRA 1976) and as the ‘opt-out’ scheme recommended by the Law Commission in England. Under the PRA 1976, de facto partners may make an agreement to contract out of the legal regime. This agreement must be made in respect to the status, ownership and division of their property (including future property), and agreed by all parties.¹⁵¹ The agreement should distinguish between relationship property and separate property, define the share that each of the partner is entitled to when the relationship ends or in cases of death, provide the calculation of the shares, and prescribe the method that will be applied to divide the relationship property.¹⁵²

It is crucial to strike a balance between the need for individual autonomy, perhaps best served by private ordering and the need to apply the protective function of family law to address exploitation by the powerful of the powerless or less powerful actors within family relationships.¹⁵³ While addressing both views, this thesis argues that functionality should prevail over individual autonomy. The argument for individual choice does not demonstrate that cohabitants have chosen an unmarried relationship to avoid legal regulation. Some cohabitants would like to marry but end up cohabiting by the choice of the other partner. In cases involving same sex relationships and inter-religious relationships, there is no valid argument for choice. Functionality on the other hand is clearly apparent among unmarried cohabiting partners.

2.4.4 The Expectations and Intentions of Married and Cohabiting Couples

What are the expectations and intentions of cohabiting couples in the relationship? Should these matters determine whether cohabitants ought to be given legal recognition and rights? One of the main arguments against legal recognition of cohabitation stems from the assertion that married couples and unmarried cohabitants have different

¹⁵¹ Property (Relationships) Act 1976, s 21(1), s 21B.

¹⁵² Ibid, s 2D.

¹⁵³ Anne Barlow and Rebecca Probert “Regulating Marriage and Cohabitation: Changing Family Values and Policies in Europe and North America – An Introductory Critique” (2004) Law and Policy 26 No 1 at 8.

expectations and intentions.¹⁵⁴ Therefore, it is important to distinguish the intention and expectations of cohabitants within the relationship. Subsequently, it is questionable whether the cohabiting relationship should be recognised as equivalent to formal marriage. In New Zealand, under section 2D of the PRA 1976, there is a list of factors to determine the expectation and intentions of cohabitants within the relationship. These features could determine the couples' functions and how they respond to the relationship.

Cohabitants freely choose not to marry. This is an omission that exemplifies their intention. Nevertheless, if the couple has the intention to be administered and protected by the same laws that apply to married couples, the question is whether they should benefit from the laws, or be left without any legal guidance and protection. In looking into this matter, if both the partners wish to be protected as if they are married, then they could be aided by the law.

Another question to be addressed is when there is clear evidence that the couple expressly rejected marriage. Should they be protected as well despite their intention? In this matter, it will be against the wishes of the partners if the laws that apply to married couples are imposed on them. The issue to consider here is whether at the initial part of the relationship, the couple rejected marriage. Even if they did reject marriage, however, there is no assurance of the same intention at the continuance of the relationship. Over time, their intention and conduct might change, hence, they tend to function the same as couples in the married relationship. Subsequently, they want their relationship to be legally recognised. In this matter, matrimonial property laws could protect them.

Further, there are situations where only one partner rejects the legal consequences, and vice-versa; the other desires marital laws to be applied to her or him. In this matter, the question would be whose intention is to be given paramount consideration here, and is it unfair or appropriate to prefer the choice of one partner to the other. For example, X and Y are cohabiting for some time and have two children. X is a homemaker while Y is

¹⁵⁴ D MacDougall "Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage" in Eekelaar and S Katz (ed) *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Toronto: Butterworths 1980) at 318.

the breadwinner of the family. In this situation, X might consider herself to be in a vulnerable position if there is a relationship breakdown. As for her being weak in the economic sphere, if her relationship ends, then she might end up with nothing to hold on to financially. Y, on the other hand, is comfortable not to have any legal consequences imposed upon him. If there is a relationship breakdown, he can just leave the relationship and start a new life. In that matter, he holds no responsibility, as there are no legal consequences for him. This is an issue to be addressed as well. In this matter, if one of the partners is in a vulnerable position, he or she shall be given protection, despite the other person's omission to be linked with legal consequences. The utmost importance is to recognise the functionality of cohabitants in the relationship. The laws should protect and benefit everyone, particularly the victim of the situation, although this may not be preferred by some part of the society, specifically in this situation, Y.

There are studies that investigate the gender differences in terms of the economic consequences of relationship breakdown.¹⁵⁵ It demonstrates that the economic consequences of separation are more severe for women than men.¹⁵⁶ If matrimonial laws are extended to cohabitants, it may benefit the female cohabitants in terms of their rights in the breakdown of such relationship.

Moreover, one of the main reasons for the state to recognise unmarried cohabitation is to pass the burden of financial support away from the community to the spouse.¹⁵⁷ If cohabitants are not held liable for their relationship, people will freely enter, omit to hold responsibility, abandon or dissolve their relationship easily. This will in turn encourage more burdens on the state to provide finance and welfare for those who are

¹⁵⁵ Anne-Rigt Poortman "Sex Differences in the Economic Consequences of Separation: A Panel Study of the Netherlands" (2000) *European Sociological Review* 16 (4) at 367-383.

¹⁵⁶ *Ibid*; this study examines the economic consequences of separation for men and women in the Netherlands and the sources of sex differences in the economic consequences using panel data from 1984 to 1995. Although public and private transfers reduce gender disparities, women still experience a decline of 46 per cent in total household income, whereas men experience a decline of 31 per cent. Multivariate analyses show that women do worse than men because they work fewer hours, have a lower level of education and more often get custody of the children.

¹⁵⁷ D MacDougall, above n 1554 at 316.

affected by the breakdown of such relationships.¹⁵⁸ However, if partners are held accountable for their relationship consequences, the financial burden on the state (from the taxpayer's money) can be funded and used in some other social development.

The public policy report of British Social Attitudes demonstrates that cohabitants primarily support the reform of the current law to one which recognises cohabitation. “70 per cent of cohabitants supporting marriage-like financial provision on the breakdown and 98 per cent on death.”¹⁵⁹ Thus, the majority of cohabitants in Britain do not seem to be cohabiting in order to avoid the legal consequences of marriage, but would welcome the extension of marriage-like rights.¹⁶⁰

In addition, there are also cohabitants who are not able to marry. Among the reasons are that the state itself does not permit interreligious or inter-racial marriage, financial constraint, same-sex relationships, and others. However, they are like the married couples, having the intention to form a family union and undertake the same functions. For example, a woman in a cohabiting relationship could be the homemaker, take care of her partner, raise children and be financially dependent on the partner. Apart from that, cohabiting partners may also expect stability, love, and continuity from their relationship. It could be stressed that between marriage and unmarried cohabitation, the only difference is that cohabitants do not legally register the relationship. In this matter, the question is whether the failure to legalise the union is sufficient justification to treat them differently to married couples. Moreover, the failure to formalise the marriage does not demonstrate that they are avoiding legal obligations. Based on these arguments, cohabitants could be proved to have similar expectations and intentions to married couples, and thus, should be given equal legal treatment.

¹⁵⁸ For example in New Zealand, men have not paid their debts under the child support scheme. The total child support debt, at June 30 2009 was \$1,058 million (comprising \$375 million in assessment debt and \$683 million in penalties): “Recovering debt, Controller and Auditor-General” [newzealand.govt.nz](http://www.oag.govt.nz/2010/child-support-debt/part7.htm#domestic) accessed on 20 May 2014 <<http://www.oag.govt.nz/2010/child-support-debt/part7.htm#domestic>> at para 7.9.

¹⁵⁹ Anne Barlow, Simon Duncan, Grace James and Alison Park “Just a piece of Paper? Marriage and Cohabitation in Britain” in A. Park, J. Curtice, K. Thomson, L. Jarvis and C. Bromley (ed) *British Social Attitudes: The 18th Report- Public Policy and Social Ties* (London Sage 2001).

¹⁶⁰ Anne Barlow “Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain within Europe” (2004) *Law & Policy* 26 No 1 at 73.

2.4.5 Unmarried Cohabitation as Freedom

For hundreds of years, women had fewer legal rights on marriage and lacked independent legal privileges. They could not construct contracts, maintain their own names, file lawsuits, or acquire full ownership and control of property, and in some cases could not ever maintain the custody of their children after their husband's death.¹⁶¹ These social rudiments were influences from the patriarchal society.

Feminists in the late 1990s and 2000s observed cohabitation as a freedom from the patriarchal institution of marriage.¹⁶² Cohabitation is the liberation from traditions and structures embedded in marriage. If recognition is given to cohabitants, the regulatory limbs of patriarchal matrimony apply to them, although they choose to organise their relationships outside of marriage.

In contrast to the feminists' arguments, it should be noted that marriages contracted these days and the responsibilities these carry differ from the ones practised previously, which had more patriarchal influence. The marriage institution has transformed in many ways. Within the last century, states could place extensive restrictions on obtaining divorce, ban interracial marriage and subjugate married women's rights to husbands.¹⁶³ Married women in the present era acquire rights to property entitlements, financial independence and rights to children. Moreover, there are increasing numbers of stay-at-home dads in western nations, where the wives in the relationship become the breadwinners.¹⁶⁴ This demonstrates the social revolutions that have taken place whereby the position of men are the head of the family and women as the caretaker has changed. Whether the marriage these days still reflects the influence of patriarchal oppression is questionable.

¹⁶¹ "Gay & Lesbian Advocates & Defenders, Marriage- A history of Change" accessed on 13 September 2013 <http://www.outcast-films.com/res_marriage/historyofchange.PDF>.

¹⁶² Heather Brook, above n 95, at 157.

¹⁶³ "Gay & Lesbian Advocates & Defenders" above n 161.

¹⁶⁴ "Are Stay-At-Home Parents At Financial Risk During Divorce?" Huffpost (26 July 2011) accessed on 14 September 2013 <http://www.huffingtonpost.com/beverly-willett/are-stayathome-parents-at_b_907792.html>.

Secondly, the newer feminist movement argues that cohabitation is a freedom to contract a different arrangement.¹⁶⁵ Previously, contracts between cohabitants were unenforceable because it was considered contrary to public policy. However, recently, there were amendments to family law in England that allow a private contract between cohabitants. Unmarried cohabitants are now allowed to engage in private contracts that specify the conditions and regulation of matters of living together.

Further, cohabitation (without legal recognition) allows freedom from state incursion into private life.¹⁶⁶ This argument that state interference will intrude on freedom cannot be accepted overall. The reason behind the existence of rules, regulation and laws is to serve justice for people. If laws are said to oppress freedom, this could be inconsistent with the purpose of the law that is to protect and safe guard those who are in need. For the context of this thesis, it could be shown that cohabitants' functions are similar to couples in the marriage union. However, certain jurisdictions, such as Malaysia, do not recognise them. Cohabitants are in need of matrimonial laws to protect their family rights. Therefore, the introduction of laws and policies may have a good effect on cohabitants' life, recognise their functions within the family but will be intended not to intervene in their freedom to live within society.

In addition to that, Auchmuty questions the idea of extending marital rights to other types of relationships. Even though she particularly looks at whether same-sex marriage should be introduced in United Kingdom (UK), her thoughts and arguments can be discussed from the perspective of different sex cohabitants. Like many other feminists, Auchmuty opposes the institution of marriage for the reason that it exploits and oppresses women.¹⁶⁷ The ideas of second-wave feminism influenced her thoughts about exploitation of women. Despite many legal and social changes to the marriage institution, there are increasing critiques of the institution, particularly concerning the differences in power of men and women in the family institution. Marriage portrays men as having

¹⁶⁵ Brook, above n 95, at 160.

¹⁶⁶ Ibid, at 161.

¹⁶⁷ R Auchmuty "Same-sex Marriage revived: Feminist Critique and Legal Strategy" (2004) 12 *Feminism & Psychology* at 103, 105.

more power with a better lifestyle, greater freedom, and women by contrast as limited in their freedom, impoverished, and vulnerable to abuse by husbands. However, as mentioned before, this dichotomy is not the exact scenario faced by men and women in a present-day relationship. Women today have more freedom, financial stability and independency in the marriage relationship, although there are concerns of women's earning power and/or economic consequences in relationship breakdown.

Auchmuty further claims that one major difference between marriage and unmarried cohabitation is that only marriage laws impose a formal legal procedure for the dissolution of the relationship, for instance, through divorce.¹⁶⁸ At the breakdown of a marriage, the divorce court has unlimited discretion to redistribute property as it thinks fit. This situation applies in England mostly.¹⁶⁹ By contrast, contracts between the couple regarding the distribution of property are preferable to the marital regulations because they are less likely to be changed by courts. Therefore, individual contracts are preferred to the legal regulation of intimate relationships. Nonetheless, there are many couples who do not make any pre-arrangements. Cohabiting couples are not arranging contracts for many reasons; for instance, they could not afford the cost, lack of knowledge about contracts, are not aware or understand the importance of having such an arrangement and other causes, such as apathy. As a result, they are vulnerable within the relationship, particularly to relationship breakdown. In spite of that, the power differentials that might occur in the drawing up of contracts by the parties also need to be acknowledged. Elizabeth Kingdom has addressed in her studies that cohabitation contracts construct cohabitants' obligations as commercial and typically detrimental to women because of their weaker bargaining power.¹⁷⁰ She argued that cohabitation contracts should include considerations of the parties' different financial status and social circumstances.¹⁷¹ In this

¹⁶⁸ Ibid, at 113.

¹⁶⁹ Under Part two of the Matrimonial Causes Act 1973, the court has discretion to distribute property and financial provision.

¹⁷⁰ Elizabeth Kingdom "Cohabitation Contracts and the Democratization of Personal Relations" (2000) *Feminist Legal Studies* 8 at 5-27.

¹⁷¹ Ibid.

way, the constructions of cohabitants' obligation can accordingly foreground fairness and equality, both in drafting and in enforcing cohabitation contracts.¹⁷²

2.4.6 Morality

Until the last decades of the twentieth century, moral condemnation of non-marital conjugal relationships and public policy considerations in favour of marriage motivated traditional family law to oppose cohabitation in various ways.¹⁷³ The argument against legal recognition of unmarried cohabitation is based on the argument that cohabitation is not morally appropriate and opposes religious doctrines of marriage. The courts in several western jurisdictions deny rights to cohabitants on the ground that this is against the law and Christian morality.¹⁷⁴

However, it could be argued that marriages and religious traditions are two different entities. "While marriage is partly a religious institution for religious people, it has never been only a religious act. In the western tradition, marriage has represented the best efforts of state and society to integrate goods, love, money, mutual support, sex, children, in the service of helping men and women to raise the next generation."¹⁷⁵ "Marriage in every known society has been deeply influenced and coloured by religious traditions in the societies in which it has taken root."¹⁷⁶ It should be noted that marriage is older than some of the oldest religious traditions.

¹⁷² Ibid.

¹⁷³ Jane Lewis *Family Policy in the Post-War Period* (ed) Sanford N Katz, Cross Currents: Family Law and Policy in the U.S and England (Oxford University Press 2000) at [82-90].

¹⁷⁴ In the United States of America, seven states, namely, Florida, Michigan, Mississippi, North Carolina, North Dakota, Virginia and West Virginia still classify cohabitation as illegal. The offence that can be categorised as "lewd and lascivious" male-female cohabitation remains illegal. Although the statutes are rarely enforced, yet they still make an effect of having a law that goes against cohabitation: "7 States Still Classify Cohabitation as Illegal" *Los Angeles Times* (20 August 2011) <<http://articles.latimes.com/2001/aug/20/news/mn-36308>>.

¹⁷⁵ Council on Family Law "The Future of Family Law: Law and the Marriage Crisis in North America" published on line by the Institute for Marriage and Public Policy (iMAPP) accessed on 21 May 2014 <http://www.marriedebate.com/pdf/future_of_family_law.pdf> at 31.

¹⁷⁶ Ibid, at 31.

The Bible stated:¹⁷⁷

Marriage is honourable among all, and the bed undefiled; but fornicators and adulterers God will judge.

Fornication is demarcated as any sexual activity between two persons who are not married to each other. Adultery is when a married person has sexual intercourse with someone other than whom he or she is married to. Sexual relationships outside marriage are considered as a sinful act. It was also stated that adultery and fornication excludes men from the Kingdom of God.¹⁷⁸

Matthew 15:19:¹⁷⁹

The acts of fornication and adultery come from an evil heart of unbelief. They corrupt the beautiful gift of sexuality given by God only to married couples.

Sexual conduct outside marriage is considered irreligious in Christianity. As cohabitants conduct a sexual relationship outside marriage, they are not abiding by the teachings of religion. They are considered to commit the act of fornication against the wisdom of Christianity.

The practise of marriage or cohabitation in reality may be at variance with the principles in the Bible. The process of marriage and determining of the timing of when a courtship becomes a marriage has changed throughout the centuries. In the Middle Ages, marriage was a process rather than a simple act whereby the spouses initiated their marriage by their betrothal and they completed marriage by sexual conduct.

¹⁷⁷ Hebrews 13:4.

¹⁷⁸ I Corinthians 5: 9, 10; I Corinthians 6: 9.

¹⁷⁹ Richard Mansel "Is it Acceptable to Live Together Before Marriage?" *Forthright Magazine* (6 January 2011).

The Bible mentions that marriage is to be ‘one flesh’.¹⁸⁰ Physically they become ‘one flesh’, and the result of that ‘one flesh’ is found in the children that their union produces.¹⁸¹ If sexual intercourse determines a relationship, then it does not necessarily suggest marriage. In this discourse, cohabitation can also be recognised as a relationship for it could involve sexual intercourse between the partners.¹⁸² Moreover, the term becoming ‘one flesh’ could also mean the emotional, spiritual, intellectual, financial, and in any other way that the couple share between them and therefore, is becoming one.¹⁸³ Regarding this matter, cohabitants could also fall under this ambit of ‘one flesh’ as they share the above matters. This matter was previously discussed in this chapter.

Ephesians 5:22-23 presents the meaning of ‘the union of man and woman’ in the New Testament. It incorporates: (1) love, respect and submission; (2) ‘one flesh’ relationship; and (3) leaving one’s parents in order to enter into a new relationship.¹⁸⁴ In considering these qualities, cohabitants could fall under this realm, as there is no requisite for the ceremonial, legal or ecclesiastical issues. With respect to cohabitants’ functions, love, respect and submission to their relationship is apparent.¹⁸⁵ Second, sexual intercourse between cohabitants could explain the ‘one flesh’ practicality.¹⁸⁶ Third, the leaving of their family and moving in to a different house with the cohabiting partner to start a new life could explain the third criteria.¹⁸⁷

¹⁸⁰ The term ‘one flesh’ comes from the Genesis account of the creation of Eve. Genesis 2:21-24 describes the process by which God created Eve from a rib taken from Adam’s side as he slept. Adam recognized that Eve was part of him, and that they were in fact ‘one flesh’: S Michael Houdmann “What does it mean to be one flesh in a marriage?” Gotquestions?org accessed on 22 May 2014 <<http://www.gotquestions.org/one-flesh-marriage.html>>.

¹⁸¹ Ibid.

¹⁸² Sexual conduct between cohabitants was discussed earlier in this chapter.

¹⁸³ Houdmann, above n 180.

¹⁸⁴ This is the Pauline perception of a divinely accepted partnership between two heterosexual people that are symptomatic of marriage per se: Keith Warrington “Cohabitation and the Church” accessed on 17 May 2014 <http://www.biblicalstudies.org.uk/pdf/churchman/111-02_127.pdf> at 134: A pastoral testament of this topic is contained in N Hudson and K Warrington “Cohabitation and the Church” (1994) Epta Bulletin: Journal of the European Pentecostal Theological Association 13 at [63-73].

¹⁸⁵ This was discussed earlier in the example situation given of Amy and Jack. The degree of mutual commitment to a shared life could highlight this matter.

¹⁸⁶ The existence of sexual relationship is one among the other features of functionality within the cohabitant’s relationship.

¹⁸⁷ The nature and common residence discussed earlier in the chapter could explain this matter.

Further, marriage could be considered as a public declaration made to prove the enduring fidelity, sexual exclusiveness, and accountability to one another within the relationship.¹⁸⁸ It should be mentioned that the Bible did not expressly stipulate the use of declaration in marriage.¹⁸⁹ The important matter is the mutual consent of both the party to the marriage.¹⁹⁰ Therefore, the legal and institutional aspects of marriage ceremony initiated by a government are not essential to confirm a marriage that has occurred in the eyes of God.¹⁹¹

In England, it was not until AD 866 that the Church imposed laws relating to marriage.¹⁹² For the first 1000 years, the distinction between marriage and cohabitation was very blurred.¹⁹³ Then, in the beginning of the 17th century, Christian norms demanded that there should be no sexual intercourse until after a marriage ceremony. From then on, Christian marriage portrays exclusivity, unity of partners in ‘one flesh’ and the joining of two lives into an enduring relationship. It could also be argued that the concept of ‘marriage’ is relatively recent in origin. Apart from which, marriage was also considered a symbol of the unity of Christ and the Church (the spiritual union with God).

Clearly, cohabitation can incorporate similar elements and functions of marriage, a relationship between a man and woman that shows exclusivity, fidelity, and responsibility. Subsequently, it could be acceptable and recognised. As stated by Pastor Dr Gregory J. Foster: “cohabitation that can show sufficient functional characteristics of marriage should be given the moral dignity of marriage”.¹⁹⁴

¹⁸⁸ Keith Warrington, above n 184, at 135.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid, at 136.

¹⁹³ Ibid, at 137.

¹⁹⁴ Greg Foster “Cohabitation and Marriage, A Pastoral Response” (1994 London: Marshall Pickering) at 79.

A non-western religious perspective, specifically Islam, is also included in the discussion in order to understand its views on marriage and cohabitation. Predominantly, Islamic philosophy encourages marriage. It is stated in Quran: ¹⁹⁵

You shall encourage those of you who are single to get married. They may marry the righteous among your male and female servants, if they are poor. CREATOR will enrich them from His grace. CREATOR is Bounteous, Knower.

Islam allows Muslim men to practise polygamy with a specific limitation to four wives at the same time. Conversely, Muslim women are not allowed to practise polyandry. Therefore, women are not permitted to marry more than one man. Quran clearly states that men who practice polygamy must treat their wives as fairly as possible. For example: ¹⁹⁶

If ye fear shall not be able to deal justly with the orphans, marry women of your choice. Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.

Islam has taken a definite stand against ‘Zina’, often translated as fornication or adultery. ¹⁹⁷ Adultery in Islam is one of the most heinous and deadliest of sins. The verses in the Quran that relate to adultery are as the following: ¹⁹⁸

¹⁹⁵ Al-Quran: An-Nur:32.

¹⁹⁶ Al-Quran: An-Nisa (4): Verse 3.

¹⁹⁷ Across all four Sunni practice and two schools of Shi’a the term ‘zina’ signifies voluntary sexual intercourse between a man and a woman, not married to one another regardless of whether both are married to other persons or not married at all. This is in contrast to the most Western languages that differentiate between the concepts of adultery (sexual intercourse of a married person with someone he or she not married with) or fornication (sexual intercourse between two unmarried persons).

¹⁹⁸ Al-Quran: Al-Isra (17): Verse 32.

*Allah, the Almighty, commands: And come not near unto adultery. Lo!
It is an abomination and an evil way.*

*Do not go near adultery. Surely, it is shameful deed and evil, opening
roads to other evils.*

Prophet Muhammad (SAW) has said in many places that adultery is one of the three major sins.¹⁹⁹

There are three types of sinners that Allah will not speak to on the Day of Resurrection; neither He will purify them nor will He even look at them; rather they will suffer severe punishment; an older person who commits adultery, a king or ruler who lies to his subjects, and a poor person who acts arrogantly!

The Prophet (SAW) said:²⁰⁰

Whoever guarantees me that he will guard his chastity, I will guarantee him Paradise.

Abu Hurayrah reports that the Messenger of Allah said:²⁰¹

No one commits adultery while still remaining a believer, for faith is more precious unto Allah than such an evil act!” and “when a person commits adultery he casts away from his neck the bond that ties him to Islam; if, however, he repents, Allah will accept his repentance.

¹⁹⁹ Muslim and An-Nasa'i.

²⁰⁰ Al-Bukhari.

²⁰¹ Al-Bukhari, Muslim, Abu Dawud, An-Nisa'i.

The Quran uses the phrase ‘fornicators or adulterers’²⁰² and prescribes 100 lashes as the punishment.²⁰³ It should be noted that the Quran did not differentiate the unmarried sexual offences committed by unmarried persons or married persons. Quran mentioned:

*The woman and the man guilty of adultery or fornication-flog each of them with hundred stripes: Let not compassion move you in the case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.*²⁰⁴

However, in the Islamic practise, for those who have committed adultery, their punishment ranges from stoning to death (Rajm) to lashing. The punishment stoning to death is not prescribed in the Quran (the Islamic Holy Book).²⁰⁵ The verses on ‘stoning to death’ are available in the Hadith (the secondary source of Islamic law, the Prophet’s sayings).²⁰⁶ The Hadith differentiates the sexual conducts committed by married persons to the ones conducted by unmarried persons. In case of married persons, there is a punishment of hundred lashes and then stoning to death and in case of unmarried persons, the punishment is one hundred lashes and exile for a year.²⁰⁷ The punishment available today in the Islamic practise is based on the Hadith below:²⁰⁸

²⁰² Al-Quran: 24:2

²⁰³ Al-Quran: 4:15

²⁰⁴ Al-Quran: 24:2.

²⁰⁵ A leading Muslim scholar Maulana Muhammad Ali noted that stoning to death was never contemplated by Islam as a punishment for adultery: “Punishments for Non-marital Sex in Islam” Ontario Consultants on Religious Tolerance (2002) accessed on 22 May 2014

<http://www.religioustolerance.org/isl_adul2.htm>.

²⁰⁶ Roman Catholic Archbishop of Lagos, Dr Anthony Olubunmi Okogie said that the official text of the Quran only sanctions a punishment of so many lashes for such an offence not stoning to death ... [the] punishment of stoning was introduced later by Omar, the second Calif for reasons best known to him: Andrew Ahiane “Nigeria: Koran Does Not Approve Stoning” Archbishop (24 March 2002) accessed on 22 May 2014 <<http://allafrica.com/stories/200203250395.html>>; Al-Quran 17:4224: Abd al-Rahman reported that ‘Ali’, while delivering the address said: “O people, impose the prescribes punishment upon your slaves, those who are married and those not married, for a slave-woman belonging to Allah’s Messenger (may peace be upon him) had committed adultery, and he committed me to flog her. But she had recently given birth to a child and I was afraid that if I flogged her I might kill her. So I mentioned that to Allah’s Apostle and he said: You have done well.”

²⁰⁷ Al-Muslim 17:4192: Ubada b. as-Samit reported that whenever Allah’s Apostle (may peace be upon him) received revelation, he felt its rigour and the complexion of his face changed. One day revelation descended upon him, he felt the same rigour. When it was over he felt relief and said: “Take from me. Verily Allah has ordained a way for them (the women who commit fornication): (When) a married man (commits adultery) with a married woman, and an unmarried male with an unmarried woman, then in case

‘Ubada b. as-Samit reported: Allah’s Messenger (may peace be upon him) as saying: Receive (teaching) from me. Allah has ordained a way of those (women). When an unmarried male commits adultery with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death.

Concerning the punishments ordered by the Prophet (SAW), he took into consideration the circumstances and the nature of crime in his own times and granted remission to certain criminals guilty of debauchery by exiling them. Similarly in obeying this verse, he stoned to death certain others who did not deserve any leniency.²⁰⁹ His inquiry into the marital status of the offenders guilty of fornication is to consider whether they should be dealt with strictly or leniently. However, Islamic jurists have erroneously inferred from the Prophet’s inquiry that the marital status of a person was actually the basis of the punishment and on this basis, maintain that the directive of administering a hundred lashes (the punishment of fornication as mentioned) is only for unmarried people.²¹⁰ Actually, the offender’s marital status was one of such question, however, the Muslim jurist concluded that it was the only question asked, hence, made it the basis for the punishment.²¹¹ This matter leads to the conclusion that there is a conflict between the penalties for adultery, in the Hadith (differentiate the punishment for married and unmarried persons who are engaged in sexual intercourse out of marriage) with the punishments ordered in the Quran (does not differentiate the punishment for married or unmarried partners who are engaged in sexual intercourse out of marriage).

The majority of Muslims accept the punishments ordered in the Hadith as it popularly claimed as another source of Islamic law. However, it should be noted that the

of married (persons) there is (a punishment) of one hundred lashes and then stoning (to death). And in case of unmarried persons, (the punishment) is one hundred lashes and exile for one year”.

²⁰⁸ Al-Muslim 17:4191.

²⁰⁹ “Is Rajm a Quranic Punishment?” Renaissance.com accessed on 22 May 2014

< <http://www.renaissance.com.pk/aprq320.htm>>.

²¹⁰ Ibid.

²¹¹ Ibid.

penalty for ‘zina’ in the Hadith that suggest ‘stoning to death’ is in conflict with the primary source of Islamic law, the al-Quran. The Quran prescribes flogging and does not mention the word ‘stoning’ or ‘death by stoning’. So, how is this pre-Islamic punishment conveyed into the Islamic practise? This matter invites suspicion on the authenticity of the Hadith and it requires a careful examination, if not to reject them outright because of their contradiction with the Quran.²¹²

In Malaysia, unmarried cohabitants who are found to commit sexual intercourse out of wedlock are ordered to be punished. For example, section 23 (1) of the Syariah Criminal Offences (Federal Territories) Act 1997 stipulates that any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence, and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes, or to any combination. Further, a similar punishment is ordered for women. Any woman who performs sexual intercourse with a person who is not her lawful husband shall on conviction be liable to a fine not exceeding five thousand ringgit, or imprisonment not exceeding three years, or to whipping not exceeding six strokes.

Currently in Afghanistan, adultery can be punished with up to 15 years in prison, but stoning to death was used from the mid 1990’s to 2001 during the Taliban government.²¹³ Twelve years after the fall of Taliban regime, Afghanistan is now looking at bringing back public stoning and flogging for adultery. This appears in the draft revision of their penal code.²¹⁴ In Iran, an adulterer or an adulteress who qualifies as

²¹² Ahmad Shafaat “Punishment for Adultery in Islam: A Detailed Examination: (6 March 2005) accessed on 24 May 2014 <<http://www.islamicperspectives.com/Stoning5.htm>>.

²¹³ Akhtar Soomro “Stoning to make comeback as punishment for adultery in Afghanistan?” RT Question More (26 November 2013) accessed on 24 May 2013 <<http://rt.com/news/stoning-adultery-afghanistan-punishment-295/>>.

²¹⁴ Article 21 states: “Men and women who commit adultery shall be punished based on the circumstances to one of the following punishments: lashing, stoning (to death), according to the Guardian, which saw a translated copy of the draft. Further down in the documents, it is specified that stoning should be public: Akhtar Soomro, *ibid*.”

marriage-bound shall be subject to flogging punishment prior to stoning.²¹⁵ The last reported case of stoning was in 2009, when an unidentified man was stoned to death in the northern city of Rasht.²¹⁶

On the other hand, according to an Islamic scholar, Mohammad Haroun, the ideal Muslim home shall consist of the following:²¹⁷

- i. Simple and not ostentatious, for the Holy Prophet said, “Eat, drink, give ‘sadaqah’ (charity) and wear good clothes as long as these things do not involve excess and arrogance;
- ii. Clean, for the Prophet said, “Cleanliness is part of faith”
- iii. Free from statutes or revolting pieces of art, for the Holy Prophet said, “God is beautiful and loves beauty;
- iv. A place where there are basic necessities of food and clothing; where meals are eaten together, and where there is hospitality and generosity;²¹⁸
- v. A place where the greeting of Salaam (peace) is heard at dawn and at night, and at times of going and coming;
- vi. A place where tenderness, love and mercy are the norm, for the Quran says: “And we have made between you love and tenderness”;²¹⁹ and,
- vii. A place where recitation of the Quran and the performance of salaah (prayers) are a daily occurrence and where knowledge is imparted and pursued.

Although these seven principles are a long way from the western perspectives, for example the list in section 2D of the PRA 1976, however these matters provide a

²¹⁵ Article 84, Iran: Code of Punishment for Adultery in Iran, translated by Dr Soheila Vahdati, compared with the original text by Gholam Hossein Raeesi “Women Living Under Muslim Laws” (8 June 2007) accessed on 24 May 2014 <<http://www.wluml.org/node/3908>>.

²¹⁶ Barney Henderson “Iran amend law on stoning for adultery” *The Telegraph UK* (30 May 2013) accessed on 24 May 2014 <<http://www.telegraph.co.uk/news/worldnews/middleeast/iran/10089270/Iran-amends-law-on-stoning-for-adultery.html>>.

²¹⁷ Mohammad Haroun “Family Life in Islam” (Speech delivered at Ahmadiyya House (UK) 16 January 1999) The Lahore Ahmadiyya Movement in Islam <<http://aail.org/text/articles/others/familylifeinislam.shtm>>.

²¹⁸ Al-Quran: 2:233, 2:235-6.

²¹⁹ Al-Quran: Ar-Rum 30:21.

mechanism to prove that cohabitants could also fall within the Islamic ideal family. This ideal Muslim home is applicable for unmarried cohabitants who are functionally the same as married couples. Cohabiting partners are able to provide for food and clothes for one another. Secondly, Islamic teachings encourage the house to be kept clean, which home making cohabitants generally also do. A cohabiting relationship also provides a scenario where partners have meals together with care, hospitality and generosity. Moreover, when partners live together in the same household, they usually greet each other at any time of the day. This relationship also provides room for the occurrence of tenderness, love, and mercy within the family. A cohabiting relationship could also provide a place where religious belief can be commenced. Subsequently, unmarried cohabiting couples can undertake those characteristics of an ideal Muslim family that are predominantly used to reflect the relationship of married spouses.

Christian and Islamic deontological views encourage marriage. It is a union accepted as a sacred amalgamation in almost every part of the world. From the Christian and Islamic perspectives, the marriage union is believed to be a commitment for life. When a man and woman are joined in the marital relationship, they are obeying God's law. After becoming husband and wife, they are considered to be remaining in a permanent union as marriage is for life.

As previously discussed, both Islam and Christian discourage cohabitation without marriage. In Christianity it is an act of sin. Islamic practise took a more drastic view by imposing stricter punishments ranging from lashes to stoning to death.

There is a metamorphosis in the way in which the western countries adopt the teachings of religion and the way it is implemented in the society. Western civilisation has a diverse view about cohabitation as it is popularly practised. They commonly accept cohabitation, although the religious teaching portrays the opposite. In addition, religious affiliation among westerners has been declining. For example, there is a clear decline in the church attendance among westerners. In England, in 2002, the average number of

people attending church on Sundays declined by 4 per cent, to just over a million.²²⁰ In New Zealand, the percentage of the population involved in the Christian church in New Zealand has been declining since the middle 1960's.²²¹

In societies that are less secular, for instance in the Muslim regime, religious teaching and practise on marriage is given importance. Islamic countries apply laws and regulations that are in parallel with the religious practise. Muslim society accepts and complies with the religious norm in daily activities. Societies that practise strict religious teachings are not encouraged by the law and the community itself to be involved in cohabitation outside marriage. They elect for marriage as the only way for a man and woman to form a family. In Malaysia, for instance, there are no laws to enforce or provide marital rights for cohabitants. Some are in fact, punished for cohabiting before marriage.²²² Cohabitants in United Arab Emirates could be punished with up to 100 lashes or imprisonment.²²³ Countries like Iran, Afghanistan, Somalia, Nigeria, and Saudi Arabia, practise the punishment of stoning for adultery (zina) offences.²²⁴ These punishments are not necessarily the preference of the majority of Muslims, as there are Islamic scholars who are against these practises.²²⁵ In conclusion, religion and the adaptation of the theological teaching play an important role in determining the acceptance of unmarried cohabitation within a society. Societies that practise stricter religious rules are not actively involved in cohabitation, nor provided with laws and

²²⁰ "Church of England" *BBC Religions* (30 June 2011) accessed on 24 May 2014

< http://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml>.

²²¹ Kevin Ward "Towards 2015: the future of mainline Protestantism in New Zealand" (2006) *Journal of Beliefs & Values* 27 Issue 1 at 1.

²²² Mohd. Ibrahim bin Mohd Shariff lwn Pendakwa Syarie Pulau Pinang MR-04-98 Jilid 13:2 26 September 1998.

²²³ Lara Setrakian "UAE Morality Cops Hunt for Cohabiting Couples" *ABC News* (April 2010)

< <http://abcnews.go.com/>>.

²²⁴ M. A. Khan "Stoning to Death for Adultery in Islam: The Missing Stoning Verse of the Quran Eaten up by a Goat" *Islam Watch* (20 April 2012)

<<http://www.islam-watch.org/authors/65-khan/999-stoning-death-for-adultery-in-islam-missing-stoning-verse-of-quran-eaten-by-goat.html>>: In October 2008, Aisho Ibrahim Dhuhulow, a girl aged 15 was buried up to her neck and later stoned to death in front of more than 1000 people for pleading guilty to adultery.

²²⁵ Iman Alauddin Shabazz "Stoning is in Conflict with Qur'anic Injunction" Islamic Research Foundation International Inc. accessed on 10 June 2014

<http://www.irfi.org/articles/articles_51_100/stoning_is_in_conflict_with_qur.htm>.

regulation. Notwithstanding that, it should be stressed that the Islamic teachings per se encourage the treatment of equality among people.²²⁶

For the white to lord it over the black, the Arab over the non-Arab, the rich over the poor, the strong over the weak or men over women is out of place and wrong.

The authority cited above is from the Hadith, a source of Islamic law. It denotes that every person is equal despite being dissimilar in status, colour, gender, languages and power. On that ground, every person should be treated the same without being discriminated for their weaknesses and differences. This supports the notion of equality between relationships. Cohabitants could be treated equally to married couples and not discriminated against. Islam supports equality and does not discriminate against a person or a group of people for their distinctive characteristics. Even then, cohabitants' characteristics could also be proven to be indistinguishable with those of married couples.

In spite of that, it should be mentioned that Christianity and Islamic teachings are only practised by some parts of the society. The question is whether these religious perspectives are reliable enough to understand the issues surrounding the lives of cohabitants. It should be noted that the theological teachings are just adapted by a section of society who have the faith in it. It does not portray the majority's view. By contrast, the numbers of people venturing into the cohabitation union is increasing by day and becoming more prevalent in a society that permits such relationships.²²⁷ With regards to that, can these religious views discourage every cohabitant from gaining any benefits, right, and protection from the state? Further, can religion be accepted as a base to deny the rights to cohabitants who are just functionally the same as married couples?

²²⁶ Hadith of Ibn Majah.

²²⁷ The numbers of de facto relationship in New Zealand is increasing and similar rights are provided for married spouses, civil union partners and de facto partners under the (Property (Relationships) Act 1976). This is further discussed in chapter six.

To reiterate, religious practise itself is not uniform or universally accepted by every segment of the society. Thus it is inadequate to withhold the state from providing rights and protection to cohabitants on that basis of religious practise. If the status of these people are not recognised, the consequences may vary, particularly placing more burdens on the economically vulnerable parties, predominantly, for the context of my thesis, unmarried cohabitants. For cohabitants who are functionally the same as married couples, they should be provided with legal rights that are equivalent to married spouses.

2.5 Diversity in Unmarried Cohabitation

The diversity of couples who cohabit and their reasons for doing so is the fundamental challenge facing legal systems in addressing cohabitation.²²⁸ At the end of the spectrum are well-informed couples who, for whatever reason, reject the concept of marriage and/or the package of legal consequences that accompanies it.²²⁹ For some of these ‘informed choice’ partners, this rejection may be temporary because, if everything goes well, they plan to marry in the future. However, the assumption that they are making a meaningful choice is an illusion for the many ‘misinformed’ partners’ who believe variously that the legal consequences of cohabitation are greater than they are, and precisely, that they qualify as ‘common law’ spouses²³⁰ when they do not, or that their legal system recognises common law marriage when it does not. In England, for example, the myth of common law wife runs deep. One survey that showed more than 50 per cent of women believed that cohabiting couples won the same rights as their married friends after living together for a number of years.²³¹ A part of the contemporary justification for recognising common law marriages is that such marriages share many of the functional attributes of standard (ceremonial) marriages.²³²

²²⁸ Barlow, Duncan, James, and Park, above n 64, at [15-26].

²²⁹ Elaine E. Sutherland “From ‘Bidie-In’ to ‘Cohabitation’ in Scotland: The Perils of Legislative Compromise” (2013) *International Journal of Law, Policy and the Family* 27 at 145.

²³⁰ “Common law” spouses are partners who live together in a stable relationship. Cohabitants mistakenly think that they have rights as common law spouses.

²³¹ Barlow, Duncan, James, and Park, above n 64, at [24-27].

²³² Edward Stein, above n 89, at 367; David S. Caudill “Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage” (1982) 49 *TENN. L. REV* at 537, 566:

There are the asymmetrical couples' where one partner is well informed while the other languishes in ignorance.²³³ For example, there may be a situation where the female is aware that she possesses no legal rights in an unmarried relationship and therefore, wishes to marry her partner. However, the male partner could feel reluctance to enter into a committed relationship. Then there are the 'no-choice' couples' who have no opportunity to select marriage or cohabitation, either because one of the parties is not free to marry (or neither is), or because a legal impediment prevents them from marrying each other.²³⁴ This situation occurs in jurisdictions that do not allow inter-religious marriage or same-sex relationship. For example, a same sex relationship is a criminal offence in Malaysia and on conviction, shall be liable to a fine and/or imprisonment.²³⁵ For the context of inter-religious couples, as mentioned before, there are no provisions within the laws in Malaysia that allow couples of different faiths to consummate marriages (non-Muslim with a Muslim).

Kiernan²³⁶ advocated the idea that cohabitation goes through an evolutionary process with four distinct stages. At first, it emerges as a deviant phenomenon practiced by a small group. In the second stage, cohabitation functions as a prelude or probationary phase before marriage. In the third stage, it becomes an alternative to marriage and parenthood (no longer having the intention to marriage). Hence, unmarried cohabitation is socially acceptable and becoming a parent is no longer restricted to marriage.²³⁷ In the final stage, cohabitation and marriage are believed to become indistinguishable, with children being born and reared within the both.

'Although many of the traditional reasons for recognizing common-law marriage are no longer relevant, society may benefit from specific legal recognition of essentially marriage-like relationships ... [b]ecause many of the state's interests in marriage are substantive, not formal (footnote omitted)'.

²³³ Sutherland, above n 229, at 145.

²³⁴ Ibid.

²³⁵ Syariah Criminal Offences (Selangor) Enactment 1995, s 27: Any person who engages in a sexual act with another person of the same gender shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or both.

²³⁶ Kiernan, Kathleen "The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe" (2001) *International Journal of Law, Policy and the Family* 15 at [1-21].

²³⁷ Ibid, at 5.

Besides Kiernan, a group of researchers²³⁸ suggested that there are essentially four categories of cohabitants, namely:

- (1) The ideologues: those in long-term relationships, but with an ideological objection to marriage;
- (2) The romantic: those who expect to get married eventually and see cohabitation as a step towards marriage, which they saw as a serious commitment;
- (3) The pragmatists: who decided whether or not to get married on legal or financial grounds; and
- (4) The uneven couples: where one partner wanted to marry and the other did not.

In summary, there are different types of cohabitants, from not having the legal right to formalise marriage, to the ones who do not willingly want to commit in the marriage partnership. This diversity explains that there are many cohabitants who favour the extending of marital-like laws, and there are common law partners who are misled about their rights as cohabitants (presuming that they have the same rights as married couples), and the asymmetrical couples, where one of the partners wants the legal recognition while the other languishes in ignorance, as well as the no-choice cohabitants, for being same-sex or inter-religion. In light of this divergence, the failure to legally recognise cohabitants implies that they are not worthy of the same respect and recognition as married couples. Therefore, to address the cohabitants' position, the law needs to tackle all the mentioned arguments and apply a system of property division that will produce the fairest result for cohabitants embedded in every scenario. These cohabitants are much in need of assistance from the legal system in the event of a relationship breakdown. This is particularly true for the large number of couples who were misinformed about the legal consequences of cohabitation or gave no thought to the law, and thus, have not planned ahead.²³⁹ As Millbank stated in her evidence to the Australian Senate Committee considering this matter:

²³⁸ Barlow, Burgoyne, and Smithson, above n 111.

²³⁹ Sutherland, above n 229, at 149.

It makes absolute sense to put de facto and married couples in the same property regime. It does not remove peoples' choice; it protects the vulnerable party in an economic and emotional relationship ... economic interdependence and dependence happens and should be recognised.²⁴⁰

By contrast, for the couples who make a well-informed choice to reject the marital property regime, their autonomy is deserving of respect. It would be possible to permit couples to opt out of the automatic regime for cohabitants by executing an express agreement. However, they should have the knowledge in respect of the status, ownership and divisions of the property.²⁴¹ They could also elect to organise the agreement with the advice from the legal expertise.²⁴² Granted this, it puts the onus on such couples to take necessary steps to opt out and they are the group who are sufficiently well informed to do so.²⁴³

²⁴⁰ Senate Standing Committee on Legal and Constitutional Affairs (Australia) (2008) at para 3.50.

²⁴¹ The agreement should include certain elements, among them: (1) what property is intended to be owned together and in what shares (equal or other proportion); (2) what property is to remain the separate property of each party; (3) whether or not any property should no longer be classed as separate property because it has been or will be used jointly; (4) who owns any gifts made by one party to the other, or any gifts from third parties. The agreement must be in writing, signed by both parties. Each party must have received independent legal advice and each party's signature must be witnessed by a solicitor who must certify that the effect and implications of the agreement were explained to the signing party.

²⁴² This is similar to the Property (Relationships) Act 1976 of New Zealand, s 21: After three years of living together as de facto couples, cohabitants will be covered by Property (Relationships) Act. However, they could opt to contract out of the Act. Further, there are law firms that provide independent legal advice. In order to minimise the legal expenses of people who wish to contract out of the Property (Relationships) Act, the government has issued a model form of agreement that can be used for contracting out: schedule to the Property (Relationships) Model Form of Agreement Regulations 2001 (SR 2001/177).

²⁴³ Sutherland, above n 229, at 149; however, in New Zealand, there are events where the parties in the relationship are not aware of the legal consequences of the Property (Relationships) Act 1976 (PRA 1976). Under the Act, cohabitants who are living together for more than three years are considered the same as married couples and civil union partners. However, some cohabitants are not aware of their similar legal rights as married couples and the options to opt out of the regime, until it is too late, by which time their property is caught by the equal-sharing rules: Margaret Briggs, "Relationship Property for Cohabitants in New Zealand" (paper presented at the annual meeting of the Law and Society Association, Westin St. Hotel, San Francisco 30 May 2011) accessed on 5 April 2014

<http://citation.allacademic.com/meta/p_mla_apa_research_citation/4/9/5/4/1/p495418_index.html?phpsessid=b6bvdkpgbbqags6jgeplpc8m10>.

2.6 Conclusion

This chapter argues that cohabitants should be treated the same as married couples in regards to property division as to their same functionality in the family institution. It highlighted the functions of cohabitants within their relationship. The discussion was mainly to show that both married spouses and cohabitants live in much the same way. Since both the unions are functionally the same, cohabitants should be equally treated to married couples. Specifically, the former should have legal rights to property divisions as equal as to married couples, should the relationship break down. In general, the matrimonial property regime should be extended to unmarried cohabiting partners.

The discussion ascertains that a paradox exists in the debate of ‘form’ or ‘functionality’. There are arguments both for and against the notion of functionality to cohabitants’ rights. Besides that, religious teachings are ultimately proposing the institution of marriage. Marriage is considered as the superlative form of family union that encourages stability and life-long commitment. However, the marriage institution itself does not promote stability and commitment, but it is the individuals who are committed to the relationship. It is usually the social situations of couples, namely, unemployment, lack of education, financial difficulties, and younger age groups that determine the stability and commitment of relationship, rather than whether the couples are married or merely cohabiting. Instead of focussing on the marriage alone, society should endeavour to protect all varieties of relationships, predominantly, unmarried cohabitation.

Additionally, although there have been many debates to encourage the ‘form’ of relationships, it seems convincing that the arguments for ‘functionality’ are more substantial. The evaluation of the literature makes it clear that scholars have provided much of the impetus for encouraging laws that set cohabitation in parity with the marriage institution. In many western societies, the stigma once associated with unwed

cohabitation has virtually vanished²⁴⁴ and the number of unmarried cohabitants is dramatically increasing (as discussed in chapter five and six). Therefore, cohabitation shall be defined as an alternative to marriage and that the law and social policy should actively support this emerging family form,²⁴⁵ and thus, treat them equally to couples in the marriage institution.

Despite cohabitants functioning the same as married couples, their legal position differs. Why does the law differ? Is it the paper formality through marriage registration, which differentiates marriage with cohabitation more essential than their functionality? Or is it because cohabitants themselves are diversified in their opinion on the extension of matrimonial laws upon them? Among the important reasoning for denying laws for cohabitants in Malaysia is based on the common perceptions within the non-western values: (1) the Islamic perspectives; and (2) Asian values. The following chapter three examines this further.

²⁴⁴ Lynne Marie Kohm and Karen M. Groen “Cohabitation and the Future of Marriage” (2005) *Regent University Law Review* 17:261 at 264.

²⁴⁵ Brining and Nock, above n 60, at 403, [406-407].

Chapter 3: The Plurality of the Legal System in Malaysia: A Historical Contextual Analysis

3.1 Introduction

This thesis is concerned with the lack of legislative protection for the property interests of unmarried cohabitants in Malaysia. There is growing legal recognition of cohabiting relationships in Malaysia.²⁴⁶ This thesis proposes to formalise their recognition into a legislative scheme. However, that transition will face many challenges due to the foundations upon which Malaysian law is built. In order to fully understand the situation presently in operation in Malaysia relating to the division of property for cohabitants, a discussion must first be presented here concerning the underlying historical and contextual situation, which is in operation within the Malaysian legal system.

This chapter examines the historical background of the legal developments in Malaysia and the plurality of its legal systems comprising Sharia and Civil law. It also analyses the underlying clash between Malaysian Values (Asian and Islamic values) and the values of international human rights law.

3.2 Historical Background

Malaysia has its origins in the Malay Kingdoms from the 18th century and was incorporated into the British Empire in 1824.²⁴⁷ The territories of Malaysia were first unified as the Malayan Union in 1946. Malaya²⁴⁸ was restructured as the Federation of Malaya in 1948, and received independence from Britain and British rule in 1957. In 1963, the eleven states of the Federation of Malaya, including the former colonies of

²⁴⁶ This thesis whilst appreciating that the courts in Malaysia are beginning to recognise unmarried cohabitation, it is argued that formal recognition through legislation would provide a better legal mechanism.

²⁴⁷ Translated from “Ringkasan Sejarah Malaysia” accessed on 13 March 2015

<<http://pmr.penerangan.gov.my/index.php/profil-malaysia/7954-ringkasan-sejarah-malaysia.html>>.

²⁴⁸ The term ‘Malaya’ was the name of the country before and after British incorporation. The name ‘Malaysia’ was adopted after the unification of Malaya and Singapore as one nation. Later in 1965, Singapore became independent but the name ‘Malaysia’ remained.

Sarawak and Sabah on the western coast of Borneo and the state of Singapore, united to form the Federation of Malaysia. Later in 1965, Singapore seceded from this newly formed Federation to become an independent republic.²⁴⁹ Malaysia, as it is known today consists of the eleven peninsular states that constituted Malaya (referred as Peninsular Malaysia)²⁵⁰ and two other states known as Sabah and Sarawak (East Malaysia).

Malaysia has always had a dominating Muslim religion throughout the region. Thus, Sharia law and Islam were important factors within the newly constituted Malaysian state, and also a point on which further unification could be established: “the key geographical and cultural reference has always been made to the state of ‘Malacca’”.²⁵¹ ‘Malacca’ was renowned for the sovereignty of its Sultanate, an international entrepot, and the centre for Islamic religion. The process of Islamisation, which introduced Sharia law into Malaysia,²⁵² was later modified to the local Malay ‘adat’²⁵³ in order to accord with the Islamic principles.²⁵⁴ As illustrated in *Shaik Abdul Latif & Ors v Shaik Elias Bux (1915)*, Edmond JC held that “the only law applicable to the Malays in the Malay States before the arrival of the British administrators is Islamic law modified by local custom”.²⁵⁵ The position of Islamic law was repeated in *Ramah v Laton (1927)*, whereby Thorne LJ in delivering his judgment of the Appeal Court of the Federated Malay States held that:

²⁴⁹ Shaikh Mohamed Noordin and Lim Pui Keng “An Overview of Malaysian Legal System and Research” Hauser Global Law Program New York University School of Law accessed on 17 March 2015 <<http://www.nyulawglobal.org>>.

²⁵⁰ The states are Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu, Kelantan, Pulau Pinang and Malacca, and three federal territories: Federal Territory of Kuala Lumpur, Federal Territory of Labuan and Federal Territory of Putrajaya.

²⁵¹ Hooker, M. B *Islamic Law in South-east Asia* (Singapore: Oxford University Press 1984) at 130.

²⁵² ‘Sharia’, also spelled as ‘Syariah’, ‘Shariah’, ‘Syaria’ and ‘Shari’ah’ is defined as Islamic law. Its literal meaning is ‘the path leading to the watering place’: “Shariah” Encyclopaedia Britannica accessed on 5 December 2014 <<http://www.britannica.com/EBchecked/topic/538793/Shariah>>.

²⁵³ ‘Adat’ is defined as the customary law of the indigenous peoples of Malaysia and Indonesia. It was unwritten traditional code governing all aspects of personal conduct from birth to death: “Adat” Encyclopaedia Britannica accessed on 22 August 2013 <<http://www.britannica.com/EBchecked/topic/5336/adat>>.

²⁵⁴ Before Islam, the early days of Malacca Sultanate had been influenced by the old Hindu tradition from Palembang, a province in Indonesia: G. O. M., Jameson “A Short History of South East Asia” accessed on 26 February 2014 <http://aero-comlab.stanford.edu/jameson/world_history/A_Short_History_of_South_East_Asia1.pdf> at 6.

²⁵⁵ *Shaik Abdul Latif & Ors. v Shaik Elias Bux (1915)* 1 FMSLR 204.

Muslim law is not foreign law; it is the law of the land, and as such the court must take judicial notice of it. It must propound the law itself, and it is not competent for the court to allow evidence to be led as to what is the local law.²⁵⁶

Despite the above judgments, the status of Islam declined during British colonial rule particularly in the Straits Settlements of Malacca, Singapore, and Penang due to the strong influence of British administration. An example of this was that the Islamic law was limited to family law, including division of property and matters related to general adherence to religious law.²⁵⁷ British colonial rule however would continue to be applicable to all other areas of law with the result that the present Civil legal system in Malaysia is based on English common law.²⁵⁸ Common law was absorbed into Malaya by codifying statutes of the same law, which were practised in England, which also saw the significance of judicial precedence.

Further, it was later agreed that British rule would not interfere in matters relating to Malay culture and religion, as recognised under the Anglo-Dutch Treaty 1824 (Article 6). However, it should be noted that the treaty retained an advisory clause should British rule need application.²⁵⁹ Thus, the Malay ruling authorities were limited in their powers to matters involving religion and customs only. An example of this can be illustrated in the memorandum made by Sir Stamford Raffles and ‘Temenggong of Johore’²⁶⁰ in 1823 under the 6th Regulation Rule²⁶¹ that:

²⁵⁶ *Ramah v Laton* (1927) 6 FMSLR 128.

²⁵⁷ Ibrahim, A. and Joned, A *Sistem Undang-Undang di Malaysia* (Kuala Lumpur: Dewan Bahasa dan Pustaka 2002) at 51.

²⁵⁸ Ibid: In Malaya, Sarawak and North Borneo in the early 19th century to the 1960s.

²⁵⁹ Mutalib, H., “Islamic Malay Polity in Southeast Asia” in Mohd. Taib Osman (ed) *Islamic civilization in the Malay world* (Kuala Lumpur: Dewan Bahasa dan Pustaka and The Research Centre for Islamic History, Art and Culture 1997) at 36.

²⁶⁰ ‘Temenggong’ in the context of traditional Malay states is an official who was responsible for maintaining law and order and for commanding the police and army: “Temenggong” Encyclopaedia Britannica accessed on 22 august 2013
<<http://www.britannica.com/EBchecked/topic/586461/temenggong>>.

²⁶¹ Treaties with Native States, Part III: 1877, 13: H. A. O’Brien “An Old Minute by Sir Stamford Raffles” (1891) *Journal of the Straits Branch of the Asiatic Society* (JSBRAS) 24 at 9; L. A. Mills “British Malaya 1824-1867” (1925) *Journal of the Malaysian Branch of the Royal Asiatic Society* (JMBRAS) 1:II at 65.

In all cases regarding the ceremonies of religion, and marriages, and the rules of inheritance, the laws and the customs of the Malays will be accepted, where they shall not be contrary to reason, justice or humanity. In all other cases, the laws of the British authority will be enforced with due consideration to the usages and habits among the people.

Thus arose the dualist nature of Sharia and Civil law. Sharia only applicable to the family and religious activities; and British law applicable to all other matters, for example, trade or contract.

3.2.1 An Overview of the Malaysian System

Malaysia practises a constitutional monarchical system with an elected federal parliamentary democratic government. The head of State is ‘Yang di-Pertuan Agong’, the king, who is a designated monarch chosen from the hereditary rulers every five years among nine states in the Federation. The states are Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu, and Kelantan. In other states, namely, Malacca, Penang, Sabah, and Sarawak, the head of state is the Governor of the State. Furthermore, the head of the Malaysian government is the Prime Minister.

The total population of Malaysia in 2013 was 29,948,000.²⁶² The citizens consist of the ethnic groups as follows: the ‘Bumiputera’, who are Malays and aborigines (67.4 per cent), Chinese (24.6 per cent), Indians (7.3 per cent), and others (0.7 per cent).²⁶³ ‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to the Malay customs.²⁶⁴ Islam was declared in the Federal

²⁶² In 2010 the total population was 28.3 million. In 2013, males were about 14,422,290 and females were 15,294,675: “Malaysia population” country economy.com accessed on 5 December 2014 <<http://countryeconomy.com/demography/population/malaysia>>.

²⁶³ “Population Distribution and Basic Demographic Characteristics Report 2010” Chart 7: Percentage distribution of the population by ethnic group, Malaysia in 2010 (2011) Malaysian Department of Statistics <http://www.statistics.gov.my/portal/index.php?option=com_content&id=1215>.

²⁶⁴ Malaysian Federal Constitution, art 160(2).

Constitution as the religion of the federation.²⁶⁵ Approximately, 61.3 per cent of the population in Malaysia practise Islam, 19.8 per cent practise Buddhism, 9.2 per cent Christianity, 6.3 per cent Hinduism, 1.3 per cent practise Confucianism, Taoism, Tribal, and other traditional Chinese religions, 0.7 per cent declared no religion, and the remaining 1.4 per cent practised other religions or did not provide any information.²⁶⁶

The rights to freedom of religion are one among other fundamental rights guaranteed in the Malaysian Federal Constitution. Article 11 provides that every person has the right to profess and practise his religion. Article 3(1) reiterates the rights of individuals, especially non-Muslims to profess and practice their religion freely without any fear and interference.

Freedom of religion, despite being guaranteed in the constitution, faces many restrictions in Malaysia.²⁶⁷ Non-Muslims are freer to shift between religions.²⁶⁸ On the other hand, the state government punishes Muslims wishing to change their religion, ranging from fines to imprisonment.²⁶⁹ Even non-Muslims who have converted to Islam are not allowed to leave Islam.²⁷⁰ Children born to Muslim parents are considered to be Muslims and are not allowed to leave Islam.²⁷¹ Many Muslims who have attempted to

²⁶⁵ Ibid, art 3(1).

²⁶⁶ "Population Distribution and Basic Demographic Characteristics Report 2010", above n 258, Chart 12.

²⁶⁷ Abdullah Saeed and Hassan Saeed *Freedom of religion, apostasy and Islam* (Ashgate Publishing Ltd 2004) at 3, 124, 126, 132.

²⁶⁸ Raymond L. M. Lee and Susan E. Ackerman "Sacred tensions: modernity and religious transformation in Malaysia" (University of Carolina Press 1997) at 17, 21, [24-25].

²⁶⁹ Crimes (Syariah) Enactment 1992, s 13: Any Muslim who willfully, either by his action or words, claims to denounce the religion of Islam or declares himself to be a non-Muslim, he is found to be guilty of an offence of deriding the religion of Islam, and on conviction, shall be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

²⁷⁰ Imran Imtiaz Shah Yacob "Doing the Impossible: Quitting Islam in Malaysia" *Asia Sentinel* (27 April 2007) <<http://www.asiasentinel.com/society/doing-the-impossible-quitting-islam-in-malaysia/>>: Lina Joy have converted to Islam when she was 26 years old. 12 years later, she would like to marry her non-Muslim boyfriend and lead a normal married life. However, as a Muslim, she is not allowed to marry her boyfriend or leave Islam to carry out the marriage. She has been carrying a long fight to change her religion up through Malaysia's judicial system in a no win situation.

²⁷¹ Jonathan Kent "Malaysia convert' claim cruelty" *BBC News Kuala Lumpur* (6 July 2007) <<http://news.bbc.co.uk/2/hi/asia-pacific/6278568.stm>>: A Malaysian woman held for months in an Islamic rehabilitation centre says she was subjected to mental torture for insisting her religion is Hinduism. Revathi Massosai, the name by which she wants to be known, says she was forced to eat beef despite being a Hindu. Miss Massosai was born to Muslim converts and given a Muslim name, but she was raised as a Hindu by her grandmother and has always practised that faith. However, under the Malaysia's Islamic law,

convert out of Islam have received death threats.²⁷² Despite that, those people who have illegally converted out of Islam lead a secret double life, and hide their new faith from family and friends.²⁷³

Despite Article 5(1) of the Constitution guaranteeing individual liberty, it seems questionable as to its practicality in Malaysia in relation to the issue of people practising the Islamic faith. Generally, the government has sought to stay out of the issue and has referred questions over apostasy or conversion to the country's Sharia law and Islamic courts. The Sharia courts have ruled unanimously that ethnic Malays must remain Muslims.²⁷⁴

The Federal laws (Civil law) are enacted by the Parliament of Malaysia, which applies to every part of the country. The state laws are enacted by the State Legislative Assemblies only applying to particular states. The supreme law in Malaysia is the Federal Constitution, which sets out the fundamental liberties given to Malaysians.

Presently and as noted above, Malaysia operates under two different streams: the Sharia and Civil. The former administers the Muslim population, and the latter governs the non-Muslim population.

3.2.2 Malaysian Legal Pluralism: Civil and Sharia Laws

Within Malaysian Civil law, the Civil Law Act 1956 ("CLA 1956") is an important foundation of its operation. Section 3 of CLA 1956 stipulates that:

having Muslim parents makes one a Muslim and, as such, one is not allowed to change his or her faith or marry a non-Muslim.

²⁷² Perlez, Jane "Once Muslim, Now Christian and Caught in the Courts" *Kuala Lumpur Journal: New York Times* (24 August 2006) <<http://www.nytimes.com>>.

²⁷³ Linda Pressly "Life as a secret Christian convert" *BBC UK* (15 November 2006) <<http://www.news.bbc.co.uk>>; P Ramakrishnan "Abuse of Power under the ISA" *Aliran monthly* (2001) accessed on 26 February 2014

<<http://web.archive.org/web/20040217205524/http://www.aliran.com/monthly/2001/11d.html>>:

Jamaluddin Othman@ Yeshua Jamaluddin, a Malay converted to Christianity was arrested, stripped naked and forced to enact the crucifixion of Jesus Christ, tortured and physically assaulted, he passed blood in urine and was not allowed to sleep for days at a stretch.

²⁷⁴ Imran Imtiaz Shah Yacob, above n 270.

So far as other provision has been made or may hereafter be made written law in force in Malaysia, the Court shall apply the common law of England and the rules of equity as administered in England on the 7 April 1956; provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.²⁷⁵

Since 1948, Sharia laws and principles were applied in the Malaysian court system. From 1952 onwards, new laws were progressively introduced in the eleven Muslim-majority States of Malaysia on criminal and civil matters. For example, the Syariah Criminal Offences (Selangor) Enactment 1995, Syariah Criminal Offences (Federal Territories) Act 1997, Islamic Family Law (State of Penang) Enactment 2004 to name but a few.

Presently, the Sharia laws that apply to Muslims are in the area of religion and family law specifically in relation to marriage, divorce, custody and guardianship, maintenance of spouse and children, matrimonial properties, alimony, law of succession, probate, and administration.²⁷⁶ In contrast, the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) applies to married non-Muslims and their matrimonial matters, which states that:

[S]ubject to the provisions contained in the Act, the court shall in all suits and proceedings give relief on principles which in the opinion of the court are, as nearly as may be, comfortable to the principles on

²⁷⁵ Civil Law Act 1956, s 3(1): Where there may be a conflict or variance between common law and the rules of equity with reference to the same matter, the rules of equity shall prevail, which was the position in the United Kingdom (“UK”). This provision applies within Malaysian Civil Law.

²⁷⁶ For example, the Islamic Family Law (Federal Territories) Act 1984, Islamic Family Law (State of Selangor) Enactment 2003.

which the High Court of Justice in England acts and gives relief in matrimonial proceedings.²⁷⁷

With regards to criminal offences, Muslims are subject to Sharia law but only to the extent that those offences relate to the sanctity of Islam,²⁷⁸ for example, offences such as gambling, intoxication, disrespect for the month of Ramadan, failure to perform Friday prayers, and others. Other aspects include offences relating to decency,²⁷⁹ incest, prostitution, sexual intercourse out of wedlock, sexual relations between the persons of the same gender, indecent dressing and behaviour, and others. All other criminal offences not relating to the Islamic religion are regulated within the scope of civil laws applicable to both Muslims and Non-Muslims under the Penal Code Act 574.

A significant amendment to the Malaysian Federal Constitution came in 1988 with the insertion of Article 121(1A). The article awarded Sharia courts the power to have an exclusive jurisdiction over all matters relating to Islam. The jurisdiction of Sharia courts is defined and limited by the law and covers mostly family and religious matters, and only applicable to people of the Islamic faith.²⁸⁰ The Civil Courts have no jurisdiction in respect of any matter within the jurisdiction of Sharia courts.²⁸¹ The Civil law and court orders apply to non-Muslims. Article 121(1A) declares that the Civil High Court shall have jurisdiction and powers as may be conferred by or under the federal law and have no jurisdiction in respect of any matter within the jurisdiction of Sharia courts. For instance, if two Muslims encounter problems involving personal law, such as divorce, it falls under the ambit of Sharia law. The Civil court does not have the power to interfere within this jurisdiction.

²⁷⁷ Law Reform (Marriage and Divorce) Act 1976, s 47 (emphasise added).

²⁷⁸ Syariah Criminal Offences (Selangor) Enactment 1995, part 3. For the Muslims, the applicable Sharia laws are based on the states the applicants live in. There are about 14 states in Malaysia. With respect to the various Sharia statutes (each state has its own statute), this section is limited to the discussion of the Sharia laws applicable in the Federal Territories of Kuala Lumpur.

²⁷⁹ Syariah Criminal Offences (Selangor) Enactment 1995, part 4.

²⁸⁰ Shad Saleem Faruqi “The Constitution of a Muslim Majority State: The Example of Malaysia” (paper presented at the Constitution-making Forum: A Government of Sudan Consultation, 24-25 May 2011 in Khartoum, Sudan)

<http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/2011-05_Faruqi_Malaysia.pdf> at 10.

²⁸¹ Malaysian Federal Constitution, art 121(1A).

The same principle applies to the Sharia court whereby it shall not interfere in the jurisdiction of the Civil court that applies to non-Muslims. However, problems arise in legal matters where one party is a non-Muslim and the other party is a Muslim. An illustration of this, and an issue of which is further developed by this thesis, concerns the division of property of partners of different faiths (between a Muslim and a non-Muslim): both partners are subject to different laws. The Sharia court can only confer its authority and jurisdiction over the Muslim party whilst the Civil court's jurisdiction can only apply to the non-Muslim party. To put in another way, the Sharia court order is only enforceable on Muslims and cannot be enforced over non-Muslims. Vice versa, the Civil court order is only enforceable over non-Muslims and not over Muslims. The matter is further complicated when dealing with married spouses who have children. For example, the Sharia court will grant custody to the Muslim partner, leaving the non-Muslim spouse with no rights at all over the custody matter. In contrast, the Civil court would grant custody to the non-Muslim spouse who brings the case to the Civil court. Thus, both courts would give very different orders and this creates instability within the legal system.²⁸²

However, the controversy over jurisdiction continues to occur when a spouse crosses from one jurisdiction to the other. The provision in Article 121(1A) of the Federal

²⁸² *Shamala Sathiyaseelan v Dr Jeyaganesh C. Mogaraja* [2004] 2 CLJ 416: In this case, Shamala and Jeyaganesh were married in 1998, under the Hindu rites and were registered under the jurisdiction of the LRA 1976, which applies to Non-Muslims. Later, on 25 November 2002, the husband converted to Islam and further converted his children without the mother's knowledge or consent. Shamala who was unaware of the children's conversion left the matrimonial home. On 31 December 2002, she filed an application to the Civil High Court for care, custody and control over her children. She had the custody application served on the father, unknown to her that the father had already filed an ex-parte application in the Sharia High Court on 7 January 2003, for the custody of their sons. On the date of the Civil High Court hearing, the father obtained a postponement of the Civil proceedings without informing the Civil High Court about his application before the Sharia Court. This postponement was to enable him to appoint a lawyer to take the case further. The father also moved to the Sharia Court for an ex-parte order for the custody of the children without informing the mother. The Civil High Court ruled that it had the jurisdiction to hear the case. Therefore, on the 17 April 2003, an Interim Order was made leaving the children in the de-facto care and control of the mother with access to the father. After the Civil Court order, on 8 May 2003, the father went to the Sharia Court and obtained a final order for the custody of the sons. Concerning the custody application, finally, on 20 July 2004, the Judge awarded legal custody to both the father and mother, with care and control to the mother. This was subject to the caveat that the mother would lose the right to care and control if, there are reasonable grounds to assume that she would influence the children's present religious beliefs (Islam). For example teaching them the articles of her Hindu faith, and making them eat pork (which is in contrast to the Islamic teachings). Although eventually the mother was granted the care and custody of the children, the process to achieve that result was not an easy endeavour.

Constitution stipulates that the Sharia court has no power over Civil matters, and dissolving a Civil marriage is perceptibly not within its jurisdiction. This is similarly true under Article 121 (1A) whereby the Civil court has no power to dissolve a Muslim marriage. As a response to this dilemma, Section 51 of the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) was enacted. This provision enables the non-converting spouse to make a petition in the Civil Courts, for divorce, claim for child rights, financial support, and property division orders against the converted party.²⁸³ This section preserves the rights of the non-converting spouse to seek ancillary relief as a consequence from the divorce, notwithstanding the general inapplicability of LRA 1976 over Muslims. The LRA 1976 in this situation prioritises the Civil jurisdiction and the non-Muslim party.

The resulting situation of section 51 saw lengthy court procedures and delays, large costs, and a lack of clarity in final judgment orders. The Sharia courts have been far more aggressive in their approach to this situation and have unilaterally expanded their powers by dissolving marriages registered under the Civil law. In *Subashini Rajasingam v Saravanan Thangathoray*,²⁸⁴ Saravanan, a Muslim convert, sought to dissolve his marriage to his non-Muslim wife through the Sharia court. His wife, Subashini applied to Kuala Lumpur High Court for an injunction against her husband seeking divorce in the Sharia court. As the High Court dismissed her application, in appeal at the Court of Appeal, the court ordered Subashini to take her case to the Sharia court. Subashini, also sought to stop or declare void of the conversion of their children to Islam. However, she failed in her attempt to stop her husband from divorcing her in the Sharia court. She also failed to ban her husband from converting their children to Islam. The problem caused by the over-lapping powers of the courts was further commented on in *Mohamed*

²⁸³ Although there is no recent case, there was a precedent in the case of *U Viswalingam v S Viswalingam* [1980] 1 MLJ 10: The husband and wife were married for a long period of time. Eventually, the husband left the wife, converted to Islam and remarries another woman. The court took into consideration of the wife's financial and non-financial contribution to the relationship and ordered a part of the husband's estate to her.

²⁸⁴ *Subashini Rajasingam v Saravanan Thangathoray* [2008] 2 MLJ 147. Other similar cases include *M. Indira Gandhi v K. Pathmanathan* in 1993 and *S. Deepa v N. Viran* in 2004: "Conflict of Jurisdiction: Federal Constitution must be Amended" *The Malaysian Times* (16 April 2014) <<http://www.themalayiantimes.com.my/conflict-of-jurisdiction-federal-constitution-must-me-amended/>>.

Habibullah bin Mahmood v Faridah Dato' Talib, "... it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter..."²⁸⁵

These legal pluralities, namely, the Sharia and Civil cause inconsistencies and difficulties for the applicants in the respective courts and this continues to spur many issues within Malaysian society.²⁸⁶

3.3 Malaysian (Islamic and Asian) Values

Apart from its plurality, the Malaysian legal system is embedded within a unique Malaysian value system, which consists of both Islamic and Asian values. From a general perspective, Islamic values originated from Islamic principles and law, while Asian values are assimilated from the customs and traditions of people living in Asia. The importation by the British Empire of its western philosophies and law causes direct conflict with Malaysian cultural and religious beliefs. On the one hand, Malaysian Civil law is flexible enough to change with societal perspectives, for example, the acceptance of non-married people living together as cohabitants. Here the Civil courts have begun to recognise this as a functioning relationship akin to marriage (as discussed at length in chapter four), and have made decisions and orders upon the dissolution of the relationship determining the division of property (division of which is based on the theoretical principle to recognise the functionality within the relationship, which is discussed in more detail in chapter four). However, in Malaysia, there is a strong Asian-centric value

²⁸⁵ *Mohamed Habibullah bin Mahmood v Faridah Dato' Talib* (1992) 2 MLJ 793, citing Lord Diplock in the case of *Hunter v Chief Constable of the West Midland Police* (1982) AC 529 at 536.

²⁸⁶ Thomas Fuller "Malaysian Court Overturns Islamic Law Banning Cross-Dressing" *The New York Times* (7 November 2014)

<http://www.nytimes.com/2014/11/08/world/asia/malaysian-court-overturns-islamic-law-banning-cross-dressing.html?_r=0>: A Malaysian appeal court struck down an Islamic law that banned men from dressing as women in what lawyers described as a landmark case in the stormy battle for primacy between secular and religious laws. The decision overturned a religious law in the Malaysian state of Negeri Sembilan that prohibited men from wearing women's attire or posing as a woman in public. Transgender women have been subject to arrest, fines and harassment and have been molested by the religious authorities, according to the evidence presented in the case.

system, which operates alongside religious (Islamic) perspectives. JCA Shankar Mahadevan commented on this in his judgment of *Ching Seng Woah v Lim Shook Lin*.²⁸⁷

It has become acutely aware that the differences between social and cultural aspirations with regard to marriage, divorce and welfare in England and Malaysia are such that much caution is called for before we adopt modern English attitudes. The measures we should take today to preserve the integrity of the Malaysian family when it is threatened by the calamity of divorce must be determined in the light of the Malaysian conditions. At best, therefore the English reports should only be regarded as being persuasive value or as case study why the family unit is progressively disintegrating in that country where one parent households and unmarried mothers now number at least three out of ten.

JCA Mahadev Shankar, representing the voice of the Malaysian upper echelons' legal elite, highlighted the social and cultural aspirations within the family law horizon.

Glenn argued that, "the idea that a legal system is shaped by its elite priesthood of legal professionals who share certain peculiarities: they look principally to the legal tradition itself, which is conservative and backward looking in its demand for authority, precedent and legal justifications."²⁸⁸ "In this sense, the legal elite and the law they construct, develop, preserve and interpret, are 'insulated' from the country's external factors such as culture, economics and politics."²⁸⁹ These external factors are noticeable in Malaysia's multi-race, ethnic, religion, culture, and tradition. While distinctive values (Islamic and Asian) are apparent in Malaysian society, Islamic values are dominant and epitomise the centrality of discussion.

²⁸⁷ *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 at 122.

²⁸⁸ P Glenn "A Concept of Legal Tradition" (2008) 34 Queen's Law Journal 427; Mindy Chen-Wishart "Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding" (2013) International and Comparative Law Quarterly 62 at 11.

²⁸⁹ *Ibid*, Mindy Chen-Wishart, at 11.

From a general perspective, the law responds to, or echoes the values of the society it has originated from. Thus in Malaysia, the legal community leans towards adopting these societal values, for example giving importance to couple's status in a relationship, rather than encouraging or introducing new legal ideas to cater for the current legal issues, specifically for the context of this thesis, laws to protect the rights of unmarried cohabitants. It is also submitted that Malaysia has its traditions, culture, and belief of multi-cultural and multi-religious society. Therefore, it is important to protect the sanctity of marriage, which mirrors the culture and religion of Malaysia. This conservative view is also analogous to the principles and teachings embedded in the Islamic and Asian values. Based on this traditionalist opinion, Malaysia continues to neglect the importance of legislating laws to protect every type of family relationship, whereby unmarried cohabitation falls under the relationship category.

However, Malaysia is changing and progressing,²⁹⁰ thus a necessity exists to adapt to its changing society, especially as it relates to unmarried cohabitants. Similarly, there are concerns when debating the prospect of introducing new laws for unmarried cohabitants as to whether it could reflect the cultural and traditional values of Malaysians or ignore to represent their values. In an attempt to address both these matters, the debate over cultural and value dependency should be included, encouraged, and assimilated within the legal development. To successfully enforce this matter, it is important to acknowledge the relationship between the law and society, meaning of culture, religion, politics, and socio-economic values and beliefs while encouraging the legal development, particularly concerning the rights of unmarried cohabitants.

In this section, the conflicts within non-western values to adopting a more liberal approach in family law matters, is addressed. The values “comprise the internalised norms or conventions or customs or collective value systems that define what is good and bad, acceptable and unacceptable, desirable and undesirable, important and unimportant

²⁹⁰ “The Millennium Development Goals at 2010 (Overview)” United Nations (2011) accessed on 15 March 2015

<<http://www.my.undp.org/content/dam/malaysia/docs/MDG/Malaysia%20MDGs%20overview%20English%20clean%200419.pdf>>: Malaysia has experienced three decades of impressive economic and social progress.

in a cohesive social group”.²⁹¹ Malaysia gives more significance to its values; Islamic and Asian values. This is apparent in that the area of family law for Muslims is governed by the Sharia principles while all other areas of law are based on the Civil law (the common law influence).

3.3.1 Malaysian (Islamic and Asian) Values and Human Rights

The matter of treating cohabitants equally to married couples could also be argued as a human rights’ principle, which encourages equality of treatment among people.²⁹² This principle is important as it supports the notion that unmarried cohabitants should not be discriminated against, but should be treated equally to married couples on the basis of their same functionality within the relationship.

Generally, human rights are grounded in the notion that people have certain fundamental and inalienable rights. The Universal Declaration of Human Rights (UDHR) states, “all human beings are born free and equal in dignity and rights. Therefore, everyone should be entitled to rights and freedom without any distinction to race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”²⁹³ The list ends with the words “or other status”. Should we understand that the status of married or unmarried cohabitants could be included under the umbrella of ‘other status’, as an area where the States should not discriminate? With a broader term used as ‘status’, it is contended that the position of cohabitants ought to fall under this

²⁹¹ J S Coleman *Foundations of Social Theory* (Harvard University Press 1990) at 243; C Sunstein “Social Norms and Social Roles” (1996) 96 Columbia Law Review at 903.

²⁹² Universal Declaration of Human Rights (UDHR), art 2: Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...”. The thesis would argue that the status as ‘unmarried’ could be converged into ‘other status’ although the UDHR does not specifically mention the term ‘unmarried cohabitants’.

²⁹³ The Universal Declaration of Human Rights (UDHR), arts 1, 2.

ambit. Therefore, the action taken by States to provide legal rights for cohabitants demonstrates support for human rights' principles.²⁹⁴

The initiators of the international human rights' regime believed that a single standard should apply across the globe, transcending culture, social (values) and politics.²⁹⁵ However, the human rights' understandings have been the subject of much criticism because they only reflect 'western' culture and values. Non-westerners argue that western human rights are not realistic for their context, because they contravene their religion, culture, and traditions. Given that the human rights concept is 'western' in origin while universal in its ethical and legal claims, the foremost question then is whether this concept can be established legally on cross-cultural foundations and thus accepted by Muslims.²⁹⁶ Can Malaysia adopt this human right principle and accord equal rights for unmarried cohabitants? The next question, how to make Muslims (Malaysian) speak the language of human rights in their own tongue?²⁹⁷

3.4 Malaysian 'Islamic' Values

This section deals with Malaysian Islamic perspectives in light of international human rights' law. The discussion and analysis presented here are important foundational aspects when considering present Malaysian law (discussed in chapter four). Whilst this thesis is primarily concerned with the recognition of functionality within cohabiting relationships, this section discusses the embedded Islamic perspectives and Sharia law, which act as a bar to the development of the law relating to cohabiting relationships, especially as it relates to the division of property. Although these illustrations do not

²⁹⁴ Ibid, art 16: Men and women of full age, without limitation due to race, nationality or religion have the right to marry and to found a family (can be interpreted to apply for unmarried cohabitants). Besides that, art 17 states that everyone has the right to own property alone, as well in association with others, and no one shall be arbitrarily deprived of his property.

²⁹⁵ Guyora Binder "Cultural Relativism and Cultural Imperialism in Human Rights Law" (1999) 5 *Buff Human Rights Law Review* at 211.

²⁹⁶ Bassam Tibi "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations" (1994) *Human Rights Quarterly* 16 John Hopkins University Press at 286.

²⁹⁷ Bassam Tibi "The European Tradition of Human Rights and the Culture of Islam" (ed) Abdullahi A. An-Na'im and Francis Deng *Human Rights in Africa* (Washington DC: The Brookings Institute 1990) at 205.

directly point to treating cohabitants equally as married couples, nor does the thesis suggest law reform for the Muslims in Malaysia, the principle of equality which is described and analysed at length provides a tool of conceptual ideology that could be extracted from Islamic principles and imported into Malaysian Civil law.

The international human rights' principles are criticised by the Islamic philosophies as:

1. 'Westoxification';²⁹⁸
2. A conflict between Sharia and (western) human rights' principles;
and,
3. Sharia law is a complete system of itself (it is not essential to include human rights' principles).

Western cultures are primarily disparaged and linked to the idea of 'westoxification'. This discourse presents western culture as poisoning the morality and culture of the rest of the world. Further, the idea of 'westoxification' strongly featured in Islamist pronouncements in Malaysia. Ustaz Ashaari Muhammad, the leader of the Malaysian 'Al-Arqam' Islamist organisation published a virulent attack in 1992 on the mores of the West, "The West on the Brink of Death":

I am now convinced that they (Westerners) have literally debased themselves to inhumanistic levels. They indulge in free sex, nudity, homosexuality, lesbianism, wife swapping and the like. But we are not in the least concerned by their own choice. However, since the

²⁹⁸ A term coined by the Iranian secular intellect, Jalal al-e Ahmad to describe the fascination with and dependence upon the West to the detriment of traditional, historical and cultural ties to Islam and Islamic world. Defined as an indiscriminate borrowing from and imitation of the West, joining the twin dangers of cultural imperialism and political domination. Implies a sense of intoxication or infatuation that impairs rational judgment and confers an inability to see the dangers presented by the toxic substance, that is the West. The West's inherent dangers are described as moral laxity, social injustice, secularism, devaluation of religion and obsession with money, all of which are fuelled by capitalism; the common result is cultural alienation. Ali Shariati, ideologue of the Iranian revolution to describe the results of Iran's modernisation program, adopted the term: "Westoxification" Oxford Islamic Studies Online accessed on 10 October 2014 <<http://www.oxfordislamicstudies.com/article/opr/t125/e2501>>.

Westerners do have a strong influence on the life and culture of those people outside their continent, particularly the Asians, we have to be extra wary. It is heartening therefore; to hear some leaders in Asia today, speak of dire need to protect their people from the intrusion of bad Western influences. They know that Westerners are morally corrupted and have plotted to corrupt the morals of the other people outside their continent. Wilfully and daringly, they work untiringly to destroy the human integrity and civilization. They want the world to be an entertainment house where they are free to perpetrate their evil deeds.²⁹⁹

Thus, the application of Sharia principles is also considered to be in conflict with the western international human rights standards. Among them are mostly the issues involving religion, women, children and the rights associated with them. For example, Muslim women are not allowed to marry non-Muslim men, unless the latter converts to Islam. By contrast, in western international human rights discussion, religions do not always become barriers for couples to unite in the marriage, although in some instances, there are different concerns about marriage (e.g. when it involves Catholics and non-Catholics in the Christian belief).³⁰⁰

The other issue of concern is the practise of polygamy among Muslims.³⁰¹ Polygamous marriages are reasoned to discriminate against women, as to their smaller allocation of share in the finance, property division among the wives, the sharing of love,

²⁹⁹ Ashaari Muhammad *The West on the brink of death* (trans from the original version in the malay language by Tajul Ariffin bin Abd Rahman (ed) Raja Chulan Raja Ahmad Tajuddin, Fauzi and Aqilah Mohd Yusuf 'Barat di Ambang Maut' (London: ASOIB Books 1992) at x, xii.

³⁰⁰ This happened historically; Henry VIII split from Rome for the reason that he wanted to divorce Catherine of Aragon and marry Ann Boleyn. However, the beliefs within the Catholic Church were clear that only the Pope could annul a marriage and as the Church believe in the sanctity of marriage and family, this was reasonably rare occurrence: "Henry's Divorce from Catherine" History Learning Site accessed on 2 September 2014

<http://www.historylearningsite.co.uk/henry_catherine_divorce.htm>.

³⁰¹ In Malaysia, Muslims are allowed to commit in polygamous marriages: Islamic Family Law (Federal Territories) Act 1984, s 23.

and affection from the husband. By contrast to Islamic law that generally permits polygamy,³⁰² this matter is not typically encouraged within western laws.³⁰³

According to An-Na'im on the practise of polygamy:

This unacceptable discrimination exists despite modern reform of personal law in several countries. These efforts cannot achieve the desired degree of reform because of the internal limitations of reform within the framework of Sharia. Moreover, limited benefits achieved through these modern reforms are constantly challenged and threatened by more fundamental principles of Sharia, which remains intact in the jurisprudence and legal practise of the countries that introduce those reforms.³⁰⁴

By contrast, he argues that Muslims themselves need to re-examine the Quran and 'Sunnah' (Prophet's practise) in order for these to be read in light of contemporary human rights' standards. Subsequently, reformation in Islam is needed to cater for the human rights' issues involving Muslims. Besides relying solely on the Quran and other sources of Islamic teaching, Muslims could also interpret those Islamic principles in accordance to international human rights' standards. This matter is on the premise that Islam is in substance, compatible with western human rights' legal norms, if interpreted accordingly.³⁰⁵

³⁰² Although there are Muslim countries that introduced laws against polygamous marriages, for example, the Tunisian Personal Status Code passed in 1956 prohibits polygamy: "Polygamy for Tunisia? The Islamic revolution calls for multiple wives" Albawaba editor's choice (1 September 2012) <<http://www.albawaba.com/editorchoice/tunisia-polygamy-islamist-440281>>.

³⁰³ For example in England, under section 11 of the Matrimonial Causes Act 1973: marriage is void if at the time of the marriage, either party was already married (or in a civil union partnership). In New Zealand, under the Marriage Act 1955: marriage is defined as a union of two people, and a person who subsequently enters another marriage, or civil union can be charged with bigamy, which is a crime under section 205 of the Crimes Act 1961 (carries two to 14 years imprisonment).

³⁰⁴ An-Na'im, Abdullahi Ahmed *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse 1996) at 177.

³⁰⁵ Bassam Tibi (1994), above n 296.

The third denigration of the western perspective of human rights is that Sharia law is considered comprehensive, thus not requiring the interference from other sources (i.e. international human rights). For instance, an academic from the Islamic University in Kuala Lumpur, Kausar, exemplifies that “Islam is the complete system of life and it perceives life as an integrated whole. For this reason, sexuality, reproduction and the family system are also parts of life, and not outside of it.”³⁰⁶ Subsequently, legal matters and opinion could be derived from the Islamic law itself without any meddling from the western foundations.

The Sharia law rests partly on the Quran as the primary source of Islamic law. The practises of the prophet (his sayings and patterns of behaviour) have been collected as ‘Hadith’, considered as the secondary source of Islamic law. Additionally, there are supplementary sources that include consensus among the Muslim scholars, the analogical reasoning,³⁰⁷ customs, and traditions. By drawing on these various sources, Muslim jurists constructed Sharia over the first three centuries of Islam. Although it derives from the fundamental divine sources, nevertheless, it is the product of human interpretation of those sources. Likewise, this process of construction through human interpretation took place within the specific historical context. For instance, polygamy was allowed in Islam during the early centuries, where Islam was being introduced to the people. During the war between Islam and others, many men who went to the war lost their lives. Their wives and children in this context were living in misery and in financial difficulty. Therefore, men were allowed to marry more than one woman, engage in polygamous relationships, to improve the women’s quality of life. However, this situation does not seem to fit the current social contexts. It could be argued that contemporary Muslims should undertake a similar process of interpretation and application of the Quran and Hadith to suit the contemporary modern context. Further, perhaps the development of alternative Islamic public law principles that better reflect the modern day society and its

³⁰⁶ Kausar, Zeenath *Feminist sexual politics and family deconstruction: An Islamic perspective* (Kuala Lumpur International Islamic University 2011).

³⁰⁷ ‘Qiyas’ or analogical reasoning is the fourth source of Islamic Law. In case of lack of direct text from the Quran or Hadith, on any contemporary issue, making judgment based on analogy is permissible by Sharia: Amani Fairak “Analogy” (Islamic) Encyclopedia of Psychology and Religion (2014) <http://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-6086-2_25> at 56.

values might be adopted. To simplify this matter, the old interpretations are out-dated in a modern society, and thus new interpretations on the Islamic principles would fill in the gap to provide a better perception about Islam and its adaptability to contemporary circumstances.

Apart from that, it should be noted that the early Muslims' interpretation of Islam was influenced by their culture, social and political atmospheres. For example, there were differences in the method that the two early Islamic intellectuals used to interpret Islamic laws. "Medina was the site of the first Muslim community and had traditional roots to Islam and as a result, there were access to an abundance of 'hadith'".³⁰⁸ Kufa (Iraq) also became a centre of intellectual thought, but as distinguished from Medina, it was not as closely linked to Islamic traditions and therefore, the jurists had to use more analogy."³⁰⁹ The legal method in Kufa and Medina were similar, but "differed hugely".³¹⁰ Kufa was a cosmopolitan centre, where "women enjoyed a higher estimation", whereas Medina was more insular and closely knit.³¹¹ In Kufa, women could contract their own marriages; whereas in Medina this was not so.³¹² In short, the Quran was "interpreted by different Islamic schools in the light of existing social circumstances... Apart from such differences in the details of the law, the whole outlook and attitude of the scholars was conditioned by their respective environments."³¹³ Therefore, to fit within the current social contexts, the Quran could be interpreted accordingly, while taking into account the recent and modern legal issues and development, and the context of cohabitants and their rights to equal legal rights, could be foreseen to fall under this sphere.

³⁰⁸ 'Hadith' could be defined as the record of the traditions or sayings of the Prophet Muhammad, revered and received as a major source of religious law and moral guidance, second only to the authority of al-Quran: Albert Kenneth Cragg "Hadith" Encyclopaedia Britannica accessed on 2 September 2014 <<http://www.britannica.com/EBchecked/topic/251132/Hadith>>.

³⁰⁹ Muslim Women's League "Intellectual Background: Islamic Sources of Information and their Development into Islamic Law" (September 1995) accessed on 24 November 2014 <<http://www.mwusa.org/topics/sources/sources.html>> at 7.

³¹⁰ Noel James Coulson *A History of Islamic Law* (Edinburgh: Edinburgh University Press 1996) at 47.

³¹¹ Muslim Women's League, above n 305.

³¹² Ibid.

³¹³ Noel James Coulson, above n 310, at [49-50].

Islamic scholars could be encouraged to interpret laws that would protect the rights of cohabitants to equal property rights and the adaptability of Islamic principles to cover this area of family law is possible. The Islamic principles of ‘Ijma’, ‘Ijtihad’ and ‘Istislah’ could be utilised to provide legal opinion on the rights of cohabitants to equal legal treatment, as analogous to married couples. ‘Ijma’ (scholarly consensus) is defined as ‘the universal and infallible agreement of the Muslim community, especially of Muslim scholars on any Islamic principle, at any time’.³¹⁴ ‘Ijma’ has come to operate as a principle of toleration of different traditions within Islam, and thus allows the four legal schools equal authority. In modern Muslim usage, ‘Ijma’ has lost its association with traditional authority and appears as a democratic institution and an instrument of reform.³¹⁵ Ijtihad, on the other hand is defined as ‘the independent or original interpretation of problems not precisely covered by the Quran, Hadith and Ijma’.³¹⁶ In the 19th and 20th centuries, reformist movements clamoured for the reinstatement of ‘ijtihad’ as a means of freeing Islam from harmful innovations accrued through the centuries, and as a reform tool capable of adapting Islam to the requirements of life in a modern world.³¹⁷ Furthermore, ‘Istislah’ is a norm employed by Muslim jurists to solve perplexing problems that find answers in sacred religious texts.³¹⁸ In such a situation, the judge reaches a decision by determining first what is materially most beneficial to the community as a whole, then what benefits the local community, and finally, what benefits the individual.³¹⁹ Almost all Muslim schools of theology acknowledge the usefulness and legitimacy of ‘istislah’, for they accept the premise that whatever is materially beneficial for humanity in general, is almost certainly beneficial to individuals.³²⁰

Islamic resurgents have been challenging the declaration of human rights. When the UDHR was drafted in 1947, the Saudi Arabian delegation solicited specific

³¹⁴ “Ijma” Encyclopaedia Britannica accessed on 20 October 2014, <http://www.britannica.com/EBchecked/topic/282520/ijma>

³¹⁵ Ibid.

³¹⁶ “Ijtihad” Encyclopaedia Britannica accessed on 20 October 2014 <http://www.britannica.com/EBchecked/topic/282550/ijtihad>.

³¹⁷ Ibid.

³¹⁸ “Istislah” Encyclopaedia Britannica accessed on 20 October 2014 <http://www.britannica.com/EBchecked/topic/297055/istislah>.

³¹⁹ Ibid.

³²⁰ Ibid.

objections.³²¹ The Saudi delegate made an argument that “the authors of the draft had, for the most part, taken into consideration only the standards recognised by the western civilisation and had ignored more ancient civilizations which were past the experimental stage, and the institutions of which, (for example, marriage) had proved their wisdom through the centuries. It was not for the committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world.”³²² The Saudi Delegation refused to ratify certain articles in the declaration grounding the defence of Islam and culture. Islamic law and patriarchal culture does not support the notion of freedom in family matters (marriage or allowing the freedom of religion).

In his writings on the ‘Clash of Civilisation’ between the west and the rest, Huntington proposed a clarification for the most ultimate internal regime-weaknesses within human rights. Huntington argues:

At a superficial level much of Western culture differs fundamentally from those prevalent in other civilizations. Western ideas of individualism, liberalism, constitutionalism, human right, equality, liberty, the rule of law, democracy, free markets, the separation of church and state, often have little resonance in Islamic, Confucian, Japanese, Hindu, Buddhist or Orthodox cultures.³²³

At the drafting of the UDHR, many religious affiliations were represented, the Chinese, middle eastern Christian, Marxist, Hindu, Latin American, and Islamic. The members of the committee engaged in an attempt to delimit a range of moral universals from within their very different religious, political, ethnic, and philosophical backgrounds (not a simple task of merely ratifying western beliefs). The accomplishment in drafting or accepting the UDHR by way of adoption of western human rights does not necessitate

³²¹ Universal Declaration of Human Rights, art 16: relating to free marriage choice; and art 18: relating to freedom of religion.

³²² Michael Ignatieff *The Attack on Human Rights* (The Foreign Affairs Princeton University Press 2001) <http://www.columbia.edu/itc/sipa/S6800/courseworks/Ignatieff_Human_Rights.pdf>.

³²³ Huntington, Samuel P “The Clash of Civilizations?” (1993) *Foreign Affairs* 72 No 3 at 40.

accepting the western ways of life. The recognition of human rights principles is not to change the non-western civilisation to western dogma, but it is to simply benefit from the protections, although some non-westerners would view it as a threat and presumably continue to oppose it. In reality, human rights should not, or do not overturn traditional culture practises that continue to obtain acceptance of its members. It does not define the content of culture, but in trying to empower all agents so that they can freely mould the culture and values to comprehend the human rights' content. Accordingly, human rights encourage an intercultural dialogue in which all parties come to the table under common expectations of being treated as equals.³²⁴ Subsequently, in adopting this broad-driven human rights' approach, Malaysia could still employ its positive response to human rights' notions, thus encouraging the rights of cohabitants to equal treatment, specifically for the right to property matters.

As quoted by President John Adams (1797-1801): "Property is surely a right of mankind as real as liberty... The moment the idea is admitted into society that property is not as sacred as the laws of God and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."³²⁵ Besides that, the European Union Charter of Fundamental Rights, in Article 17 states, "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."

Even in Malaysia, the Federal Constitution observes that, all persons are equal before the law and entitled to equal protection of the law, and there shall be no discrimination on the ground of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property, or to establishing or carrying on of any trade, business, profession, vocation or employment.³²⁶ Furthermore, Article 13 states, no person shall be deprived of property save in accordance with law,

³²⁴ Michael Ignatieff, above n 322.

³²⁵ Walter Williams "Property Rights are a Fundamental Human Right" Capitalism Magazine (3 September 2013) <<http://capitalismmagazine.com/2005/08/property-rights-are-a-fundamental-human-right/>>.

³²⁶ Malaysian Federal Constitution, arts 8(1)(2).

and no law shall provide for the compulsory acquisition or use of property without adequate compensation. In a simplified conclusion, private property rights protect individual liberty.³²⁷ Cohabitants' right to property should not be denied, and thus on the basis of the human rights' principle of equality, their rights to relationship property should be protected by the laws. The legal rights applicable to married couples on the relationship property divisions should be extended to unmarried cohabitants, in an attempt to recognise the similarity of functions within their relationships.

Notwithstanding that, based on traditional values, Malaysia is not likely to accept the universality of human rights' arguments on a general level; for example, recognising rights of cohabitants to relationship property would go against their values and beliefs on marriage. However, it should be noted that the movement to recognise the cohabiting relationship is not to undermine marriage. Marriage is still a protected relationship and continues to be available for couples to consummate nuptials. The need to acknowledge cohabitants within the present legislation is to support all forms of committed, exclusive and stable relationships as unmarried cohabitation, recognise their functionality within the relationship and provide them with the equal legal protection.

3.4.1 Malaysia's Response to Human Rights in light of 'Islamic' Values

Contemporary western philosophers such as John Rawls have made cross-cultural arguments for universality of human rights between western and non-western regimes reflective of religious beliefs. To paraphrase, Rawls³²⁸ argues that harmonising human rights and non-western culture, particularly Islam could be possible. Some reconciliation between the traditional Sharia and the modern idea of human rights feasibly could be accomplished in accordance with well-established Islamic pragmatism. Therefore, Islam should not be underestimated for its potential to cope with new challenges and demands in a pragmatic way. In conformity with the humane flexibility that has largely marked the

³²⁷ Armen A. Alchian "Property Rights" The Concise Encyclopaedia of Economics, Library of Economic and Liberty (2008) accessed on 8 October 2014
<<http://www.econlib.org/library/Enc/PropertyRights.html>>.

³²⁸ Bielefeldt, Heiner "Muslim Voices in the Human Rights Debate" (1995) Human Rights Quarterly 17.4 The John Hopkins University Press Baltimore at [594-595].

Sharia, some of the conflicts between different normative requirements might be settled. Hence, in the context of non-Western cultures, it is possible to recognise and implement the universality of human rights. These Sharia principles can be interpreted in a way that is consistent with international human right standards. If the Sharia laws are interpreted to include rights for unmarried cohabitants, their legal rights could be protected, thus demonstrating the adaptability of Islamic laws to present-day societal settings.

The current Malaysian Prime Minister, Datuk Seri Najib Tun Razak, does not support western human rights dogma.³²⁹ In his recent speech, he viewed that “Human rights-ism goes against Muslim values”.³³⁰ He cautioned that Islam and its followers are now being tested by new threats under the guise of humanism, secularism, liberalism, and human rights.³³¹ “Human rights ideology is like a new ‘religion’, it is retrograde as it glorifies human wants and desires.”³³² Therefore, “we will not tolerate any demands for apostasy to be allowed, or for Muslims’ rights to implement Islamic teachings through Sharia Court to be denied”.³³³ Consequently, “movements like the LGBT (lesbian, gay, bisexual and transgender) will not be recognised and permitted”.³³⁴

The Prime Minister said the understanding of the true and all-encompassing Islam was the basic principle of the country’s strength and the people should attempt to understand the Quran according to the teachings of Prophet Muhammad, who emphasised

³²⁹ Due to the multi-religious pattern, Malaysia has taken the route of a moderate Islamic country. The UDHR is criticised for being secular and thereby discriminating against non-secular states like Malaysia, as the religious factor (of the majority) is not considered. As a member of the Organisation of Islamic Cooperation (OIC), Malaysia signed the Cairo Declaration on Human Rights in Islam (CDHRI) in 1990, which is not legally binding.

³³⁰ Robert Spencer “Malaysian PM: “Human rights-ism” goes against Muslim values” *Jihad Watch* (14 May 2014) <<http://www.jihadwatch.org/2014/05/malaysian-pm-human-rights-ism-goes-against-muslim-values#>>.

³³¹ “PM says ‘human rightism, humanism, secularism’ new religion threatening Islam” *Malay Mail Online* (14 May 2014) <<http://www.themalaymailonline.com/malaysia/article/pm-says-human-rightism-humanism-secularism-new-religion-threatening-islam>>.

³³² Robert Spencer, above n 330.

³³³ Ibid.

³³⁴ Ibid.

faithfulness only to Allah and brotherhood among Muslims.³³⁵ As such, Muslims must continue understanding the words of the Quran.³³⁶

In order for the Muslim nation to accept the notion of equality as espoused by human rights' principles, for example, equality between married spouses and unmarried cohabitants, it could perhaps look no further than the Islamic framework itself. By understanding the original conception derived from the Quran, clearly Islam was never against equality, and supports the idea of equality and justice in their practise. For illustration:³³⁷

O believers, let no group make fun of another, for they may be better than them. Let no women make fun of other women, for they may be better than them. Refrain from backbiting one another, and from calling each other by nicknames. Wretched is a depraved name once faith has come! But those who are unrepentant are surely wicked.

This verse can be interpreted to the understanding that human beings are all equal, and thus, not to discriminate against others on the basis of their understanding, status, or opinions. Cohabitants within the framework of this thesis would be regarded similar to married couples and should be afforded equality recognised under Islamic law. Their functionality indicates the need to establish equality between the relationships, that is, between married couples and unmarried cohabitants. Although the verse above does not directly mention the rights of cohabitants, nonetheless, it demonstrates the importance of respecting human beings without the influence of inequality. In Malaysia, for example, the union of married couples is legally recognised, unlike that of cohabitants, who are not acknowledged in any legislation. It is apparent that there is an absence of equality of legal treatment between these two relationships irrespective of their similar functionality within the relationships. In applying the Islamic conception of equality, cohabitants could

³³⁵ “PM says ‘human rightism, humanism, secularism’ new religion threatening Islam”, above n 331.

³³⁶ Ibid.

³³⁷ Al-Quran: 49:11.

be equally treated as married couples, at least for the context of the property divisions in relationship breakdown.

Furthermore, the principle of equality is manifested in Quran, for example:³³⁸

O Mankind! We created you male and female and made you into nations and tribes that you may come to know one another”.³³⁹ “And among His signs is the creation of the heavens and earth, and the difference of your languages and colours. Verily in that are signs for men of sound knowledge.

This verse illustrates the idea of equality. Gender, tribes and community, languages and colours, differentiate human beings. However, that difference must not be the reason to discriminate against one another. God has created a difference in humans for them to know each other and learn from others’ views and experiences. One is not superior over the other, and thus is the same and should be treated as such.

The al-Quran upholds the importance of equality and fairness. For example:³⁴⁰

For the white to lord it over the black, the Arab over the non-Arab, the rich over the poor, the strong over the weak or men over women is out of place and wrong.

The verses above are from the ‘Quran’ and Hadith. It denotes that every person is equal, despite being dissimilar in status, colour, languages, gender and power. On that ground, every person should be treated the same without being discriminated against for their weaknesses and differences. These Islamic verses could be interpreted to apply to unmarried cohabitants, for they should be given equal legal treatment as the married spouses, specifically for the purpose of the property divisions in the event of relationship breakdown.

³³⁸ Al-Quran: 30:22.

³³⁹ Al-Quran: 49:13.

³⁴⁰ Hadith of Ibn Majah.

In Islamic human rights, the teachings are ultimately derived from the al-Quran. The Quran upholds the sanctity and absolute value of human life.³⁴¹ In essence, the life of each individual is comparable to that of an entire community and therefore, should be treated with utmost care.³⁴² The Quran also deems all human beings to be worthy of respect.³⁴³ In an example from the Prophet Muhammad's farewell speech before his death:³⁴⁴

O Mankind, Your God (Allah) is one and your father (Adam) is one, there is no favouring for any Arab over non-Arab nor non-Arab over Arab, nor black (skinned) over (white skinned) except in God's piety. O Mankind, God has declared inviolable to you each other's blood, money and honor, therefore your blood, money and honor is violable to you till the day you meet Him.

This speech given by Prophet Muhammad signifies the characteristics of Islam rejecting any form of racism, thus encourages equality among human beings. Despite human beings' differences in race or colour, one should not be favoured over the other, but shall be treated justly.

Clearly, the notion of equality is present in the Islamic teaching. To summarise, both the Islamic teachings and UDHR principles uphold the sagacity of equality without any discrimination. According to the Islamic philosophies (derived from the Quran and Hadith) and the UDHR, the differences in gender, colour, languages, origin, and others, should not be the reason to discriminate against others. This matter indicates that the Sharia supports the concept of equality, parallel to the western human rights. Furthermore, it demonstrates that there is a possibility for the harmonisation between the western and non-western principles to adopt the idea of equality in their implementation, as both (the western and non-western) support equality among human beings. Thus both

³⁴¹ Al-Quran: 6:151.

³⁴² Al-Quran: 5: 32.

³⁴³ Al-Quran: 17:70.

³⁴⁴ Akber Ahmad *Discovering Islam-making sense of muslim history and society* (Psychology Press 2002) at 20.

the western and non-western perceives equality of treatment, and for the discussion of this thesis it could be extended for the purpose of unmarried cohabitants and the legal rights associated with them in the matters concerning their rights to relationship property. Based on the relationship functionality, unmarried cohabitants should be treated equally to married couples for the purposes of the division of their relationship property.

3.5 Malaysian 'Asian' Values

It is an on-going debate as to whether 'Asian values' in Southeast Asia represent the values of conservatism and tradition, whilst the West advocating the values of liberal democracy.³⁴⁵ Some human rights advocates from the West contend that 'Asian values' are little more than an excuse for authoritarian government and for authoritarians to retain power.³⁴⁶ On the other hand, critics from the East say that Western views and values on human rights and democracy are not necessarily suitable for Asian states and to try to impose them is neo-colonialist, racist, and a conspiracy to handicap Asian economic competition.³⁴⁷

'Asian values' commonly portray the West as morally decadent, Lee Kwan Yew (the first Prime Minister of Singapore) for example, said that in the USA the individual has acquired the right 'to behave or misbehave' as he pleases'.³⁴⁸ By contrast, the proponents of 'Asian values' hold that strong states, with limitations on human rights, are necessary for economic development.³⁴⁹ These advocates of the 'Asian values' position argue that some limitations of human rights are necessary for stability in relatively poor societies striving for economic development, which is itself a precondition for a wide range of political goods.³⁵⁰

³⁴⁵ Diane K Mauzy "The human rights and 'Asian values' debate in Southeast Asia" (1997) *The Pacific Review* 10 No 2 at 211.

³⁴⁶ *Financial Times* 5-6 March 1994.

³⁴⁷ Diane K Mauzy, above n 345.

³⁴⁸ Interview with Lee Kuan Yew, Prime Minister of Singapore (Fareed Zakaria, *Foreign Affairs* March/April 1994); "Culture is Destiny: A Conversation with Lee Kuan Yew" <<http://www.foreignaffairs.com/articles/49691/fareed-zakaria/a-conversation-with-lee-kuan-yew>>.

³⁴⁹ Freeman, Michael (1996) "Human Rights, democracy, and Asian values" *The Pacific Review* 9(3) at 356.

³⁵⁰ Interview with Lee Kuan Yew, above n 348.

[G]enerally, the Asian states, particularly Singapore, Malaysia, and Indonesia have aggressively resisted the human rights discourse emerging from the West. The Asian states resent the West's belittling of 'Asian values' and assert that they are resisting what they perceive to be Western bullying.³⁵¹ Second, there has been a growing confidence in many Southeast Asian countries, buoyed by substantial economic success³⁵² that appear to justify the policy of placing economic development first and giving priority to order and stability and they call it 'good government'.³⁵³ They believe that their own values and traditions have served them well and that they are experiencing an 'Asian Renaissance', in terms of a cultural rebirth and Asian empowerment.³⁵⁴ Third, there is also a suspicion that the West has a hidden agenda to maintain hegemony by slowing down Asian prosperity and crippling its competitiveness by 'changing the rules' to involve a new kind of protectionism with human rights and democracy as the standard bearers succeeding the old banners of colonialism and Christianity.³⁵⁵ Lastly, there is a feeling that the Western model being promoted, meaning predominantly the US model, is flawed and therefore undesirable for Asia,³⁵⁶ for example, the problems of rampant crime, welfare-induced sloth and a breakdown of society.³⁵⁷

However, it may be an over simplified task and perhaps even absurd to talk about 'Asian values' because the region is known for the diversity of its cultures, religions, traditions, and histories.³⁵⁸ Several others dismiss this claim of 'Asian value' because they believe it is being manufactured as a convenient defence for authoritarian

³⁵¹ Vincent, R. J *Human Rights and International Relations* (Cambridge University Press 1986) at 2.

³⁵² Tan, Kevin Y. L. "What Asian think about the West's response to the human rights debate" *Human Rights Dialogue Time Magazine* (14 June 1993) at [16-19].

³⁵³ *Far Eastern Economic Review* 12 October 1995.

³⁵⁴ Expressed by Anwar Ibrahim (when he was the deputy Prime Minister) *Far Eastern Economic Review* 7 December 1995 at 23.

³⁵⁵ *Far Eastern Economic Review* 7 April 1994 at [20-21].

³⁵⁶ *Time Magazine* 14 June 1993 at [16-19].

³⁵⁷ *The Economist* 28 May 1994 at [9-10].

³⁵⁸ Emmerson, Donald K "Singapore and the "Asian values" debate" (1995) *Journal of Democracy* (6) 4 at [96-100]; *Business Times* 30 April-1 May 1994.

government.³⁵⁹ Others see it as a counter-discourse to Western liberal and social democratic values that uses Asian culture as a mask for conservatism.³⁶⁰

There is no single pan-Asian view or set of values or a uniform ideology or even a single cultural system.³⁶¹ However, there are a considerable number of shared values and commonalities. Among them are communitarianism, the concept that responsibilities to the family and the community have priority over the rights of the individual.

The governments of forty Asian countries adopted the Bangkok Declaration on human rights. The Declaration accepted that rights were 'universal in nature' but added that they must be considered 'in the context of national and regional particularities and various cultural, historical and religious backgrounds and with the understanding that norms and values change over time'.³⁶² The delegates also agreed to uphold the principle of sovereignty and urged the promotion of human rights by cooperation and consensus, not confrontation and conditionality.

The human rights and 'Asian values' debate is mainly about: (1) how to best organise a modern or modernising society so as to achieve and maintain prosperity and security and general happiness in that society; (2) how to strike a balance between freedom and stability; and (3) between government responsibilities and individual rights and duties.³⁶³

With no single authoritative version, 'Asian values' could be summarised as a stress on the community rather than the individual, the privileging of order and harmony over personal freedom, refusal to compartmentalise religion away from other spheres of

³⁵⁹ Little, David "Human Rights: East and West"(1996) Canadian International Council Behind the Headlines 53 No 2 & 3 Canadian Institute of International Affairs at 18.

³⁶⁰ Rodan, Garry and Hewison, Kevin "The clash of cultures or convergence of "Political Ideology"" (ed) Richard Robison *Pathways to Asia: The Politics of Engagement* (St. Leonards NSW 1996); Robison, Richard "The politics of 'Asian values'" (1996) *The Pacific Review* (9) 3 at [309-327]; Rodan, Garry "The internalization of ideological conflict: Asia's new significance" (1996) *The Pacific Review* (9) 3 at [329-339].

³⁶¹ Diane K Mauzy, above n 345, at 215.

³⁶² Bangkok Declaration 1993.

³⁶³ *The Economist* 28 May 1994.

life, a particular emphasis on saving and thriftiness, an insistence on hard work, a respect for political leadership, a belief that government and business need not necessarily be natural adversaries and an emphasis on family loyalty.³⁶⁴

3.5.1 Malaysian 'Asian' Values: Individualism Versus Collectivism

At the outset it should be noted that both 'Islamic' and 'Asian' values share the common arguments of *individualism versus collectivism/community*. Individualism is the idea that the individual's life belongs to him and that he has an inalienable right to live it as he sees fit, to act on his own judgment, to keep and use the product of his effort, and to pursue the values of his choosing.³⁶⁵ Collectivism, on the other hand, is the idea that the individual's life belongs not to him, but to the group or society of which he is merely a part, that he has no rights, and that he must sacrifice his values and goals for the group's 'greater good'.³⁶⁶ According to collectivism, the group or society is the basic unit of moral concern, and the individual is of value only insofar as he serves the group.³⁶⁷

The utilitarian approach that *community comes first* demonstrates that the needs of individuals are always outweighed by the importance given to the community.³⁶⁸ [F]or Asians, "the individual exists in the context of his family. He is not pristine and separate. The family is part of the extended family, and then friends and the wider society".³⁶⁹ "[A]sians also believe that 'whatever they do or say, they must keep in mind the interest of others ... and the individual tries to balance his interests with those of family and society'".³⁷⁰

³⁶⁴ Anthony Milner "What's happened to Asian Values?" (1999) Faculty of Asian Studies accessed on 8 October 2014 <<https://digitalcollections.anu.edu.au/bitstream/1885/41912/2/values.html>>.

³⁶⁵ Craig Biddle "Individualism vs. Collectivism: Our Future, Our Choice" (2014) The Objective Standard 7 No 1

<<http://www.theobjectivestandard.com/issues/2012-spring/individualism-collectivism/>>.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Takashi Inoguchi and Edward Newman "'Asian Values' and Democracy in Asia" (Proceedings of an Asia-Pacific Forum Conference at Hamamatsu Japan 28 march 1997)

<<http://archive.unu.edu/unupress/asian-values.html>>.

³⁶⁹ Interview with Lee Kuan Yew, above n 348.

³⁷⁰ Takashi Inoguchi and Edward Newman, above n 368.

The role of family is important because it is within the family that children learn their role in society, they get lessons of hierarchy, and they learn to think of the society as a vital unity that somehow rationalises the idea of communitarianism.³⁷¹

Asian culture is commonly said to differ from the western culture, according priority to the interests of the community over those of individuals.³⁷² The individualism of the West is however often over-stated.³⁷³ Ghai points out that there are strong communitarian traditions in the West, including conservatism, democratic socialism and some forms of liberalism.³⁷⁴ The doctrine of human rights attributes to individuals but requires that appropriate communities protect them.³⁷⁵ There are laws introduced within the western countries that are designed for the benefit of the community as a whole, rather than for the individual benefits per se. An example of this is the New Zealand Social Security Act 1964 that benefits the community from an unabridged perspective, specifically, for the people who needed financial support. So it is not true to argue that western values emphasises only individualism.

As noted earlier, Islamic tradition shares the arguments for communitarianism. In Islam, individualism must be understood within the ‘ummah’ or the community, which is paramount.³⁷⁶ For Muslims, human action affects the community where he or she is concerned. Therefore, Islamic principles are of importance for the welfare within the community. This understanding of ‘community’ could be extracted from the Malaysian case of *Lina Joy*.³⁷⁷ The Counsel for the ‘Majlis Agama Islam’ (Islamic Religious Council) submitted that:

³⁷¹ Michael D. Barr *Cultural Politics and Asian Values* (London Routledge 2002) at 7.

³⁷² Mahathir Mohammad “Let’s have mutual cultural enrichment” New Straits Times 16 March 1995 at 11.

³⁷³ Freeman, Michael, above n 349, at 355.

³⁷⁴ Ghai, Yash “Asian perspectives on human rights” (ed) James T.H. Tang *Human Rights and International Relations* (Asia-Pacific Region, London: Printer 1995) at 61.

³⁷⁵ Freeman, Michael, above n 349, at 356.

³⁷⁶ David Jordan “The Dark Ages of Islam: Ijtihad, Apostasy and Human Rights in Contemporary Islamic Jurisprudence” (2003) 9 Washington & Lee Race & Ethnic Ancestry Law Journal 55 at 57.

³⁷⁷ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2007] 3 CLJ: This understanding is different to the western view that embraces individualist traditions and emphasise liberal social freedom. Western liberal theory upholds practising human rights in which condition, human freedom and individual happiness and fulfilment flourish: Michael Kirby AC CMG (The Hon Justice) “Fundamental Human Rights

Being a Muslim is not an individual act. It is part of being the wider community, is being part of the Ummah. And the responsibility of the State is to take care of the Ummah.

Despite that, it is undeniable that “although we speak of individualism as the underlying value possessed by the westerners, and collectivism as an outstanding value orientation manifested by the easterners, they are not separate entities, that is, individualism is not peculiar to the West, nor the collectivism to the East. As a matter of fact, all people and cultures have both individual and collective dispositions.”³⁷⁸ To simplify, individual rights require a right-supporting community and both the westerners and non-westerners are not alien to this matter.³⁷⁹ It could be summarised that both individualism and collectivism (communitarian) are inter-related, and thus have equal value and importance. For without community, the individual does not exist, and without the individual, the community cannot exist. For example, individuals create community, by procreation, continuation of the human generation, raising and protecting children within the community and so on. On the other hand, the community is of importance for the survival of the individual, by way of human interaction and others. The purpose of law is to accommodate both these visions and the lawmakers on the other hand, should be encouraged to create laws or policies that assimilate individualism and collectivism in the factual balance, which both the individual per se, and community as a whole would accept.

3.5.2 Malaysian ‘Asian’ Values: Equality Versus Hierarchy

In the West, the value of equality is prevalent, in both primary and secondary social relationships, whereby, most of the primary social relationships within a family tend to advance equality rather than hierarchy, for example, such as children being treated as

and Religious Apostasy, The Malaysian Case of Lina Joy” (2008) an article based on a lecture delivered at Griffith University Brisbane on 16 November 2007 Griffith Law Review 17 (1) at 165.

³⁷⁸ Liu Quingxue “Understanding Different Cultural Patterns or Orientations Between East and West” (2003) *Investigationes Linguisticae* IX at 25.

³⁷⁹ Freeman, Michael, above n 349, at 361.

adults and address the parents by their names.³⁸⁰ In secondary relationships, friends and co-workers are also treated as equals; for example, the (people in power) supervisors or government officials, often interact with their constituents and consider the subordinates as equals.³⁸¹ In very general terms, social harmony is sought in the west via a system of individual rights protected by law and the emphasis is on that which can be ratified by agreement among equals.³⁸²

In Asia however, the relationships are hierarchal.³⁸³ People of older generations are superior to those of the younger, within each generation, the elder are superior to the younger, and men are superior to the women.³⁸⁴ “The hierarchy defines an individual’s status, role, privileges, duties and liabilities within the family order. The family is then viewed as the prototype of all social organisations, a metaphor for community, country and universe.”³⁸⁵

Asian culture tends to observe signs of social hierarchy of interpersonal politeness, with the Westerners using strategies of involvement (e.g., to pay attention to others, show a strong interest in their affairs, point out common in-group membership or points of view with them, or use first names) as a way of emphasising equality, and the Asians using strategies of independence (e.g., to make minimal assumptions about the needs or interests of others, not to “put words into their mouths”, to give others the widest range of options, or use more formal names and titles) as a way of showing deference.³⁸⁶

³⁸⁰ Liu Quingxue, above n 378 at 26: Although this matter could be argued that only the small minority of westerners adopts this approach.

³⁸¹ Ibid.

³⁸² Mindy Chen-Wishart, above n 288: Hence the widely accepted idea of the social contract as the basis of political authority, famously found in Hobbes’ *Leviathan* (1651), Locke’s *Second Treatise on Government* (1689) and Rousseau’s *Du Contrat Social* (1762); and more recently Rawls’ idea of what can be agreed from the original position behind the veil of ignorance in *Theory of Justice* (Belknap Press 1971).

³⁸³ This matter can be argued, whereby there are influences of hierarchal status within the western setting as well.

³⁸⁴ Mindy Chen-Wishart, above n 288, at 14.

³⁸⁵ Ibid.

³⁸⁶ Scollon, R., and Scollon, S. W *Intercultural Communication: A Discourse Approach* (Beijing: Foreign Language Teaching and Research Press/ Blackwell Publishers Ltd 2000) at 131.

The duty of all to conform to the order of relationships for the sake of maintaining harmony engenders patriarchy and behaviour characterised by authoritarianism and obedience.³⁸⁷ Historically, Western patriarchy was also characterised by the authoritarian control of the household members and of property, the symbolic connection with family ancestors, and the state's support of patriarchal powers.³⁸⁸ That is why it took some time for the West to recognise cohabiting relationships for the purpose of relationship property distribution.³⁸⁹

3.5.3 Malaysia's Response to Human Rights in light of 'Asian' Values

In 1992, Asian leaders met for a Conference in Bangkok on human rights: the 'Bangkok Declaration'.³⁹⁰ The ostensible reason was to stand together before the Vienna World Conference a year later, to demonstrate their confrontation against the normative understanding of human rights. Malaysia is a popular proponent for Islam and Asian values. The Asian leaders, with Malaysian Prime Minister, Mahathir as one of the main proponents labelled their stance as 'Asian values' asserting that the uniqueness of the Asian community and way of life must be acknowledged.

Mahathir was the most influential Malaysian Prime Minister. He took office in 1981 and transformation occurred. He combined universalist/moderate Islam, developmental nationalism, market laissez-faire and mass appeal, and featured authority and order as more important than democracy.³⁹¹ Mahathir labelled human rights as a western model; hence human rights were not present in his agenda. He criticised the conspiracy of the west and stressed human rights were covering up for economic

³⁸⁷ Walter H Slote "Psychocultural Dynamics within the Confucian Family" in Walter H Slote and Georhe A DeVos (ed) *Confucianism and the Family* (State University of New York Press 1998) at 37.

³⁸⁸ Mindy Chen-Wishart, above n 288 at 15.

³⁸⁹ This matter is highlighted in chapter five and six, discussing the legal developments on property sharing in England and New Zealand.

³⁹⁰ The Bangkok Declaration 7 (26) 2 April 1993, republished in *Human Rights Law Journal* 14 (1993) at 370.

³⁹¹ Langlois, Anthony J *The Politics of Justice and Human Rights-Southeast Asia and Universalist Theory and International Relations* (Oxford University Press 2001) at 294.

protectionism and that the west was exploiting human rights in an attempt to neutralise the position of the emerging Asian Tiger-economies.³⁹²

According to him, values in the west and east are different and that the western-style democracy and human rights can lead to undisciplined behaviour that could hinder development and stability. Therefore, it is justified to remove civil liberties and fundamental freedoms to ensure the material need of the people.³⁹³

Malaysian human rights are embodied in the Federal Constitution. Article 5 stipulates that no person may be deprived of life and personal liberty except in accordance with the law. All persons are equal before the law and there shall be no discrimination on the ground of religion, race, descent, place of birth, or gender in any law.³⁹⁴

However, the right to life and personal liberty are not absolute and are subject to, among others, public order, morality, and security of the country.³⁹⁵ While upholding the universal principles of human rights, Malaysia claims to emphasise its human rights values, which take into account the history of the country as well as the religious, social, and cultural diversities of its communities. This is to guarantee that the respect for social harmony is conserved and protected. “The practices of human rights in Malaysia are argued to be a reflection of a wider Asian value system where welfare and collective well-being of the community are more significant compared to individual rights...”³⁹⁶ Notwithstanding that, according to Manan, the constitution of Malaysia is substantial in defining the human rights’ framework of the country despite having been amended more

³⁹² Hurrell, Andrew “Power, principles and prudence: protecting human rights in a deeply divided world” in Tim Dunne and Nicholas J. Wheeler (ed) *Human Rights in Global Politics* (Cambridge University Press 1999) at 296; Mauzy, Diane K and Barter, Shane J “Learning to Lose? Not if UMNO Can Help It” in Wong, Joseph and Friedman, Edward (ed) *Learning to Lose: Adapting Democracy to One-Party Dominant Systems* (Routledge Publishers 2008) at 224.

³⁹³ Ibid, Hurrell, Andrew at [361-362].

³⁹⁴ Malaysian Federal Constitution, art 8.

³⁹⁵ Ibid, art 10(2).

³⁹⁶ “*Malaysia-today*” (edited by Malaysia’s Raja Petra Kamaruddin) accessed on 24 November 2014 http://www.kln.gov.my/web/guest/md-human_right

than 40 times since independence.³⁹⁷ The Constitution is merely incorporated in order to allow the political party to stay in power. For example, the constitution prohibits speech that advocates the forcible overthrow of the government³⁹⁸ but the government could always undermine the opposition party to maintain their grip on political power.³⁹⁹

Despite Mahathir's objection to international human rights, the ability of Malaysia to reach consensus along with the other diverse Asian states was an accomplishment, when the 40 states signed the Bangkok Declaration.⁴⁰⁰ It could be argued that the opponents of universality succeeded in integrating the various historical, cultural, and religious backgrounds, and endorsing the missing universality in values. Subsequently, all states formally agreed on the importance of international standards and universality. Nevertheless, Amnesty International referred to the declaration as a step backwards for human rights.⁴⁰¹ The act to frame as 'Asian values' was an obstacle in the promotion of universality in the mid-1990s although it gave the Asian countries some bargaining power in the UN-system.

Malaysia's action to prioritise economic development is not wrong per se, but heavily restricting criticisms under the cover of stability and racial harmony is not what many would label as democracy.⁴⁰² Malaysians concerned with human rights issues and democracy hoped Mahathir's retirement would create changes. But according to Sani, his successors Badawi and Najib⁴⁰³ (the latter is the current Prime Minister) basically rule the

³⁹⁷ Manan, Wan A "A Nation in Distress: Human Rights, Authoritarianism and Asian Values in Malaysia" (1999) *Journal of Social Issues in South Asia (SOJOURN)* 14 (2) at 364: Until 2005, the Constitution has been amended 42 times.

³⁹⁸ Sani, Mohd Azizuddin Mohd "Free Speech in Malaysia: From Feudal and Colonial Periods to the Present" (2001) *The Commonwealth Journal of International Affairs* 100 at 416, 540.

³⁹⁹ *Ibid*, at 543.

⁴⁰⁰ Mauzy, Diane K and Barter, Shane J, above n 392, at [220-221].

⁴⁰¹ Smith, Rhona K.M "The Essentials of Human Rights" in Smith, Rhona K. M and Van der Anker Christien (ed) *Textbook on International Human Rights* (2nd ed Oxford University Press 2005) at 89.

⁴⁰² Hassan, Saliha and Lopez, Carolina "Human rights in Malaysia: Globalization, National Governance and Local Responses" in Francis Loh Kok Wah and Joakim Ojendal (ed) *Southeast Asian Responses to Globalization: Restructuring Governance and Deepening Democracy* (Nias press 2005) at [116-117].

⁴⁰³ Prime Minister Datuk Seri Najib signed ASEAN's first human rights declaration (AHRD) in 2012, officially committing to its first foreign convention to promote human rights.

same way as their predecessor.⁴⁰⁴ Accordingly, Andrew Hurrell associates Asian values and human rights with democracy and argues that it could be politically motivated more than a genuine description of particular values.⁴⁰⁵

Hurrell is correct in his assertion. The Malaysian political elite clearly advocates that universal values do not exist. This alleged concept of a specific Asian culture is a disguise for justifying their own state ideologies and maintaining political dominance.⁴⁰⁶ The claims made by proponents of Asian values that government autocracy enabled the economic boost is not substantiated. According to Langlois, “there is no conclusively established link between authoritarian government and development”.⁴⁰⁷ This matter contradicts Mahathir’s claim, but as Langlois argues “many authoritarian regimes have failed to develop and the outcome from the empirical data is that authoritarian government might be sufficient but it is not a necessity for economic development”.⁴⁰⁸

Malaysia’s political authoritarianism could not hinder the involvement of people in embracing and adopting the understanding of human rights’ principles. Malaysians are becoming more aware of their human rights and through the support of NGO’s these rights are being fought for.⁴⁰⁹ The Malaysian politicians have so far hidden the importance of human rights behind the wall and declared it as ‘Asian values’. The people are beginning to uncover those hidden human rights notions, and the universality of its application is not far away from being attained.⁴¹⁰ Malaysians are showing a preference

⁴⁰⁴ They have adopted the policies that restrict political freedom to officially ensure racial harmony and eliminate any threats to national security, while at the same time, enabling the government to retain power: Sani, Mohd Azizuddin Mohd, above n 398, at 541.

⁴⁰⁵ Even if the challenge is political rather than cultural or civilizational, it is still powerful, with serious implications for both the international human right regime and international efforts to promote democracy: Hurrell, Andrew, above n 392, at 297.

⁴⁰⁶ Langlois, Anthony J, above n 391, at 29.

⁴⁰⁷ Ibid, at 35.

⁴⁰⁸ Ibid, at [35-37].

⁴⁰⁹ Malaysian non-governmental organisations and businesses have earned a high level of trust among Malaysians, but the government and media do not fare so well, according to the survey conducted by Edelman Trust Barometer for Malaysia: Hemananthani Sivanandam “Malaysians trust NGOs, businesses more” *the Sun Daily* (1 February 2012) <<http://www.thesundaily.my/news/281997>>.

⁴¹⁰ Asian and International Human Rights Groups (136 Malaysian civil society groups) urge Malaysian government to end harassment against SUARAM, Malaysia’s human rights organization. SUARAM has been a target of harassment by the government through investigation, vilification and threats for alleged financial irregularities, non-registration as a society and receipt of foreign funds: “Asian and International

for international human rights theories. For example, they are even questioning the undemocratic electoral system. Recently, the people have demonstrated at 'Bersih'-rallies to demand for electoral reforms.⁴¹¹ This indicates that the electoral system is the most prominent institution to improve if Malaysia were to represent the Malaysian people, not just the Malaysian government. Accordingly, 'Asian values' is influenced by the country's political agenda and does not portray the people's interests.

The next question to consider is how would the majority regard giving rights to cohabitants? Would they accept the movement to provide legal rights for cohabitants, or vice-versa, oppose the idea for the religious reasons? How is one "to be sure that this indeed is the preference of the society as a whole?"⁴¹² Likewise, Michael Freeman asks 'whose good is the common good?' and notes that it is impossible to know whether or not the claim of a government to represent the values of its people is true unless the citizens have freedom to express their opinions.⁴¹³ Joseph Chan emphasises that it is impossible to know whether or not the claim of a government to represent the values of its people is true unless the citizens have freedom to express their opinions.⁴¹⁴ Unless individuals have a robust set of human rights, it is impossible to know what the values of the community actually are.⁴¹⁵ Subsequently, when cohabitants are given the freedom to express their view on cohabitation, provided with the rights associated to this courtship and protected by the principle of human rights, only then the real intention of the people could be seen on this topic.

Human Rights Groups Urge Government to End Harassment against SUARAM" Joint press Statement (17 September 2012) <<http://www.fidh.org/en/asia/malaysia/Asian-and-International-Human-12183>>.

⁴¹¹ Shamim Hin "Malaysia BERSIH 3.0 Rally 2012" *CNNireport* (29 April 2012) <<http://ireport.cnn.com/docs/DOC-782881>>.

⁴¹² Larry Diamond "Some democratic lessons in the Asian values debate" (paper presented to the 48th Annual Meeting of the Association for Asian Studies in Honolulu in April 1996 at [3-6]).

⁴¹³ Freeman, Michael, above n 349, at 357, 363.

⁴¹⁴ Chan, Joseph "The Asian challenge to universal human rights: a philosophical appraisal" James T.H. Tang (ed) *Human Rights and International Relations in the Asia-Pacific Region* (London: Printer 1995) at [36-37].

⁴¹⁵ Freeman, Michael, above n 349 at 357.

3.6 Conclusion

Principles of international human rights are consequential to international treaties and establish a fundamental and basic concept pertaining to human rights, namely that people have freedom of choice, everyone should be treated equally without discrimination, and so on.⁴¹⁶ The principles embodied in those treaties are the result of the experiences of structural injustice, specifically, civil wars, religious intolerance, arbitrary detentions, and other acts of state oppression that demonstrated the urgency of far reaching political and cultural reforms.⁴¹⁷ By comparison, the non-western societies, particularly the Muslim group apply basic Islamic principles, namely, from the al-Quran and 'Hadith' that also inspires human rights. Representatives of traditionalist or fundamentalist Islam typically claim that human rights have always been recognised in the Islamic Sharia, which, due to its divine origin, provides an absolute foundation for protecting the rights and duties of every human being.⁴¹⁸ Though the ethical and moral qualities outlined in Islam may be universal, however, the practice is affected by time and space. Through time it became clear that cultural, historical, and political contexts directly affected the individual status, despite the Quran's clear guidelines. Apart from Islamic values, international human rights are also challenged by the Asian values. These 'Asian values' were contended to be influenced by the country's political agenda and not to portray the people's genuine interests.

Although there are differences in the way westerners and non-westerners apply the understanding of human rights, nevertheless, both support the idea of upholding rights for people and treating them equally without discrimination. Moreover, cross-cultural arguments for the universality of human rights emulate the modernity and adaptability of Muslims to the concept of human rights. Besides that, Asians participation in the Conference in Bangkok and acceptance of several United Nations conventions reflects their adaptability to social needs and the desire to give attention to understandings of

⁴¹⁶ Universal Declaration of Human Rights, European Convention on Human Rights, United Nations Convention on the Elimination of All Forms of Discrimination against Women.

⁴¹⁷ Bielefeldt, Heiner "Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights" (2000) *Political Theory* 28 (1) at 101.

⁴¹⁸ *Ibid*, at 102.

human rights. Subsequently, there is a forum for inter-cultural debate and reform of the current law to accommodate the needs of the people while ascribing to international human rights' philosophies.

Finally, "cultures are dynamic, heterogeneous, stratified, overlapping, interactive and internally negotiated. The idea of universal human rights does not represent an attempt to impose a particular 'culture' on those who would prefer another, but rather a proposal for the rules under which people who pursue diverse goals in a complex, rapidly changing and highly interdependent world might hope to live in dignity and peace."⁴¹⁹ Further, by giving wide and modern interpretation to Islamic practises or Asian cultures, human rights' principles could be utilised in conjunction with Islamic and Asian values. In the context of cohabitants, while providing them with legal rights under the influence of international human rights' principles, particularly in applying the notion of equality, Islamic principles that correspondingly suggest an equality of treatment should be highlighted. Both western and non-western ideas should be assimilated to provide legal rights to cohabitants, particularly on their rights to relationship property.

⁴¹⁹ Freeman, Michael, above n 349, at 358.

Chapter 4: Law of Marriage and Cohabitation in Malaysia

4.1 Introduction

This chapter examines the division of property in relation to married couples and unmarried cohabitants within the Civil and Sharia legal systems of Malaysia. For non-Muslims, the Law Reform (Marriage and Divorce) Act 1976 (“LRA 1976”) applies to matrimonial matters. Couples adhering to the Islamic faith are governed by Sharia law in relation to matrimonial matters under the Islamic Family Law (Federal Territories) Act 1984 (“IFLFTA 1984”). This Act only applies to Muslims living in the Federal Territories of Kuala Lumpur.⁴²⁰ However, in relation to the law applicable to cohabiting partners, there is a fundamental lack of legislation. Similarly, there is a lack of literature pertaining to Malaysian law and the situation of unmarried cohabitants. Thus, this chapter aims to provide a scholarly contribution by providing analysis on this subject area.

This chapter further aims to address the similarities and differences between the laws between married couples (within the Sharia and Civil laws), and thereafter provide an analysis of the case law applicable to unmarried cohabitants within the Civil law. The trends and patterns of the judgments provided in cases of unmarried cohabitants, particularly in the division of property is presented here. Additionally, this chapter aims to demonstrate that the legislation applicable to married couples (both for Muslims and non-Muslims) is not drafted in a manner which allows easy export of principles and application thereof, into the complicated realm of unmarried cohabitants (as discussed in chapter three concerning the difficulties of adopting legislative measures in light of Malaysian values). As a result of this ‘uneasy’ transfer, cases involving unmarried cohabitants particularly those of non-Muslims are usually settled by way of application of

⁴²⁰ Muslims in other States are administered for their family law matters in accordance with the Family Law acts or enactments that applies within each states. The discussion on case law will look at other States in Malaysia to cover the wide Malaysian context.

equitable principles, through the establishment of a constructive trust which is also the remedy adopted by the English Courts (as discussed in chapter five).⁴²¹

4.2 Property Law and Rights in Malaysia

The basic concept of property rights could be defined as:⁴²²

A property right gives the owner of an asset the right to the use and benefit of the assets, the right to exclude others from them, and typically gives the owner the freedom to transfer these rights to others.

Oliver Wendell Holmes on the rights to ownership similarly stipulated that:⁴²³

They are substantially the same as possession. Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all and is accountable to no one but him.

Thus, property rights over an asset can be defined as a bundle of decision rights involving the asset (also called entitlement, in the legal literature), which provides rights to take certain actions (rights to access) and to prevent others from taking certain actions (rights of exclusion), including the right to take profit generated by the use of the asset.⁴²⁴

For the purposes of family or in a relationship context, property could be divided into relationship property (or matrimonial property) and separate property. The statutes in

⁴²¹ For Muslim cohabitants it is a criminal offence to live in an unmarried cohabiting relationship. The discussion in section on ‘Cohabitation among Muslims’ would enlighten this further.

⁴²² Ilya Segal and Michael D. Whinston “Property Rights” (7 August 2010) Webstanford.edu <<http://web.stanford.edu/~isegal/prights.pdf>> at 2.

⁴²³ Ilya Segan and Michael D. Whinston *Property Rights* in Robert Gibson and John Roberts (ed) *The Handbook of Organizational Economics* (Princeton University Press 2013) at 101; Holmes 1881 at 246, quoted in Grossman and Hart (1986) at 694.

⁴²⁴ Ilya Segal and Michael D. Whinston, above n 422.

Malaysia are silent on the definition of ‘matrimonial property’.⁴²⁵ Generally, the term ‘matrimonial property’ describes the property acquired during the subsistence of marriage.⁴²⁶ In the civil court case of *Ching Seng Woah v Lim Shook Lin*,⁴²⁷ Shankar J defines ‘matrimonial property’ as:

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

Based on the case above, the court gave a wide definition to the term ‘matrimonial property’. It indicates that any property acquired by both or either spouse during the marriage are considered as matrimonial property, in addition to the earning capacities of the spouses. The spouses’ paid income out of employment is also considered as matrimonial property.

Formerly, matrimonial property included houses and animals used to work the land and recently it has developed to include moveable and immoveable property, such as household goods and furnishings, in line with the lifestyle and the purchasing power of

⁴²⁵ Law Reform (Marriage and Divorce) Act 1976 and Islamic Family Law (Federal Territories) Act 1984.

⁴²⁶ In the old case of *Hujah Lijah binti Jamal v Fatimah binti Mad Diah* [1950] MLJ 63: Briggs J defined matrimonial property as the property acquired during the subsistence of marriage by husband and wife out of their resources or by their joint efforts. The acquisition may be extended to cover enhancement of value by reason of cultivation or development. In *Yang Chik Abdul Jamal* [1985] 6 JH 146, the learned Kadhi mentioned that matrimonial property is the property acquired during the marriage with both husband and wife contributing by their joint efforts or money to acquire the property. On the other hand, separate property acquired before the marriage is usually kept separate and the other spouse has no entitlement to the separate property. Section 76 (2) states that assets owned before the marriage by one of the parties, which has been substantially improved during the marriage, by the other party or by their joint efforts is considered as ‘matrimonial property’.

⁴²⁷ *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109.

society.⁴²⁸ It also incorporates joint bank accounts, compensation paid for land acquired by the government,⁴²⁹ shares registered in the name of either spouse,⁴³⁰ and business assets acquired during the subsistence of marriage.⁴³¹

For married couples, both the Sharia and Civil courts implement wide discretionary powers to divide the matrimonial property in the divorce petition. “The main test applied by both courts in deciding rights and proportion for divorced parties is the ‘contribution test’, whereby, if both parties contribute to the acquisition of the property, subsequently, each of the parties shall have rights over the property.”⁴³² For example, if a couple to a Muslim or non-Muslim marriage have made financial contributions in the acquisition of the matrimonial home, by way of half (½) share each and in the event of marriage breakdown, the court would probably divide the property in equal shares. In this matter, an equality of property division is apparent when both the spouses in the marriage relationship have made ‘financial contributions’ in the acquisition of the matrimonial property.

‘Financial contributions’ for the purposes of dividing the matrimonial property could be outlined as the contributions made by each party towards acquiring those assets, in the form of:

1. money;
2. property; or,
3. labour.⁴³³

⁴²⁸ Mimi Kamariah *Family Law in Malaysia* (Malayan Law Journal Kuala Lumpur 1996) at 366.

⁴²⁹ *Rokiah bte Haji Abdul Jalil v Mohammad Idris bin Shamsuddin* [1989] 3 MLJ ix; *Kamariah v Mansur* (1986) 6 JH 301.

⁴³⁰ *Noor Jahan bt. Abdul Wahab v Md Yusuff bin Amanshah* [1994] 1 MLJ 156.

⁴³¹ *Tengku Anum Zaharah v Dato’ Dr. Hussein* [1980] 3 JH 12.

⁴³² Zuhairah Ariff Abd Ghadas and Norlia Ibrahim “Business Assets as Matrimonial Property: Implication for Family Policy” in Zuhairah Ariff Abd Ghadas and Norlia Ibrahim (ed) *Contemporary Issues on Matrimonial Property* (International Islamic University Malaysia (IIUM) Press 2011) at 141.

⁴³³ This is extracted from Law Reform (Marriage and Divorce) Act LRA 1976, s 76(1) and Islamic Family Law (Federal Territories) Act 1984, s 122(1).

The term ‘money’ implies the direct financial contribution in purchasing the matrimonial home. For illustration, if each party to a marriage contributes 50 per cent to the total amount of the house purchase price (matrimonial home), then both have clearly made direct financial contributions. Second, the term ‘property’ implies the income generated from any property belonging to either partner, as in the form of rent, or proceeds out of the sale of the property, which is then used towards acquiring matrimonial assets. Third, ‘labour’, includes the income from paid employment, which is then used to buy the matrimonial property. The work contributed to developing agricultural lands is also considered as ‘labour’. Hereafter, ‘financial contribution’ includes contributions in the form of money, property and/or labour.

Whilst the LRA 1976 and IFLFT 1984 protect the rights of married couples to property division, unmarried cohabitants by contrast are subject to the equitable principles of constructive trusts. The relationship property is divided between the parties in accordance to their financial contributions to the acquisition of the relationship property. The parties who do not make any financial contribution in the acquisition of the property generally possess no legal rights to property entitlements. Hence, non-financial contributions are not taken into consideration in dividing the property of unmarried cohabitants.

In order to illustrate how married couples and unmarried cohabitants are treated differently in Malaysia, this chapter offers a fictional example⁴³⁴ by way of illustration that will take into account both the Sharia and Civil jurisdictions. Thus, a man, Daniel, and a woman, Sara, have committed to marriage or a cohabiting relationship for about five years. At the beginning of their relationship, they were renting a house. Daniel and Sara were working, and both have paid for the house rent. Later, after a year of living together, they bought a house under Daniel’s name as he applied for the bank mortgage. The house price was \$250,000.00. Daniel has been paying the bank mortgage. Nonetheless, Sara contributed ten per cent of the house purchase price, which was about

⁴³⁴ This example is different to the fictional scenario given in chapter two. The example situation in chapter two discusses the functionality of cohabitants in their relationship. The fictional example in this chapter four analyses the laws relating to property division of married couples and unmarried partners.

\$25,000.00. In the course of the relationship, they had a child after about three years of living together. Due to the responsibility of caring for the child, Sara had to quit her job and became a homemaker. This couple were performing the same functions as in the married family. After living with each other for about five years, they had some conflict and decided to break up. In such a situation, the following shall examine the laws applicable in Malaysia, specifically within the Sharia and Civil jurisdictions should they have been married or remained as unmarried cohabitants. This chapter aims to answer the following questions:

1. How is matrimonial property divided among married Muslims, married non-Muslims and customarily married non-Muslims? Whether there are any similarities and/or differences within the laws applicable for these unions;
2. How is the relationship property divided among the Muslim cohabitants, non-Muslim cohabitants and inter-religious cohabiting partners;
3. Whether the functionality of cohabitants is recognised within the Malaysian case law;
4. Whether the property division is based on the principle of equality; and
5. Whether there is equality between the relationships, primarily between marriage and unmarried cohabitation.

When it comes to property divisions among the married couples, be it (1) married Muslims, (2) married non-Muslims and (3) customarily married non-Muslims, the laws within both the Sharia and Civil jurisdictions are similar. However, the relationship property divisions differ among the (1) Muslim cohabitants, (2) non-Muslim cohabitants and/or (3) inter-religious couples (specifically when it involves a Muslim partner with a non-Muslim partner). Further, cohabitants' functionality are recognised within the Civil jurisdictions, subject to the court's wide discretion, however cohabitants are not recognised within the Sharia court.

4.3 Property Divisions for Married Couples and Unmarried Cohabitants

4.3.1 Matrimonial Property Division for Married Couples

This section examines the position of married couples in relation to matrimonial property rights, firstly, addressing property divisions among Muslims. Generally, the IFLFTA 1984 applies to Muslims living in the territories of Kuala Lumpur. Thereafter, the legal position of non-Muslim married couples is addressed and the related legislation, the LRA 1976. Thirdly, this section examines the property divisions for non-Muslim couples who are customarily married, but failed to legalise the marriage under the LRA 1976. These three different categories will then be applied to the case example of Daniel and Sara in order to illustrate the varied outcomes.

*The Legislation*⁴³⁵

Section 122

(1) The Court shall have power, when permitting the pronouncement of talaq⁴³⁶ or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1), the Court shall have regard to—

- (a) the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets;*
- (b) any debts owing by either party that were contracted for their joint benefit;*
- (c) the needs of the minor children, of the marriage, if any,*

⁴³⁵ Islamic Family Law (Federal Territories) Act 1984 (IFLFTA), s 122 and Law Reform (Marriage & Divorce) Act 1976 (LRA), s 76. Both the Act provides the same wording for the provisions relating to matrimonial property divisions of married couples. Section 58 of the IFLFTA and 76 of the LRA are also provided in the appendices. This is the actual wording within the legislation.

⁴³⁶ 'Talaq' is defined as divorce.

and, subject to those considerations, the Court shall incline towards equality of division.

(3) The Court shall have power, when permitting the pronouncement of talaq or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3), the Court shall have regard to—
(a) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;
(b) the needs of the minor children of the marriage, if any,

and, subject to those considerations, the Court may divide the assets or the proceeds of sale in such proportions as the Court thinks reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

I. Married Muslims

There are several cases decided in the Malaysian Sharia courts that demonstrate the division of matrimonial property by way of:

- (1) Half ($\frac{1}{2}$) to each spouse (both spouses receive an equal share of the total value of the matrimonial property); or
- (2) Two-thirds ($\frac{2}{3}$) to one of the spouses, while the other spouse receives one-third ($\frac{1}{3}$).

The “contributions”, whether to the matrimonial property and/or to the relationship plays an important role in the division of the matrimonial property. Generally, for the first category, the couple who have made financial contribution, (by way of money, property and/or labour) to the acquisition of the matrimonial property receives an equal share (each spouse receives half of the share to the property). In comparison (the second category), in cases where only one of the spouses made financial contribution to the acquisition of the matrimonial property, he or she receives two-third (2/3) of the share and the remaining one-third (1/3) of the share is given to the spouse who has not made any financial contribution but who has however contributed to the welfare of the family such as by looking after the home and caring for the family.

The broad provisions in the applicable Acts support the court’s extensive flexibility.⁴³⁷ The related provisions in these Acts assure the court’s power to consider the financial contributions of spouses within the marriage relationship. In this matter, the court shall take into account the ‘extent’ of contributions made by each party (in the form of money, property and/or labour) towards acquiring the matrimonial property, and subject to those considerations, the court shall incline towards an equality of division.⁴³⁸ Concerning this matter, the court has an extensive power to determine (1) what could be accepted as contributions or the ‘extent’ of contributions, and (2) whether the court’s orders reflect the principle of equality in the property divisions. The wide wording provided within the Acts resulted in a variety of decisions from the courts. Although the Acts⁴³⁹ mention that greater share is to be afforded to the party who has made greater contributions, the court seems to give little weight to these contributions. Therefore, it is very difficult to discern any definite patterns based on the courts’ decisions. The courts’ wide discretion on property division orders is evident within the case law discussed in the following.

⁴³⁷ Islamic Family Law (Federal Territories) Act 1984 (IFLFTA), s 122 and Law Reform (Marriage & Divorce) Act 1976 (LRA), s 76.

⁴³⁸ Law Reform (Marriage and Divorce) Act 1976, s 76(2) and Islamic Family Law (Federal Territories) Act 1984, s 122(2).

⁴³⁹ Ibid.

In the Sharia court case of *Noraini binti Mokhtar lwn Abd. Halim bin Samat*,⁴⁴⁰ the appellant and respondent were married in 1984, and divorced in 2002. Within 18 years of marriage, they had six children. They also bought properties, which the appellant was claiming for equal shares. The details of the properties are as following:

1. A two-storey bungalow, worth of RM 150,000.00;
2. A land at Lot No. 727 Mukim Langgar, Jalan Long Yunus, Kota Bharu, worth of RM 80,000.00; and,
3. A land at Lot No. 4929 Mukim Pasir Genda, Tanah Merah, (she was claiming for 2/3 of the section worth of RM 20,000).

The overall property claim was for RM 250,000.00. There were three witnesses in the case. First, the appellant's father who explained that the first property claimed (the two-storey bungalow) was actually built as a house for him. Later, he decided to sell it to the daughter (the appellant). The second witness was the contractor who built the house, while the third witnesses were the appellant's siblings who had contributed in building the house, for example, fixing the floor mosaics and bathroom fittings. All the witnesses claimed that it was the appellant who arranged and organised every matter related to building the house.

The respondent agreed that the appellant wife had paid the balance debt of the house to her father. He also acknowledged that, while the appellant was working as a clerk in the government department, she was also doing some business, such as selling clothes and kitchen appliances. He agreed that the appellant had made financial contributions in the acquisition of all the property mentioned above.

The Appeal Court decided that all three properties were bought during the course of the marriage relationship. The appellant made financial contributions in the acquisition of all the property claimed for, although it was not in equal value as of the respondent's

⁴⁴⁰ *Noraini binti Mokhtar lwn Abd. Halim bin Samat* Jilid 18 Bahagian 2 Jurnal Hukum 2004 at 303-313.

financial contributions. Therefore, the three properties were to be divided equally between the appellant and respondent, by half (1/2) share each.

In the second Sharia case of *Sabaria binti Md Tan lwn Busu bin Md Tan*,⁴⁴¹ the defendant owned lands under the 'Felda' scheme (the Federal Land Development Authority was established to handle the resettlement of rural poor people of Malay origin into newly developed areas to organise small holder farms growing cash crops). The plaintiff in this case claimed for shares in:

1. A land at Lot No. 6132, No. 78, Block 4, FELDA Jelai 3, Gemas, Negeri Sembilan;
2. Two farming lands at Lot 1124 and Lot 1125, Mukim Gemas, Negeri Sembilan;
3. The income from those lands; and,
4. Income from the fund for living expenses given by Felda to the defendant.

The court recognised the plaintiff's contributions to the married relationship. She had contributed in the farms, (worked to grow crops) since the couple owned it from the beginning of the marriage. Moreover, one of the requirements to be eligible for a business opportunity under the Felda scheme is for the applicant to be married. Without a marriage relationship between the parties, they would not have qualified for the Felda programme. In considering these matters, the court held that the plaintiff should receive a half (½) share of all the property claimed for.

In the two cases discussed above, the courts granted equal share to both spouses. The courts achieved this consensus due to the clear presence of direct contributions to the property. The first case engages a direct financial contribution; whereby, the appellant bought the house from her father, and which she paid by herself. For the other properties, it was proved that she has made financial contributions in the acquisition of those properties. The court did not require equal monetary contribution by both spouses in the acquisition of the matrimonial properties. In a situation of unequal financial

⁴⁴¹ *Sabaria binti Md Tan lwn Busu bin Md Tan* Jilid 27 Bahagian 2 Jurnal Hukum 2009 at 303.

contributions, for example, where the husband and wife contribute in different amounts, the court could still give equal weight to their financial contribution. Since both the spouses made direct financial contribution in any percentage, the court decided that both parties should receive an equal share of the matrimonial property. For married couples, the presumption is that the couple intended to share the interest in the property equally irrespective of the different monetary contributions that each made to the purchase price.

In the second case, the plaintiff contributed by doing agricultural work on the land. Although there is an absence of contribution, in the form of ‘money’ however, she made direct contributions in developing the land by way of labour. In this case, both the plaintiff and the defendant did not acquire the property by any financial means. They were given the ownership of the property by FELDA scheme, for which they developed the agricultural land by both their joint efforts (contributions as in the form of labour). The existence of a marriage is a pre-condition to be eligible into the programme. Both the plaintiff and defendant developed the land equally and subsequently; the court decided that the land should be divided equally between the couple.

To summarise, the courts in both of these cases recognised the contribution of spouses towards the matrimonial property, and thus, granted equal rights in the divisions of those properties. This matter is consistent with the IFLFTA 1984, which stipulates that the court shall have regard to the extent of contributions made by each party towards acquiring matrimonial assets, by way of their financial contributions, specifically, money, property or labour, and subject to those considerations, the court shall incline towards an equality of division.⁴⁴² In the first case, the plaintiff and defendant made direct financial contributions in acquiring those matrimonial properties. In the second case, the court considered the contribution, as in the work/labour of developing lands/farms, which has economic value. In the presence of financial contribution, the courts, in corresponding to the IFLFTA 1984 have granted equal rights to the married spouses over their matrimonial properties.

⁴⁴² Islamic Family Law (Federal Territories) Act 1984, s 122(2).

However, the cases discussed in the following section demonstrates that one of the parties to the marriage receives two-third (2/3) of the shares, while the other spouse receives one-third (1/3). The differences in the division of shares are because the party who solely made financial contributions in the acquisition of the property receives a greater share than the other party who only contributes in the home-making and child rearing. The latter receives a smaller division of the property due to the absence of any financial contribution.

In the case of *Normah binti Muda v Daud bin Awang Min*,⁴⁴³ the plaintiff was a housewife, while the defendant husband was an Inspector of Police. They divorced in 2009 and the plaintiff claimed for equal shares in the matrimonial property. The following were the properties contested for:

1. GM 5043, No. Lot 7049, Mukim Hulu Telemung, Hulu Terengganu;
2. GM 1897, No. Lot 2243, Mukim Gelugur Kedai, Kuala Terengganu;
3. GM 358, No. Lot 2113, Mukim Gelugur Kedai, Kuala Terengganu; and,
4. PM 1567, No. Lot 15250, Mukim Kuala Nerus, Kuala Terengganu and a house built on this land.

In the present case, the plaintiff and defendant were married in 1984 and divorced in 2009. They had five children from the marriage. At the beginning of the marriage, the plaintiff was a housewife and the defendant was a Police Constable for about five years. They lived at Simpang Renggam, in the state of Johor. Later, the defendant was promoted to be a 'Lance Corporal'. Then, the plaintiff and defendant moved to Gong Badok, in the state of Terengganu and the defendant was involved in the 'Special Forces Unit'. They lived there for about 14 years and the defendant was then promoted as a 'Corporal'.

In 2006, the defendant was promoted as a 'Sergeant' and transferred to Brigade Kuantan, in the state of Pahang. Then, from 2007 to 2008, the defendant joined the

⁴⁴³ *Normah binti Muda v Daud bin Awang Min* Case No 11100-017-0449-2009 Sharia High Court of Kuala Terengganu.

police-training course and was promoted as the Inspector of Police. During all the placements and transfers, the plaintiff has been moving and following the defendant.

The discussion below examines the plaintiff's claim for equal shares in the matrimonial properties.

1. GM 5043, No. Lot 7049, Mukim Hulu Telemung, Hulu Terengganu;

The land was bought in 1999 for the price of RM 6,000.00, by selling eight cattle and a van. This land was registered under the defendant's name. It was bought in the course of the marriage relationship. The plaintiff claimed that the van (which the defendant sold to buy the land) was previously used to do her business. The plaintiff carried out a business by selling food around the housing area, for which she was driving the van for the purpose of business. The plaintiff's business earned extra income for the family.

The court accepted that the land was bought during the marriage and it should be considered as a matrimonial property. However, the court found that the plaintiff did not financially contribute to the acquisition of either property. She merely contributed to earn extra income for the family by running a food business. The court ordered 1/3 of the property to the plaintiff.

2. GM 1897, No. Lot 2243, Mukim Gelugur Kedai, Kuala Terengganu;

The defendant claimed that this land was acquired during the subsistence of the marriage relationship. However, it was a gift by the defendant's father to him. The father who appeared before the court supported this statement. The court found that this land was not a matrimonial property and there was no evidence that either plaintiff or defendant developed this land further during the marriage relationship. The court decided that the plaintiff had no share over this property.

3. GM 358, No. Lot 2113, Mukim Gelugur Kedai, Kuala Terengganu;

The defendant bought this land with a financial loan and paid from 1999 to 2006. Although the land was bought during the marriage courtship, the court found that the plaintiff did not financially contribute to the ownership of the land. However, the court acknowledged that the plaintiff made other non-financial contributions to the relationship; for example, the plaintiff raised four children and sold food (as extra income) to support the family. Thus, the court ordered 1/3 of the land to the plaintiff.

4. Land PM 1567, Lot 15250, Mukim Kuala Nerus, Kuala Terengganu and a house built on the land;

The house that was built on this land was the matrimonial home and the plaintiff and the children were still living in the house at the time of the court hearing. The house was registered under the defendant's name. Similarly, the court noted that the plaintiff did not make any financial contribution in the acquisition of the land or the house built on it, although she made non-financial contribution, such as home-making and child rearing. The court ordered 1/3 of the land to plaintiff and the defendant receives 2/3.

The court held that among the four properties claimed by the plaintiff, three were considered as matrimonial property ((1), (3) and (4)), while the other property (2) was a gift by the defendant's father to the defendant. The court addressed plaintiff's non-financial contributions to the relationship, as the following:

1. Plaintiff was earning extra income by way of her catering business.⁴⁴⁴
2. The patience of plaintiff in regularly relocating (following the defendant).
3. The sacrifices made in the care of and education of the children at home.⁴⁴⁵

⁴⁴⁴ In a different case of *Boto Binti Taha lwn. Jaafar bin Muhammad* (1985) 2 MLJ 98, the court ordered 1/3 of the property to the plaintiff wife, in recognising her contribution to engage in a business selling fish at the market.

⁴⁴⁵ In the case of *Rokiah Bt Haji Abdul Jalil lwn Mohamed Idris Shamsudin* (1990) JH 111, the court held that the wife should be able to receive shares on the basis of home making, which allows the husband to go

In taking into consideration the non-financial contributions above, the court ordered that the three properties, which were considered as matrimonial property to be divided so that the plaintiff received one third (1/3), and the defendant two-thirds (2/3).

Section 122 (4) of the IFLFT 1984 mentions that the court has the power to make an order whilst having regard to the extent of contributions made by the party who did not acquire the assets, but contributed to the welfare of the family by looking after the home and caring for the family. The Act does not guide the court in quantifying the 'extent' of the contributions of the spouses. It only stipulates that the property is to be divided, having regard to the welfare undertakings of looking after the family and home. It also states that the court may divide the assets or the proceeds of the sale in the proportions as the court thinks reasonable, but in any case, the party through whose efforts the assets were acquired shall receive a greater proportion than the party who did not make any financial contribution. The term 'greater' is wide in context and the court has all the power to determine and quantify how much of property sharing is 'greater'. However, in the present case, the 1/3 and 2/3 property divisions ordered by the court were basically at its discretion, since the Act does not specify the exact way to divide the shares of the matrimonial property although there are other cases with 1/4 and 3/4 property divisions.⁴⁴⁶

In the Sharia case of *Zaiton Aziz lwn. Mohd Sidek Mohd Sarjan*,⁴⁴⁷ the plaintiff and defendant were married in 1983 and divorced in early 2007. They had seven children in the relationship. They also bought a house under the defendant's name. The court in this case decided that the plaintiff and their seven children would be able to continue staying at the matrimonial home (the defendant agreed to this).⁴⁴⁸ However, if the parties

out and work. Similar decision was made in *Haminahbe lwn Samsudin* (1979) 1 JH (2) 71 and *Tengku Anum Zaharah lwn Dato' Dr. Hussein* (1980) 3 JH 125.

⁴⁴⁶ For example, in the case of *Sidek bin Haji Awang lwn Halimah binti Musa* Jilid 12 Bahagian II No Artikel 91989, the appellant was not satisfied with the Sharia court order that only granted her a 1/4 share out of the land claimed for, while the respondent received 3/4 share. Upon appeal, the Sharia Appeal court ordered the appellant a 1/3 and the respondent husband, the balance 2/3.

⁴⁴⁷ *Zaiton Aziz lwn. Mohd Sidek Mohd Sarjan* Case No 005100-017-0122-2007.

⁴⁴⁸ It is conducted by way of 'sulh', which means an agreement entered into, by the couples, to resolve dispute or conflict between parties who are Muslims. It is called 'mediation' in the civil courts.

were to sell and share the profit of the property, the plaintiff would receive 40 per cent and the defendant would receive 60 per cent. The court did not explain the basis of dividing the property using the 60/40 divisions. This could be for the reason that the defendant would receive a greater share because the property was acquired by his sole financial contribution. The plaintiff on the other hand, did not make any financial contribution in the acquisition of the property, but only made non-financial contributions, such as taking care of the family and children. Hence, the court only granted her a 40 per cent share of the matrimonial home.

*Norhayati binti Yusoff lwn Ahmad Shah bin Ahmad Tabrani*⁴⁴⁹ was a Sharia appeal case in the state of Kelantan Appeal Court. The appellant was not satisfied with the Kota Bharu High Court decision that only granted one-fourth ($\frac{1}{4}$) of the share of the property to the appellant. The Sharia appeal court took into consideration that although the appellant did not financially contribute to the acquisition of the property, however she contributed in the home making, which allowed the architect husband to develop his career without needing to concentrate on household matters. Therefore, instead of the one-fourth ($\frac{1}{4}$) share division, the appeal court granted one-third ($\frac{1}{3}$) of the property to the appellant.

It is apparent that the Sharia courts for Muslims have wide discretion in dividing matrimonial property. It can be summarised that matrimonial property will be divided equally in cases where the parties to the marriage have both made financial contributions in the acquisition of the matrimonial property, in the form of money, property and/or labour.⁴⁵⁰ This financial contribution does not have to be equal in amount, between the spouses. For example, even if a spouse contributes 90 per cent of the property purchase price, and the other spouse contributes a ten per cent, the court could order equal division of the matrimonial property. Notwithstanding that, the court has a wide discretionary power to order otherwise.

⁴⁴⁹ *Norhayati binti Yusoff lwn Ahmad Shah bin Ahmad Tabrani* Jilid 26 Bahagian 1 Jurnal Hukum 2008 at 33.

⁴⁵⁰ *Noraini binti Mokhtar lwn Abd. Halim bin Samat* Jilid 18 Bahagian 2 Jurnal Hukum 2004 at 303.

By contrast, in situations where the matrimonial property was acquired by the sole effort of one of the parties to the marriage, an equality of division is not apparent. Although the Sharia court recognises non-monetary contributions of the spouses, for example, the welfare of looking after the home and family and the needs of the children, nevertheless, this non-financial contribution of married spouses to their relationship is not given equal weight in comparison to monetary contribution. The former mostly receives a one-third (1/3) share of the property.⁴⁵¹ Therefore, it could be noted that the party who has contributed more on the financial perspective (the money, property and labour) possess more rights over the property entitlements, in comparison to the party who has not made any financial contribution.⁴⁵²

If Daniel and Sara were a married Muslim couple, living in Malaysia, Sara would be entitled to an equal share of the matrimonial property (refer to page 134 for the facts of the scenario). This is because she has made direct financial contributions to the acquisition of the property. She contributed ten per cent of the house purchase price as the down payment. Although, only ten per cent, and clearly Daniel contributed more in the financial perspective, the Malaysian Sharia court is able to give equal importance to both their unequal monetary contributions. Subsequently, an equal division of the matrimonial property could be anticipated.⁴⁵³ However, the wide term available in the Act specifically on the 'extent' of contributions' could be given different interpretations by the courts and the result of the property divisions could vary from cases to cases. As a consequence, the division of property would largely depend on the court's discretion

⁴⁵¹ *Normah binti Muda v Daud bin Awang* Min Case No 11100-017-0449-2009 Sharia High Court of Kuala Terengganu, *Zaiton Aziz lwn Mohd Sidek Mohd Sarjan* Case No 005100-017-0122-2007, *Norhayati Yusoff lwn Ahmad Shah bin Ahmad Tabrani* Jilid 26 Bahagian 1 Jurnal Hukum 2008 at 33.

⁴⁵² Notwithstanding that, it does not render an equal sharing entitlement of the matrimonial property: Islamic Family Law (Federal Territories) Act 1984, s 122(4).

⁴⁵³ Islamic Family Law (Federal Territories) Act 1984, s 58(1): The court shall have the power to order the division, between the parties, of any assets acquired by them during the marriage relationship, by their joint efforts. The court shall have regard to the extent of contributions made by each party in the acquisition of the property, and subject to those considerations, the court shall incline towards an equality of division. This principle is apparent in the cases decided in the Sharia courts for married Muslim couples who contest for their rights over matrimonial property: *Noraini binti Mokhtar lwn Abd. Halim bin Samat* Jilid 18 Bahagian 2 Jurnal Hukum 2004 at 303; *Sabaria binti Md Tan lwn Busu bin Md Tan* Jilid 27 Bahagian 2 Jurnal Hukum 2009 at 303.

since the Act does not clearly stipulate the necessary ways to quantifying the ‘extent’ of the contributions.

II. Married non-Muslims

The following examines the legal position of non-Muslims under the Civil law legislation of the LRA 1976. The cases decided in the Civil courts on the matters of matrimonial property are analysed below.

In the first example case of *Murli a/l Naraindas v Sajni Bai a/p Bulchand*,⁴⁵⁴ the petitioner husband and respondent wife were married in 1993, but had been living apart since March, 2008. The proceedings were concerned with the issue of custody of the children, maintenance for the respondent and children and the divisions of the matrimonial home and other assets of both the petitioner and respondent.

1. Matrimonial home: No 7, Western Gardens, 10450 Penang.

The petitioner and respondent lived in this property, prior to their separation. The value of the property was RM2,000,000.00 at the time of the court hearing. It was purchased for RM800,000.00 in year 2004. The petitioner had paid a total deposit of RM80,000.00 and also spent a further RM400,000.00 to renovate the matrimonial home. The home was under the joint names of both the petitioner and respondent.

The petitioner argued that the respondent was not entitled to an equal share of the matrimonial home because she never contributed directly towards the purchase, renovation and instalments of the home (lack of monetary contributions).

There was another matrimonial property, the ‘La Vilas Condominium’ (The Gombak property), which was under their joint names and sold for RM150,000. The petitioner agreed that he did not give any share from the proceeds of the sale to the

⁴⁵⁴ *Murli a/l Naraindas v Sajni Bai a/p Bulchand* [2012] 9 MLJ 10.

respondent although he agreed that they pooled their resources during their relationship. The petitioner, after selling the Gombak property, purchased another, which is called the 'Tamarind'. This property was bought with part of the proceeds from the sale of the Gombak property.

The court held that the respondent should not be denied her half share in the matrimonial property (the matrimonial home in Western Gardens), which was in their joint names. Hence, she was entitled to the half value of the property. Further, the respondent as the mother has no other property or source of income comparable to the petitioner. The court also found that since the respondent had contributed to the running of the home and the caring of the two children, she was entitled to her half share of the matrimonial home. This decision is comparable to Sharia court's decision that merely ordered 1/3 division for non-financial contributing spouse.⁴⁵⁵

2. Other matrimonial assets

(i) Petitioner's Employment Provident Fund (EPF):⁴⁵⁶

Counsel submitted that the respondent was also entitled to a part of the EPF contribution, as this should be considered as matrimonial property. The respondent claimed for 1/3 of the total sums. In the case of *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor*,⁴⁵⁷ it was decided that the EPF formed part of the matrimonial assets of the parties and therefore, would also attract the operation of sections 76 (3)⁴⁵⁸ and 76 (4)⁴⁵⁹ of the LRA 1976, and the party who acquired the assets should receive a major share.

⁴⁵⁵ *Normah binti Muda v Daud bin Awang Min* Case No 11100-017-0449-2009 Sharia High Court of Kuala Terengganu, *Zaiton Aziz lwn Mohd Sidek Mohd Sarjan* Case No 005100-017-0122-2007, *Norhayati Yusoff lwn Ahmad Shah bin Ahmad Tabrani* Jurnal Hukum 2008.

⁴⁵⁶ Employer Provident Fund (EPF) is a compulsory savings scheme in Malaysia. It provides a measure of security for old age retirement to its members, encourages supplementary benefits to members to utilise part of the savings for house ownership and other withdrawal schemes, such as for children's education.

⁴⁵⁷ *Shudesh Kumar a/l Moti Ram v Kamlesh a/p Mangal Sain Kapoor* [2005] 5 MLJ 82.

⁴⁵⁸ The court shall have the power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of the sale.

In the present case, the court mentioned that the EPF was solely the contribution of the petitioner. The respondent on the other hand, did not make any direct contributions to the accumulation of the amount in the EPF account. Having considered this matter, the respondent was entitled to one-fourth ($\frac{1}{4}$) of the amount in the petitioner's EPF as at the date of this order. The LRA 1976 generally mentions that the party who made financial contribution receives a greater share than the other spouse who only contributed for the welfare of the family (no financial contribution) in that particular matrimonial property.⁴⁶⁰ In applying the wide provision, the court decided $\frac{1}{4}$ of the share should be given to the respondent. However, the court did not mention the reason for choosing $\frac{1}{4}$ as the appropriate division and not $\frac{1}{3}$ division.

(ii) Shareholding in BN Lakhwani Sdn Bhd:

The court made no order on the issue involving the respondent's shareholding or other rights and entitlements in BN Lakhwani Sdn Bhd because these were matters under the purview of companies law and enforceable by way of civil remedy.

(iii) The contents in the safe deposit box:

Both the petitioner and respondent testified that the contents in the safe deposit box were gold bullion, jewellery and watches given to them as wedding gifts and/or dowry during marriage and that the parties have equal rights over those gifts. There were also 'Gold Kijang' coins worth about RM 5,000 at the time of purchase. Having considered these matters, the court decided that the items of monetary value in the safe deposit were to be divided equally between the petitioner and respondent. This could be for the reason that both the parties did not acquire the items by their financial efforts, but merely received as gifts, for which both have equal rights.

⁴⁵⁹ In exercising this power, the court shall have regard to the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family; the needs of the minor children, if any, of the marriage, and subject to those considerations, the court may divide the assets or the proceeds of the sale in such proportions as the court thinks reasonable, but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

⁴⁶⁰ Law Reform (Marriage & Divorce) Act 1976, s 76(4).

To summarise, the court awarded the matrimonial home in equal shares to both the parties. Although the wife did not make any financial contribution in the matrimonial property, however, the court considering: (1) their joint names in the title of the property and (2) the needs of the children, has granted her an equal share of the matrimonial home. For the share on the EPF, the court ordered $\frac{1}{4}$ of the amount to be shared with the respondent based on the petitioner's sole contribution. The contents in the safe deposit box were to be divided equally between the couple.

*Lim Chee Beng v Christopher Lee Joo Peng*⁴⁶¹ is a case on divorce petition. The petitioner applied for an order under Section 76 of the LRA 1976 that the respondent transfer his half undivided share of the matrimonial home to the petitioner. The respondent purchased the property in December 1973 for a total purchase price of RM47,000.00. On February 1975, the name of the petitioner was included as the co-owner. In addition to the initial down payment and the monthly instalments totalling RM55,603.86, the respondent also expended a sum of RM20,458.98 on legal fees, assessments, fixtures and improvements and assorted movables.

Since 1980, the petitioner paid the quit rents⁴⁶² and assessment on the property and in August 1990, she expended a sum of RM47,094.96 towards the redemption of the property following action by peninsula Mortgage Bhd to auction off the property. The petitioner also maintained that she had paid certain mortgage instalments in cash on the property, covered by ten receipts in the petitioner's custody. The receipts were in the name of the respondent. Notwithstanding that, the respondent testified that all the said instalments were paid from his own funds and resources (and not by the petitioner). The respondent argued that the property should be sold and the proceeds of the sale to be divided with 70 per cent for the respondent and the balance 30 per cent to the petitioner. The petitioner together with the child of the marriage had been in the sole occupation of the property since 1977, however the child of the marriage is no longer a minor.

⁴⁶¹ *Lim Chee Beng v Christopher Lee Joo Peng* [1997] 4 MLJ 35.

⁴⁶² It is a form of land tax collected by the Malaysian State Governments and the amount varies from state to state and within each state. This local tax is levied on all landed properties and is payable annually: "Land tax" Gov.my accessed on 15 March 2015 <<http://www.pdtjasin.gov.my/en/online-services/e-calculator/computation-of-yearly-land-tax-rate.html>>.

The court ordered the property to be divided equally between the petitioner and respondent, with a 50/50 share to each party. It is clear that both the parties had made financial contributions to the property and both have their joint names over the property. The plaintiff and defendant did not make equal financial contribution, but both have made financial contribution in different sums. The court gave equal weight to their financial contribution and successively ordered equal division of 50/50 division to each spouse. Similar to the application within the Sharia jurisdiction, there is a presumption that the couple intended to share the interest in the property, irrespective of the contributions that each had made to the purchase price. In comparison to this case, the following case demonstrates that the property contested for was acquired by the sole effort of one of the parties to the marriage. Subsequently, the court did not order for an equal division of the matrimonial property.

In the case of *Ng Bee Lee v Liew Kam Cheong*,⁴⁶³ Faiza Tamby Chik J had granted a decree nisi after hearing the divorce petition in this case. The decree nisi, *inter alia*, ordered that:

- (1) The matrimonial home at Taman Tiara Kemensah (the Kemensah property) be held on trust by the appellant (wife) and respondent (husband) for both their children until they attained the age of 21 years; and,
- (2) The medical expenses of the appellant borne by the respondent upon being furnished with proof of payment.

Upon appeal by the respondent, the Court of Appeal ordered that the issues pertaining to the Kemensah property be remitted to the High Court for rehearing. The appellant claimed that the Kemensah property was given to her as a matrimonial home to enable her to live there with her children.

⁴⁶³ *Ng Bee Lee v Liew Kam Cheong* [2010] 6 MLJ 858.

Allowing the appeal, the court held that the Kemensah property was a matrimonial asset as it was acquired during the marriage of the parties. Since the property was acquired by the respondent's sole effort, the relevant provision was section 76(3) of the LRA.⁴⁶⁴ In exercising the court's power to divide the matrimonial asset, the court applied section 76(4) of the LRA where it is mandatory for the court to have regard to:

- (a) the extent of the contributions made by the other party who did not acquire the assets, but contributed to the welfare of the family by looking after the home or caring for the family; and,
- (b) the needs of the minor children, if any, of the marriage.

Since the two children of the marriage were no longer minor children, section 76(4)(b) was not relevant.

Based on the facts, the court decided that a just division of the Kemensah property was 65 per cent, and thus it should be given to the respondent because he had contributed to nearly the entire purchase price of the property. The appellant looked after the home and cared for the family as a fulltime housewife and therefore, was entitled to 35 per cent of the Kemensah property (for her non-monetary contributions to the family). In this case, it is worth noting that since the property was bought by the sole effort of the respondent, there was no equal division of the property. The respondent who bought the property by way of sole financial contribution received a greater share than the appellant, who is the non-monetary contributing party and subsequently she received a lesser share allocation.

The following case demonstrates a different pattern in the court judgement. In *Shudesh Kumar A/L Moti Ram v Kamlesh A/P Mangal Sain Kapoor*,⁴⁶⁵ the wife (respondent) was a teacher and had left the shared residence in September 1990 (the couple were married in 1977). The petitioner (husband) petitioned for divorce and the

⁴⁶⁴ The court shall have power when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

⁴⁶⁵ *Shudesh Kumar A/L Moti Ram v Kamlesh A/P Mangal Sain Kapoor* [2005] 5 MLJ 82.

respondent filed for judicial separation of the parties. In her petition for judicial separation, the respondent claimed shares in various assets of the respondent and maintenance for herself and the children. She also alleged adultery of the petitioner and claimed damages against the adulterer (co-respondent), but did not cite the adulterer as the co-respondent. The petitioner and the co-respondent vehemently denied the adultery allegation. The parties had two grown up children.

The court granted a decree nisi to be made immediately and made no orders for maintenance for the respondent or for provision of matrimonial assets. The court further mentioned the following:

1. By failing to plead properly and to make the co-respondent a party to the divorce proceedings, the respondent had in fact shut herself out from seeking relief under section 54(1)⁴⁶⁶ and 58⁴⁶⁷ of the LRA 1976.
2. There was no doubt that there was much unhappiness and in fact physical confrontations between the parties. In view of the separation of about 11 1/2 years before filing the petition, it could not be denied that this marriage had irretrievably broken down on the grounds of them having lived apart for such a long time.
3. The children were 24 1/2 and 22 1/2 years of age. The petitioner had met all the financial needs of the children for their tertiary education and continued to do so (at the time of the court hearing). Since there is no legal duty on a parent to support children beyond the age of 18, the court shall make no order as to

⁴⁶⁶ 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 one or more of the following facts, that is to say: (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent; (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; and (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

⁴⁶⁷ 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 adulterers a co-respondent, unless excused by the court on special grounds from doing so.

maintenance of the children. As both parties were close to retirement age and had the capacity to earn enough for their needs, there should be no order for maintenance.

4. Section 76(4) of the LRA 1976⁴⁶⁸ states that the party through whose effort the property was acquired shall receive a greater proportion. Equality is provided in section 76(1),⁴⁶⁹ where there is a direct financial contribution by the other spouse. When only section 76(4) applies, the division cannot be equal. In the nature of things, the respondent could not have made any direct contribution for the past 14 years and therefore clearly only section 76(3)⁴⁷⁰ could apply in this case. Since the respondent had the best of the three properties,⁴⁷¹ and the petitioner had single-handedly met all the financial needs of the tertiary education of his children, there should not be any further order for the division of assets. The justice of the case demand that the petitioner should (according to section 76(4)) receive a greater proportion of the remaining assets and the fairest order in this case would be no order at all for the division of matrimonial assets.

The range of cases discussed above demonstrates that the Malaysian Civil court has wide discretionary power to give orders for the division of the matrimonial property. Additionally, there is no discernible pattern to the court's decision when making these orders, and outwardly, the orders vary among the cases. For example, in *Ng Bee Lee*, one of the parties to the marriage relationship was granted 65 per cent of the matrimonial

⁴⁶⁸ In exercising the power conferred by subsection (3) the court shall have regard to: (a) the extent of contributions made by each party who did not acquire the assets to welfare of the family by looking after the home or caring the family; and (b) the needs of the minor children.

⁴⁶⁹ The court shall have power when granting a decree of divorce or judicial separation to order the division between the parties of any assets by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of the sale.

⁴⁷⁰ The court shall have power when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

⁴⁷¹ (1) The residence known as No 151, Jalan Krian, Taman Rainbow, Jalan Ipoh, Kuala Lumpur; (2) A double-storey link house known as No 7, Jalan 10/6A, Section 10, Jalan Gasing, Petaling Jaya; (3) Single storey link house known as No 2, Jalan 10/6, Section 10, Petaling Jaya.

property division whilst the other party only received 35 per cent.⁴⁷² The case of *Lim Chee Beng* demonstrates a situation where 70 per cent of the matrimonial property was given to a spouse and the remaining 30 per cent to the other partner.⁴⁷³ In *Shudesh Kumar A/L Moti Ram* no order was made on the property division.⁴⁷⁴ These variations ensued from the wide legal provision contained in section 76(4) of the LRA 1976, which illustrates that the party by whose effort the property was acquired receives greater share.

As regard to this matter, it could be submitted that the Civil court (similar to the Sharia court) gives importance to the spouse's financial contributions in the acquisition of the matrimonial property. It could be argued that the system gives more weight to the spouse's contributions to the property rather than the contributions to the relationship. This matter is similar to the former New Zealand position in light of the existence and application of the Matrimonial Property Act 1963 whereby the emphasis was on direct contributions to the acquisition of the property and not non-financial contributions such as child care.⁴⁷⁵ However, this legal position has changed since the introduction of Matrimonial Property Act 1976 and the now operational Property Relationships Act (PRA 1976) (as discussed in depth in chapter six). In Malaysia, there is an equality of division in the matrimonial property when there is clear evidence of financial contribution in the acquisition of the property, or at least if the property was held in joint names. The basis that the property, which is held in joint names, should be shared equally between the couple, is similar to the principle applied within the English system (discussed in chapter five). In the event where the property was acquired by the sole effort of one of the parties to the marriage, there is no equal property division.

If Daniel and Sara were married as non-Muslims, living in Malaysia, Sara is entitled to an equal share in the matrimonial property. This is because there is a clear evidence of her monetary contribution in the acquisition of the matrimonial home. She

⁴⁷² *Ng Bee Lee v Liew Kam Cheong* [2010] 6 MLJ 858: The matrimonial property was bought by the sole effort of one of the parties to the marriage.

⁴⁷³ *Lim Chee Beng v Christopher Lee Joo Peng* [1997] 4 MLJ 35: Both spouses made financial contribution to the matrimonial property.

⁴⁷⁴ *Shudesh Kumar A/L Moti Ram v Kamlesh A/P Mangal Sain Kapoor* [2005] 5 MLJ 82: One of the parties acquired the property by the sole effort, whilst his spouse did not make any financial contribution.

⁴⁷⁵ This is discussed in depth in chapter six.

contributed ten per cent to the house purchase price. Although it is less than Daniel's contribution, the fact that she made a 'financial contribution' is given consideration in the Civil court. Her financial contribution is recognised and the court could give equal weight to this contribution with Daniel's 90 per cent contribution. Based on this premise, the Civil court could grant Sara an equal division of the matrimonial home. Subsequently, both Daniel and Sara could be ordered a 50/50 share each. However, this matter largely depends on the court's discretion and it could order otherwise as it is supported by the wide provision within the Malaysian legislation of LRA 1976 that stipulates the wording, 'extent' of contributions. The court could apply its wide discretion to quantify the 'extent' of the parties' contributions and orders for either equal division or 1/3 and 2/3 divisions.⁴⁷⁶ This situation would be similar if Daniel and Sara were married Muslims, living in Malaysia (this matter has been discussed in detail in the previous segment). At the outset, both the Sharia and Civil courts treat married couples in the same way.

Another question to be considered is whether the existence of a pre-nuptial agreement could make any difference to the position of married couples and their rights to matrimonial property. Although Malaysian courts have yet to deal with pre-nuptial agreements, however they have dealt with a number of other agreements pertaining to matrimonial proceedings, namely 'Deeds of Separation' and 'Maintenance Agreements' entered into after the marriage had already commenced (hereafter Post-nuptial Agreements).⁴⁷⁷ The LRA 1976 provides provisions concerning maintenance agreements, however, the Malaysian courts retain substantial power over the approval of agreements for payment in settlement of future claims for maintenance.⁴⁷⁸ There is an express provision in the Malaysian statute for any agreement made between the parties to a

⁴⁷⁶ This would be based on the provisions in the Law Reform (Marriage and Divorce) Act 1976, ss 76(1) and (2).

⁴⁷⁷ Foo Yet Ngo "Pre-nuptial Agreements in Malaysia" accessed on 24 August 2014, <https://www.iaml.org/cms_media/files/prenuptial_agreements_in_malaysia.pdf> at 4.

⁴⁷⁸ Law Reform (Marriage and Divorce) Act 1976, s 80: An agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance. Further, s 84 provides that "subject to section 80, the court may at any time and from time to time vary agreements as to maintenance made between husband and wife ... where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreements". (emphasise added)

marriage that relates to, arises out of, or is connected with divorce proceedings, to be referred to the Court for their opinion on the reasonableness of such an agreement.⁴⁷⁹

In *Lim Thian Kiat v Teresa Haesook Lim Nee Teresa Haesook Dean & Anor*,⁴⁸⁰ there was a deed of separation dealing with matters of maintenance, custody of the child and matrimonial assets. The Court reached the opinion that the provisions in the Deed should be held to be subject to the court's approval being obtained under section 80 of the LRA 1976 aforesaid, before they shall become effective. The LRA 1976 specifies provisions granting the Court the power to vary agreements entered into between the parties in respect of maintenance, notwithstanding any provision to the contrary in any such agreement under section 84 of the LRA 1976, "where it is satisfied that there had been any material change in the circumstances." However, the Judge expressed the view that there are no provisions in the LRA 1976 requiring that the Court's approval be sought for any agreement in relation to the division of matrimonial assets to become effective, as had been specifically provided for in relation to agreements regarding maintenance.

Nevertheless, it should be noted that the deed of separation is different to prenuptial agreements. The former is entered into by parties after the marriage breakdown and the parties would have appraised and weighed their respective positions at the time of the breakdown, whereas, the latter agreement by its very nature is entered into prior to any legal relationship having begun. However, as seen in *Lim Thian Kiat*, the court will be referred to any agreements taking place, and this is including the pre-nuptial agreements. Notwithstanding that, the parties to the marriage could not contract out of the statutory provisions of the LRA 1976. Further, the pre-nuptial agreement should not be contrary to any principles covered in the LRA 1976. Indeed, case law is very clear that

⁴⁷⁹ Ibid, s 56: "Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court, any agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or ... have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreement or arrangements and to give directions, if any, in the matter as it thinks fit".

⁴⁸⁰ *Lim Thian Kiat v Teresa Haesook Lim Nee Teresa Haesook Dean & Anor* [1997] 5 CLJ 358.

any attempt made by parties to contract out of the statutory provisions or the court's jurisdiction would not be accepted.⁴⁸¹

III. Customarily Married non-Muslim Couples

Since the introduction of the LRA 1976, non-Muslim couples need to formally register their marriage. However, there are cases involving couples who marry according to the customary rites (Indian Customary wedding, Chinese customary wedding or Christian wedding in church), but fail to record their marriage formally at the National Registration Department. For instance, Indian customary weddings are usually conducted by the temple priest⁴⁸² in a religious ceremony in a Hindu temple, wedding halls, or even at the house of the bride or the groom. The Chinese conventional wedding may be as simple as a tea drinking ceremony. With the attendance and blessings of the elders of the family, the Chinese couples are easily accepted as married. The Christian wedding is usually conducted in the church.

In Malaysia, these customary marriages are still commonly practised and popularly recognised by the community as a valid ground for couples to live together and start a family. When marriages of such nature are consummated, the couple is considered married, only in the eyes of the family, friends, and community. Nonetheless, if they fail to document their marriage by a formal marriage registration, their 'married' status is not recognised.⁴⁸³ Despite the general non-application of the LRA 1976 to married couples under this category, they could still contest for their rights over the matrimonial property as legally married couples. The LRA 1976 states that marriages solemnised under any law, religion, custom or usage is valid and deemed to be registered under this Act.⁴⁸⁴ However, the couples that fall within this category need to prove to the court the

⁴⁸¹ *Tan Kai Mee v Lim Soei Jin* [1981] 1 MLJ 271.

⁴⁸² Law Reform (Marriage and Divorce) Act 1976, s 24(4): 'Priest of temple' includes any member of a committee of management or governing body of that temple and any committee member of any religious association. 'Priest of a church' includes any officer or elder of the church.

⁴⁸³ "Daftar Perkahwinan Elak Komplikasi" Sisters in Islam accessed on 10 August 2014 <<http://www.sistersinislam.org.my/news.php?item.747.111>>.

⁴⁸⁴ Law Reform (Marriage & Divorce) Act 1976, ss 4(1) and (2).

existence of the customary marriage.⁴⁸⁵ The documentation of marriages is given importance in Malaysia and those who neglect to adopt this measure are left with limited legal remedies. It is discernible that Malaysia strictly adopts the importance of status of the relationship, rather than the functionality of partners.

In the case of *Nancy Kual v Ho Thau On*,⁴⁸⁶ the plaintiff was a native ‘Sabah’⁴⁸⁷ woman, and the defendant, a Chinese man. On 5 May 1990, they underwent a tea ceremony to celebrate their marriage. This marriage was held in according to the Chinese traditions. The ceremony is considered as a customary wedding for the Chinese descendants. The plaintiff and defendant thereafter lived as wife and husband. They both continued to live together until they experienced domestic problems. The defendant left the matrimonial home. After the relationship breakdown, the plaintiff and defendant had meetings with the Native Courts. At one meeting, the defendant, on being shown photographs of the marriage, replied, “Itu main-main sahaja” (That was merely a play thing).

The plaintiff sought a declaration that she was the legal wife of the defendant and that the native customary marriage entered into between them on 24 June 1990 was valid and subsisting in law. The issue in view of section 5(4)⁴⁸⁸ of the LRA 1976, read with section 3(1),⁴⁸⁹ was whether a marriage solemnised under native customary law, between a non-native (the defendant) and a native (the plaintiff) was valid, and whether this marriage could be recognised in accordance with the provisions of the LRA 1976.

The court held that the plaintiff was the legal wife of the defendant. The court’s order was based on the humanitarian grounds of supporting the relationship of husband

⁴⁸⁵ *Leong Wee Shing v Chai Siew Yin* [2005] 5 MLJ 162: The plaintiff applied for an order that her marriage with the deceased under the Chinese customary rites was valid, but the defendant, who is the mother in law of the plaintiff contended that the marriage between plaintiff and the deceased was void for non-registration at the Registry of Marriages.

⁴⁸⁶ *Nancy Kual v Ho Thau On* [1994] 1 MLJ 545.

⁴⁸⁷ ‘Sabah’ is one of the Malaysian states.

⁴⁸⁸ After the appointed date, no marriage under any law, religion or usage may be solemnised, except as provided in part III of the LRA 1976.

⁴⁸⁹ 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.

and wife and to discourage any party from treating weddings and marriage rituals lightly. This case supports the view that LRA 1976 recognised a customarily celebrated relationship, and thus, treats them equally in a legally recognised married relationship, if evidence of the marriage being consummated could be provided. Nonetheless, a couple who merely live together without any commencement of a customary marriage would not be entitled to equal rights under the ambit of the LRA 1976. “Procedurally, the applicant has to satisfy the court that she is a legal wife of the respondent by establishing that the marriage is a valid marriage and deemed to be registered under Malaysian law. Failure to prove it will mean that the court has no jurisdiction to impose any liability on the respondent.”⁴⁹⁰

The importance of the marriage validity is also apparent in the case of *Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors.*⁴⁹¹ The issue before the court was to prove a Chinese customary marriage. Both the appellant (Ching) and the respondent (Soh) appealed against the magistrate’s decision, ordering the appellant to pay the respondent RM 1,500 per month as maintenance for her (the respondent) and RM 1,000 per month for their daughter, Lena Ching. The facts revealed that the respondent first met the appellant in 1957 when she was nineteen years old and working in a bar. The respondent came from a family with a humble background, while the appellant from a more affluent family. At the end of 1958, they had sexual relations and he promised to marry her. Subsequently, they lived together at her home. The appellant kept putting off the subject of marriage until 1959. In 1959, a modest ceremony was arranged and the appellant gave the respondent’s mother RM 1,000.00 towards the expenses for the ceremonial wedding. In 1977, the respondent left the matrimonial home after a violent quarrel with the appellant.

⁴⁹⁰ Anis Shuhaiza bt Md Salleh and Noor Aza bt Ahmad “Cross Boundary Marriage under Malaysian Family Law: between a Dream of Life and Reality of Legal Requirements” (2010) *Journal of Politics and Law* 3 (2) at 153.

⁴⁹¹ *Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors* [1997] 4 MLJ 464.

The court held that there was ample evidence to show that the respondent and appellant had undergone a ceremony of marriage, they had lived openly as husband and wife and therefore, a valid marriage exists between them.

To summarise, the status of the relationship (in the procedure of formal registration) is given importance, although the couple could have performed the functions generally associated within a marriage relationship, attesting to the importance of functionality (the theoretical framework and importance of which is discussed in chapter two). Consequently, only when couples are legally married in Malaysia, can they achieve automatic rights to matrimonial property. In the absence of a formally registered marriage the parties need to prove to the court the authenticity of the marriage relationship. If the marriage were legitimate, the LRA 1976 would be applied in cases claiming for shares in the matrimonial property. Therefore, in such circumstance section 76 of the LRA 1976 applies.

4.3.2 Relationship Property Division for Unmarried Cohabitants

I. Cohabitation among Muslims

Even before considering rights to property, it should be noted that unmarried cohabitation is an Islamic criminal offence. Regulation of sexual activities among the Muslim population in Malaysia is strict, with laws prohibiting unmarried couples from occupying a secluded area or a confined space, to prevent suspicion of acts considered Islamically immoral.⁴⁹² Muslim couples are thus not allowed to cohabit unless they are committed in a legally married relationship. Muslim couples rarely admit their act of living together, as they could be found guilty and be punished.

If Daniel and Sara were a Muslim couple cohabiting in Malaysia, their act of living together would be strictly prohibited. They would be considered to have committed

⁴⁹² Jennifer Pak “Unmarried couples caught in Malaysia hotel raid” Richard Dawkins Foundations (5 January 2010) accessed on 20 September 2013 <<http://old.richarddawkins.net/articles/4872-unmarried-couples-caught-in-malaysia-hotel-raids>>.

Islamic criminal offences. They could be punished with imprisonment, fine, and/or whipping. The punishments are in accordance to the Islamic statutes that vary among the 13 states in Malaysia.

Under the Syariah Criminal Offences (Federal Territories) Act 1997, any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence and shall be liable to a fine not exceeding five thousand 'ringgit',⁴⁹³ imprisonment to a term not exceeding three years, or to whipping not exceeding six strokes, or to any combination thereof.⁴⁹⁴ The same punishments apply to a woman if she performs sexual intercourse with a man who is not her lawful husband.⁴⁹⁵

Additionally, unmarried cohabitants could also fall under the offence mentioned in section 27 of the Syariah Criminal Offences (Federal Territories) Act 1997. It is stated that 'any man who is found together with one or more women, not being his wife'; or any 'woman who is found together with one or more men not being her husband', in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts, they shall be guilty and on conviction, would be liable to a fine not exceeding three thousand ringgit, or to imprisonment for a term not exceeding two years, or both.

⁴⁹³ 'Ringgit' is Malaysia's official currency since 1975: "Malaysian Ringgit" accessed on 22 Aug 2013 <<http://www.oanda.com/currency/iso-currency-codes/MYR>>.

⁴⁹⁴ Syariah Criminal Offences (Federal Territories) Act 1997, s 23(1).

⁴⁹⁵ Ibid, s 23(2). Besides that, under s 23(3): the fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent while she is fully conscious is considered as an offence. It is considered as an offence under section 25(2), and on conviction, she shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination. Under s 23(4): if a woman who gives birth to a fully developed child within a period of less than six months, from the date of marriage, she is deemed to have been pregnant out of wedlock. The Syariah Criminal Offences (Federal Territories) Act 1997 specifies a more severe punishment for the offences categorised as 'liwat' and 'musahaqah' that are committed within the state of Federal Territory. 'Liwat' denotes sexual relations between male persons under s 2(1). 'Musahaqah' denotes sexual relations between female persons (s 2(1)). Any male person who commits 'liwat' shall be guilty for an offence, and shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination above (under s 25). The same punishments apply to women who commit 'musahaqah'. Any female person who commits 'musahaqah' shall be guilty for an offence and shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof (under s 26).

There are several cases in Malaysia involving cohabitation among Muslims and the punishment ordered differs among the cases. In the Sharia case of *Pendakwa Syarie Negeri Sabah lwn. Rosli bin Abdul Japar*,⁴⁹⁶ the accused, Rosli bin Abdul Japar was charged with committing sexual conduct out of wedlock with Ms Murni binti Muhammad, until the birth of their son, named Hasmawi bin. Abdullah. Therefore, Rosli was ordered to pay a fine for the sum of RM 3,000.00, or six months imprisonment, if failing to pay the fine.

The same punishments apply to women if they perform sexual intercourse with a man who is not her lawful husband.⁴⁹⁷ In Sharia appeal case of *Zainab binti Abdul Rahman lwn. Pendakwa Syarie Negeri Sembilan*,⁴⁹⁸ the appellant was found to cohabit with a Muslim man named, Mustafa bin Abdul Aziz on 21 September 1993 at a house in the state of Negeri Sembilan, Malaysia. The appellant was found guilty and sentenced to ten months imprisonment. However, the appeal was allowed and the punishment was reduced to two months imprisonment along with a fine of RM 2,000.00.

Referring back to the example situation, if Daniel and Sara were Muslims living in Malaysia and found to be living together in a cohabiting relationship, this matter would be regarded as an Islamic criminal offence. If they live in the Federal Territories, Daniel and Sara could be charged under section 23 of the Syariah Criminal Offences (Federal Territories) Act 1997. This provision stipulates that any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence. For Sara, it would be an offence to perform sexual intercourse with a man who is not her lawful husband. If found guilty, each could be liable to a fine not exceeding five thousand ringgit, or to imprisonment not exceeding three years, or to whipping not exceeding six strokes, or could be liable to a combination of those punishments.

⁴⁹⁶ *Pendakwa Syarie Negeri Sabah lwn Rosli bin Abdul Japar* No S-3/95-7(7) (2001).

⁴⁹⁷ Syariah Criminal Offences (Federal Territories) Act 1997, s 23(2).

⁴⁹⁸ *Zainab binti Abdul Rahman lwn. Pendakwa Syarie Negeri Sembilan* Jilid 16 Bahagian 1 <41-49http://www.esyariah.gov.my/JurnalHukumSearch/htdocs/jurnalhukumsearch/JurnalHukumSearchDetailsPageBM.jsp?DetailsID=710>.

Daniel could also be charged under section 27,⁴⁹⁹ which stipulates that a man who is found together with a woman not his wife, in any secluded place or in a house which gives suspicion that they were engaged in immoral activities, he shall be liable to a fine not exceeding three thousand ringgit, or to imprisonment for a term not exceeding two years, or both. Sara as well, could be charged under the same provision and be liable to similar punishment.

Unmarried Muslim cohabitants claiming rights to relationship property will not typically bring the case to the Sharia court. This is because they could be found guilty of committing Islamic criminal offences. To avoid criminal prosecution, they often avoid taking legal action to the Sharia court. Aside from this, article 121(1A) of the Federal Constitution clearly mentions the division between the Sharia and jurisdictions, and thus, any personal law concerning Muslims should be dealt within the Sharia jurisdiction. As regards to their relationship property, although cohabitants would not be able to apply for property division under the ambit of Islamic matrimonial law within the Sharia system, they may still elect for the property division in the Civil courts as two different individuals. Muslim cohabitants are not seen as criminals in the Civil court. Although precedents do not exist for such cases involving Muslim cohabitants in the Civil courts, nevertheless, regarding the division of their relationship property, the common law principle of constructive trusts could be applied. The parties may contest for their rights over the property only to the extent of the monetary contribution in the acquisition of the property. To reiterate, they could bring this case to the Civil court as two different individuals and not as married couples or intimately involved unmarried cohabiting couple.⁵⁰⁰ This is discussed in-depth in the following section.

In applying the example of Daniel and Sara, they perform the same functions as married couples. For example, both have lived together for about five years in duration

⁴⁹⁹ Syariah Criminal Offences (Federal Territories) Act 1997.

⁵⁰⁰ The couple could not contest for their rights as married couples in the Civil court because the matrimonial laws and rights of Muslims fall under the Sharia court jurisdiction. The civil court has no power to interfere in the matrimonial rights of Muslim couples. The Civil court can only have jurisdiction to view the case as between two different individuals under the normal property rules. This is consistent with the Malaysian Federal Constitution, art 121(1A); *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.

and bought a house for which Daniel has been paying the mortgage. Sara as well, contributed for the down payment of the house purchase price. They also had a child after about three years of cohabiting. Moreover, Sara had to leave her job to take care of the child. To reiterate, couples in a marriage institution primarily perform these functions. However, as a Muslim cohabiting partner living in Malaysia, Daniel and Sara would not have a quorum in the Sharia court, nor would their functions be recognised. Both could also be charged with Islamic criminal offences which, if found guilty, may be punished with imprisonment, fine, and/or whipping. Unmarried Muslim cohabitants clearly have no legal rights to relationship property in the event of relationship breakdown. Subsequently, there is an absence of equality between relationships, specifically between the marriage and unmarried cohabitation (amid married Muslims and unmarried Muslim cohabitants). The former are somewhat protected by the matrimonial laws applicable for Muslims, specifically under the IFLLTA 1984, while the latter are regarded as criminals.

II. Cohabitation among Non-Muslims

The legislation is silent over the issue of unmarried cohabitation among non-Muslims. It is not a criminal offence to cohabit and there are no legal provisions available to address the rights of cohabitants as ‘unmarried’ and ‘living together’ in Malaysia. Cohabitation among unmarried non-Muslim couples is not against the Civil (secular) law that applies to them, but it is still a social taboo within society. Cohabiting relationships are not a preferred way to establish and start a family in the Malaysian context. Despite that fact, by objective observation, there are many young couples who elect to cohabit as a preliminary process before marriage. Therefore, without any legal guidance or protection, they are vulnerable to situations when partners die intestate, or in the event of the relationship break up. Cohabitants in this situation are not covered by the LRA 1976, which only applies to legally married non-Muslim couples. Therefore, the common law principles of constructive trusts fills in the gap should the case be brought to the Civil court. It should be noted that for cohabiting partners who could not afford the costs to initiate legal proceedings in the court, there are no legal remedies available.

If Sara and Daniel lived in Malaysia and both were non-Muslims, the following would be their legal rights to the division of relationship property in event of relationship breakdown. From a general perspective the Malaysian court does not treat unmarried cohabitants as equal to married spouses. For example, in the case of *Sivanes A/L Rajaratnam v Usha Rani A/P Subramaniam*,⁵⁰¹ (obiter dictum) the court stated that:

In this country, the courts should not treat such a relationship in *Dennis v McDonald*⁵⁰² as a 'matrimonial relationship'. There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either married or not married. There is nothing in between.... The principle in *Dennis v McDonald* should not be applied to unmarried couples in Malaysia. The terms 'matrimonial property', 'matrimonial home', 'conjugal rights', 'matrimonial proceedings' or 'division of matrimonial assets' are terms exclusively for lawfully married couples.

To illustrate further the situation of non-Muslim cohabitants in Malaysia, the case of *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*⁵⁰³ is discussed. The plaintiff was the registered proprietress of a property, which was purchased in 1971 by the defendant in the plaintiff's name. The plaintiff alleged that the property was a gift from the defendant because he had wanted her to be his mistress since he was then already married. The defendant paid the full purchase price of the property in 1972, and when his marriage broke down, he moved into the property to live there with the plaintiff and their infant daughter, Karen. The defendant alleged that the plaintiff and he were married under the Chinese rites in 1973, but the plaintiff denied this matter. The plaintiff and defendant ceased to live together from April 1975 and plaintiff left the property. Thereafter, the plaintiff claimed for vacant possession of the property, rent and costs, and relied on the presumption of advancement. The defendant counterclaimed for a declaration that the

⁵⁰¹ *Sivanes A/L Rajaratnam v Usha Rani A/P Subramaniam* [2002] 3 MLJ 273.

⁵⁰² *Dennis v McDonald* [1981] 2 All ER 632.

⁵⁰³ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.

plaintiff held the property on a resulting trust for him and contended that it was never meant as a gift to her.

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

Although the presumption of advancement arose because the defendant had provided the funds for the purchase of the property and had registered it in the plaintiff's name, the defendant had succeeded in rebutting the presumption of advancement, since, *inter alia*, at all material times he had dealt with the property as he wished with the acquiescence of the plaintiff.

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

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

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

The judge stated that:⁵⁰⁴

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

There are several matters to be highlighted in the case above. Among them is that the court considered the functions of the partners within the relationship. Firstly, the property was bought in 1971, the plaintiff moved in together in 1972 and the relationship

⁵⁰⁴ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115 at 33.

broke down in 1975. It was for the duration of three years that both the plaintiff and defendant have been living together in a common residence. Secondly, it was proved that the plaintiff and defendant were sexually intimate and as a result, there was a child born out of the relationship. Thirdly, the defendant claimed that the property was purchased for the purpose of a matrimonial property, and not a gift as claimed by the plaintiff. Fourthly, the reputation and public aspect of the relationship was taken into consideration. For example, the plaintiff's mother has treated the defendant as the plaintiff's husband. Besides that, there was documentary evidence that the plaintiff was variously addressed and known as Mrs Eugene Khoo, or Mrs Khoo, and had sent several birthday cards to the defendant signing off with expressions of endearment, such as 'from your dearest wife'. Apart from that, the court believed that there was a customary marriage consummated by the couple, although the plaintiff denied this matter. The court had considered the functions highlighted above and accepted that the property contested for was a matrimonial property, and thus both parties have equal rights over the property. The court treated this couple as similar to married couples, even though this matter was not literally stated in the judgment of the court, nor did the court apply the provisions embedded within the LRA 1976.⁵⁰⁵ The judge however inferred the parties' common intention to share the beneficial ownership of the property. Subsequently, the property was accepted as being for the purpose of a matrimonial home. To reiterate, although the LRA 1976 was not extended to this couple (in the absence of a legal marriage), the court nonetheless decided that the property should be equally divided between the parties based on the equitable principles of constructive trusts.

⁵⁰⁵ Law Reform (Marriage & Divorce) Act 1976 (LRA 1976), s 76. Besides the legislation, based on the cases discussed in the previous section on the case law for married non-Muslim couples, it is apparent that when the property was acquired by the sole effort of one of the parties to the marriage, that party receives a greater share out of the property: *Ng Bee Lee v Liew Kam Cheong* [2010] 6 MLJ 858. However, there is also case law whereby, without the monetary contribution, the court granted equal right over the matrimonial property: *Murli a/l Naraindas v Sajni Bai a/p Bulchand* [2012] 9 MLJ 10. This is due to the consideration given to the contribution in the form of taking care of the family and children. Apart from that, the title of the property, which is commonly shared by both the spouse, is also given importance. The name on the title of the property signifies the intention of the couple to acquire, possess and/or share the property: *Murli a/l Naraindas v Sajni Bai a/p Bulchand* [2012] 9 MLJ 10.

In *Loo Cheng Suan Sabrina*,⁵⁰⁶ the property was acquired by the sole effort of the defendant. However, the title of the property was in the plaintiff's name. If this couple in the current case had been married, the provision contained in the LRA 1976 would be applicable. In considering: (1) the financial contribution of the defendant in acquiring the property; (2) the needs of the child; (3) the name on the title of the property; and, (4) the (non-monetary) contributions of the plaintiff, by way of home making and taking care of the child, the court would probably order an equal division of the asset. Notwithstanding that, the LRA 1976 was not extended to this couple because of the absence of a legally recognised marriage. Therefore, the court applied the common law principles of constructive trusts. The court gave extensive consideration to the couples' functions and contributions to the property and relationship. Subsequently, the court granted an equal division for both partners. This matter illustrates the court's decision in treating cohabitants as similar to married couples, for the legal purpose of relationship property division.

The Malaysian Court of Appeal in *Heng Gek Kiau v Goh Koon Suan*⁵⁰⁷ overruled the High Court and extended the presumption of advancement from a man to his mistress on the ground that 'principles of equity are not etched in stone tablets, inflexible and impervious to the passage of time and modernity'.⁵⁰⁸ Goh owned a construction and realty company, hardware shop, factory and jewellery shop in Singapore, and met Heng when she was an Indonesian illegal immigrant. He bought a house for RM 61,1000 under Heng's name in the state of Johor, Malaysia, so that he could meet her there in intimacy. He also misled her into believing that he was single. They were living together in a 20-year relationship. Several years later, when the relationship broke down, she claimed that the house was a gift to her. He counterclaimed that he was the beneficial owner under a resulting trust.

⁵⁰⁶ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.

⁵⁰⁷ *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626.

⁵⁰⁸ Mohsin Hingun "Expanding the Boundaries of the Presumption of Advancement in Favour of Mistresses: A Step Too Far" [2010] 4 MLJ xviii; [2010] 4 MLJA 68.

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

At appeal, Gopal Sri Ram J said that the High Court adopted an incorrect approach and he reversed the High Court decision, basing his judgment on two grounds. He held that ‘there was clearly a want of judicial appreciation of the evidence by the trial court thereby warranting appellate intervention’. The trial judge had failed to appreciate the salient facts that were indicative of a donative intention on the part of the man, thus rebutting the presumption of a resulting trust in his favour. The second ground for allowing the appeal was by extending the presumption of advancement from a man to his mistress. Gopal Sri Ram J ordered Goh to hand the title of the deed of the house to Heng.

He also quoted:⁵⁰⁹

[Y]ou squeezed her like a lemon and later cast her aside like an old shoe. Surely, you cannot use her like that and later claim she has no right... the court would not allow such injustice to go unnoticed, not in this court.... As mistress to Goh, Heng was entitled to the property... the principles of equity are not cast in stone and they change according to circumstances of a contemporary society ... and that women in Heng’s position would have no rights if the law remained static... It was inappropriate to treat women as a chattel as it was in a case in England in 1858⁵¹⁰ where women had no right to own property or rights in society and the court ruled that there was no presumption of

⁵⁰⁹ “Mistress has right to property, court rules” *The Sun daily* (15 June 2007) <<http://www.thesundaily.my/node/170048>> (emphasise added).

⁵¹⁰ *Soar v Foster* 4 Kay and Johnson 152 70 ER 64.

advancement in favour of a mistress ... but it would be retrogressive step if the court applied similar principle...

It could be argued that the appellate judges have acted contrary to established legal precedents in extending the boundaries of advancement to the mistresses (it can be applied to the context of unmarried cohabitants). Further, it was mentioned that “[t]he extension of the presumption of advancement has been in favour of the de facto common law wives within the matrimonial home, who all intents and purposes, play the role of traditional wives but have not gone through a marriage ceremony.”⁵¹¹

The Court of Appeal’s judgment can be rationalised as an instrument of social engineering to provide an element of relief to mistresses given the increasing rate of cohabitation in modern society,⁵¹² and it ruled as a landmark case that mistresses have rights in equity. Although the term ‘mistress’ was used in this case, the principles developed as in the judge’s response to cohabitation is beneficial to address the movement to recognise cohabiting relationships and their relationship functionality within the Malaysian Civil jurisdiction.

In contrast, the case of *Liew Choy Hung v Fork Kian Seng*⁵¹³ illustrates a situation whereby cohabitants were treated as two different individuals in the context to acquire rights to relationship property. In this case, it fell on the court to decide on the proportions of the beneficial interests of a man and woman in the ownership of the house, which they have acquired in their joint names. Both were not married to each other, but had lived together as cohabitants. The plaintiff and the defendant bought a house jointly with the aid of a housing loan for which both were liable for the repayment. The plaintiff and defendant were registered as the joint proprietors. The plaintiff later repaid the balance of the outstanding loan to the bank. However, there was no agreement or any transfer document indicating their beneficial interest towards the property.

⁵¹¹ Mohsin Hingun, above n 509, at 7.

⁵¹² Ibid, at 3.

⁵¹³ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.

Later, the relationship broke down. The plaintiff claimed that she was entitled to the property as she had substantially paid for it. The defendant, on the other hand, claimed that he had bought the plaintiff's share of the property, but he could not prove it. He was then prepared to accept a share of the property representing his contribution towards its purchase. The court had to decide on the issue of the proportions of beneficial interests to both parties. It was held that the defendant should transfer his share to the plaintiff for RM 34,000 and declare that the plaintiff is entitled to the whole of the beneficial interests in the property. The court mentioned:⁵¹⁴

1. If two persons purchased property in their joint names and there was no declaration of trusts on which they were to hold the property, they held the property on a resulting trust for each other, proportionate to their contributions to the purchase price.
2. On the facts, the contributions towards the purchase price meant that the parties are presumed by operation of law to hold the property in this proportion – the plaintiff 91.5 per cent share and the defendant 8.5 per cent share in the property. Both parties had agreed for the plaintiff to take over the defendant's 8.5 per cent share of the property for RM 34,000.

In this case, the parties did not attempt to prove their relationship (whether similar to marriage), or their functionality within the relationship. They represented themselves as two different individuals and the court viewed the relationship in the same way. The matter before the court was only to quantify the proportions of the beneficial interest that both the parties acquire in the property, which they purchased in their joint names and where they contributed to the purchase price differently. This scenario differs to the previous case of *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*,⁵¹⁵ whereby, the court was directed to look at the relationship of the couple, whether they performed the same function as married couples or whether they could claim for property as married spouses.

⁵¹⁴ Ibid, at 1.

⁵¹⁵ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.

Thus, it is apparent that Malaysian legislation does not recognise the rights of cohabitants towards relationship property but the courts have found ways using devices such as constructive trusts to divide the property of cohabitants. The case of *Liew Choy Hung v Fork Kian Seng*⁵¹⁶ was considered as between two different individuals (not married or intimately involved unmarried couple) who have jointly purchased a property. The court only took into account the parties' individual monetary contribution to the purchase of the property. The party who financially contributed more than the other party received a greater share. When the property is purchased with the couple's joint names and there is no declaration of trusts on who holds the property, it should be based on a constructive trust. The property was divided in accordance with the proportion of the contributions to the purchase price. To reiterate, the party who made larger financial contributions in the acquisition of the property received a greater share than the other party who made less financial contribution. The plaintiff in this case who clearly contributed more on the purchase price had more entitlement to the property.

The case of *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*⁵¹⁷ was between unmarried cohabitants who were functionally the same as married couples and the court divided the relationship property equally among the partners. The instant case of *Liew Choy Hung*⁵¹⁸ did not concern the partners' functionality within the relationship and the court treats the couple as two different individuals. The property was divided in accordance with the monetary contribution in the acquisition of the property.

The following case⁵¹⁹ observes a different scenario, whereby one of the partners to the relationship bought a property during the cohabitation period and eventually the couple got married in the course of the relationship. The court treated the couple on an equal basis. This could be for the reason that the couple eventually got married.

⁵¹⁶ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.

⁵¹⁷ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.

⁵¹⁸ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.

⁵¹⁹ *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359.

In the case of *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt*,⁵²⁰ the petitioner Wong Kim Foong (F) was lawfully married to the respondent, Teau Ah Kau, in April 1979. Before their marriage, like the most modern Chinese couples, they cohabited. They cohabited at ‘the Tasek house’ that was purchased in June 1977 in their joint names for RM 58,500.00. The house was bought during the cohabitation period. In the petition, the wife contended that both she and her husband had contributed RM 8000.00 each (both contributed the same amount). The balance was paid from the bank loan. The house was later sold in November 1993 but the petitioner testified that she did not get a percentage out of the proceeds of the sale for the amount RM 230,000.00. Later in October 1991, they jointly purchased another house; ‘the Johor house’. They were married at this time. In the divorce petition, the court held that the wife should receive equal shares of the houses.

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

Abdul Malik Ishak J highlighted the best approach to consider the division of the ‘Tasek’ and ‘Johor Jaya’ houses. Firstly, is to ascertain whether these houses were acquired during the marriage, and secondly, whether these two houses were acquired by the joint efforts of the parties to the marriage, or by the sole effort of one of the parties. Having found these facts, the third step would be to turn to the considerations laid down in section 76 (2)⁵²¹ or 76 (4)⁵²² of the LRA 1976. In short, the court must incline and be

⁵²⁰ Ibid.

⁵²¹ The court shall have the power to order the division between the parties of any assets acquired by them during the marriage by their joint efforts. The court in this matter shall have regard to the extent of contributions made by each party in money, property or work towards the acquiring of the assets, any debts owing by either party which were contracted for their joint benefit, the needs of the minor children, if any, of the marriage and subject to those considerations, the court shall incline towards equality of division.

⁵²² The court shall have the power to order the division between the parties of any assets acquired by the sole effort of one of the party to the marriage. In this matter, the court shall have regard to the extent of the

responsive to the concept of equality of division. The court applied LRA 1976 because the plaintiff and defendant did not merely separate as unmarried cohabitants but eventually got married. Clearly LRA 1976 applies to married non-Muslim couples and is not extended to unmarried cohabitants.

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

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

Thus, in *Wong Kim Foong*,⁵²³ despite the house being bought during the cohabitation period of the parties, the court decided that it should be divided equally since (1) the house was in the joint-title and (2) they were functionally the same as if they were married, at the time of purchasing the ‘Tasek’ house. The petitioner was ordered an equal share because both eventually got married and legally considered as husband and wife. The court considered the wife’s financial and non-financial contribution to the family.

contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family, and/or the needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

⁵²³ *Wong Kim Foong (F) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359.

However, if both were not married at all in this case, the judgment would have been different.⁵²⁴ If the couple merely cohabited, the non-financial contribution of the wife is not recognised. The property will then be divided only in accordance to their financial contribution in the acquisition of the matrimonial property. This matter is apparent from the third case law discussed above, *Liew Choy Hung v Fork Kian Seng*.⁵²⁵

*Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit*⁵²⁶ illustrates a case where the court accepted a couple's relationship as equivalent to a marital union. The court took into consideration of the couple's functions in the relationship as the following:

1. The parties displayed common intention to live together, cohabited for a period of 29 years and there were arrangements of financial affairs;
2. The court held that there was a common law marriage between the defendant and the deceased, given the fact that they cohabited for a considerable length of time accompanied by the repute and presumption of marriage;
3. They cohabited, holding themselves out as husband and wife;
4. They started a family with the birth of their daughter, Isabelle;
5. The deceased opened and maintained joint accounts; and,
6. The deceased, taking out of insurance policies naming the defendant and Isabelle as beneficiaries.

Although this case involves challenges to the status of a relationship, the court showed an acceptance of the couple's relationship "as a common law marriage given the fact that

⁵²⁴ As Abdul Malik Ishak J referred to Lord Denning MR in *Ulrich v Ulrich* [1968] 1 All ER 67 at 69: "... in the first place, I think money contributed by a man and woman before marriage, with a view to setting up a matrimonial home, are in the same position as moneys contributed by them after marriage. They are contributed to the purchase of property, which is intended to be a family asset. When the marriage takes place, it might be very different if there was no marriage at all. If the marriage never took place, the whole thing might have to be cancelled. There would probably in those circumstances be a resulting trust in the proportions in which they contributed. When the marriage takes place as contemplated, however, I am satisfied that the moneys stand in the same position as moneys contributed after the marriage..."

⁵²⁵ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.

⁵²⁶ *Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit* [2013] 4 MLJ 82.

they cohabited for a considerable length of time, accompanied by repute and the presumption of marriage”.⁵²⁷

Referring back to the example situation of Daniel and Sara, the partners in that scenario have bought a house under the sole name of Daniel, and he has been paying a loan to the bank since then. From a general perspective, since the house is in Daniel’s name only, he is the legal owner, thus acquires more rights to the property. Even so, Sara paid ten per cent of the purchase price. Therefore, she is eligible for the percentage contributed to the house purchase price under the principles of constructive trusts. She also has her rights over the property for the proportion that accords to her financial contribution. In the property settlements, the court may order the sale of the property and that it is distributed among the partners according to their financial contributions. For instance, if the house is to be sold at the same price of \$ 250,000.00, she will be able to have her share of \$ 25,000.00. If the current price of the house has risen up to \$350,000.00, Sara will then be eligible for the ten per cent, which is about \$35,000.00. The court would probably reach this order if both Daniel and Sara were treated as two different individuals. In this matter, the court only looks at Sara and Daniel’s financial contributions to the acquisition of the house, while Sara’s non-financial contribution to the family is not recognised.

Moreover, in establishing the arguments for Daniel and Sara, as based on the cases of *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*⁵²⁸ and *Wong Fong Yin*,⁵²⁹ the court would take into account the functions and contributions of the partners within the relationship. Firstly, Daniel and Sara have been living together for almost five years in duration. Secondly, both have engaged in sexual intimacy, and as an outcome they had a child, and thirdly, whether they have been sharing a common residence, from living together at a rented property to buying a house together. Although both have financially contributed different amounts Sara had sacrificed her job to become a homemaker and contributed to do the child caring activities. Sara had performed the functions that are

⁵²⁷ Ibid at 31.

⁵²⁸ *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115.

⁵²⁹ *Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit* [2013] 4 MLJ 82.

habitually carried out by a married spouse in a marriage relationship. Both Daniel and Sara have functionally acted the same as married couples. Although the LRA 1976 would not be extended to this couple, however, the application of constructive trusts could also result in a similar decision, as if the LRA 1976 was applied. The court would recognise the relationship functionality and beneficial interest of the parties towards the property and subsequently order for equal sharing.

By comparing unmarried cohabitants to married couples, the former undergo ambiguities in the laws applicable to them, specifically the application of the principle of constructive trusts (the difference between the cases discussed above). In contrast, married couples possess clearly specified matrimonial rights under the statutory law. These rights are guaranteed under the Law Reform Act 1976 for non-Muslim married couples and Islamic Family Law (Federal Territories) Act 1984 for married Muslims.⁵³⁰

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

III. Cohabitation among Inter-religious Couples

Malaysian law does not permit inter-religious marriage between a Muslim and a non-Muslim. The Sharia laws govern Muslims, while marriages and other family matters for the non-Muslims are governed by the Civil laws, exclusively under the LRA 1976. There are no legal provisions under both the Sharia law and Civil law for inter-faith partners to consummate marriage. Under the Sharia principles, marriages can only be consummated

⁵³⁰ Without any financial contribution in the acquisition of matrimonial property, married couples could still be able to obtain a one-third share. Cohabitants on the other hand, would not be able to prove their beneficial interest within the property. The cohabiting partner who does not contribute financially but contributed in the welfare of taking care of the home and family would probably be denied his or her right to the relationship property.

for partners who are Muslims, while the LRA 1976 specifies that marriages valid under the Act is only for non-Muslims, and the Act does not apply for the Muslims.⁵³¹ Under the Islamic Family Law (Federal Territories) Act 1984, “no man shall marry a non-Muslim and/or no woman shall marry a non-Muslim”.⁵³² A marriage that is in contravention of this Act shall not be able to be registered under the Act.⁵³³

Without specific laws or regulations to formalise and validate the inter-religious marriage, partners of different faiths (involving a Muslim and non-Muslim) are not able to legalise their marriage. Therefore, with limited choice, these couples would cohabit without marriage. From the factual observation, some inter-religious couples elect to customarily marry and cohabit without conferring any legal rights to their relationship (or the non-Muslim partner converts to Islam in order to marry the Muslim partner, and it is not common for the vice-versa, as a Muslim is not allowed to apostate out from his or her religion to marry a non-Muslim partner).⁵³⁴

Article 121(1A) of the Federal Constitution mentions that the Sharia court only has jurisdiction over Muslims and the personal law of Muslims whilst the Civil court applies to non-Muslims. In the circumstance where the couple is from the two different jurisdictions engaged into one relationship, there is no law to recognise the relationship. The only available provision for inter-religious couple is within section 51 of the LRA 1976. This provision only applies to non-Muslim couple: (1) who has already married within the Civil jurisdiction; and (2) where one of the spouses converted to Islam during the marriage relationship. Section 51 of the LRA 1976 provides rights for the non-Muslim spouse against the converted spouse in relation to divorce and maintenance

⁵³¹ Law Reform (Marriage and Divorce) Act 1976, s 3(3): This Act shall not apply to a Muslim or any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act.

⁵³² Islamic Family Law (Federal Territories) Act 1984, s 10.

⁵³³ Ibid, s 12.

⁵³⁴ The offence of apostasy generally falls under the offence that relates to ‘insulting, or bringing into contempt, etc., the religion of Islam: Syariah Criminal Offences (Federal Territories) Act 1997, s 7. Recently, the state of Kelantan proposed a ‘hudud’ (crimes against God) bill that will allow the state to execute anyone accused of apostasy: Mary Chastain “Malaysian State Proposes Bill Issuing death Penalty for ‘Apostasy’” *Breitbart News Network* (20 March 2015) <<http://www.breitbart.com/national-security/2015/03/20/malaysian-state-proposes-bill-issuing-death-penalty-for-apostasy/>>.

claims.⁵³⁵ Apart from this section, there is no other provision within the statutory law for an inter-religious couple. For a couple who want to marry, one partner from the Civil jurisdiction (a non-Muslim), the other from the Sharia jurisdiction (a Muslim), there is no law to legalise their relationship through marriage. Consequently, inter-faith partners would not be able to legalise their relationship and thus, would most probably remain as unmarried cohabitants without acquiring legal rights. For the context of relationship property, they could apply for the divisions of property within the Civil court and perhaps the couple would be treated as two different individuals. Therefore, the property would most likely be divided in accordance to the couple's financial contributions towards the property.

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

The following illustrates the issues faced by inter-religious cohabitants in Malaysia. "A Hindu man filed a suit alleging that Islamic authorities had illegally detained his Muslim wife. He said that Islamic officials raided the couple's home and took away their three year old daughter, telling him that his marriage under Hindu rites is illegal".⁵³⁶ There is no legal marriage consummated by the couple and the present law does not recognise customary marriage between a Muslim and a non-Muslim.⁵³⁷ On

⁵³⁵ Law Reform (Marriage and Divorce) Act 1976, s 51(1): Where one party converted to Islam, the other party who has not so converted may petition for divorce, provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion. S 51(2): the court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

⁵³⁶ Baradan Kuppusamy "Dismay at Cancellation of Islam-Christian Meet" accessed on 15 September 2013 <<http://www.ipsnews.net/2007/05/religion-malaysia-dismay-at-cancellation-of-islam-christian-meet/>>.

⁵³⁷ Law Reform (Marriage and Divorce) Act 1976, s 3(3): This Act shall not apply to a Muslim or any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act.

another occasion, a young Hindu man customarily married a Muslim woman, Najeera Farvinli binti Mohamed Jalali (not a legally formalised marriage, thus considered as unmarried cohabitation). He was also separated from the wife by the religious authorities because their marriage was not legally consummated.⁵³⁸

Recently in 2014, the Islamic Religious Department (Selangor) raided a Hindu wedding involving a Muslim bride marrying a non-Muslim man.⁵³⁹ The religious authorities detained Zarena Abdul Majid in the midst of her wedding ceremony. She had reportedly tried to have her marriage registered under the LRA 1976, before pushing ahead with the Hindu marriage ritual, but it was rejected, as the law does not apply to Muslims.⁵⁴⁰ Zarinah has claimed that she and her siblings were secretly converted by her Muslim convert father when they were children but have long been practising Hinduism since their father divorced and abandoned her family 20 years ago. The case is waiting to be heard.

In the case of *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*,⁵⁴¹ the first plaintiff, though ethnically a Malay and born a Muslim, renounced the religion of Islam about five years ago, and adopted Hinduism as her religion. She changed her name to a Hindu name, and married the second plaintiff, an ethnic Indian and a lifelong Hindu, and they have two infant children, the third and fourth plaintiffs. After the birth of her eldest child and while carrying her second, the first plaintiff was arrested, charged for deriding the religion of Islam (for the actions she took to leave Islam) and for cohabitation outside lawful Muslim wedlock with

⁵³⁸ Steve Gilbert “Malaysia: Muslims Cannot Marry Non-Muslims” The Political Insider Faith Family America (11 August 2008) < <http://sweetness-light.com/archive/malaysia-muslims-cannot-marry-non-muslims>>: Islamic authorities in Malaysia has detained a Muslim woman for four months after she married a Hindu man. Islamic religious police raided the couple’s house and arrested her on the charge of ‘illegally cohabiting’ with a Hindu man and failing to produce any relevant marriage documents.

⁵³⁹ Joseph Sipalan “Why need for Islamic authorities to raid Hindu wedding, lawyers ask” *Malay mail online* (4 June 2014,) <<http://www.themalaymailonline.com/malaysia/article/why-need-for-islamic-authorities-to-raid-hindu-wedding-lawyers-ask>>.

⁵⁴⁰ “Isma backs JAIS on Hindu wedding, says in line with Islamic moral code” *Malay mail online* (5 June 2014) <<http://www.themalaymailonline.com/malaysia/article/isma-backs-jais-raid-on-hindu-wedding-says-in-line-with-islamic-moral-code>>.

⁵⁴¹ *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 MLJ 302.

the second plaintiff, until a child was born (the third plaintiff). The first plaintiff pleaded guilty and was convicted and fined. She sought declarations from the court under the Federal Constitution that her continued treatment as a Muslim and the criminal sanctions imposed or threatened to be imposed against her was unconstitutional despite the fact that she no longer professed the religion of Islam.

The second plaintiff went through a formal conversion to Islam. However, he confessed that it was done under a state of duress as he was advised that his wife would go to jail unless he went through the formal conversion to Islam. He also claimed that he truly professed Hinduism, and had never practised the Islamic rites nor professes the religion of Islam. The first and second plaintiffs had also decided for the third and fourth infant plaintiffs that their religion was Hinduism. At the outset, the defendants raised a preliminary objection on the question of the court's jurisdiction to hear this matter. The Civil court decided that it has no jurisdiction to hear the case and that it falls under the Sharia jurisdiction.

If the fictional case example of Daniel and Sara was that if they were an inter-religious couple (Muslim and a non-Muslim) wanting to marry, their marriage could not be formalised and thus, they would need to remain as unmarried cohabitants and would be deprived of the matrimonial (statutory) legal rights. Since they are cohabiting without marriage, there are chances that this couple could be detained⁵⁴² and be denied of their rights to live together. In the instance where it involves a Muslim party (or both are Muslims), their functionality in the relationship could not assist the Sharia court but instead they would be regarded as criminals.

However, they could claim for their rights in the Civil court, which will regard them as two different individuals and not as a married couple.⁵⁴³ On the quantification of the relationship property, their property would be divided in accordance to the financial contributions in the attainment of the property under the equitable principles of trusts.

⁵⁴² Syariah Criminal Offences (Federal Territories) Act 1997, ss 23, 27.

⁵⁴³ Liew Choy Hung v Fork Kian Seng [2000] 1 MLJ 635.

4.4 Conclusion

The divisions of matrimonial property for married couples, both within the Sharia and Civil jurisdictions are subject to the couple's financial contribution in the acquisition of property. These 'financial contributions' comprise of:

1. 'money' belonging to the spouses, which is spent in acquiring the property;
2. 'property', the income derived from any property belonging to the spouses that was expended to acquire the matrimonial property; and,
3. 'labour', the wage from paid employment and the income from the work contributed to developing lands and/or farms, which is then spent to buy the matrimonial property.

The spouse who made most financial contributions has more rights to the entitlement of the division of the property. In cases where the property contested was acquired by the sole effort of one of the parties to the marriage, that party would receive more shares within the division of the property. Although the Malaysian courts acknowledge that there is a non-monetary contribution such as taking care of the family and the needs of the children, it does not render an equal sharing regime in the matrimonial property divisions. Only in the event where both of the couple in the marriage have made financial contributions in the acquisition of the property could they then benefit from an equal division of the matrimonial property. The courts have wide discretion and its orders are parallel to the interpretation of the statutory Acts applicable for married couples, under the Sharia and Civil jurisdictions.⁵⁴⁴ In relation to the division of matrimonial property of married Muslims, married non-Muslims, and customarily married non-Muslims (if their relationship could be legally proved), the application of the laws on the divisions of the relationship property are similar within both the Sharia and Civil jurisdictions.

The position of cohabitants in Malaysia is subject to either Sharia or Civil jurisdiction. Relationship property divisions vary between Muslim cohabitants and non-

⁵⁴⁴ Islamic Family Law (Federal Territories) Act 1984 and Law Reform (Marriage and Divorce) Act 1976.

Muslim cohabitants. Within the Sharia jurisdiction, cohabitation among Muslims and to a certain extent over the inter-religious cohabitants (when it involves a Muslim) is considered a criminal offence. However, under the Civil jurisdiction, cohabitation among non-Muslims is not categorised as a criminal offence. Nonetheless, the LRA 1976 is not extended to unmarried non-Muslim cohabitants. Cohabitants' right to relationship property is determined by the equitable principles of constructive trusts. As a result, the courts decide the division of property in accordance with the beneficial interest of the parties to the property. Although the courts' establishment of case law concerning cohabitants' right to property is not an unconstitutional usurpation of the legislature's power, however, a specific statutory regime would offer better guidance to both judges and society at large.⁵⁴⁵

This matter is in contrast to married couples, whereby without any financial contributions, married spouses are still able to receive a share of at least one-third or one-fourth in the matrimonial property (depending on the courts discretion). Subsequently, it is also clear that the principle of equality is absent between married and unmarried cohabitants in Malaysia. The former are offered more protection, especially in the division of property (although this does not always necessarily guarantee an equal division of assets), whilst the latter group continue to struggle without any legislative protection of their interests. Interestingly, the situation in England, which also adopts the equitable principle of a constructive trust like Malaysia, actually affords further protection through the use of wider discretionary powers, which is discussed further in chapter five.

⁵⁴⁵ Judges are not ideal lawmakers, since their decision-making is focused on deciding the case before them: L Alexander and E Sherwin "Judges as Rule Makers" in D Edlin (ed) *Common Law Theory* (CUP 2007) at 27, 33: The legislatures are the ones to properly weigh the different values, policy options and their implications for individuals and the community, from a comprehensive perspective: M Harding "Defending *Stack v Dowden*" (2009) 73 *Conveyancer* at 309, [317-318]. Referring to Dworkin's distinction between policy and principle: R Dworkin *Taking Rights Seriously* (Duckworth 1977 chapter 4).

Chapter 5: Law of Marriage and Cohabitation in England

5.1 Introduction

This chapter presents research relating to the division of property of married and cohabiting couples in England. Within the English legal system, married couples are covered by the Matrimonial Causes Act 1973 (“MCA 1973”) whereas unmarried couples are not. Rather, unmarried couples must turn to other remedies, such as equitable trusts, in order to resolve their property disputes when they separate.

Additionally, this chapter provides a historical overview pertaining to the development of law in relation to married and unmarried couples concerning the division property. A study of this nature is necessary in order to fully understand why England has decided not to draft formal legislation in respect of unmarried couples. This discussion will also highlight the legal position of married couples at common law, followed by the developments in the statutory laws, to the acceptance of same sex marriages and unmarried cohabitation in modern times.

The law relating to the division of relationship property in England will be compared to the law in Malaysia including the recognition of cohabitants’ functionality. A comparative discussion is also offered from the Scottish and Irish perspectives. An analysis is presented concentrating on the present law in operation in England, which is applicable to this subject matter. A fictional scenario concerning Daniel and Sara in relation to the division of their relationship property and the English postulation of the division of such property is also presented within this chapter (refer to page 134 for the facts of the scenario).

5.2 Historical Background

At common law the husband and wife were said to be one person. As Blackstone said:⁵⁴⁶

[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything, and is therefore called femme-covert ... Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by marriage.

Before the introduction of any statutory rights for married woman, her husband had uncontrolled disposition of all property mutually belonging to himself and his wife.⁵⁴⁷ For example, the property brought in to the marriage by the wife and property acquired by her during marriage, belonged to the husband.

Upon marriage, a wife lost her ability to own or control property, enter into contracts,⁵⁴⁸ or make a will, without the consent of her husband.⁵⁴⁹ A married woman's real property, for example, land, became her husband's responsibility. Although he did not own the property and could not sell it without her consent, during his lifetime he could do anything to the property, such as, planting, leaving it uncultivated, renting it and taking the profits produced. A woman's moveable property such as her money, livestock and personal possessions, became her husband's outright. He had control over the cash she brought in to the marriage, inherited or earned during the marriage. The husband's control over his wife's real property and ownership of her personal property explains her inability to enter into contracts, or create a will without his permission. Since the husband

⁵⁴⁶ William Blackstone *Commentaries on the Laws of England* (1765) 1 at [442-445].

⁵⁴⁷ With the exception to freehold property, which the wife possess in her own right.

⁵⁴⁸ E. H. Bennett *The law of infancy and coverture* (Burlington: Chauncey Goodrich 1849) at 187: The husband is liable for the necessities, which, are the food, shelter and clothing, however, this is subject to his degree and estate, and the misconduct or even adultery of wife does not discharge him from his liability.

⁵⁴⁹ *Ibid*, at 209: if the husband omits to make disposition of the property in his lifetime, then the property will survive to his wife (after his death).

became entitled to substantial interests in the wife's property, he therefore had an obligation to support his wife in accordance to his estate and financial circumstances. Married women could only reclaim the property through widowhood. In contrast to wives, women who never married or were widowed maintained control over their property and inheritance. This is because the law considered them as *femme sole*.⁵⁵⁰

After the dissolution of marriage, women were usually left impoverished, as the law offered them no rights to marital property. The case of *Caroline Norton* in 1836 highlighted the injustice of the English property law.⁵⁵¹ As noted earlier, under the common law doctrine of unity of marriage, the husband and wife became legally one. "In the absence of specific provision by settlement, much of the wife's property was vested in her husband, and in compensation, she acquired a right to be supported by the husband and she also had certain rights after his death."⁵⁵² Women could enjoy a cumulative life interest in a portion of her late husband's land known as dower.⁵⁵³ Dower provided the essential support for the widow and any children to their father's property.⁵⁵⁴ Dower was a widow's share of her husband's lands, customarily one-third.⁵⁵⁵ In 1833, England passed a Dower Act and later abolished it in 1925.⁵⁵⁶

⁵⁵⁰ *Femme sole* is referred to a woman who had never been married or who was divorced or widowed, or to a woman whose legal subordination to her husband had been invalidated by trusts, a pre-nuptial agreement, or judicial decision: "Feme-sole" Encyclopaedia Britannica accessed on 3rd March 2014
<<http://www.britannica.com/EBchecked/topic/204101/feme-sole>>.

⁵⁵¹ "History Figures: Caroline Norton (1808-1877)" BBC History accessed on 15 March 2015
<http://www.bbc.co.uk/history/historic_figures/norton_caroline.shtml>: Caroline Sheridan was in an extremely unhappy marriage as she was a victim of regular and vicious beatings. Later, she left her husband, George Norton, who previously encouraging the friendship, now claimed that Caroline was guilty of adultery with the home secretary, Lord Melbourne. Caroline was unable to obtain divorce and was denied access to her three sons. Her reputation was also ruined. Her subsequent protests were instrumental in the passing of the Infant Custody Bill of 1839. Norton later attempted to take proceeds of her writing. Her campaign to ensure women were supported after divorce included an eloquent letter to Queen Victoria, which was published. Caroline's efforts were influential in the passing of the Marriage and Divorce Act of 1857.

⁵⁵² As per Lord Denning in *Williams & Glyn's Bank Ltd v Boland* [1979] at ch 312, 432.

⁵⁵³ Sue Sheridan Walker *Wife and Widow in Medieval England* (University of Michigan Press 1993) at 7.

⁵⁵⁴ *Ibid*, at 8.

⁵⁵⁵ "Dower in English Common Law" Oxford Reference accessed on 15 March 2015

<<http://www.oxfordreference.com/view/10.1093/acref/9780195134056.001.0001/acref-9780195134056-e-255>>: The Dower Act 1833 actually reduced a woman's rights and it was abolished in 1925.

⁵⁵⁶ "Dower Legal Definition" Duhaime legal Dictionary accessed on 15 March 2015

<<http://www.duhaime.org/LegalDictionary/D/Dower.aspx>>.

The weaknesses in the unitary system encouraged the need to create laws that would protect the rights of married women. Following that, a series of legislation was introduced for this purpose. The following discussion examines this further.

5.2.1 The Development of the Statutory Framework

In the nineteenth century, there was a movement against the injustice caused by the common law rules. The MCA 1857 was the first law to protect a wife's property and legalise divorce under the British law.⁵⁵⁷ This legislation required Parliament to examine the ramifications of the common law doctrine of coverture. The MCA 1857 introduced a three-step process:⁵⁵⁸

1. creating a Court of Divorce and Matrimonial Causes, which could only rule on child custody cases;
2. establishing the grounds for divorce, whereby, a husband must prove that the wife had committed adultery; and,
3. requiring the wife to prove that her husband had committed aggravated adultery.

The Act decreed that a divorced wife's property and future earnings would be her own.⁵⁵⁹ Where a woman was legally declared to have been deserted by her husband or where she had obtained a judicial separation, her earnings and property were protected.⁵⁶⁰

The subsequent enactments of the Married Women's Property Act 1870 created a system that allowed any money which a woman earned to be treated as her own property and not her husband's.⁵⁶¹ Secondly, deposits or savings in the banks contributed by a

⁵⁵⁷ Kelly Hager "Chipping Away at Coverture: The Matrimonial Causes Act of 1857" (Branch: Britain, Representation and Nineteenth Century) in Dino Franco Felluga (ed) *Extension of Romanticism and Victorianism* accessed on 1st March 2014 <http://www.branchcollective.org/?ps_articles=kelly-hager-chipping-away-at-coverture-the-matrimonial-causes-act-of-1857>.

⁵⁵⁸ Ibid, at 552.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid.

⁵⁶¹ Married Women's Property Act 1870, s 1; "Relationships, Marriage: property and children" UK Parliament accessed on 1st March 2014

married woman was regarded as her separate property.⁵⁶² The Act gave power to a woman to contract for taking her own life insurance policy, or for her husband's life.⁵⁶³ It also gave her the right to sue in her name in respect of her separate property and provided her with all the remedies in civil and criminal cases for the protection of her separate property.⁵⁶⁴ She was also accountable for any debts contracted before marriage.⁵⁶⁵ On the death of the wife during the lifetime of the husband, any personal property that the wife might possess and which was not disposed by a will was passed to the husband.⁵⁶⁶

Further campaigning resulted in a series of enactments culminating in the introduction of the Married Women's Property Act 1882. This Act allowed married women to have complete personal control of their property.⁵⁶⁷ Parliament adopted the regime of 'separate property' and from then onwards a married woman's property could remain as her separate property and not become subject to the common law rules. Husband and wife were treated as two different entities in the same manner as a *feme sole*. Marriage no longer had any immediate effect on the property entitlement.⁵⁶⁸ This reform was intended for the benefit of married women and outwardly it did change the position of married women. For instance, the wife's property and her earnings were thenceforth her own, compared to common law whereby her earnings and property had belonged to her husband.

Nevertheless, the separate property regime only introduced a system of formal equality in respect of legal capacity to acquire and retain property. Although married women benefited from non-interference by the husband in respect of their property rights, the new laws would have little effect on those women not financially well off in their own right. The spouses' respective roles within the marriage determined the financial

<<http://www.parliament.uk/about/livingheritage/transformingsociety/privatelives/relationships/overview/propertychildren/>>.

⁵⁶² Ibid, s 2.

⁵⁶³ Ibid, s 10.

⁵⁶⁴ Ibid, s 11.

⁵⁶⁵ Ibid, s 12: The husband is not liable for the debts contacted by the wife before the marriage.

⁵⁶⁶ Ibid, s 1.

⁵⁶⁷ Relationships, Marriage: property and children, above n 561.

⁵⁶⁸ Despite that, there is one long-standing non-statutory presumption that applies to transfer from husband to wife and fiancé to fiancée, namely, the presumption of advancement.

aspect of the family. For example, in a situation where the woman is the homemaker and does not inherit any property and the husband, on the other hand, is the breadwinner; upon divorce, equality may not be achieved in economic terms. Women without property and earnings would continue to be in financial hardship without the husband's financial assistance. The woman's home-making role in marriage created an inherent disadvantage, as they were financially weak. This would have been the situation in the large majority of marriages, where the women were economically dependent on the husband.

A further development was made by the introduction of the Law of Property Act 1922. This Act enabled the husband and wife to inherit each other's property and also granted them equal rights to inherit property of intestate children.⁵⁶⁹ Under the 'new' Law of the Property Act passed in 1926, women were allowed to hold and dispose of property on the same terms as men.⁵⁷⁰ Consequently, both husband and wife were allowed to inherit property on equal terms.

In summary, the early legislative moves had little automatic impact on married parties' property rights. England did not recognise a shared marital property regime but instead applied a separation of property regime whereby each spouse owned his or her own separate property during the marriage.⁵⁷¹

5.2.2 The Modern Era

The current legislation governing property rights of married couples is to be found in MCA 1973. The MCA 1973 does not apply to unmarried couples. This Act takes effect when the marriage comes to an end. While the marriage is still in existence, each spouse legally controls his or her separate property.

MCA 1973 begins from a presumption of separate property, but provides the court with a number of different orders it may make that have the effect of redistributing the

⁵⁶⁹ Relationships, Marriage: property and children, above n 561.

⁵⁷⁰ Ibid.

⁵⁷¹ *Charman v Charman* [2007] EWCA Civ at 503 at para 124.

property. These are referred to as “ancillary relief”, largely because the powers only arise on or after the grant of a decree or order. The court also has a wide discretion as to how it may exercise its powers to order relief. These matters are discussed in more detail at 5.3.1. It is important to note that under the MCA 1973, there is no presumption of equal sharing between the spouses who have contributed to the property and spouses who have contributed to the relationship.

The approach adopted by the courts on financial relief has changed over the years. Before 2000, awards were based on the principle that the reasonable requirement of the financially weaker party must be met.⁵⁷² In 2000, in *White v White*, the House of Lords judgment placed the role of the homemaker on an equal footing with that of the breadwinner and established a “yardstick of equality of division”.⁵⁷³ However, this does not necessarily lead to an equal division in all cases as the circumstances of each case are taken into consideration.

Subsequently, in *Miller v Miller and McFarlane v McFarlane* in 2006,⁵⁷⁴ the House of Lords held that three principles should guide the court in trying to achieve fairness in the division of property in any given case, specifically:⁵⁷⁵

1. the financial needs of the parties;
2. compensation aimed at redressing any significant prospective economic disparity between the parties arising from the way they had conducted their marriage; and,
3. the principle of equal sharing.

⁵⁷² Law Commission *Marital Property Agreements Executive Summary* (11 January 2011).

⁵⁷³ *White v White* [2000] UKHL 54, Law Commission, *Marital Property Agreements Executive Summary*, 11 January 2011: In cases where one party to a marriage primarily looks after the home and children and the other is the “money-earner”, the court should not discriminate between these roles when making financial provisions.

⁵⁷⁴ *Miller v Miller and McFarlane v McFarlane* [2006] 1 FLR 118; [2006] UKHL 24.

⁵⁷⁵ *Ibid*: The Court of Appeal has called it the “sharing principle”. The court suggested that property acquired before the marriage shall also fall under the ambit of sharing principle. ‘Law Commission *Marital Property Agreements Executive Summary*’, above n 567: However, the one area of uncertainty which remains is the extent to which certain property owned by one party can be considered “non-matrimonial”, and not to be shared with the other party.

Despite the sharing principles developed within the case law, it should be noted that the courts are afforded a wide ambit of discretion. As Baroness Hale observed in *Miller*,⁵⁷⁶ “the flexible statutory powers that the court exercises once a marriage comes to an end exist against the background of separate property during marriage.”

5.2.3 Same- Sex Relationships

In 2001 the Mayor of London launched the London Partnerships Register, allowing lesbians, gay men and heterosexual couples to register their partnerships.⁵⁷⁷ In 2002, Parliament passed measures allowing lesbian and unmarried couples to adopt children.⁵⁷⁸ In 2005 the first civil registrations of the same-sex couples took place as a result of the long campaign for the Civil Partnerships Act (“CPA 2004”), which was passed a year earlier in 2004. Under the CPA 2004, the court has the power to make financial relief orders on the breakdown of civil partnership. Section 72(1) of the CPA 2004 states that Schedule 5 to the Act makes provision for financial relief in connection with civil partnership that “corresponds” to the provisions made in respect of marriage within the MCA 1973. The CPA 2004 accords civil partnership all the rights, responsibilities and advantages of civil marriage. Besides the provisions governing financial relief under part two of the MCA 1973 that now apply to civil partnerships, the provisions governing wills, administration of estates and family provisions are also extended to civil partners in the same way they are to married spouses. Accordingly, the approach developed by case law and judicial responses to financial relief in the marriage breakdown shall be applied to civil partnership.

Recently, the UK Parliament passed the Marriage (Same Sex Couples) Act 2013 (M(SSC)A 2013), which came into force on 13 March 2014.⁵⁷⁹ It stipulated that partners

⁵⁷⁶ *Miller v Miller and McFarlane v McFarlane* [2006] 1 FLR 118 at [123-124].

⁵⁷⁷ Linda McDowell “Post-war Legislation, Working Lives: Gender, Migration and Employment in Britain, 1945-2007” (First Edition 2013 John Wiley & Sons Ltd) accessed on 5th March 2014 <<http://onlinelibrary.wiley.com/store/10.1002/9781118349229.app1/asset/app1.pdf;jsessionid=89117AFD2BA620D3DD2CFC73B87E6B08.f01t02?v=1&t=hscjwk7p&s=b6f082de21321fdc67c8f0745d73ec8d3803d495>> at 261.

⁵⁷⁸ *Ibid*, at 262.

⁵⁷⁹ “Same Sex Marriage, Civil Partnerships, Co-Habitation Agreements and Disputes”

of the same sex should be allowed to marry, irrespective of their same sex. Section 9 of the M(SSC)A 2013 grants couples who are registered in a civil partnership the ability to convert that partnership into a marriage. Section 11 and schedules 3 and 4 provide that, as a general rule under the English law, marriage has the same effect in relation to same sex couples as it has relation to opposite sex couples. This provision sets out how the English law is to be interpreted to ensure that same sex marriages are treated in the same manner as the opposite sex marriages.

However, it should be noted that neither the CPA 2004 nor the 2013 Act affect the laws relating to same-sex or heterosexual couples who cohabit, but are not married or in a civil partnership. The position of cohabitants remains largely unregulated, without specific statutory legislation. The following section examines this issue further.

5.2.4 Unmarried Cohabitation

In the Law Commission's consultation paper entitled 'Cohabitation: the financial consequences of relationship breakdown', published in 2006, it was noted that cohabitation had risen dramatically since the 1970s and was expected to rise further still. Moreover, the 2001 Census⁵⁸⁰ had already recorded that over two million couples were cohabiting in England and Wales,⁵⁸¹ a 67 per cent increase in the figures from 1991.

The numbers of children born to cohabiting couples in England have also risen.⁵⁸² In 2001, over 740,000 cohabiting couples had dependent children,⁵⁸³ between them supporting over 1.27 million children.⁵⁸⁴ The number of cohabiting couple households

Gaylawyers.co.uk accessed on 5th March 2014

<<http://www.gaylawyers.co.uk/articles-about-gay-legal-issues/civil-partnerships-sex-marriage-co-habitation-agreements-disputes/>>.

⁵⁸⁰ A survey of the population of England and Wales conducted by ONS once every ten years: The Law Commission, above n 1, at 3.

⁵⁸¹ "ONS, Census 2001": These figures include same sex couples: The Law Commission, above n 1, at 3: <<http://www.ons.gov.uk/ons/guide-method/census/2011/>>.

⁵⁸² The Law Commission, above n 1, at 4.

⁵⁸³ ONS Census 2001, above n 581.

⁵⁸⁴ Ibid: 27 per cent of these children were aged 0 to 2. There were over 2.6 million children in lone parent families in 2001.

with dependent children more than doubled between 1991 and 2001.⁵⁸⁵ By contrast, in 1970, fewer than 10 per cent of births were to unmarried parents.⁵⁸⁶ However, during the next three decades this number rose dramatically, whereby in 2004, 42 per cent of births fell within that category.⁵⁸⁷

Cohabitation is expected to become even more common and to spread across a wider range of the population. The Government's Actuary Department has predicted that by 2031, the number of cohabiting couples in England and Wales will increase to 3.8 million.⁵⁸⁸ On this projection, over one in four couples will be cohabiting by 2031; 16 per cent of adults⁵⁸⁹ will be in cohabiting relationships and 41 per cent married.⁵⁹⁰ Other data suggests that the number of children dependent upon a cohabiting couple will also increase as more couples have children outside marriage and fewer parents decide to marry.⁵⁹¹

Besides the demographic data and future projection provided by the Law Commission Report, the Office for National Statistics has also produced some statistics relating to cohabitants. The 41st edition of the Social Trends report was published in 2010 and projected the details of households and families in the overall United Kingdom (UK) perspective. The Social Trends report highlighted the comparisons of families between 2001 and 2010 that show cohabitation has increased over time.⁵⁹²

⁵⁸⁵ The Law Commission, above n 1, at 4.

⁵⁸⁶ K Kiernan "Unmarried Cohabitation and Parenthood in Britain and Europe" (2004) 26 Law and Policy 33 at 40 fig 2.

⁵⁸⁷ ONS, Social Trends 36 (2006), at 30 and table 2.19 which provides comparisons with other EU countries; Social Trends 35 (2005), at 26-27 and fig 2.17 which shows the changes in jointly and solely registered non-marital births over time.

⁵⁸⁸ "Marital Status Projections for England and Wales" Government's Actuary Department accessed on 04 September 2013 <http://www.gad.gov.uk/marital_status_projections/background.htm>.

⁵⁸⁹ "Adult" refers to those over the age of 16.

⁵⁹⁰ The Law Commission, above n 1, at 4.

⁵⁹¹ J Haskey "Cohabitation in Great Britain: Past, Present and Future Trends-and Attitudes" (2001) 103 Population Trends 4 at 18.

⁵⁹² Families consisting of a cohabiting couple with or without children increased from 12.5 per cent of all families in 2001 to 15.3 per cent in 2010. The number increased from approximately 2.1 million in 2001 to 2.7 million in 2010; The proportion of cohabiting couple families with dependent children increased between 2001 and 2010 from 10.9 per cent to 14.0 per cent and lone parent families from 23.6 per cent to 25.5 per cent of all families with dependent children; Of all those living in families, just over 70.0 per cent (35.7 million) lived in a married-couple family in 2010, while the proportions living in cohabiting families and lone parent families were each nearly 15.0 per cent, or 7.5 million people; The proportion of dependent

In line with the increasing numbers of cohabiting couples, there are nowadays many cases involving cohabitants coming before the courts. One such recent example is the English county court case of Pamela Curran and Brian Collins.⁵⁹³ This case highlights the difficulties that arise when unmarried couples in England separate. The couple were in a relationship for 30 years and together ran a successful kennel company. Both the family home and the business were in Mr Collins' sole name. Upon the breakdown of the relationship, Ms Curran claimed a share in the home and business. However, the county court judge ruled that Ms Curran had no right to share in the family home or the business. Despite working hard in the business, the court did not grant her with any financial relief. However, her application for an appeal was granted by Lord Justice Toulson, who commented that, "the law of property can be harsh on people, usually women, in that situation. Bluntly, the law remains unfair to people in the Appellant's position".⁵⁹⁴ The appeal is still waiting to be heard at the time of writing.

The English courts (as demonstrated in the above case and further cases that are discussed below) are reluctant to order financial relief to unmarried cohabitants (as equal to married couples). Marriage continues to have a central and prominent position in the English legislation, judiciary and social culture. According to the Church of England, it has always been the teaching of the Church that marriage is a faithful, committed, loving, permanent, legally sanctioned relationship between a man and woman, providing the best context for raising of children and is central to the stability and health of human society.⁵⁹⁵ It has been argued that for those reasons it warrants a special position within the social and legislative framework.⁵⁹⁶ As marriage contributes to the common good,

children living in cohabiting couple families increased from 10.1 per cent (1.3 million) in 2001 to 13.4 per cent (1.8 million) in 2010. Over the same time period, the proportion of dependent children living in lone parent families increased from 21.9 per cent to 23.6 per cent (2.9 million to 3.1 million).

⁵⁹³ Katie O'Callaghan "'Unfair' laws for cohabiting couples highlighted again" *BBC News* (6 February 2013) accessed on 1st March 2014 <<http://www.bbc.com/news/business-21337154>>.

⁵⁹⁴ Ibid.

⁵⁹⁵ Thomas Southwark *The Law Commission, Consultation paper no 179, Cohabitation: The Financial Consequences of Relationship Breakdown, A Response from the Mission and public Affairs Council of the Church of England* (September 2006) accessed on 29 May 2014 <<http://www.churchofengland.org/media/1129330/cohabitation.pdf>> at 2.

⁵⁹⁶ Ibid.

there is a very strong case for pursuing public policies that promote and encourage marriage (and not unmarried cohabitation).⁵⁹⁷

For cohabitants, there is no basis on which capital assets or income may be reallocated between the parties.⁵⁹⁸ Hence, they have to rely on property law, both when engaged in a dispute with a third party, and when disputing the ownership of the property upon breakdown of the relationship or death.

The domestic law of England has therefore always recognised a difference in its treatment of unmarried cohabitants and married couples. The difference is very apparent in the area of property rights. Consideration of property rights falls into two parts, firstly, rights of occupation during the relationship and on its breakdown, and secondly, rights to ownership of the property. Cohabitants who believe that they should acquire a beneficial interest, statutory or contractual right over the property, may apply for the right of occupation in accordance with their interest or right.

As regards cohabitants' rights to the ownership of the property, they have to rely upon the rules of equity in order to establish their rights to the property contested.⁵⁹⁹ Those rights may arise as a result of:

1. an express declaration of trust within the documents of title or other expressly created interest;
2. a resulting trust (on the basis of a contribution to the purchase price of a property);
3. a constructive trust (as a result of the parties common intention upon which the claimant has acted to his or her detriment);⁶⁰⁰

⁵⁹⁷ Ibid.

⁵⁹⁸ There is no specific legislation for cohabitants that provide provisions for the allocation of property after the relationship breakdown and the Matrimonial Causes Act 1973 does not apply to cohabitants.

⁵⁹⁹ This is similar to the position of cohabitants in New Zealand before the introduction of Property (Relationships) Act 1976.

⁶⁰⁰ *Oxley v Hiscock* [2004] 3 All ER 703 at para 73: 'What would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?' and the House of Lords decision in *Stack v Dowden* [2007] All ER (D) 208 at para 69: 'In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts, many more factors than financial contributions may be relevant to dividing the parties' true intentions'. In *Fowler*

4. proprietary estoppel; and,
5. other relief (such as licence to occupy).

When cohabitants' relationship breaks down, the equitable principles are applied to establish a beneficial interest for one cohabiting party. Where the property is in the sole name of one cohabitant, and in the absence of any express declaration, the principles of constructive trusts will be applied. This matter is to establish a beneficial interest for the non-owner. A constructive trust operates where there is no written agreement as to how the property is held. The court will look at whether there was any agreement, arrangement or understanding reached between the parties on how the property was to be shared beneficially.⁶⁰¹ The acceptance of cohabitants and the availability of financial relief by way of equitable remedies, demonstrates the movement from merely recognising the status of couples in the relationship as in 'marriage' to acknowledge cohabitants based on their 'functionality'. The question of functionality is investigated further at 5.3.2.

5.3 Property Divisions for Married Couples and Unmarried Cohabitants

As foreshadowed at 5.2.2, in England, a separate property regime is applied to the division of matrimonial property. The husband and wife are treated as two different

v Barron [2008] All ER (D) 318, applying *Stack v Dowden*: it was proper inference to draw that payments outside of mortgage payments were contributions to household expenses for which both parties were responsible. In *Jones v Kernott* [2010] EWCA Civ 578; [2010] 2 FCR 372, the 12 year period following separation of the parties during which the applicant paid the mortgage and all other expenditure relating to the property was not sufficient evidence of a changed shares intention to depart from the equal ownership agreed by the parties at the time of purchase. A constructive trust was based on the common intention of the parties and detrimental reliance based on the existence of a trust, demonstrated by indirect contributions to the purchase price or renovation work: *Grant and Edwards* [1986] 2 WLR 582; *Eves v Eves* [1975] 1 WLR 1338. The beginning era of the development of the trust of the family home was the presumed intention of resulting trusts in *Crisp v Mullings* [1976] 2 E.G.L.R. 103 whereby if a person contributed to the purchase price of another person's property, it was presumed that there was a trust in favour of the contributing party who had intended the gift (in *Dyer v Dyer* (1788) 2 Cox Eq 92). The family constructive trust developed after decisions, such as in the cases of *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.

⁶⁰¹ *Gissing v Gissing* [1971] AC 886: This case sets out the basic principles of constructive trusts. First, there must be a common intention or agreement between the couple that they were to share the beneficial interest of the property. Second, the non-owner must have acted to that detriment in relying on such situation.

persons for any purposes in the property.⁶⁰² Each spouse owns and administers the property acquired before the marriage and during the course of the marriage relationship. Therefore, neither spouse has a right over the other spouse's property. The court's jurisdiction is contemplated within part II of the MCA 1973 (sections 24, 24A and 25). These provisions stipulate the rights of married couples to matrimonial property.

While the MCA 1973 applies to married couples, unmarried cohabitants rely on the equitable principles of constructive trusts to claim for their rights to relationship property. The MCA 1973 is not extended to unmarried cohabitants, and as explained in 5.2.4, the application of constructive trusts fills in the gap when there is a dispute over the rights to the divisions of relationship property.

To illustrate the difference between the two jurisdictions examined so far, Malaysia and England, the scenario of Daniel and Sara from chapter four (refer to page 134) is extended to this chapter, examining the issue from the England perspective. It answers the query concerning Daniel and Sara's legal position if they were married or if they were living together as unmarried cohabitants. It questions how far their functionality within the family is recognised by the legislation and/or the courts (based on the case law) and discusses their rights to claim for property rights in the event of the relationship breakdown.

Returning to the illustration, Daniel and Sara have committed to a marriage or a cohabiting relationship for about five years. At the beginning of their relationship they were renting a house. Daniel and Sara were working, and both have paid for the house rent. Later, after a year of living together, they bought a house under Daniel's name as he applied for the bank mortgage. The house price was \$250,000.00. Daniel has been paying the bank mortgage. Nonetheless, Sara contributed ten per cent of the house purchase price, about \$25,000.00. They had a child after they had lived together for about three years. Due to the responsibility of caring for the child, Sara had to quit her job and became a homemaker. This couple were performing the same functions as a married

⁶⁰² Law of the Property Act 1925, s 37.

couple. After living with each other for about five years, they decided to break up. The following discussion will examine the laws applicable in England and answer the following questions.

1. How is matrimonial property divided for married couples?
2. How is relationship property divided for unmarried cohabitants?
3. Whether the cohabitants' functionality within the relationship is recognised.
4. Does the property division demonstrate equality?
5. Is there equality between the relationships, precisely, between married spouses and unmarried cohabitants?

5.3.1 Matrimonial Property Division for Married Couples

Under the principles of the Matrimonial Causes Act 1973 (MCA 1973), the purpose of the court order is to decide how an equal and just outcome for both parties in the proceedings can be achieved.

The MCA 1973 takes effect when the marriage ends, either on divorce, nullity or by judicial separation.⁶⁰³ Section 24 of the MCA 1973 describes the court's powers to make a property adjustment order for a party to the marriage or to any children of the marriage when the marriage comes to an end.⁶⁰⁴ There are also corresponding provisions in the Civil Partnership Act 2004 (CPA 2004).⁶⁰⁵ The property adjustments orders are for the purposes of modifying the financial position of the parties to the marriage and any children of the family.

[O]n granting a decree of divorce, nullity of marriage or a judicial separation, the court may make any one or more of the following orders:⁶⁰⁶

⁶⁰³ Matrimonial Causes Act 1973, s 21.

⁶⁰⁴ Ibid, ss 21 (1)(2); transfer of property, settlement of property, variation of settlement.

⁶⁰⁵ Ibid, ss 65-72.

⁶⁰⁶ Ibid, s 24 (1).

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order, for the benefit of such child such property as may be specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including settlements made by will or codicil), other than one in the form of a pension arrangement.

Likewise with a property adjustment order, the court may further order the sale of property (the property in which, the proceeds of the sale which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion).⁶⁰⁷

The court has a duty to decide whether to exercise its powers under section 24⁶⁰⁸ or 24A.⁶⁰⁹ First consideration must be given to the welfare of any minor child of the family who has not attained the age of eighteen. In relation to applying sections 24 or 24A, the court shall then have regard to the following matters:⁶¹⁰

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity, any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

⁶⁰⁷ Ibid, s 24A.

⁶⁰⁸ Property adjustments orders in connection to divorce proceedings.

⁶⁰⁹ Orders for sale of property.

⁶¹⁰ Matrimonial Causes Act 1973, s 25(2).

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each party to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions which each of the parties has made or is likely (to make) in the foreseeable future to the welfare of the family, including any contribution by looking after the home or caring for the family;
- (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
- (h) in the case of proceedings for divorce or nullity of marriage, the value to each of the parties to the marriage of a benefit (for example, a pension which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

The court in exercising its power in relation to a child of the family, it shall have regard to the following matters:⁶¹¹

- (a) the financial needs of the child;
- (b) the income, earning capacity (if any), property and other financial resources of the child;
- (c) any physical or mental disability of the child;
- (d) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;
- (e) the considerations mentioned in relation to the parties to the marriage in paragraphs (a), (b), (c) and (e) of subsection (2) above.

The English courts therefore have wide discretionary powers to make orders for married couples in order to reach fair decisions for both parties and their children.

⁶¹¹Ibid, s 25(3).

By comparison, the legislation in Malaysia noticeably differentiates between the properties bought by sole effort or via joint effort. The law investigates the contributions of the spouses to the property. Although the court has wide discretion in the order of quantification, it is definite that the party by whose sole effort the property was acquired receives a greater share than the spouse who made no financial contribution in the acquisition of the property. Additionally, section 25(2) of the MCA in England provides a guideline for the court to consider a whole range of matters in dividing the property.⁶¹² By comparison, Malaysia has limited provisions that direct the court to take into account of the contributions made: (1) to the property by way of money, property or labour; (2) any debts owing by either party which were contracted for their joint benefit; (3) the needs of the minor children; and (4) the welfare to the family by looking after the home and caring the family.⁶¹³

Returning to the example, if Daniel and Sara were married under the English jurisdiction, sections 24, 24A and 25 of the MCA 1973 would apply to them for matters of dividing the matrimonial property. Besides that, the discretion of the court to make the orders is certain. The Act provides a guideline for the court to make an order for all parties concerned. However, on the basis of its wide discretion, the court's order could vary from one case to the other. This matter is supported by section 25 of the MCA 1973, which directs that all the circumstances of the case should be taken into account⁶¹⁴ and it has been stressed by the courts that every case has to be dealt with individually on its own facts.⁶¹⁵ Based on this discretion and having concern to achieve an equal outcome,⁶¹⁶ the court would decide by taking into account the whole course of dealing of the relationship.

⁶¹² For example, the income, earning capacity, property and other financial resources which each of the parties has or is likely to have in the foreseeable future, the financial needs, obligations and responsibilities which each of the parties has or likely to have in future, the standard of living enjoyed by the family before the marriage breakdown, the age of the party to the marriage and the duration of the marriage, any physical or mental disability of either parties, and other matters.

⁶¹³ Law Reform (Marriage and Divorce) Act 1976, s 76: Although for maintenance purposes (to determine the amount of maintenance), the court is directed to assess the means and needs of the parties (s 78), and whether the parties were incapacitated, by mental or physical injury or ill health (s 77(2)).

⁶¹⁴ The elements contained in the Matrimonial Causes Act 1973, s 25(2).

⁶¹⁵ Jane Bridge (The Right Honourable Lady Justice Jill Black DBE) Tina Bond, Liam Gribbin, Madeleine Reardon *A Practical Approach to Family Law* (Oxford University Press 2012) at para 31.01. Baroness Hale suggested that "each case will turn on its own facts": *Stack v Dowden* [2007] UKHL 17 [2007] 2 WLR 831 at para 69.

5.3.2 Relationship Property Division for Unmarried Cohabitants

Cohabitants' functionality is rapidly becoming more recognised within the English courts, but that does not necessarily render an equal division of property. By contrast to married couples, unmarried cohabitants are subject to the equitable principles of constructive trusts and thus, whether the court reaches an order that displays an equality of property division is subject to a variety of circumstances and this includes (but is not limited to) whether there is an existence of an agreement to share the property.

In English law, the family home has a special significance within cohabitational disputes.⁶¹⁷ Commonly, the English courts distinguish between cases of joint and sole registration of the family home. When married or cohabiting couples hold a property under both their names as joint tenants, each possess the legal interest over the property. This matter is similar to married couples in Malaysia. Therefore, generally, any share from the sales or investments from the property would be distributed equally between the couple. The question is mostly to what extent (the quantification) of the terms of any trust of the family home are at variance with the legal title, for example, if the parties share equally, or according to their contributions made to the purchase price. In cases where only one partner is the registered legal owner of the property, the non-registered partner may need to prove the beneficial interest that he or she has over the property.

In applying the scenario of Daniel and Sara who are now living in England as unmarried cohabitants, they would be defined within the Family Law Act 1996 (FLA 1996) as 'a man and a woman who, although not married to each other, are living

⁶¹⁶ In *White v White* [2000] 2 FLR 981, the House of Lords established a 'yardstick of equality of division'. It was indicated that in applying section 25 of the Matrimonial Causes Act 1973 the court should achieve a 'fair outcome'.

⁶¹⁷ Anne Sanders "Cohabitants in Private Law: Trust, Frustration and Unjust Enrichment in England, Germany and Canada" (2013) *International and Comparative Law Quarterly* 62(3) at 633: Especially in Greater London, the rise of house prices over the last decades has been striking. Peter Sparkes "How Beneficial Interests Stack up" (2011) *Conveyancer* at [156-163], a development that might have increased the willingness of former cohabitants to litigate.

together as husband and wife'.⁶¹⁸ Although afforded less protection than that provided by the MCA 1973, the cohabiting couple may still acquire some protection through equity.

There is a series of cases in England that apply the principle of constructive trusts to cases involving cohabitants and their rights to relationship property. These cases are analysed in the following discussion.

Hammond v Mitchell,⁶¹⁹ is the first reported case following the House of Lords judgment in *Lloyds Bank plc v Rosset*,⁶²⁰ dealing with the acquisition of a beneficial interest in domestic property. In the former case, the financial entitlements of unmarried cohabitants were made according to a strict equitable principle. The enquiry was made on:

1. whether the couple had reached any agreement or understanding based on an express discussion concerning their interests towards the property; and,
2. whether there should be an action in reliance to that agreement.

In the absence of such agreement, the court shall take into consideration whether there was any intention to share the beneficial ownership of the property contested for. In this case, during the period of cohabitation, H bought a bungalow over which he took out a mortgage and conveyed it into his sole name. M supported H in his business adventures. H, on the other hand, encouraged M in her part-time business. Later, H purchased a house in Spain, and they lived there for a short while. Subsequently, the relationship broke down. M claimed for the beneficial interest in the bungalow and the property in Spain.

Waite J (as he then was) delivered the judgment in the case. According to him, “had they been married, the issue of ownership would be scarcely relevant, because when dealing with the financial consequences of divorce, the law adopts a forward-looking

⁶¹⁸ Family Law Act 1996, s 62(1)(a).

⁶¹⁹ *Hammond v Mitchell* [1991] 1 WLR 1127.

⁶²⁰ *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

perspective”.⁶²¹ This forward-looking viewpoint questions the ownership of the property, considers the means of both the parties and their needs, while giving importance to the welfare of the children. This perspective is apparent from the provision in section 25 of the MCA 1973. However, since this couple were not married the MCA 1973 did not apply nor did any of the flexibility available for married couples, except a limited power to direct capital provision for their children.

Waite J held that the financial entitlements of the parties had to be worked out according to the strict equitable rights, which necessitated the enquiry as to:

1. whether there had been any agreement or understanding; and,
2. whether there was reliance out of that understanding.

The court examined whether there was any understanding between the parties concerning their beneficial interest over the property. If some understanding did exist, and there was reliance on that agreement, the court would subsequently make orders based on that particular agreement. In this case, there was an express understanding that M should have a beneficial interest in the bungalow (half-share) but not on the Spanish property. Waite J was clear that he considered the question of finding a common intention ‘detailed, time-consuming and laborious’, and therefore:⁶²²

In the light of all the facts, it was found that her share of the house should be one half of the total interest, on the basis that it appeared that the couple had intended to muck in together and thereby share everything equally. On this basis, we might say that Mitchell deserved her interest in the home because of her contribution to their relationship and to the business.

⁶²¹ *Hammond v Mitchell* [1991] 1 WLR 1127 at 1129.

⁶²² *Ibid* at 1130.

In the case of *Drake v Whip*,⁶²³ the plaintiff and the defendant bought an old barn and wanted to convert it into a joint occupation house. Both had contributed to the purchase price of the property. The plaintiff paid 40 per cent of the purchase price while the defendant paid the balance 60 per cent. The latter subsequently spent a considerable amount on the costs of the conversion before the property was finally conveyed to him. Upon separation, Mrs Drake claimed for the 40 per cent of the sale value on the basis of a resulting trust. However, the trial Judge considered the subsequent contributions made by the defendant to the conversion costs of the property and only awarded her 19 per cent. On appeal, the Court of Appeal decided that she could receive one-third of the share. According to Peter Gibson LJ, “once a common intention to share the property had been established, the resulting trust was displaced by a constructive trust, and the court could exercise its discretion in deciding what share should be fair”.

Both these English cases⁶²⁴ demonstrated that in the development of relationship property rights, there is no equality of division between unmarried cohabiting partners.

In *Wayling v Jones*,⁶²⁵ the plaintiff had lived with Mr Jones for many years in a homosexual relationship and also worked for him. In spite of that, Wayling was only given some pocket money for living expenses. During the relationship, Mr Jones made repeated assurances that when he died, Wayling could inherit his business. However, he died without having altered his will so that the plaintiff could inherit the business. This is a case involving an estoppel claim against the deceased’s estate. The judge found that there was a sufficient link between the promises relied upon by the plaintiff, and the conduct said to constitute the detriment suffered by him. The Court of Appeal held that once a promise as to the ownership had been made, and that promises relied upon were an inducement of the conduct; the burden of proof fell on the defendant to show that the plaintiff did not rely on the promises. Since the defendant failed to discharge that burden, the plaintiff was entitled to rely on the proprietary estoppel that had arisen. Therefore, he

⁶²³ *Drake v Whip* [1996] 1 FLR 826.

⁶²⁴ *Hammond v Mitchell* [1991] 1 WLR 1127 and *Drake v Whip* [1996] 1 FLR 826.

⁶²⁵ *Wayling v Jones* [1995] 69 P & C.R 170.

was entitled to the proceeds of sale of the business, which the deceased had promised but failed to leave to the plaintiff in the will.

Based on the discussion of these cases in England,⁶²⁶ when a cohabiting relationship ends, the unmarried partners were generally treated as two different individuals. Therefore, assets acquired during the relationship would belong to the partner who had directly contributed to the acquisition of the property. This ownership could be shared with the other partner if:

1. there was any agreement, arrangement or contract to do so; and
2. whether there was reliance based on the agreement.

In the absence of such an agreement between the couples concerning their relationship property, the courts decide on the basis of individual cases (or otherwise leave it in the hands of the partners to divide the assets according to their preferences, assuming decisions can be reached).

Among some identified problems for cohabitants are that those who discuss their respective rights tend to be in a better position than those who simply trust the other person.⁶²⁷ These discussions may occur at any time during the relationship.⁶²⁸ According to Lord Bridge of Harwich in *Lloyds Bank Plc v Rosset*:⁶²⁹

The first and fundamental question that must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or

⁶²⁶ *Hammond v Mitchell* [1991] 1 WLR 1127, *Drake v Whip* [1996] 1 FLR 826 and *Wayling v Jones* [1995] 69 P & C.R 170.

⁶²⁷ Anne Barlow and Rebecca Probert "Addressing the Legal Status of Cohabitation in Britain and France: Plus ça change..." (1999) 3 Web JCLI accessed on 23 September 2013 <<http://webjcli.ncl.ac.uk/1999/issue3/barlow3.html#contents>>.

⁶²⁸ *Clough v Killey* (1996) 72 P. & C. R. D22; *James v Thomas* [2007] EWCA Civ 1212 at para 24.

⁶²⁹ *Lloyds Bank plc v Rosset* [1991] AC 107 at 132.

understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance of the agreement in order to give rise to a constructive trust or a proprietary estoppel.

In the case of *Springette v Defoe*,⁶³⁰ Miss Springette and Mr Defoe purchased a house in their joint names. Miss Springette obtained a 41 per cent discount, as she has been a tenant of the local authority for about 11 years. There was no declaration of trust in the transfer, and both were liable to repay the mortgage instalments and in point, they contributed equally to the repayments. When the relationship later broke down, Miss Springette claimed a 75 per cent share on the basis of her financial contributions. Mr Defoe, on the other hand, claimed for 50 per cent on the proposition that both understood that they were to share the property equally. The Court of Appeal held in favour of Miss Springette, following Lord Bridge's remark (as above) in the *Rosset*⁶³¹ case.

Steyn LJ observed that: "[O]ur trust law does not allow property rights to be affected by telepathy. Prima facie, therefore, the alleged actual common intention was not established."⁶³²

Lord Bridge in *Rosset*⁶³³ outlined two methods by which interest on the property can be acquired in the absence of writing. For the claimant to succeed, the court must be satisfied that:

⁶³⁰ *Springette v Defoe* (1992) 24 HLR 552; [1992] 2 FCR 561.

⁶³¹ *Lloyds Bank plc v Rosset* [1991] AC 107.

⁶³² *Springette v Defoe* (1992) 24 HLR 552 at 558.

⁶³³ *Lloyds Bank plc v Rosset* [1991] AC 107.

1. there has been “an agreement, arrangement or understanding between the claimant and the legal owner to share the beneficial interest, evidenced by the oral discussion between them; and,
2. that claimant has acted to the detriment or altered his or her position in reliance upon the agreement.

If these requirements are satisfied, the law relating to constructive trusts,⁶³⁴ and proprietary estoppel⁶³⁵ could be applied as alternative ways of acquiring a beneficial interest.⁶³⁶

It could be argued that when cohabiting partners choose to live together as independent individuals with equal access to employment opportunities, the application of constructive trust is sufficient. However, that is not the common scenario experienced by cohabitants. There are situations where cohabitants not only acquire property but also have children, or where one party to the relationship may need to opt out from paid employment in order to care for the child, or at least reduce the working hours. Parents, either the father and/or mother, are directly involved in the childbearing and breadwinning roles. Moreover, there is a high tendency for the mother to take care of the children while sacrificing waged employment, or reducing working hours. The most common non-financial contribution to a family are those made by the primary care-giver (usually the wife/mother) in her role as homemaker and/or parent.⁶³⁷ Home making and caring for the children alone is not enough to claim for a beneficial interest over the property.⁶³⁸ This role taking is merely considered as non-financial contribution towards the relationship. Within the application of constructive trusts, the courts give little weight

⁶³⁴ *Lloyds Bank plc v Rosset* [1991] AC 107; *Eves v Eves* [1975] 1 WLR 1338; *Midland Bank v Cooke* [1995] 1 FLR 915; *Le Foe v Le Foe* [2001] 2 FLR 97.

⁶³⁵ *Wayling v Jones* [1995] 2 FLR 1029, *Oyyet v Grundy* [2003] EWCA Civ 1176; *Taylor's Fashion Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133.

⁶³⁶ This concept of constructive trusts was an approach adopted within New Zealand for de facto partners before the introduction of Property (Relationships) Act 1976 which revolutionised the way in which the courts could decide the divisions of unmarried cohabitants (discussed in chapter six).

⁶³⁷ Royston J. Lawson “A comparative study of domestic contribution and family property allocation in Australia, New Zealand and United Kingdom” (1991) *Journal of Consumer Studies and Home Economics* 15 at 367.

⁶³⁸ L Flynn and A Lawson “Gender, Sexuality and the Doctrine of Detrimental Reliance” (1995) 3 *Feminist Legal Studies* at [105-121].

to cohabitants' domestic contributions. By contrast, financial contributions (i.e. monetary value) or work of which may have a commercial value can readily be ascribed a value.⁶³⁹ Therefore, in cases of relationship breakdown, cohabitants who exchange or reduce their labour market role for an unpaid domestic role receive no financial compensation from their partner.⁶⁴⁰ This suggests that the non-employed partners would find themselves in hardship, relatively more affected in comparison to the employed partner, who has stable financial income.

It is apparent that cohabitants who have not made any financial contribution to the acquisition of the family home face more difficulties. Although in cases where one partner was financially dependent on the other, and the other partner may have gained from the domestic and child-care services provided, it is difficult to prove the interest in the family home without evidence of any real financial contributions. Moreover, there are also cases where the cohabiting relationship ends when their children have reached adulthood.⁶⁴¹ In this matter, often the female partner may face harsher consequences regarding age and the difficulties to find new employment adding to the requirement of modern work skills.

⁶³⁹ Anne Barlow and Rebecca Probert, above n 627.

⁶⁴⁰ *Burns v Burns* [1984] Ch 317 [1984] 1 All ER 244: Valerie Burns was in an unmarried cohabiting relationship for about 19 years. During the relationship, she worked part-time and paid the household bills. Further, she also raised two children. In this case, she was not able to establish either an express or inferred 'common intention' to share the family home with her partner. She was therefore considered as having no beneficial interest in the family home purchased in her partner's name. Followed by that, she could not obtain any legal redress to her position of the home ownership. By comparison to married couples on divorce, the family assets of married couples will be distributed, despite the existence or non-existence of minor children and the original ownership of the property. Under section 25 of the Matrimonial Causes Act 1973, there are a few matters, which shall be considered by the court in granting the distribution of family property, including the standards of living during marriage, the age of the parties and duration of marriage, the parties' respective current and future income and assets, needs and resources as well as financial and non-financial contributions made and likely to be made to the welfare of the family by each of the parties. With regards to that, after divorce, the homemaker spouse will usually receive at least half of the assets, though the ownership of the property is on the other spouse's name. In comparison to Valerie Burn's position, who was also the homemaker and equally carried the same responsibilities as a married spouse, she was not automatically in a position to receive the division of assets. Moreover, she would need to prove constructive trusts to retain any share of the family home. She was in an economically weaker position to prove her ownership of the home. This matter indicates that although Valerie Burns was functionally the same as a married spouse, however her position as an unmarried cohabitant prohibited her from acquiring an automatic right to the division of family home after the relationship broke down.

⁶⁴¹ Ibid.

In the case of *Midland Bank v Cooke*,⁶⁴² the judge identified the wife's contribution to a marriage and recognised that she deserved to share the property rights. However, the intention of the court was to protect Cooke's family from the mortgage. Based on Mrs Cooke's non-financial contributions, she was granted an entitlement to the home. By contrast, this contribution was rejected in the cases of *Llyods Bank v Rosset*⁶⁴³ and *Burns v Burns*.⁶⁴⁴ In the case of *Cooke*, the court did not give importance to monetary contributions, but accepted that the parties constituted a clear example of a situation in which a couple 'had agreed to share everything equally'. In delivering the judgment, the court considered Mrs Cooke's contributions in bringing up the children, working part-time and full-time to pay the household bills and becoming a co-signatory in the second mortgage.

Since the earlier case law relied on the concept of resulting trusts in determining the beneficial entitlements to the relationship property in the event of relationship breakdown, there are now more recent cases that have adopted a more holistic approach based on constructive trusts, which takes into consideration of the parties 'common intention'. In a more recent case of *Oxley v Hiscock*,⁶⁴⁵ the property contested was transferred into Mr Hiscock's sole name. However, there was no discussion about the beneficial ownership of the property when the transfer was made. Based on the parties' joint contribution to the purchase and outgoings made for the property, the Court of Appeal inferred the parties' common intention to share the beneficial ownership. In the absence of evidence to quantify the common intention of the parties, the court ordered that "each is entitled to that share which the court considered fair having regard to the whole course of dealing between them in relation to the property".⁶⁴⁶ On that basis, the beneficial entitlement in *Oxley*'s case was to split 60/40 in Mr Hiscock's favour, partly because of the larger financial contribution that he has made to the acquisition of the property.

⁶⁴² *Midland Bank plc v Cooke* [1995] 4 All ER 562.

⁶⁴³ *Llyods Bank plc v Rosset* [1991] AC 107.

⁶⁴⁴ *Burns v Burns* [1984] Ch 317 [1984] 1 All ER 244.

⁶⁴⁵ *Oxley v Hiscock* [2004] EWCA Civ 546.

⁶⁴⁶ *Ibid*, at para 69.

In the sole name cases where the title of the property is held by one of the parties to the relationship, the presumption is that the entire beneficial entitlement is vested on the legal owner whose name is on the title of the property. The onus is on the claimant to establish any beneficial entitlement, if there was any. The common intention to share the property or beneficial ownership may be inferred from the parties' conduct (no express declaration) and likely to be inferred from the financial contributions towards the property. If the claimant was successful in establishing his or her sole entitlement to the beneficial interest over the property contested, there is no presumption of equality between the parties. Hence, the party whose sole name is on the title of the property acquires more rights to the entitlement of the property.

However, the case of *Stack v Dowden*⁶⁴⁷ concerns a situation whereby the property was transferred to the couple's joint names. The question was whether the party who made a greater contribution to the purchase price of the house could claim a beneficial interest, which exceeded the equal sharing of the beneficial interest, indicated by joint registration. Ms Stack claimed for 65 per cent of the property entitlement. In applying the presumption that the beneficial ownership follows legal ownership and subsequently, resulting in equal shares, the court said that Ms Stack had to prove the 65 per cent entitlement. Lady Hale in the House of Lords said that the court must ascertain the parties' shared intentions, "actual, inferred or imputed", in the light of the parties' whole course of conduct in relations to the property.⁶⁴⁸ Ms Stack's greater financial contribution could, in context, support the inference of an intention to share otherwise than equally. The court in this case made a reference to the parties' strict division of their finances, thus enabling the court to find it in favour of Ms Stack.

The case judgment was criticised by Swaddling, who argued that the case has abandoned an equal division principle as developed within the trust law, but applied in favour of imprecise and fictitious agreements.⁶⁴⁹ Sir Terence Etherton regretted the lack

⁶⁴⁷ *Stack v Dowden* [2007] UKHL 17.

⁶⁴⁸ *Ibid*, at para 60.

⁶⁴⁹ S Gardner "Family Property Today" (2008) 124 LQR 422 at 422, [424-425]; T Etherton "Constructive Trusts: A New Model for Equity and Unjust Enrichment" (2008) 67 CLJ at 265, 279; M Dixon "The

of a principled approach, in contrast to commercial cases, whereby in the latter cases, property will be divided equally among the business partners in accordance with a principled approach.⁶⁵⁰ McFarlane on the other hand suggested that it would be preferable to apply the doctrine of proprietary estoppel rather than use fictitious agreement.⁶⁵¹

Harding, however, argued that *Stack*⁶⁵² could be defended from a communitarian perspective, whereby, in focusing on the parties' intentions rather than developing a quasi-statutory scheme, which should be left to the legislator, the court had in fact observed its proper role in a democratic society.⁶⁵³ Relevant to the comments made by critics was the role the court played when deciding the parties' agreements, and whether an autonomy-orientated approach focusing on the consent of the parties should be adopted. This approach would require there to be an agreement between the parties on the sharing of the property.⁶⁵⁴

In *Stack*,⁶⁵⁵ Baroness Hale remarked that 'in law, context is everything, the domestic context is very different from the commercial world'. However, it has been suggested that *Stack* has a 'weak communitarian flavour',⁶⁵⁶ and adopts a 'context-specific approach'.⁶⁵⁷ At least at the quantification stage, considerations of fairness and the whole course of dealings of the parties in relation to the property is used to infer or impute an agreement.⁶⁵⁸

Never-Ending Story: Co-Ownership after *Stack v Dowden*" (2007) 71 *Conveyancer* at [456-461]; N Piska "Intention, Fairness and the Presumption of Resulting Trusts after *Stack v Dowden*" (2008) *MLR* 120.

⁶⁵⁰ T Etherton "Constructive Trust and Proprietary Estoppels: The Search for Clarity and Principle" (2009) 73 *Conveyancer* at [104-126]; *Yeoman's Row Management v Cobble* [2008] UKHL 55.

⁶⁵¹ Ben McFarlane *The Structure of Property Law* (Hart Publishing 2008) at [767-781].

⁶⁵² *Stack v Dowden* [2007] UKHL 17.

⁶⁵³ M Harding "Defending *Stack v Dowden*" (2009) 73 *Conveyancer* at 309, [321-322].

⁶⁵⁴ Anne Sanders, above n 617, at 635.

⁶⁵⁵ *Stack v Dowden* [2007] UKHL 17.

⁶⁵⁶ M Harding, above n 653, at 309, 314.

⁶⁵⁷ N Hopkins "Regulating Trusts of the Home: Private Law and Social Policy" (2009) 125 *LQR* at 310, [316-318].

⁶⁵⁸ Anne Sanders, above n 617, at 649.

Following this case, the lower courts acted cautiously⁶⁵⁹ and granted leave to appeal in *Jones v Kernott*.⁶⁶⁰ In this case, the unmarried couple had bought a house in their joint names in 1985. Ms Jones paid for the deposit of the purchase price and eventually paid about 80 per cent of the equity. The mortgage, on the other hand was in the couple's joint names, and both paid the outgoings. In spite of that, there is an absence of an express declaration of their beneficial interest to the property. In the relationship, the couple had two children, but eventually the relationship broke down in 1993. Ms Jones and their children stayed in the house, but Mr Kernott moved out. Ms Jones was paying all her outgoings without any financial contribution from Mr Kernott for the children or the house. Subsequently, the couple cashed in a life policy, enabling Mr Kernott to pay a deposit on a separate second house.

Fifteen years later, Mr Kernott claimed a beneficial interest in the first property, and the question of how their respective shares should be quantified reached the court. The parties were in an agreement that they had held equal shares to the property until the time that he left the house. However, Ms Jones claimed that Mr Kernott's purchase of the second property, along with other events since the parties separated, constituted evidence that their intentions had changed. Judge Dedman, considering *Oxley v Hiscock*⁶⁶¹ and *Stack v Dowden*,⁶⁶² held that while the interests of the parties at the outset might well have been that the property should be split jointly, those intentions had altered significantly over the years, he considered that the correct test was therefore, what was 'fair and just' between the parties, taking into account the whole course of dealing between them. He took into account:

1. Mr Kernott's ceasing to pay bills;
2. the fact that Ms Jones contributed over 80 per cent of the equity; and,
3. the lack of assistance provided by Mr Kernott to the maintenance of the children.

⁶⁵⁹ *James v Thomas* [2007] EWCA Civ 1212; *Morris v Morris & Ors* [2008] EWCA Civ 257; *Fowler v Barron* [2008] EWCA Civ 377.

⁶⁶⁰ *Jones v Kernott* [2011] UKSC 53.

⁶⁶¹ *Oxley v Hiscock* [2004] EWCA Civ 546.

⁶⁶² *Stack v Dowden* [2007] UKHL 17.

He concluded that the correct split would be 90:10 in favour of Ms Jones. This matter demonstrates that the beneficial entitlements are not rigid, thus alterable in accordance to the common intention of the parties towards the property contested for. However, on appeal, the Court of Appeal decided that Mr Kernott held a 50 per cent beneficial interest because the couple had intended to share the house in equal shares at the time of registration and had not changed their intentions later, despite their separation.

The Supreme Court overturning the Court of Appeal decision held that Mr Kernott and Ms Jones would hold the shares in the house on trust in a ratio of 10 per cent to 90 per cent respectively. In upholding the decision of the trial judge, the judges took the opportunity to revisit and clarify *Stack*.⁶⁶³ Baroness Hale and Lord Walker explicitly abandoned the presumed intention resulting trust for houses and flats registered in the joint names of a couple. In such cases, there was a presumption that the parties intended to share the interest in land equally, both at law and in equity, irrespective of the contributions each made to the purchase price. Interestingly, this matter was also apparent in the Malaysian Sharia and Civil courts for the matrimonial property divisions for married couples.

The ‘presumption of equal sharing’, however, could be rebutted by evidence of a contrary intention⁶⁶⁴ expressed or inferred.⁶⁶⁵ However, to justify such a rebuttal, the facts had to be very unusual, as parties in an intimate relationship did not normally intend to demand compensation for their contributions, which were also very difficult to keep track of.⁶⁶⁶ In *Jones*,⁶⁶⁷ the majority (Lady Hale, Lord Walker and Lord Collins) held that such an intention could be inferred from the actions of Ms Jones and Mr Kernott. The ‘ambulatory trust’⁶⁶⁸ of equal shares established at the time of registration had changed over time with the parties’ intentions.

⁶⁶³ Ibid.

⁶⁶⁴ *Jones v Kernott* [2011] UKSC 53 at 25.

⁶⁶⁵ Ibid at 31.

⁶⁶⁶ Anne Sanders, above n 617, at 636.

⁶⁶⁷ *Jones v Kernott* [2011] UKSC 53.

⁶⁶⁸ Ibid, referring to *Stack v Dowden* [2007] UKHL 17 at 62.

Nonetheless, the minority, Lord Wilson and Lord Kerr, assented with the result but questioned the evidence that supported an intention not to share the beneficial interest equally. Such an intention had to be imputed in order to do justice.⁶⁶⁹ The minority however did not explain how a 90:10 split could be justified by means of imputation, an omission Gardner and Davidson explained by arguing that a materially communal relationship should essentially be treated like a marriage.⁶⁷⁰

From the overall perspective, although the court made unequal property division (the 90:10 ratio), by adding together the value of both the properties that Ms Jones and Mr Kernott purchased, Ms Jones had received roughly a 50 per cent share, and a result she might well have received in a divorce. It is important to note that the United Kingdom Supreme Court in *Jones* praised the valuable work of the Law Commission while realistically stating that no action should be expected from the legislature, with the result that courts themselves had to find answers to the problem.⁶⁷¹ Besides the property that is in the joint names of the parties, whether, and, if so, to what extent, these principles are to be applied to cases where the title was in the name of one party alone, remains to be seen.⁶⁷²

It is apparent that the case law is moving towards recognising cohabitants and their rights to the divisions of the relationship property. The cases related to cohabitants decided in the English courts were not rigid. Among the important matters to highlight is that if there is an express or implied promise to share the relationship property, cohabitants may prove this consensus to the court by constituting the evidence of their intention to share the property. The home making contributions of cohabitants to the

⁶⁶⁹ *Jones v Kernott* [2011] UKSC 53 at 65.

⁶⁷⁰ S Gardner and KM Davidson “The Supreme Court on Family Homes” (2012) 128 LQR at 178, [180-181].

⁶⁷¹ *Jones v Kernott* [2011] UKSC 53 at [35-57]: The couple’s functionality is accessed thoroughly by the court. First, the contribution of Ms Jones to the property and the relationship altogether is considered. She had contributed the most for the property, and for the welfare of the children. Mr Kernott on the other hand, lacked in contributing to the relationship. He failed to contribute for the welfare of the children and/or help Ms Jones to pay for the property (only contributed of about a ten per cent) with the court indirectly taking into consideration of the functions of this couple, Ms Jones was awarded a 90 per cent share, which represents an almost equal property division, taking into account Mr Kernott’s second property, which he was solely entitled to.

⁶⁷² Anne Sanders, above n 617, at 637.

welfare of the family alone are not satisfactory enough to establish the interest in the family property. Further, with only the domestic services, the non-financial contributory parties could not prove the common intention to share the property. In most cases, until and unless the property is acquired in the joint names of the parties, or if there is equitable interference in the relationship property, successively cohabitants can easily prove their intention to share the family property. Equitable interference generally occurs when there is a common understanding or ‘intention’ between the parties that beneficial ownership should be shared,⁶⁷³ or where there is a direct contribution by one party toward the other’s purchase of property.⁶⁷⁴

It might be argued that English cohabitants’ remedies are similar to the remedies available to cohabitants in Malaysia. In Malaysia, the court applies the notion of constructive trusts, and thus, parties who have made financial contributions towards the acquisition of the property have definite rights towards the property. Both in Malaysia and England, an equality of property division is apparent if the property was acquired by equal contribution of either partners, or at least if their joint names are on the title of the property. Otherwise, the party who has made more financial contributions in the acquisition of the property receives a greater share. In the event where one of the partners made only non-financial contributions, such as home making and child rearing, this matter does not give the partner any rights to the relationship property. Where there has been financial contribution, the cohabiting partner could then claim a share of the property. In the absence of financial contribution, the court examines the equitable interference of the parties in the relationship property, the existence of any agreement or understanding on the sharing of the property, any financial arrangements and so on, and there is a reliance based on that matter. This thesis does not advocate for equality between financial and non-financial contributions, however, what is advocated is that equality between married and unmarried couples, especially in the division of property, is an issue that should be both addressed and recognised.

⁶⁷³ *Jones v Kernott* [2011] UKSC 53.

⁶⁷⁴ *Lloyd’s Bank plc v Rosset* [1991] 1 AC 107.

Apart from the equitable principles, cohabitants in England could also apply to the court for an order under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA). The court may ‘declare the nature or extent of a person’s interest in property, subject to the trust’, order a sale, or order that sale be postponed until a certain event and in the meantime require the party remaining in occupation to pay the other rent.⁶⁷⁵ TOLATA provides a set of guidelines in section 15 on matters to be taken into account when exercising these powers. The court shall have regard to:

- (a) the intentions of the person or persons (if any) who created the trust;
- (b) the purpose for which the property subject to trust is held;
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; and
- (d) the interests of any secured creditor or any beneficiary.

In deciding applications under this Act, the courts will take the view that if two people buy property as a home for themselves, the underlying purpose of the trust is to provide a home and not for investment, and while that purpose continues to exist, the property should not be sold.⁶⁷⁶ But, once the purpose for which the property was acquired ends (the couple or either partner not intending to stay in that property), the court is likely to order a sale of the property.⁶⁷⁷

Returning to the example illustration, if Daniel and Sara were living in England as unmarried cohabitants, they do not acquire any statutory rights to property entitlements, in comparison to married couples who are protected by the provisions under the MCA 1973. However, based on equitable principles, Sara would be able to claim for beneficial interests as to her financial contribution towards the acquisition of the property. Further, though she may have been home making and child rearing, this matter alone may not gain her ownership or a beneficial right to the matrimonial home. In this matter, she would need to prove the common interest to share the property. For instance, if there were any

⁶⁷⁵ Trusts of Land and Appointment of Trustees Act 1996, s 14.

⁶⁷⁶ Gillian Douglas, Julia Pearce and Hillary Woodward, above n 56, at 33.

⁶⁷⁷ Ibid.

promise that Sara could have rights over the property. Second, whether there was any reliance over the promise. In answering these questions, if both these matters can be proven, Sara may be able to claim for more than the ten per cent of her entitlement to the matrimonial home, under the principles of constructive trusts.

To conclude, the analyses on the property division for unmarried cohabitants decided in the English courts suggest that the functionality of cohabitants within the relationship is not wholly recognised as equal to that of married spouses. Marital laws that apply to married couples are not extended to unmarried cohabitants. The latter are governed by the legal doctrines developed in the equitable principles of constructive trusts, and thus an equality of property division is not apparent in all cases and/or circumstances. Although the courts to a degree recognise functionality of cohabitants, they are likely to give more weight to the financial contributions made by the partners to the acquisition of the property contested for, or to the existence of any agreement on the sharing or divisions of the property, and there is a reliance based on that understanding. Even in the recent case of *Jones v Kernott*,⁶⁷⁸ Ms Jones received 90 per cent and Mr Kernott a ten per cent. The fact that Ms Jones received more is due to the fact that she paid almost an 80 per cent of the purchase price. Despite the existence of a clear movement within the English courts to recognise the functionality of cohabitants, from the period of 1990's to 2011, the courts are still adopting a narrow approach that is clearly giving more weight to the financial contributions made by cohabitants to the acquisition of the property. Subsequently, there is an absence of equal divisions in the relationship property of unmarried cohabitants. It could be argued that this inequality of property divisions is due to the lack of legislation to specifically deal with matters arising as to the rights of cohabitants to the property divisions, in comparison to married couples who are protected under the ambit of MCA 1973.

⁶⁷⁸ *Jones v Kernott* [2011] UKSC 53.

5.4 Related Jurisdictions

Scotland

By contrast to England, Scotland, as part of United Kingdom, has moved forward to include legal provisions for the property division of cohabitants. The Family Law (Scotland) Act 1996 (FLA 2006) defines cohabitants as:

- (a) a man and woman who are (or were) living together as if they were husband and wife;
or
- (b) two persons of the same sex who are (or were) living together as if they were civil partners.⁶⁷⁹

For the purposes of determining whether a person is a cohabitant under the Act, the court shall have regard to:

- (a) the length of the period during which A and B have been living together (or lived together);
- (b) the nature of their relationship during that period; and
- (c) the nature and extent of financial arrangements subsisting, or which subsisted during that period.

These specifications in the Act demonstrate the importance given to recognising the functionality of cohabitants (as in the consideration given to the length and duration of the cohabiting period, the existence of any financial arrangements and others).

The legal developments⁶⁸⁰ in Scotland have encouraged the debate among the lawyers and policy makers in England, since the Labour Government's decision in 2008

⁶⁷⁹ Family Law (Scotland) Act 2006, s 25(1).

⁶⁸⁰ Apart from the legislation, the Supreme Court in *Gow v Grant* [2012] UKSC 29 heard the first appeal case concerning the financial remedies between cohabitants applying the provisions of Family Law (Scotland) Act 2006.

to defer any decision or implementation of recommendations by the Law Commission for the reform of the law, pending empirical research on the new Scottish law.⁶⁸¹ Following the first research and in spite of its positive findings, the Coalition Government postponed any reform to the next Parliament.⁶⁸²

Ireland

The Republic of Ireland has also progressed to legally recognise cohabitants, with the introduction of the Civil Partnership and Related Rights and Responsibilities of Cohabitants Act 2010 (the Irish Act). The Act distinguishes between cohabitants and qualifying cohabitants. It states that a cohabitant is ‘one of two adults who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other’.⁶⁸³ However, only a ‘qualified’ cohabitant is entitled to claim redress under the Irish Act, defined as ‘an adult who was in a relationship with another adult and who, immediately before the time that the relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period:’⁶⁸⁴

1. of two years or more, in the case where they are parents of one or more dependent children; and,
2. of five years or more in any other case.

In determining whether two adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular:⁶⁸⁵

- (a) the duration of the relationship;
- (b) the basis on which the couple live together;

⁶⁸¹ The Law Commission, above n 1, at 307.

⁶⁸² F Wasoff, J Miles and E Mordaunt “Legal Practitioners’ Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006: Research Report” (2011) University of Cambridge Faculty of Law Research Paper 11 (3).

⁶⁸³ Civil Partnership and Related Rights and Responsibilities of Cohabitants Act 2010, s 172(1).

⁶⁸⁴ Ibid, s 172 (5).

⁶⁸⁵ There are some similarity to section 2D of the New Zealand Property (Relationships) Act 1976, Property (Relationships) Act 1984 (NSW) and ‘Molodowich’ Test in Canada (as discussed in chapter two).

- (c) the degree of financial dependence of either adult on the other and any arrangements in respect of their finances;
- (d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;
- (e) whether there are one or more dependent children;
- (f) whether one of the adults cares for and supports the children of the other;
- (g) the degree to which the adults present themselves to others as a couple.

These elements demonstrate the examination of functionality of the partners within the relationship.

5.5 Conclusion

The development of the law of England has laid the foundations of the present equitable principles relating to cohabiting partners and the division of property. Nevertheless, change and reform is necessary. The Law Commission made recommendation for the reform of the current law concerning cohabitants; the recommendations were not taken further. The issue of functionality was important in their findings (as discussed in chapter two). Whilst cohabitants' functionality is acknowledged within the laws in Scotland and Ireland, England has thus far failed to legislate laws for the protection of cohabiting couples in matters of relationship property.

Cohabitants in England continue to struggle with claims concerning the division of property and the application of property and trusts law, which is also a costly venture to resolve within the English courts.⁶⁸⁶ In particular the common intention constructive trusts, whose contours have arguably become no easier to discern following *Stack v Dowden*⁶⁸⁷ and *Jones v Kernott*⁶⁸⁸ do not provide adequate guidance for the courts in their decision-making. The predicament of Mrs Burns,⁶⁸⁹ who made 'only' domestic

⁶⁸⁶ The Law Commission, above n 1, at 95.

⁶⁸⁷ *Stack v Dowden* [2007] UKSC 37; [2007] 2 AC 432.

⁶⁸⁸ *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776.

⁶⁸⁹ *Burns v Burns* [1984] Ch 317.

contributions to the life shared with a partner who owned their home in his sole name, could be the same today as it was 30 years ago.⁶⁹⁰ The English legislature clearly needs to introduce specific legislation to recognise the functionality of cohabitants and protect their rights in the division of relationship property. The following chapter six offers a comparison to the New Zealand legislation, which affords greater protection for unmarried couples in this situation.

⁶⁹⁰ Jo Miles “Cohabitation: Lessons for the South from North of the Border?” (2012) Cambridge Law Journal 71 Issue 3 at 492.

Chapter 6: Law of Marriage and Cohabitation in New Zealand

6.1 Introduction

This chapter analyses the law relating to married couples and unmarried cohabitants in New Zealand. It begins with an overview of the historical development of the law in New Zealand in order to build a foundation upon which a later discussion can be presented on the current legislation.

Before the introduction of the Property (Relationships) Act 1976 (“PRA 1976”), de facto partners were treated in accordance with the common law principles, under the influence of constructive trusts (similar to the current position of cohabitants in England and the civil jurisdiction in Malaysia). However, the PRA 1976 now covers not only married couples, but also civil union partners and de facto partners. The term ‘relationship property’ is used rather than ‘matrimonial property’ to recognise the different relationships now covered by the legislation. This phrase was amended, changing the title to PRA 1976 from the Matrimonial Property Act 1976 (“MPA 1976”). The effect of the PRA 1976 is to place married couples, civil union partners and de facto partners (during the relationship) on the same footing as regards sharing their property at the end of the relationship.

This chapter will examine a number of issues, including:

1. The differences in property division for cohabitants before and after the introduction of PRA 1976;
2. Whether the PRA 1976 treats cohabitants any differently to married couples;
3. Whether cohabitants’ functionality is recognised within the PRA 1976;
4. How the property is divided and whether it is divided on the basis of equality; and
5. Whether there is equality between marriage and cohabiting relationship.

Since the amendments made to the PRA 1976 in 2001, cohabitants⁶⁹¹ now fall within the equal sharing regime. An important aspect of the inclusion of cohabitants is the role and weight accorded to the theory of functionality. This chapter will examine the importance of section 2D of the PRA 1976, which provides guidance to the court in the form of a non-limiting list as to ways to measure functionality.

This chapter again relies on the fictional case scenario of Daniel and Sara in order to illustrate the operation of the New Zealand law in relation to the varying relationship status of the couple before and after the implementation of the PRA 1976 and its amendments.

6.2 Historical Background

As in England, the common law principle on matrimonial unity was also applied in New Zealand. By the mid 19th century New Zealand matrimonial property law was still based on the common law doctrine of matrimonial unity. This was relieved only by certain equitable principles.⁶⁹² On marriage, two spouses became one person for legal purposes. The husband constituted the controlling mind and representative of that person.⁶⁹³ The wife's assets remained in her name. However, her husband had the exclusive rights to its use and income, during their joint lives and a qualified right of succession to the property upon her death.⁶⁹⁴ The wife could not dispose of her realty unless she obtained her husband's consent and she had to ensure the court that it was voluntary on her part and not influenced by her husband.⁶⁹⁵ The husband had the sole use of, and income from his

⁶⁹¹ The term 'de facto' partners is used in New Zealand.

⁶⁹² Fisher on Matrimonial and Relationship Property (NZ) LexisNexis NZ Ltd February 2014 <<http://www.lexisnexis.com>>. From the late 17th century, the wives' disadvantaged position was progressively improved by a series of equitable principles.

⁶⁹³ Blackstone's Commentaries (21 ed) [442-444]; *R v Mellis* (1884) 10 CI and Fan 534, 878; 8 ER 844, 971 (a decision of nearly 400 pages amounting to nearly a textbook on pre-20th century marriage).

⁶⁹⁴ *Cooper v MacDonald* (1877) 7 Ch D 288: On surviving the wife, a husband retained an interest in her realty known as "tenancy by courtesy" in her estates of inheritance.

⁶⁹⁵ *Johnston v Clark* [1908] 1 Ch 303, 313 per Parker J: "[M]arriage, therefore, must by common law have implied, on the part of the wife, such a complete surrender of her will to the will of her husband that thereafter during the coverture she was, if not capable of exercising, at any rate presumed not to be exercising, that free will which is, according to the principles of the common law, necessary to voluntary alienation or contract".

wife's leasehold estate, the right to dispose of leasehold property during the marriage or keeping the proceeds and the right to succeed to her leasehold by survivorship.⁶⁹⁶

Personal property, including money, goods, chattels and personal items, either owned by the wife at the time of marriage or after the marriage, became the husband's property and he could dispose of these items during his life and they formed part of his estate when he died.⁶⁹⁷ In return for the rights conferred by the wife to the husband, the wife had rights to maintenance from the husband.⁶⁹⁸ In common with England, the wife was entitled to dower. Dower was the right of the wife to a life interest in certain property of her husband after his death.⁶⁹⁹ In New Zealand, dower was abolished by the Real Estate Descent Act 1874.⁷⁰⁰

⁶⁹⁶ *Re Bellamy* (1883) 25 Ch D 620: This is a case where the wife was entitled for a term subject to a life estate, therein predeceased her husband during the subsistence of the life estate. The court held that it was not necessary for the husband to take out letters of administration to her in order to complete this title to the leaseholds.

⁶⁹⁷ *Surman v Wharton* [1891] 1 QB 491: The action was brought by the plaintiff to recover money lent by the plaintiff to the wife of the defendant. In 1862, the defendant's late wife married a man named Smith, who, after the marriage, by a deed of gift, settled on his wife certain leasehold property, which was subject to a mortgage. The settles the property on the wife to her "own property use and benefit", and contained a clause conferring on her "full power and authority to sue and give receipts". Smith died, and in 1881, she married the defendant, Mr Wharton. After 1883, when the Married Women's Property Act 1882 came into operation, Mrs Wharton borrowed money from the plaintiff. In 1889, she died intestate and her husband, the defendant without taking out administration, enter into possession of the property comprised in the deed of gift. The judge gave judgment for the defendant and the plaintiff appealed.

⁶⁹⁸ *Dewe v Dewe* [1928] at 113, [119 120]: 'A husband is obliged to maintain his wife, and may by law be compelled to find her necessities, as meat, drink, clothes, physic, et cetera, suitable to the husband's degree, estate or circumstances', the provision that the husband is obliged to maintain his wife found its way into the proposed 1552 Reformation of Ecclesiastical Law: John Witte "From Sacrament to Contract, Marriage, Religion and Law in the Western Tradition, Marriages as Commonwealth in the Anglican Tradition" (2012) Presbyterian Publishing Corporation at 253.

⁶⁹⁹ *Dawson v Bank of Whitaven* [1875] 4 Ch D 639: The husband and wife, having married before the Dower Act, joined in a deed, acknowledged by the wife in mortgaging the husband's freeholds, free of dower, to secure a debt of the husband. The court held that the widow is entitled to dower out of surplus proceeds of sale after payment of the expenses of sale, mortgage debt, interest and costs.

⁷⁰⁰ When the wife's right to dower was abolished in 1876, she lost what limited rights she had to support from her husband's estate on his death: Nicola Peart "Towards a Concept of Family Property in New Zealand" (1996) *International Journal of Law, Policy and the Family* 10 at 108.

6.3 The Statutory Framework

6.3.1 The Married Women's Property Act

The Married Women's Property Protection Act 1860 was the first legislative reform for the rights of the woman. It enabled the court to protect a deserted wife's earnings and property, which she acquired after the desertion.⁷⁰¹ This Act was extended by the Married Women's Property Protection Act 1870 to cases where the separation was due to the husband's cruelty, adultery, habitual drunkenness or failure to maintain.⁷⁰² Subsequently, the Married Women's Property Act 1884 ("MWPA 1884") was introduced, which was modelled on England's Married Women's Property Act 1882.⁷⁰³ This statute gave women the capacity for acquiring, holding and disposing of property in the same manner as *feme sole*, thereby extending the equitable doctrine of separate estate to all forms of property without the intervention of any trustee.⁷⁰⁴ This Act gave the wife a right to sue persons (including her husband) for the protection of her property,⁷⁰⁵ and gave a wife the contractual capacity to the extent that she could bind her own separate property and

⁷⁰¹ The wife deserted by her husband may apply for protection to a Resident magistrate or Justices in Session for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion: "Married Women's Property Protection Act 1860" (30 March 1861) Nelson Examiner and New Zealand Chronicle XX Issue 28 National Library of New Zealand accessed on 7 March 2014

<<http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=NENZC18610330.2.24>> at 4.

⁷⁰² Where the husband of any woman shall be guilty of cruelty (without adultery), adultery, habitual drunkenness; the Resident Magistrate or Justices of the Peace shall be empowered while making any order to direct that any infant child or children of the marriage shall remain in the custody of the wife until the age of seven, and make an order for payment by the husband for the support of the children. "Married Women's Property Protection Act 1860" (2 September 1860) Daily Southern Cross XXVI Issue 4066 National Library of New Zealand accessed on 7 March 2014

<<http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=DSC18700902.2.19>> at 2: Both the Acts were later consolidated in the Married Women's Property Protection Act 1880.

⁷⁰³ "Wanganui Herald" Rorahi XIX Putanga 5420 (11 September 1884) National Library of New Zealand accessed on 7 March 2014

<<http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=WH18840911.2.11&l=mi&e=-----10--1----2->>.

⁷⁰⁴ "Fisher on Matrimonial and Relationship Property", above n 688: ss 3, 4 and 7 of the Married Women's Property Act 1884 equates the proprietary capacity of married women with that of *feme sole* in respect of property acquired thereafter.

⁷⁰⁵ Ibid: Married Women's Property Act 1884, s 14: Subsequently, section 9 of the Married Women's Property Act 1952, s 4 of the Married Women's Property Act 1963, and now the Property (Relationships) Act 1976, s 49 (general legal capacity of married women) and s 51(qualified right of the spouses to sue each other in tort).

render it subject to execution.⁷⁰⁶ Nonetheless, like England, it would only be of benefit to women who had some separate property, who were probably a minority. So, the MWPA 1884 may have been of limited practical effect. Under a separate property regime, women did not have rights to their husband's property and their contribution to the relationship was not taken into consideration.

The rights of women were later extended in the Married Women's Property Act 1894, the Married Women's Property Act 1908, the Law Reform Act 1936, the Statutes Amendment Act 1939, the Married Women's Property Act 1952 and the Matrimonial Property Act 1963, the Matrimonial Property Amendment Act 1968 and the Married Property Act 1976 (later renamed as the Property (Relationships) Act 1976 from 1 February 2002).⁷⁰⁷

6.3.2 The Matrimonial Property Act 1963

By the 20th century, married women had achieved property-owning capacity. The Matrimonial Property Act 1963 ("MPA 1963") changed the property rights of couples. For the first time, the indirect contributions of the homemaker to the matrimonial assets were recognised. The MPA 1963 applied on cases involving divorce or death. While still a separate property regime, under the MPA 1963, the courts had the discretion to redistribute the property of the spouses in any manner considered fit, while having regard to the respective contributions of the husband and wife to the property in dispute.⁷⁰⁸

⁷⁰⁶ Ibid: The Married Women's Property Act 1884, ss 3 and 17 initially limited a wife's liability to that of execution against her property, but this was extended by the Law Reform Act 1936, s 12 to full personal liability including possible imprisonment for debt. Correspondingly, from 1884, the husband's vicarious liability for his wife's torts and ante-nuptial debts was limited to the extent of the property, which at common law he had acquired from her (Married Women's Property Act ss 18 and 19) and from 1936 was abolished entirely (Law Reform Act 1936, s 14).

⁷⁰⁷ Ibid.

⁷⁰⁸ Matrimonial Property Act 1963, s 5: A widow or widower may claim a share of a deceased's property. The share is based on the contribution that the widow or widower made to the property. When introducing the Matrimonial Property Bill 1975 to the House of Representatives, the Minister of Justice, the Hon Dr AM Finlay QC said that the approach of the present law is to give a wife some rather vague and undefined rights in her husband's property, if she can prove them. By way of contrast, the approach of this Bill is to give each spouse a share in the matrimonial property as a whole as of right (3 October 1975) 402 NZPD 5115 accessed on 7 March 2014

<<http://www.nzlii.org/nz/other/nzlc/report/R39/R39-2.html>>.

However, the discretion remained broad and was exercised by different judges in different ways.⁷⁰⁹ Further, the Act did not receive a liberal interpretation from the Court of Appeal, as the traditional property notions continued to dominate judicial thinking and judges were cautious in exercising their discretion in favour of the non-owner.⁷¹⁰

In *E v E*, the court held that claimants must not only prove their contributions with a fair degree of precision, but must also identify the specific items of property to which the contributions had been made.⁷¹¹ As the courts tended to give more importance to the contributions to the property, a wife was generally awarded one-third of the value of the home.⁷¹² This system may infer disadvantages to the wives, due to the fact that the non-financial contributions in the home and towards the family are less valuable than the financial contribution to the property. It was still a system of separate property, though the judicial discretion allowed the non-owner to receive a share based on their contributions. The lack of statutory recognition of the couple's contribution to the relationship prompted Parliament to change the underlying philosophy of matrimonial property rights. It is to be noted that in both the Civil and Sharia jurisdictions in Malaysia, a principle of property division similar under the MPA 1963 is presently applied.

⁷⁰⁹ In *E v E* (1915) 34 NZLR 785: The judge were not willing to look at the contributions of each to the assets in the relationship (the absurdity of assessing contribution to 'sewing machine', pointed out by Wild CJ, in comparison to Woodhouse J in *Haldane v Haldane* [1975] 1 NZLR 672 (CA) at [685-686], who considered all forms of contribution to the marriage were of equal importance.

⁷¹⁰ Nicola Peart, above n 703, at 112.

⁷¹¹ *E v E* (1915) 34 NZLR 785: The estate of a testator which, when added to the widow's own property, was insufficient to provide more than a reasonable support for herself and her infant illegitimate son by the testator. The estate was given absolutely to the widow, with an expression of confidence that she would make adequate provision for the two daughters of the testator by his previous marriage. The daughters were in their 20s, well educated, and been earning their own living. The daughters had applied for an order under the section 33 of the Family Protection Act, 1908. The court held that the widow's claim was paramount and it should not be interfered with, during the minority of her son.

⁷¹² *Re Rush* (1901) 20 NZLR 249: The testator left an estate of at least 1,500 pounds net. His widow was sixty-one years of age, and there was medical evidence that she was not capable of earning her living by manual labour. She was possessed of 95 pounds, but had no other property. The only provision made for her by will was a legacy of 200 pounds. On an application by her under the Testator's Family Maintenance Act 1900, the court held that an order ought to be made that an annuity of 52 pounds a year, payable to her during her life, be purchased out of the estate of the testator, she must abandon her claim to the legacy of 200 pounds.

6.3.3 The Matrimonial Property Act 1976

The Matrimonial Property Act 1976 (“MPA 1976”) introduced a deferred community property regime for marriages ending during the lifetime of spouses.⁷¹³ This Act replaced the Matrimonial Property Act 1963. However, MPA 1976 did not cover death cases. The MPA 1963 continued in force for marriages ending in death.

MPA 1976 gave the courts the discretion to redistribute property based on spouses’ contributions to the marriage partnership. Under the previous statute, the division was made according to the contributions made to the property. Thus, the MPA 1976 moved the focus from ‘contributions to property’ to ‘contributions to relationship’.⁷¹⁴ The MPA 1976 included a list of indicia that constituted ‘contributions to the relationship’.⁷¹⁵ Marriage came to be considered as a partnership of equals, although couples may have contributed to the relationship in different ways.⁷¹⁶ Further, there was no presumption that a financial contribution was of greater value than a contribution to services.⁷¹⁷ Couples in the marriage should share equally in the property of the relationship.⁷¹⁸ This was a momentous change in 1976, as the separate property regime shifted to a system that shares the fruits of marriage. Spouses could, however, contract out of the Act.⁷¹⁹

⁷¹³ Matrimonial Property Act 1976, s 5 states that the Act only applies during the joint lifetime of spouses. Although section 5 of the Matrimonial Property Act 1976 applies from the date of marriage, the spouses were free to deal with their property as they wished, until they separated, or until matrimonial proceedings were commenced in the courts. However, a spouse was unable to transfer the property to defeat the matrimonial property claims of the other spouse: Matrimonial Property Act 1976, ss 43, 44.

⁷¹⁴ Matrimonial Property Act 1976, s 18(2): There shall be no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.

⁷¹⁵ Ibid, s 18: The care of any child of the marriage or dependant, the management of household duties, the earning of income for the relationship, the acquisition of matrimonial property, the payment of money to maintain or increase the value of matrimonial property, the forgoing of higher standard of living and the giving of support to the other spouse by way of enabling them to acquire qualifications, carrying out business and occupation.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid, s 18(2): There shall be no presumption that a contribution of a monetary nature is of greater value than a contribution of a non-monetary nature.

⁷¹⁸ Ibid, s 11: The division of the matrimonial property, each spouse share equally in the matrimonial home and family chattels.

⁷¹⁹ Ibid, s 21: The spouse to make an agreement for the purposes of contracting out of the Act.

The sharing of the property applied to the relationship property, and not the separate property.⁷²⁰ The separate property remained the property of the owner unless the other spouse could show he or she had sustained or diminished the separate property, in which case, the court was authorised to make an order in favour of the other spouse.⁷²¹ An increase in the value of separate property that was attributable to the other spouse or the application of matrimonial property became matrimonial property and was subject to the equal sharing principle.⁷²²

Although the MPA 1976 was a vast step forward from the MPA 1963, it was far from perfect. Firstly, the MPA 1976 only applied to spouses while they were alive, and not for relationships ending by death.⁷²³ In such death cases, the surviving spouse had to make a claim under the MPA 1963. Since the MPA 1963 controlled the division of assets in death cases, the property division was based on the contributions to the property rather than the contribution to the relationship, as in the newer Act. Consequently, women generally fared better in situations where their relationship ended by divorce, rather than in the death cases. This is because, in the event of divorce, the contributions of spouses to the marriage partnership were given equal consideration.

Secondly, the MPA 1976 did not address the spouse's earning capacities. It failed to recognise the adverse effects of the division of functions within the marriage on the spouses' earning abilities. For example, women who had stayed at home and contributed

⁷²⁰ Ibid, s 8: Matrimonial property is defined as the matrimonial home, family chattels and all property owned jointly or in common in equal shares by the husband and wife. S 11: The matrimonial home and family chattels shall equally shared by the spouses. S 15: The balance of matrimonial property shall be shared equally by the spouses. There is an exception to that that matter when a spouse's contribution to the marriage partnership has clearly been greater than of the other spouse. S 9 mentions that separate property are those property acquired either by the husband or the wife while they are not living together as husband and wife (for example: the property acquired before the relationship began or after it ends). However, any increase in the value of the separate property, or income or gains derived from them, which are contributed by the other spouse, shall be referred as matrimonial property.

⁷²¹ Ibid, s 17: Where the separate property of one spouse has been sustained by the application of matrimonial property or the actions of the other spouse, the Court may order the spouse to pay the other, a sum of money by way of compensation.

⁷²² Ibid, s 9(3): Any increase in the value of separate property, and any income or gains derived from such property shall be separate property unless the increase in the value or in income or gains were attributable wholly or in part to actions of the other spouse, or to the application of matrimonial home.

⁷²³ Ibid, s 5(2): The death of either spouse shall not affect the validity or effect of anything already done or suffered pursuant to the provisions of this Act.

to domestic duties, caring for the children and supporting the husband's career could face a dramatic decline in living standards following divorce. While being out of the job market, a homemaker's job skills could become out-dated leading to poor career prospects and less financial security in the future. Accordingly, divorced women often faced a more difficult financial situation than their ex-husbands. As the underlying policy of the MPA 1976 was that a divorce should be a 'clean break', maintenance awards were minimal and infrequent.⁷²⁴ Although the MPA 1976 had introduced an equal sharing regime in terms of the matrimonial property, this did not necessarily result in an equitable outcome for all parties.

A third potential deficiency was that de facto couples (unmarried cohabitants) were not covered by the MPA 1976.⁷²⁵ In the event of a de facto relationship breakdown, the property was divided according to the partners' legal title towards the property in dispute. A partner could claim a share of the other partner's property in accordance to the principles of constructive trusts. Based on the principles developed in the case of *Lankow v Rose*,⁷²⁶ the claimant had to prove:

1. the contributions made, direct or indirect, to the specific property;
2. whether the claimant had an expectation of an interest in the property;
3. whether such an expectation was reasonable; and,
4. whether the defendant should reasonably expect to yield an interest to the claimant.

Therefore, the award was limited to the extent of the claimant's direct or indirect contribution to the property, and not to the relationship. There was no presumption of equal sharing among the cohabiting partners. As a consequence, the cohabitant's share was likely to be less than that received by a married spouse after divorce.⁷²⁷

⁷²⁴ Virginia Grainer "What's yours in mine: Reform of the property division regime for unmarried couples in New Zealand" (March 2002) Pacific Rim Law & Policy Association Journal Association 11 No 2 at 297.

⁷²⁵ It has originally been proposed in the Matrimonial Property Bill 1975, cl. 49.

⁷²⁶ *Lankow v Rose* [1995] 1 NZLR 277, 294.

⁷²⁷ *Ibid*, at 277: Ms Rose was awarded a half-share of the family home, but was not awarded a share of her partner's business, even though she had assisted him with it.

These drawbacks, namely: (1) the division of property after death; (2) the lack in considering the spouses' earning capacity; and (3) the legal position of de facto partners, increased the pressure for substantially amending the MPA 1976. The Property (Relationships) Act 1976 (PRA 1976) came into force on 1st of February 2002.

6.3.4 The Property (Relationships) Act 1976

Social trends in New Zealand have seen the number of people in cohabiting relationships increase rapidly in recent decades. The declining number of marriage is linked to the increase in the numbers of cohabiting relationships.⁷²⁸ In 1996, about one in seven adults who were in partnerships, were not legally married and that figure had increased to around one in five by 2006.⁷²⁹ The number of marriages registered in New Zealand had decreased. There were about 20,900 marriages registered to New Zealand residents in 2010 in comparison to 21,500 marriages registered in 2006.⁷³⁰

In November 1994, the Minister of Justice indicated that the Government was working on revisions to the MPA 1976, as well as issues relating to those living in de facto relationships.⁷³¹ The basis for reform in 2001 was the report of the working group on 'matrimonial property and family protection' set up in 1988.⁷³² The report stated that "[t]he group is convinced that there must continue to be a significant role for the State in reducing disparities caused by social factors".⁷³³ Therefore, statutory intervention was

⁷²⁸ "Marriages, Civil Unions and Divorces: Year end December 2010" Statistics New Zealand accessed on 05 September 2013 <http://m.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces_HOTPYeDec10/Commentary>.

⁷²⁹ Ibid.

⁷³⁰ Ibid.

⁷³¹ "The Minister of Justice's Opening Speech" in Atkin et al (ed) *Family Property Law and Policy* (1995 NZ Institute of Advanced Legal Studies Wellington).

⁷³² New Zealand Working Group on Matrimonial Property and Family Protection, Report of the Working Group on *Matrimonial Property and Family Protection* Department of Justice Wellington (1988).

⁷³³ Ibid, at 12: Among the proposals put forward by the working group to achieve greater equity were to widen the pool of assets falling within the definition of "matrimonial property", to narrow the scope for avoiding equal division of property, extend the powers of the Court to reach property held by trusts and companies, to encourage greater use of lump sum maintenance. Finally, the Working Group made proposals for a statutory regime to cover those in de facto relationship. It was widely recognised that the then existing rules of common law and equity, which the courts had moulded to handle the greater numbers of unmarried cohabitants were unsatisfactory. The Working Group was unanimous that steps should be taken to improve the lot of the significant numbers of de facto couples in the community. The Courts

seen as necessary.⁷³⁴ The working group proposed that the property of de facto partners should be divided according to the equal division rules of the MPA 1976.⁷³⁵

Thereafter in 1998, two Bills were introduced: (1) the Matrimonial Property Amendment Bill; and, (2) the De Facto Relationships (Property) Bill. During the passage of the Act through the parliamentary process, statements were made to emphasis fairness, which was equated with the same treatment for both married couples and de facto partners.⁷³⁶ In the Parliamentary debates over the inclusion of PRA 1976 to include ‘de facto’ partners in the legislation, the definition of ‘de facto’ relationship was revised by the Parliamentary Select Committee, which inter alia borrowed the phrase ‘living together as a couple’ from the New South Wales Property (Relationships) Act 1984.⁷³⁷ Whilst progressing, Parliament combined the two Bills into one statute. The Property (Relationships) Amendment Act 2001 (“PRAA”) came into force on 1st of February 2002.

The PRA 1976 now covers a much wider cross section of the population than the MPA 1976. It applies to marriages ending in divorce and now also marriages ending in death. The MPA 1963 has been repealed. It has also been extended to de facto partners including same sex partners, provided they were living together as a couple when the PRA 1976 came into force. However, it is not retrospective. Thus de facto relationships that ended before that date are not covered by the Act.⁷³⁸ Otherwise, de facto relationships are generally covered by the Act if they have lasted for more than three

cannot do justice to these couples through the slow and inevitably selective method of case-law development.

⁷³⁴ Ibid, at 76.

⁷³⁵ Ibid, at 71.

⁷³⁶ “It is great that the bill proposes the same advantages for same-sex couples as married and de facto couples ...” Matrimonial Property Amendment Bill: Report of Select Committee (4 May 2000) statement of K. Locke: “In our view the time has long since passed when marriage itself is seen as something different, for most couples, from the decision to live together, share chattels and houses, and in particular bring up children together, statement by Hon. L. Harre accessed on 29 March 2014 <<http://www.knowledge-basket.co.nz/databases/>>.

⁷³⁷ Bill Atkin “The Legal World of Unmarried Couples: Reflections on “De Facto Relationships” in Recent New Zealand Legislation” (2009) 39 VUWLR at 797.

⁷³⁸ Property (Relationships) Act 1976, s 4C.

years.⁷³⁹ The court may make an order in cases of short duration relationship when two requirements are fulfilled:⁷⁴⁰

1. There must be a child of the relationship, or the applicant must have made substantial contributions to the relationship.
2. The Court must be satisfied that failing to make an order would result in serious injustice.

The de facto relationship is defined in section 2D.⁷⁴¹ There is a list of factors that is provided to guide the Courts in deciding whether two people are living together as a couple.⁷⁴² The PRA 1976 used the same criteria as those used in the Property (Relationships) Act 1984 of New South Wales to determine the de facto relationships.⁷⁴³

Since 2005, the PRA 1976 has also included civil union partners. The relationship of civil union partners was legalised by the Civil Union Act 2004, which came into force on 26 April 2005. In 2006, there were 397 civil unions registered of which about 80 per cent were same sex couples.⁷⁴⁴ In 2010 there were about 273 residents registered in a civil union of which about 73 per cent were same-sex couples.⁷⁴⁵

⁷³⁹ Ibid, s 4(5).

⁷⁴⁰ Ibid, s 14A.

⁷⁴¹ For the purposes of the Act, a de facto relationship is between two persons (whether a man and a woman, or a man and a man, or a woman and a woman), who are both aged 18 years or older, who live together as a couple, and who are not married to, or in a civil union with one another.

⁷⁴² Property (Relationships) Act 1976, s 2D (2): The duration of the relationship, the nature and extent of common residence, whether or not a sexual relationship exists, the degree of financial dependence or independence, the ownership, use and acquisition of property, the degree of mutual commitment to a shared life, the care and support of children, the performance of household duties, and the reputation and public aspects of the relationship.

⁷⁴³ Property (Relationships) Act 1984, s 4(2): In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including: (a) the duration of the relationship, (b) the nature and extent of common residence, (c) whether or not a sexual relationship exists, (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties, (e) the ownership, use and acquisition of property, (f) the degree of mutual commitment to a shared life, (g) the care and support of children, (h) the performance of household duties, (i) the reputation and public aspects of the relationship.

⁷⁴⁴ “Marriages, Civil Unions and Divorces: Year end December 2010”, above n 728.

⁷⁴⁵ Ibid.

The PRA 1976 is a code. Therefore, the provisions of the Act apply, rather than the general law. Hence, the rules and presumptions of the common law and equity do not apply.⁷⁴⁶ This is in contrast with England where the common law rules and equity are still applied in cases involving relationship breakdown among cohabitants. The same applies within the Malaysian Civil system.

PRA 1976 establishes a deferred relationship property regime. During the marriage, civil union or de facto relationship, the parties are free to deal with his or her own property during cohabitation. During this phase, any matters relating to trusts, gifts, agreements and others are determined without the application of the statutory relationship property regime. It does not come into effect until the parties separate, or one of them dies, or other circumstances in section 25(2) arises.⁷⁴⁷ Without any of these events, each spouse or partner can deal freely with his or her own assets and nothing in the Act affects those assets.⁷⁴⁸ However, the parties may apply to the court to have their property reapportioned under the statutory sharing regime. The equal sharing regime applies to the couples' relationship property.⁷⁴⁹ Separate property, such as gifts or inheritance or property, owned before the relationship is immune to statutory reapportionment and remains with the existing owner.⁷⁵⁰

The concern for the need for equality is reflected in section 1M of the PRA 1976. The purpose of the Act is to recognise the equal contribution of husband and wife to the marriage partnership, and of de facto partners to the de facto relationship, and to provide

⁷⁴⁶ Property (Relationships) Act 1976, s 4: This Act applies instead of the rules and presumptions of the common law and of equity.

⁷⁴⁷ Ibid, s 25(2): The court may not make an order, unless it is satisfied that in the case of marriage or civil union, the spouses or civil union partners are living apart, or separated, or the relationship has been dissolved. In the case of de facto relationship, the court order is based on the fact that the de facto partners no longer have a relationship with each other.

⁷⁴⁸ Ibid, s 19: The Act shall not affect the title of any third person to any property, or affect the power of either spouse or partner to acquire, deal with, or dispose of any property, or to enter into any contract or other legal transaction.

⁷⁴⁹ Ibid, s 8: Relationship property shall consist of the family home, family chattels, and all property owned jointly or in common in equal shares.

⁷⁵⁰ Ibid, s 9: All property acquired by either spouse or partner, while they are not living together, or after the death of either the spouse or partner.

a just division of the relationship property between the spouses or de facto partners when their relationship ends.⁷⁵¹

The concept of equality is also apparent in section 1N of the Act, which provides that men and women have equal status and their equality should be maintained and enhanced.⁷⁵² All forms of contribution to the marriage partnership or to de facto partnership are treated equally.⁷⁵³ Further, a just division of relationship property has regard to the economic advantages and disadvantages to the spouses or de facto partners, arising from their marriage or de facto relationship, or from ending of their marriage or de facto relationship.⁷⁵⁴

As noted above, the Act's regime on the principle of equal sharing applies to the 'relationship property' of the parties. This includes the family home, chattels, and any other property acquired during the relationship or the property that is acquired by either one of the spouse or partner in contemplation of the relationship, if the property was intended for the common use or common benefit of both the parties to the relationship.⁷⁵⁵

Separate property is not shared, although any increase in the value of the separate property may be considered as a relationship property, if the increase in value was attributable wholly or in part to the application of relationship property or the direct or indirect actions of the non-owning spouse or partner.⁷⁵⁶ If the increase was the result of actions by the non-owning spouse or partner, the increase is divided according to the contributions of each spouse or partner to the increase in value. This provision reflects the entitlement to property that is determined by contributions to the property rather than the contributions to the relationship.

⁷⁵¹ Ibid, s 1M.

⁷⁵² Ibid, s 1N.

⁷⁵³ Ibid, s 1N.

⁷⁵⁴ Ibid, s 1N.

⁷⁵⁵ Ibid, s 8(1)(d).

⁷⁵⁶ Ibid, s 9A.

The relationship property of the parties is equally divided.⁷⁵⁷ The concept of equal sharing is justified when the contributions to the relationship can be seen as equal. Unequal sharing is only available in a minority of situations. Sections 14 and 14AA do not rule out equal sharing, but they only allow for unequal division where the contributions of one spouse or civil partner have been greater than the other, particularly on relationships of short duration.⁷⁵⁸

Another new feature of the PRA 1976 is section 15. It attempts to address the economic disparity between married partners, civil union partners or the cohabitants at the end of their relationship. Section 15 applies if, on the division of relationship property, the court is satisfied that after the relationship ends, the income and living standards of one spouse or partner are likely to be significantly higher than the other spouse or partner because of the effects of the division of functions while the parties were living together.⁷⁵⁹ This section enable the court to make an order having regard to the likely earning capacity of each spouse or partner, the responsibilities of each spouse for the on-going daily care of any minor or dependent children and any other relevant circumstances.⁷⁶⁰ The court may order for a lump sum payment or the transfer of property.⁷⁶¹

Another important feature of the PRA 1976 (and the earlier MPA 1976) is that it creates an opt-out system.⁷⁶² Parties who wish to avoid the equal sharing system can contract out of the Act by entering into an agreement regulating their status, ownership

⁷⁵⁷ Ibid, s 11: On the division of relationship property, each of the spouses or partners is entitled to share equally in the family home, family chattels and any other relationship property.

⁷⁵⁸ Ibid, s 13: There is an exception to equal sharing, if the court considers that there are extraordinary circumstances that make equal sharing of property or money are repugnant to justice. This is subject to relationships of short duration in ss 14, 14AA and 14A PRA 1976. By point of contrast to the equal sharing principle of the PRA 1976, the Property (Relationships) Act 1984 of New South Wales does not advocate for equal property sharing between the cohabiting couple. The courts determine the existence of the cohabiting relationships and subsequently have wide discretion to order the divisions of the relationship property.

⁷⁵⁹ Ibid, s 15(1).

⁷⁶⁰ Ibid, s 15(2).

⁷⁶¹ Ibid, s 15(3).

⁷⁶² Justice and Electoral Committee Report on the Matrimonial Property Amendment Act and the Supplementary Order (2001) Paper No 25 at [10-11].

and the division of property.⁷⁶³ However, the court may set aside the agreement if it would cause ‘serious injustice’ to the parties involved.⁷⁶⁴ In examining whether the agreement could cause ‘serious injustice’, the court must have regard to certain aspects of the contract, for instance; the provisions of the agreement, the length of time since the agreement was made, whether the agreement was unfair or unreasonable at the time it was made, or it has become unfair or unreasonable after it was made, the certainty achieved by the parties, the status, ownership and division of property and any other matters that the court considers relevant to the matter.⁷⁶⁵

In summary, New Zealand has recognised cohabitants as equal to married couples. New Zealand is a country where the diversity of the people and their liberalised values are acknowledged and appreciated: “The act to legally recognise other forms of relationship is a way of acknowledging society’s diversity and people’s personal choices about their relationships, while respecting the exclusiveness that some feel about marriage.”⁷⁶⁶ “The equal rights given to cohabitants also encourages a society where diverse, stable family arrangements and loving personal relationship commitments can be recognised.”⁷⁶⁷

6.4 Property Divisions for Married Couples and Unmarried Cohabitants (De Facto Partners)

The previous section highlighted the developments in the legislations from the early days to the present time. The following discussion will specifically analyse the changes and advances that occurred within the case laws, precisely before and after the introduction of PRA 1976.

⁷⁶³ Property (Relationships) Act 1976, s 21: Spouses, civil union partners or de facto partners may make an agreement, that they think fit with respect to the status, ownership and division of property, for the purposes of contracting out of the Act.

⁷⁶⁴ Ibid, s 21J; Ibid, s 21J (4): If the relationship property was transferred to a trust or company, and this matter affects the interest of one of the parties to the relationship; the court may make financial adjustments to the property division.

⁷⁶⁵ Ibid, s 21J (4).

⁷⁶⁶ Hon David Benson-Pope (Associate Minister of Justice), Relationships (Statutory References) Bill- First Reading, Hansard and Journals (debates) 618 at 13952 (emphasis added).

⁷⁶⁷ Ibid.

6.4.1 The Situation Before the Adoption of the Property (Relationships) Act 1976

The following cases traces the development of trust principles as a device for recognising property interests for non-owner cohabitants in the years prior to the enactment of the PRA 1976. It will conclude by applying those principles to the hypothetical scenario of Daniel and Sara (for the facts of the scenario refer to page 134).

The primary difficulty faced by cohabiting partners in the division of property was establishing whether the partners had a common intention to share the property. This is apparent in cases where the title of the property was vested in one of the partners' name. In such cases the non-owner partner would have to establish a common intention to share the property.

The test of common intention

The case of *Hayward v Giordani*⁷⁶⁸ was among the first to recognise the relevance of trust principles to property claims by unmarried cohabitants. The plaintiff and Miss Sanders lived for five years in a de facto relationship. Miss Sanders owned the home in which they lived. The plaintiff did a great deal of work on the property. When Miss Sanders died in 1978, a document purporting to be a will was found among her papers, in which she left the house to the plaintiff. However, the will was not witnessed. According to her last will made in the year 1969, she left all her property to a former friend, the respondent. The plaintiff sought an order vesting in him an interest in the house. His claim was rejected by High Court. Moller J thought it was essential for him to prove an oral agreement or at least a *common intention* as to the joint beneficial ownership of the property. He held that the Court could not impute a trust when the parties had not addressed their minds to the question. The plaintiff then appealed.

⁷⁶⁸ *Hayward v Giordani* (1983) NZLR 140.

On appeal in *Hayward*,⁷⁶⁹ the court held that there was sufficient common intention of equal sharing to give rise to a trust and the plaintiff was entitled to a one-half interest in the house property. This case observes that in determining the property rights of cohabitants, the courts may impose or impute a constructive trust. This is to reflect the direct and indirect contributions of each party to the property, even if a common intention is not obvious in fact. This case demonstrates that any form of common intention in sharing the relationship property was beginning to be accepted in New Zealand courts. The Court of Appeal in this case held that there was a trust in favour of the plaintiff because there was evidence of a sufficient common intention of equal sharing. The court went on to consider the arguments based on a wider approach, whereby constructive trusts were applied to reflect the contribution of the parties to the relationship.

The test of reasonable expectation

In the case of *Gillies v Keogh*,⁷⁷⁰ the plaintiff and the defendant lived together for nearly three years. The defendant had bought a house in her sole name. The parties then pooled their wages in a joint account from which the household expenses were paid. The plaintiff had contributed towards the furniture and the improvement of the house. Nevertheless, the defendant always asserted that the house where they lived together was hers. The issue before the court was whether there was a constructive trust in favour of the plaintiff and whether he had any interest at all in the house. In the Court of Appeal, Cooke P was of the view that there was no practical difference between the equitable devices of constructive trust, unjust enrichment, implied common intention and estoppel. The important matter here was to look at the *reasonable expectations* of the parties while taking into account their sacrifices. These sacrifices were not limited to monetary, but also covered the length of the relationship and the benefit gained by both parties within the relationship. This reasoning therefore implies the functionality of cohabitants towards their relationship. On the facts, because the defendant had made it clear the house was hers, the plaintiff did not receive a share.

⁷⁶⁹ Ibid.

⁷⁷⁰ *Gillies v Keogh* [1989] 2 NZLR 327.

Richardson J preferred to decide the case on the basis of estoppel. The analysis began by asking whether there had been a direct or indirect contribution by the claimant to the property. Further, the claimant should have also understood that those efforts would naturally lead to an interest in the property. If the answer to both enquiries were yes, then estoppel would prevent the other party from denying the existence of an interest. Estoppel requires encouragement, reliance and detriment. Richardson J indicated that the longer the duration of the relationship, the more the expectation would be that the family property is to be shared. This reasoning demonstrates that the court considered the functionality of the partners by way of their relationship duration.

A constructive trust may be imposed although no actual or imputed common intention exists. However, the application of a reasonable expectation against estoppel may infer distinctive perspectives in different cases. Thus, there is a need for a clearer legislation on this matter, as the judges will then have a guideline to follow and decide correspondingly.

In the case of *Hopkins v Sturgess*⁷⁷¹ the parties were in a fourteen-year relationship, 'akin to marriage'. The woman contributed to the renovations, furniture and household expenses. During the relationship, the man made a will, which his partner witnessed. In the will, it was stated that 'his' property was left to his sons. The court held that there could be no expectation of a share in the property. This is because she has acknowledged her position while the will was made. Therefore, the court ordered the woman to receive a 15 per cent for her contributions to the house property.

In *Sutcliffe v Reid*⁷⁷² the parties were in a relationship for approximately three years and four months. The court held that the detriment suffered by the female claimant through the domestic work, improvements, income from a part-time job and the assistance with thoroughbred horses on the farm was counterbalanced by the benefits to her. These advantages were in the form of accommodation and assistance in developing

⁷⁷¹ *Hopkins v Sturgess* (1988) 4 FRNZ 639.

⁷⁷² *Sutcliffe v Reid* Hamilton High Court CP 17/88/ 16 December 1988 discussed in 1989 Family Law Bulletin 30.

her interest. Therefore, no reasonable person in her shoes would have expected her efforts would lead to an interest in the farm. Consequently, no share was ordered by the High Court.

By contrast, in the case of *Partridge v Moller*,⁷⁷³ the claimant was successful in arguing for a share of the property. The parties were in an eight-year relationship and Ms P's contributions included looking after the home and family, while Mr M was away earning a living as a fisherman. Ms P's name was not on the title of the property. Additionally, Mr M had not made it clear that she was not entitled to a share. Therefore, the court awarded her 40 per cent share of the combined value in the property. Similarly in the case of *Ireland v Hepburn*,⁷⁷⁴ where the plaintiff and the defendant were in a de facto relationship for 18 months, the court was prepared to order a share to the non-owner. The unemployed man moved in with a single mother and her five children. He also brought a bedroom suite, made small payments towards the household costs, built a fence and a bike shed, in addition to some childcare. His financial contributions were made from an ACC payment. The High Court ordered him a ten per cent share in the property.

The point of contention for the Court of Appeal in the case of *Phillips v Phillips*⁷⁷⁵ was whether or not a consent order for the property was enforceable. The de facto wife was under a mistake that an oral settlement was enforceable if she did not agree to the consent order. There were also some mistakes with regards to the proportionate values of the property received by the consent order and the total value of the property. The consent order was set aside on the basis of mistake. The court further commented that if there had been a mistake, the consent order would not have been set aside on the basis of unconscionability because of the disparity between what she received (14 per cent) and what she could have been entitled to under the equitable principles (25 per cent). The court also refused to make a finding that the de facto wife was under pressure in the negotiations equivalent to duress.

⁷⁷³ *Partridge v Moller* (1990) 6 FRNZ 147.

⁷⁷⁴ *Ireland v Hepburn* High Court Palmerston North 19 April 1991 CP 221/89 noted in (1991) NZLJ 223.

⁷⁷⁵ *Phillips v Phillips* [1993] NZFLR 321.

Cooke P⁷⁷⁶ commented that the six Judges who had decided that case, in both the Courts were all men most in their middle age. He suggested that a woman's insight would be helpful on at least one of the benches to assess the claims, personality and situation of a litigant woman. Subsequently, this may encourage justice between man and woman. In this case, he did not feel confident enough to make a finding of unconscionability against the husband, when the trial judge has made none.

In his observations on 'de facto' property disputes, he mentioned that in the eyes of society and law, de facto relationships were fundamentally different to marriage. In a legal marriage, the MPA 1976 created a very strong presumption of equal sharing of the marital home and chattels. The courts have no warrant to impose a similar regime on stable de facto relationships. He was not convinced that the distinction between legal marriage and de facto unions should be abolished for the long-term interests of women. He further reiterated that despite the de facto partner making important contributions and sacrifices, her unwillingness to commit herself to legal matrimony contradicted her claim to equal sharing.⁷⁷⁷

To summarise the cases examined thus far, the decisions demonstrate the idea that mere contributions and sacrifice will not guarantee an equal sharing (or indeed, any sharing) of the property. The distinctions between marriage and cohabitation were clearly identifiable. Married couples were in a better situation with the guided principles stipulated in the MPA 1976, while unmarried de facto partners had to rely on the common law principles of constructive trusts implemented in the courts.

The final decision considered in this section is *Lankow v Rose*,⁷⁷⁸ a case concerning a ten-year de facto relationship. On the *reasonable expectations test*, it was proven that there was a half interest in the home and certain residual chattels. However, no interest could be proven by the non-owner in her de facto partner's business, which was built up by him. Therefore, the overall share was still under 25 per cent of the

⁷⁷⁶ Ibid, at 335.

⁷⁷⁷ Ibid, at [333-334].

⁷⁷⁸ *Lankow v Rose* [1995] 1 NZLR 277.

partner's net worth. However, the Court of Appeal was clearly aware of the different property outcomes for married couples as opposed to cohabitants. Cooke J commented that:⁷⁷⁹

Legislation has not been enacted in New Zealand about property interests after the end of apparently stable de facto unions. While it is a controversial field and parliamentary caution is understandable, legislation laying down some hard-and-fast approach might be desirable, not only theoretically but in practice. If any such change is under consideration a point to be borne in mind is that the present New Zealand case law represents an attempt to ensure justice while recognising that there is a basic difference between legal marriage and de facto union.

According to Hardie Boys J:⁷⁸⁰

The Judge saw an analogy with the regime under the Matrimonial Property Act 1976 whereby spouses generally shared equally in the matrimonial home and the family chattels. One danger of that analogy is that the Court would tend to look at contributions to the relationship in the way that under the Act it must look to contributions to the marriage partnership; whereas for a constructive trust the Court must look to contributions to assets. Furthermore, the constructive trust remedy must reflect relative contributions, so that there is no room for the kind of presumption of equality that the Act provides. Finally, it should not be regarded as a reasonable expectation that de facto couples should share in assets in the same way that married couples do. If the distinction between the two categories is to become one of form only, that was a revolutionary step which only Parliament could take.

⁷⁷⁹ Ibid, at 280 line [43-52].

⁷⁸⁰ Ibid, at 286 line 20.

McKay J suggested that:⁷⁸¹

The Matrimonial Property Act 1976 has no application to de facto relationships. It is, however, part of the background of modern law and modern social attitudes by which people are influenced. The fact that spouses are entitled generally to share equally in the matrimonial home and family chattels, and in other property accumulated during the marriage, inevitably has an influence on the expectations which the parties to a de facto relationship may have. It also has an influence on society's attitude to what is reasonable in a de facto situation.

Further, according to Tipping J:⁷⁸²

There seems to be a view in some quarters that once qualifying contributions have been shown which justify some interest, the amount of that interest is at large and is to be determined according to broad notions of justice with a greater or lesser degree of analogy with the matrimonial property regime. Any such approach is erroneous ignoring, as it did, the fundamental difference between a legal marriage and a de facto marriage. Under the Matrimonial Property Act 1976 the status of wife or husband gives each spouse a presumptive half-share. In the case of a de facto union, the claimant does not start from a presumptive half-share but rather from nothing. A de facto claimant must demonstrate first a case for an interest and then what that interest should be.

To be noted, the New Zealand courts created a *reasonable expectations test* for cohabitants to claim over the relationship property. Tipping J summarised that de facto claimant must show:⁷⁸³

⁷⁸¹ Ibid, at 290 line 33.

⁷⁸² Ibid, at 295 line [27-37].

⁷⁸³ Ibid, at 295.

1. Contributions, direct or indirect, to the property in question.
2. The expectation of an interest therein.
3. That such expectation is a reasonable one.
4. That the defendant should reasonably expect to yield the claimant an interest.

“If the claimant can demonstrate each of the four points, equity will regard as unconscionable the defendant's denial of the claimant's interest and will impose a constructive trust accordingly.”⁷⁸⁴

To conclude, the reasonable expectation test at a first glance may appear to offer a clear way to tackle property disputes arising out of a de facto relationship. It recognises the functions of the de facto partners to the relationship, rather than merely giving importance to the financial contribution. However, it should be noted that this test may not be an easy one to satisfy. There have been instances where the claimant has gone away empty handed despite having contributed to the relationship.⁷⁸⁵

While considering the cases above and the observations made by the New Zealand judges, it is apparent that there was no presumption of equal sharing among cohabiting partners in the event of relationship breakdown. De facto partners may, but would not necessarily receive equal share in the relationship property, in comparison to married couples who were guaranteed equal division of their relationship property under the MPA 1976. In the cases of divorce, the court examined the contributions made by the parties to the marriage relationship. By comparison, in cases involving de facto partners, in order to establish the constructive trusts, the court considered the contributions of the parties to the property, but not to the relationship.

Returning to hypothetical scenario of Daniel and Sara, before the application of PRA 1976, they would not have possessed any statutory right to each other's property on relationship breakdown. They would be dependent on the common law and equitable

⁷⁸⁴ Ibid, at 295.

⁷⁸⁵ *Gillies and Keogh* [1989] 2 NZLR 327.

principles. Under the principle of constructive trusts, the non-owner of the property could be given some rights to that property based on the direct and non-direct contributions to the relationship. Nevertheless, the orders given by the court did not guarantee a half share in the assets even though the couple might have been living together for a long period of time. This matter has been evidenced in the cases discussed earlier. As a result, Sara in this situation may try to prove to the court her non-financial contributions towards the property. The courts recognised non-monetary contributions, nonetheless, recognition of non-monetary contributions did not guarantee an equal share in the property. Sara may have been able to receive more than ten per cent, but not as much as Daniel, who had made more financial contributions towards owning the property. This situation is analogous to the position of cohabitants in England and non-Muslims cohabitants in Malaysia (within the jurisdiction of the civil court). Nevertheless, the legal position of Daniel and Sara would change dramatically should the PRA 1976 apply to them.

It could be summarised that New Zealand was in immediate need of legislation that dealt with property disputes between de facto partners. In 2001, this came in the form of amendments to the PRA 1976. This ‘new’ Act was anticipated to solve all the arising matters involving property interest of cohabiting partners. In comparison to Malaysia and England, New Zealand has responded to society’s need and introduced specific legislation to protect the rights of cohabitants to relationship property.

A review of the Parliamentary debates leading to the 2001 amendments demonstrates that the question of equality and the importance of considering the functionality of cohabitants within the relationship were given utmost importance.⁷⁸⁶ Throughout the debates, the matter of the functional equivalence of the relationships was repeatedly emphasised with some speakers offering personal anecdotes about friends or constituents in de facto relationships who had fared poorly under the existing law.⁷⁸⁷

⁷⁸⁶ Frankie McCarthy “Playing the Percentages: New Zealand, Scotland and a Global Solution to the Consequences of Non-Marital Relationships?” (2011) *New Zealand Universities Law Review* 24 at 505.

⁷⁸⁷ Hon Robyn McDonald (She was the Minister of Senior Citizens) as at 26 March 1998.

Other appealed to public opinion.⁷⁸⁸ During the second reading debate, Georgina Te Heuheu stated:⁷⁸⁹

Some of the most longstanding and stable relationships are in the nature of de facto relationships, and it reflects badly on the principle of the proper recognition of the value of both partners' contribution to a relationship if the present law is not amended to rectify the situation ... a de facto relationship for all intents and purposes has the same strengths and features as a marriage, and therefore deserves to have the same recognition.

The following discussion highlights the changes in the situation of cohabitants and their rights to property division after the introduction of PRA 1976.

6.4.2 The Situation After the Adoption of the Property (Relationships) Act 1976

One of the most significant changes made by the PRA 1976 was to include de facto relationships alongside existing rights for married couples. Civil union were included in 2005. Section (1)(M) states that the Act's purpose is to recognise the equal contribution of spouses, civil union partners and de facto partners to their partnerships and to provide for a just division of the relationship property between spouses or partners.⁷⁹⁰

Section 2D of the Property (Relationships) Act 1976 defines Daniel and Sara's relationship as a de facto relationship between two persons of the same or different sexes, who are both aged 18 years old and above, who live together as couple and who are not married to each other. De facto partners, whether same or different sex, who have lived together for 3 years are treated the same as married couples.⁷⁹¹ In determining whether

⁷⁸⁸ Clem Simich (5 May 1998) 40 NZPD 8229.

⁷⁸⁹ (5 May 1998) 40 NZPD 8235.

⁷⁹⁰ Property (Relationships) Act 1976, s 1M.

⁷⁹¹ However, if this time limit is not met, alternate rules apply, whereby the relationship would be considered as a 'relationship of short duration'. If this matter applies, cohabitants are not treated equally to married couples.

the parties are in a de facto relationship, the court considers the following functionality principles set out in section 2D(2):

1. The duration of the relationship;
2. The nature and extent of common residence;
3. Whether or not a sexual relationship exists;
4. The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
5. The ownership, use and acquisition of property;
6. The degree of mutual commitment to a shared life;
7. The care and support of children;
8. The performance of household duties;
9. The reputation and public aspects of the relationship.

The court is not bound to consider every factor in every case, but rather has a broad discretion to attach weight to any matters it considers appropriate in the circumstances.⁷⁹²

The criteria are considered below. Concerning the duration of the relationship, the longer that two people are together, the more likely that they will be accepted as living together as a couple. Daniel and Sara have been living with each other for at least five years. Therefore, this duration would carry some weight in establishing that the partners were living together in a stable relationship.

As regards the nature and extent of common residence in *Scott v Scragg*,⁷⁹³ the parties were not physically living together at the same residence throughout the duration of their relationship, but the court still found they were in a qualifying de facto relationship. In June 1990, the applicant moved into a property at Rotioto owned by the respondent, at which time the latter was living and working in Guam. After a month, the applicant travelled to Guam and spent two months there with the respondent before

⁷⁹² Ibid, s 2D(3).

⁷⁹³ *Scott v Scragg* [2005] NZFLR 577 (Family Court) and on appeal *Scragg v Scott* (2006) 25 FRNZ 942 (HC).

returning to New Zealand. Then later, physical contact between the parties was limited until 1997. Between 1997 and 1999, there was significant travel by the applicant to Guam or other Pacific locations for the purposes of meeting the respondent. In 1999, the applicant also moved to Guam to assist the respondent in running a new business before returning to New Zealand after twelve months. This case shows that shared residence is not required to prove the de facto relationship. In the situation of Daniel and Sara, however, common residence is not an issue because they were renting a house together at the beginning of their relationship and later bought a house and have been living together since then. These two common residences altogether for about five years prove their intention to live together as a couple.

The existence of sexual relationship plays an important role in establishing a de facto partnership. Notwithstanding this requirement, a de facto relationship could still exist without any sexual relationship. This may be due to their religious belief, disability or simply because the couple are not intending to express their relationship in such a way.⁷⁹⁴ In the case of *Horsfield v Giltrap*, the appeal related to a long-standing relationship in the nature of a partnership between a man and a woman. The unusual feature of the relationship was that for religious reasons, the couple did not cohabit or have any sexual relationship. On the other hand, in the situation of Daniel and Sara, no such factors exist since they were committed to a sexual relationship and had a child.

The degree of financial independence, interdependence and any arrangement of financial support between the parties may also be looked at in determining the de facto relationship. Nonetheless, this matter is not obligatory because it can be proven that two people who live together can still keep their financial matters separate from each other.

Further, the degree of mutual commitment may be considered to prove the extent of the relationship. Certain aspects, such as the property ownership, common address, use and acquisition of property will be examined. In the case of *PZ v JC*,⁷⁹⁵ the applicant was

⁷⁹⁴ *Horsfield v Giltrap* [2000] NZFLR 1047.

⁷⁹⁵ *PZ v JC* [2006] NZFLR 97.

a 41 year old Chinese student who had stayed with the deceased who was 78 years of age at the beginning of the relationship. However, she failed to successfully claim against his estate. According to the judgment given by Druce J, “although there was an affectionate, mutually supportive and close relationship in certain domestic areas of their life, including, it seems, sexual contact”, there was no sufficient mutual commitment.⁷⁹⁶ They were financially independent, there was no evidence of an emotional commitment to a shared life, a “lack of any clear signposts of change in the nature of their relationship, which would otherwise assist in concluding that a land-lord-boarder relationship had changed to a couple of relationships, and a lack of a public disclosure of the relationship.”⁷⁹⁷

Additionally, the care and support of children, the performance of household duties and also the reputation and public aspects of the relationship may be considered in evaluating the relationship status. As for Sara’s situation, she had to sacrifice the paid employment to take care of their child. She has been actively involved in home making and caring for her child. These contributions are recognised under section 2D(2) and other provisions in the PRA 1976.⁷⁹⁸

The matters highlighted above may be of assistance for the court to determine the existing of de facto relationships. For example, the court could examine whether the parties are mutually committed to a shared life, whether they are entwined in a physical sense, sharing a common residence, financially interdependent or a combination of management and others. This guideline available within the PRA 1976 aids the court and clarifies the position of cohabitants, by comparison to the era prior to the introduction of the PRA 1976. Previously, without the PRA 1976, the court had no clear guidance on how the assets were to be divided, or how to determine the cohabiting relationship.

⁷⁹⁶ Ibid, at para 47.

⁷⁹⁷ Ibid, at para 48.

⁷⁹⁸ Property (Relationships) Act 1976, s 1N: All forms of contribution to the relationship are treated as equal.

Criticism of PRA 1976

PRA 1976 is not perfect and it should be acknowledged that it is open to criticism. Section 2D could be criticised for the way it has defined the de facto relationship and in the way it has been interpreted and applied by the courts. The evaluation of whether a de facto relationship exists is very fact specific. This was recognised in the case of *Scragg v Scott*.⁷⁹⁹

The test must inevitable be evaluative, with the Judge having to weigh up as best he or she can all of the factors – not only those contained in section 2D, but also any others there may be – and applying a common sense objective judgment to the particular case ... Generalisations are to be avoided because every case is fact specific.

Simon Jefferson carried out a detailed review of relevant jurisprudence on each of the factors contained in section 2D and concluded that:⁸⁰⁰

Case law reveals a sociologically fascinating array of relationships and the apparently infinite capacity of people to involve themselves in all manner of tangles. Beyond stating the obvious (that the Court is required to assess all the evidence and view cumulatively in all of the circumstances) the fact-specific nature of the enquiry which must be undertaken in such cases makes it almost impossible to distil any universal principles from the cases which have received judicial consideration; whether or not, in each case, the outcomes can truly be regarded as redolent of ‘common sense’ is another matter entirely.

Since every individual case is different, it is clear that the courts have an important role to fulfil in ensuring they make the right decisions as to whether or not there is a de facto

⁷⁹⁹ *Scragg v Scott* [2006] NZFLR 1076 (HC) at [37].

⁸⁰⁰ Simon Jefferson “De Facto or Friends with Benefits?” (2007) 12 NZ Family Law Journal at 304, 309.

relationship. This is all the more important when it is recalled that once a qualifying de facto relationship is found, equal sharing will normally apply. Thus.⁸⁰¹

The court has little to no discretion on the issue of the division of relationship property. While there are some provisions that allow a departure from equal sharing, these provisions are designed to apply exceptional cases only. None relates to a discretion so central as that found in section 2D, where the court must rule on the status of the relationship, which in turn, either qualifies or disqualifies entry to the Act's inflexible equal sharing rules. Such as uncertain access route into a rigid code can turn the process into an expensive gamble for potential applicants.

Under the PRA 1976, de facto relationships are equated with marriages and civil union partnerships, and thus de facto partners are subject to the same property regime as married couples and civil union partners. Although this generally means that the relationship property is divided equally, the court has discretion to deviate from the regime of equal sharing, in two situations. The first is where extraordinary circumstances would render equal division repugnant to justice.⁸⁰² When this applies, the property will then be divided in accordance to the parties' contribution towards the property. For example, this might occur where substantial sums of money were inherited by one party but applied to the relationship.⁸⁰³ The second situation is where the relationship does not meet the qualifying three-year time limit, known as "relationship of short duration". When this circumstance applies, the de facto relationship will not come under the PRA 1976 at all, unless there is a child out of the relationship, or that the applicant has made substantial contribution to the relationship, and the court is satisfied that failure to make and order under the PRA 1976 would result in serious injustice towards the parties (either

⁸⁰¹ Margaret Briggs "The formalization of property sharing rights for de facto couples in New Zealand" in B Verschraegen (ed) *Family Finances* (Jan Sramek Verlag, Vienna 2009) at 337.

⁸⁰² Property (Relationships) Act 1976, s 13.

⁸⁰³ Frankie McCarthy, above n 786, at 502.

party).⁸⁰⁴ If both these conditions are met, the court will then make an order based on the contributions made by each party to the relationship.⁸⁰⁵ In addition to equality that awards for equal sharing of relationship property, section 15 of the PRA 1976 attempts to address the imbalances in equity by enabling the court to award a greater share of the relationship property to the disadvantaged spouse.

By comparing de facto partnerships to marriages and civil unions of short duration, the principle of equal sharing is inapplicable (for marriages and civil unions of short duration) for certain categories of property, such as assets already owned by one party at the start of the relationship.⁸⁰⁶ It is also inapplicable to relationship property as a whole where the contribution of one party had been disproportionately greater than the contribution of the other.⁸⁰⁷ Shares in the property will be determined on the basis of the contributions actually made by each party to the relationship.⁸⁰⁸

These differences illustrates that de facto partners are not treated exactly the same as married couples or civil union partners. In examining the example situation given, Sara would be given equal rights in New Zealand only if she has been living with Daniel for at least three years. Clearly, since Sara and Daniel have been living together for more than three years and have a child. Secondly, Sara has contributed to the relationship by giving up paid employment and assuming home making and child rearing. Therefore, she would be able to have equal rights over the property under the arrangement of PRA 1976.

The inclusion of de facto relationships in the PRA 1976 is a breakthrough development in the relationship property laws of New Zealand. The PRA 1976 provides a legal platform for de facto partners to protect their rights to property. Although the

⁸⁰⁴ Property (Relationships) Act 1976, s 14A(2).

⁸⁰⁵ Ibid, s 14A(3).

⁸⁰⁶ Ibid, ss 14A(2)(a) and (b) and ss 14 AA(2)(a) and (b).

⁸⁰⁷ Ibid, s 14A(2)(c) and s 14AA(2)(c).

⁸⁰⁸ Ibid, s 14A(3) and s14AA(3).

system is not free from criticism, its application protects the purpose of the PRA 1976 that is to treat every relationship equal to one another.⁸⁰⁹

6.5 Conclusion

This chapter has illustrated that one of the fundamental pivots of the PRA 1976 rests on the theory of functionality when assessing cohabitants' rights in light of the division of property. Functionality is a key aspect, which the courts attach great weight to when assessing the relationship. As illustrated through the fictional case scenario of Daniel and Sara, functionality provided a foundation upon which the courts were able to reach a decision concerning the division of property, which was far more equal than that which might have been awarded in other jurisdictions (Malaysia and England), which do not attach much weight to functionality. The statutory guidance of the PRA 1976 provides at least some measure of consistency as regards addressing future cases concerning cohabitants and the division of property.

The functionality approach in operation in New Zealand provides a basis upon which the introduction of Malaysian law pertaining to cohabitants and the division of property might be built. The following chapter makes this recommendation and introduces a model, which is based on the New Zealand model.

⁸⁰⁹ Ibid, s 1N; Frankie McCarthy, above n 786, at 516: The system has been refined over the years with the help of the judiciary and with legislative intervention where appropriate and it is solid.

Chapter 7: Recommendation

7.1 Introduction

This chapter recommends a statutory framework relating to cohabitants' relationship property rights in Malaysia. The thesis argued that cohabitants should be treated the same as married couples in the division of relationship property on the basis that cohabiting relationships function in the same manner as married couples. Given the similarities in the way they function the same problems tend to arise on the breakdown of the relationship, especially in the division of property. It is therefore appropriate for the law to provide cohabitants with the same remedies. Yet, in the Malaysian context there are no legal provisions addressing the legal rights of cohabitants.⁸¹⁰ There is a serious legal lacuna, which needs prompt attention.

The model framework presented in this chapter could offer a solution to this situation. The statutory model recommended in this thesis partially developed from the Property (Relationships) Act 1976 of New Zealand PRA (1976),⁸¹¹ part four of the Matrimonial Causes Act 1973 (England) (MCA 1973) and the Law Reform (Marriage and Divorce) Act 1976 (Malaysia) (LRA 1976).

⁸¹⁰ The LRA 1976, which specifically governs the non-Muslim marriage and divorce and matters incidental thereto, in Malaysia, does not recognise cohabitants. It does not mention anything about such relationship and the same also cannot be found in any laws. The preamble of the Act clearly provides that "it is an act to provide for monogamous marriages and solemnisation and registration of such marriage". Thus if polygamous marriage is strictly prohibited after the enforcement of the LRA 1976, in which it is considered as an offence of bigamy under section 494 of the Malaysian Penal Code, what more to recognise cohabitants. Despite that, attempt has been made to incorporate cohabitants in the definition of "other members of the family" in section 2 of the Act, interpretation section of the Domestic Violence Act 1994, but it has been rejected and not to be considered at all. Although it is a challenge to propose legislation considering the norms of the society, sensitivity of people and the non-western cultures and traditions, Malaysia needs to acknowledge that its present legal system on this issue does not offer much protection for cohabitants and the division of their property.

⁸¹¹ This model is adopted from the New South Wales Property (Relationships) Act 1984.

7.2 The Proposed Statutory Framework

This thesis proposes a new model, detailed below. It has been drafted to reflect a statute. By doing so, the implementation of the model into existing jurisdiction is more realistic.

Draft Proposed Legislation Model

Cohabitants Relationship Property Act

The Preamble and Purpose of Legislation

The purpose of the legislation is to recognise cohabiting relationships as equal to married relationships in regard to the distribution of relationship property. Any marriage through religious ceremony, custom or usage should be regarded as equal to marriage solemnised under the applicable laws. This legislation, however does not apply to Sharia law.

Section 1: Meaning of Cohabitation

(1) For the purposes of relationship property, cohabitation is defined as a relationship between two persons (a man and a woman), who are within the age to legally consummate marriage and who live together as a couple in a relationship.

(2) In determining whether two persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case.⁸¹²

- (a) the duration of the relationship;
- (b) the nature and extent of the common residence;
- (c) the existence of sexual relationship;

⁸¹² This provision is extracted from the Property (Relationships) Act 1976, s 2(D)(2).

- (d) the degree of financial dependence or interdependence;
- (e) the ownership, use and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support for children;
- (h) the performance of household duties; and/or,
- (i) the reputation and public aspects of the relationship.

(3) In determining whether two persons live together as a couple:⁸¹³

- (a) no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and
- (b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Section 2: Matters to which the court is to have regard in deciding property division

(1) In determining the shares of both the partners, the court may have regard to the following:

- (a) the needs and resources of each of the parties;⁸¹⁴
- (b) the financial resources of each of the parties;⁸¹⁵
- (c) the effect of the order on the well being of the partner and children;⁸¹⁶
- (d) the contributions of the partners towards the relationship;⁸¹⁷
 - (i) the care of child of the relationship;
 - (ii) the care of any other dependent of either partner;
 - (iii) the management of the household and the performance of household duties;

⁸¹³ Ibid, s 2D(3).

⁸¹⁴ Matrimonial Causes Act 1973, s 25.

⁸¹⁵ Ibid.

⁸¹⁶ Ibid.

⁸¹⁷ Property (Relationships) Act 1976, s 18.

- (iv) the acquisition of relationship property;
 - (v) the payment of money to maintain or increase the value of the relationship property; or the separate property of the other partner;
 - (vi) the performance of work or services to the relationship property or the separate property of the other partner;
 - (vii) the forgoing of a higher standard of living than would otherwise have been available;
 - (viii) the giving of assistance or support to the other partner, including, but not limited to enabling the other partner to acquire qualifications or aiding the other partner in carrying on his or her occupation or business.
- (e) the responsibilities of each partner from the on-going daily care of any children or dependent of the relationship.⁸¹⁸

(2) In determining the shares of both the partners in the relationship:

- (a) no finding in respect of any of the matters stated in subsection (1), or in respect of any combination of them, is to be regarded as necessary; and
- (b) a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

Interpretation Note to the Draft Legislation Model

The Preamble and Purpose of the Legislation

The purpose of the legislation is to recognise cohabiting relationships as equal to married relationships in regard to the distribution of relationship property. On the divisions of relationship property for cohabitants, the court should divide the relationship property in that the outcome of the property divisions would be the same as if the partners were in a married relationship. This would mean that upon relationship breakdown, the cohabiting

⁸¹⁸ Matrimonial Causes Act 1973, s 25.

partners should be allocated their share to the relationship property as similar to the statutory provisions that apply to married couples.

Additionally, this legislation acknowledge the marriages solemnised by way of religious ceremony, customs, tradition and/or usage and that such marriages should be given equal weight to marriages legally solemnised under the LRA 1976. For Malaysian community, customary marriages are of equal importance as civil marriage registration. The present legislation in Malaysia for non-Muslims; the LRA 1976 stipulates that any marriage solemnised under any 'law, religion, custom or usage' shall be deemed to be registered under the Act.⁸¹⁹ Successively, the act is applied to customarily married couples. However, the issues pertaining to the validity of the customary marriages often reaches the court. The court tends to determine the existence of such marriages along with other functions of the parties in the relationship.⁸²⁰

This matter demonstrates the importance of customary marriages as a factor to prove the relationship. In such circumstances, the court mostly requires the evidences of the customary marriages in the form of photographs and/or testimonials. If evidences as such could be proved, the court may regard the relationship as a marital union. As in the case of *Nancy Kual v Ho Thau On*,⁸²¹ the plaintiff sought a declaration that she was the legal wife of the defendant and that the native customary marriage entered was valid and subsisting in law. The court held that on the basis of humanitarian grounds, it would regard the relationship as a legally recognised marriage.

Although the Malaysian Civil court considers the existence of customary marriage as another function or an event that took place in the relationship, the fact that a marriage

⁸¹⁹ Law Reform (Marriage and Divorce) Act 1976, s 4.

⁸²⁰ For example, as discussed in chapter four, in the case of *Loo Cheng Suan Sabrina v Khoo Jin Eugene* [1995] 1 MLJ 115, the court took into consideration the existence of a customary marriage between the plaintiff and the defendant according to the Chinese rites. Although the plaintiff denied the occasion, this matter was one among the other factors that the court examined to see whether they have function as married couples. Similarly, in the case of *Wong Fong Yin & Anor v Wong Choi Lin & Anor and another suit* [2013] 4 MLJ 82, the court accepted the couple's marriage through religious ceremony as equivalent to a marriage union solemnised under the LRA 1976.

⁸²¹ *Nancy Kual v Ho Thau On* [1994] 1 MLJ 545.

has already been solemnised by way of religious ceremony, tradition and culture demonstrate the couple's intention to live as a 'couple' in a relationship. Taking this matter into consideration, the court should treat couples in such marriages equal to couples who legally marry under the LRA 1976. In the absence of such customary marriages, the court may examine the other functions and roles that the parties play in the relationship. The following section highlights this further.

Section 1 (1)

Section 1 defines cohabitation as a "relationship between two persons (a man and a woman) who live together as a couple and who are within the age to legally consummate marriage". There are several ambiguities. First, the definition only includes heterosexual relationships. Although for the most part, New Zealand and English law no longer discriminates on the basis of sexual orientation,⁸²² however, the same does not apply within the Malaysian context. PRA 1976 states that the relationship of a de facto couple could be between two persons, whether a man and a woman, or a man and a man, or a woman and a woman. In Malaysia however, a same-sex relationship is not only a social taboo, but falls under the ambit of criminal law, a discussion of which is beyond the scope of this thesis.⁸²³ Therefore, section 1 is only applicable to unmarried cohabiting

⁸²² De Facto couples in New Zealand are now able to commit into marriage relationships, and with the passage of the Marriage Equality Act 2013, same-sex couples are able to adopt children jointly. Previously, in the case of *Quilter v AG* [1998] 1 NZLR 523 the court of Appeal held that the Marriage Act 1955 applies to marriage between a man and a woman only and that it does not constitute discrimination. In England, Parliament has passed the Marriage (Same-sex Couples) Act 2013, whereby same-sex partners are now able to commit in marriage relationships and solemnise the wedding.

⁸²³ In the recent case of Anwar Ibrahim (the opposition political party leader), "Malaysia's top court has begun hearing a final appeal by the opposition against a sodomy conviction. Sodomy, even consensual, is a crime in Malaysia and punishable by up to 20 years in prison. He was previously imprisoned for six years after being ousted as deputy Prime Minister in 1998 on earlier charges of sodomising his former family driver, and was freed in 2004 after the federal court quashed that conviction": "Anwar Ibrahim begins appeal against sodomy conviction" *The Guardian UK* (28 October 2014) <<http://www.theguardian.com/world/2014/oct/28/anwar-ibrahim-begins-appeal-against-sodomy-conviction>>. Under the Malaysian Penal Code (Act 574), any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature under Section 377A, (Carnal Intercourse against the order of nature). Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term, which may extend to twenty years, and shall also be liable to whipping.

heterosexual couples and recommends further research to look at the position of same-sex cohabitants in relationship property matters, as social custom and opinion changes.

Secondly, the term ‘cohabitants’ and ‘cohabitation’, and not ‘de facto’ partners or ‘de facto’ relationship is used. In Malaysia and England, the term cohabitants are popularly used to describe partners who live together and are unmarried. In New Zealand on the other hand, the term associated with this situation is known as ‘de facto’ rather than ‘cohabitants’. This is because the term ‘cohabitant’ or ‘cohabitation’ could also apply to married or civil union partners who also ‘cohabit’. During Parliamentary discussion of PRA 1976 concerning the term ‘de facto’, the definition of it was revised by the parliamentary select committee, which *inter alia* borrowed the phrase ‘living together as a couple’ from the New South Wales Property (Relationships) Act 1984.⁸²⁴ Although, the term ‘de facto’ is suitable in the New Zealand context, it is submitted here that the model proposed for use in the Malaysian context retains the term ‘cohabitants’ and ‘cohabitation’.

Thirdly, the definition applies to people who are within the age to legally consummate marriage. The PRA 1976 defines the de facto relationship to include persons who are 18 years or older.⁸²⁵ Nonetheless, there are critics of the New Zealand age limit. For marriage, a couple would be able to consummate marriage at the age of 16, with parental consent. However, this matter is not mentioned for (or extended to) de facto partners within the PRA 1976. Hence, it might be argued that de facto couples can only be recognised when both partners have attained the age of 18.⁸²⁶ This definition demonstrates the difference in the legal treatment afforded to married spouses and unmarried cohabiting partners in New Zealand.

⁸²⁴ Bill Atkin, above n 737, at 797.

⁸²⁵ Property (Relationships) Act 1976, s 2D (1)(a): A de facto relationship is between two persons who are both aged 18 years and older.

⁸²⁶ *Ibid*, s 2D(1).

In Malaysia, non-Muslim marriages can be consummated for any persons who are 21 years and above (without the parental consent).⁸²⁷ However, if the couple are above the age of 18 years (below 21), they would need parental consent.⁸²⁸ Further, for females who are 16 years and above (under the age of 18), the marriage can only be consummated with the Chief Minister's consent.⁸²⁹ For Muslims on the other hand, marriage can be solemnised when the male partner is at least 18 and the female is 16. For those who have not attained these age limits, they would need the Sharia Judge's permission (in writing) to legalise the marriage.

In England, to enter marriage and/or civil union partnership, the couple need to be 16 years or over. However, permission of the parents or guardians is necessary where the couple are younger than 18 years of age. On the basis of the differences in the age limitation to consummate marriage within the jurisdictions; the (1) Civil and (2) Sharia in Malaysia, (3) England and (4) New Zealand, this thesis does not propose the exact minimum age to fall within the definition of a cohabiting relationship. The age factor would primarily be contingent on the legally suitable age to consummate marriage, in accordance to that particular jurisdiction. If this provision applies to the Malaysian Civil jurisdiction, the most appropriate age limit would be 21 years and above to constitute the cohabiting relationship. This is similar to the age limit for couples to consummate marriage within the Civil jurisdiction.⁸³⁰

Fourthly, section 1(1) does not define 'separate property'. In Malaysia, the LRA 1976 is silent on the term 'matrimonial property' or 'separate property', and thus, the case law clarifies the assets that would fall within the two categories. Although this research does not propose provisions for 'relationship' property and/or 'separate property', it does however elucidate the divisions of property, applying the definition provided within the PRA 1976.

⁸²⁷ Law Reform (Marriage and Divorce) Act 1976, s 12.

⁸²⁸ Ibid.

⁸²⁹ Ibid, s 21(2): The Chief Minister may in his discretion grant a licence under the section authorising the solemnisation of a marriage although the female party to the marriage is under the age of eighteen years, but not in any case before her completion of sixteen years.

⁸³⁰ Law Reform (Marriage and Divorce) Act 1976, s 12.

Relationship Property

Relationship property shall consist of:⁸³¹

- (a) the family home;⁸³² and
- (b) the family chattels;⁸³³ and
- (c) all property owned jointly or in common equal shares; and,
- (d) increase in the value and any income derived from the relationship property.

This type of property refers to that acquired during the course of the relationship, or at least for the purpose of the relationship. For instance, the family home is the residence where the partners, with or without children, have been living together during the period of the cohabitation. The family chattels are those movable properties, as in the household furniture and appliances, motor vehicles used for family purposes, household ornaments and tools used for the benefit of the family, domestic animals and others. Besides that, any other property that has been shared for the common use of both the partners, for instance, insurance, bonds and others are also considered to be relationship property. Further, any income derived from the relationship property shall be considered as relationship property. For example, if a cohabiting couple has bought a house during the cohabitation period, for investments purposes, the income resulting from that investment shall be pooled into the relationship property category. Additionally, any increase in the value of that relationship property shall also be considered as relationship property all together.

⁸³¹ Property (Relationships) Act 1976, s 8.

⁸³² Ibid, s 2 defines 'family home' as: (a) the dwellinghouse that either or both of the spouses or partners use habitually or from time to time as the only or principal family residence, together with any land, buildings, or improvements appurtenant to the dwellinghouse and used wholly or principally for the purposes of the household, and (b) includes a joint family home.

⁸³³ Ibid; family chattels: (a) means chattels of the following kind that either or both of the spouses or partners own; (i) household furniture; (ii) household appliances, effects, or equipment; (iii) articles of household or family use or amenity or of household ornament, including tools, garden effects and equipment; (iv) motor vehicles, caravans, trailers, or boats, used wholly or principally, in each case, for family purposes, (v) accessories of a chattel to which subparagraph (iv) applies, (vi) household pets, and (b) includes any of the chattels mentioned in paragraph (a) that are in the possession of either or both spouses or partners under a hire purchase or conditional sale agreement or an agreement for lease or hire; but (c) does not include (i) chattels used wholly or principally for business purposes, (ii) money or securities for money, (iii) heirlooms, (iv) taonga (a treasured tangible or intangible thing, in the Maori culture).

Separate Property

Separate property is all property acquired by either partner before or after the relationship.⁸³⁴ The separate property could become relationship property in certain circumstances.⁸³⁵ Firstly, if any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of the relationship property, then the increase in value or (as the case requires) the income or gains are to be considered as relationship property. For example, if a cohabiting couple owns property A, (which is a relationship property) and later decide to rent this property. With the rental income, this couple decides to make some improvements to property B, which is a separate property belonging to one of the partners. This improvements made to the latter property increased the market value of the property. Therefore, this increase in the value of property B could be regarded as relationship property.

Secondly, if any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, that could be considered as relationship property. For example, if one of the partners uses his or her own savings to pay the mortgage of the separate property owned by the other partner, and that matter increased the value of the property (mortgage-free property), that contribution would be regarded as relationship property.

Section 1 (2)

In determining whether two persons are living together as a couple, the court should consider every circumstance of the relationship, as stipulated in the list suggested in this section. Notwithstanding that, the list is not to be considered as a checklist; some factors may be relevant to the case, while others may not, and thus, every circumstance should be

⁸³⁴ Ibid, s 9.

⁸³⁵ Ibid, s 9A.

given contemplation. Since the examination of the relationship is wide in context, this section provides a guideline to determine the relationship, within the court's discretion.

(a) The duration of the relationship

The court could give weight to the duration of the relationship to determine the functionality of the partners within the relationship. The longer the partners live together as a couple, the more this would exhibit a commitment that the partners have made to the relationship. The longer that the partners live together, the more likely they are to acquire property, have children and become financially interdependent.⁸³⁶ Therefore, this legislation does not propose a minimum relationship duration for cohabitants to fall within the regime. Based on the court's wide discretion, it has the power to assess the commitment of the partners to the relationship by taking into consideration the length of the relationship along with other functions as the following.

(b) The nature and extent of the common residence

The court ought to take into consideration the nature and extent of the common residence. This matter comprises the residency of both the partners to the relationship with or without children. In cases where the partners in the relationship share the same residency, the court might give more weight in the determination of the existence and/or the functionality within the cohabiting relationship. Notwithstanding that, the court could still accept a relationship as a 'cohabiting relationship', despite the fact that the couple live at separate addresses and/or spent less time together in the same residence. As discussed in chapter six on the New Zealand case of *Scragg*,⁸³⁷ although the couple lived in different countries for the majority duration of their relationship, the court was satisfied that the

⁸³⁶ It should be noted that in New Zealand, there is an arbitrary rule of 3 years for cohabitants to fall within the equal sharing regime. Should the relationship fall under the 3 years time limit, the court would examine the existence of a child of the relationship or whether the applicant has made substantial contribution to the relationship: s 14A:Property (Relationships) Act 1976.

⁸³⁷ *Scragg v Scott* [2006] 1076 (HC).

parties had been in a continuing and significant de facto relationship (irrespective of the absence of the shared residence).⁸³⁸

(c) The existence of sexual relationship

The existence of a sexual relationship is an important factor to determine the cohabiting relationship. However, this matter may not necessarily apply, as there are cases where the partners may have been living together for some time, but did not have a sexual relationship for religious or personal beliefs.⁸³⁹ Nonetheless, on the overall perspective, a sexual relationship may be given weight to determine the cohabitants' functionality.

(d) The degree of financial dependence or interdependence

The degree of financial dependence and/or interdependence is another factor that the court may consider to determine the relationship. In cases where a partner is financially dependent on the other partner, this matter illustrates that they have been sharing financial matters together. Partners who are financially independent may also be considered as living in a cohabiting relationship. Financial independence does not solely present the relationship as being uncommitted, as there are married couples as well who practise financial independence. Therefore, financial dependence or interdependence may be only one among other factors to determine the relationship. Contrapuntally, this matter cannot exclusively determine the relationship. For instance, as discussed in chapter six in the case of *Lynskey v Donovan*,⁸⁴⁰ even though the couple maintained separate finances, the court accepted the relationship as a de facto relationship.

⁸³⁸ Similarly in the case of *W v W* New Plymouth FAM-2004-043-891 25 July 2005: The court found that a cohabiting relationship exists despite the fact that the couple remain in separate addresses for about eight years.

⁸³⁹ *Horsfield v Giltrap* [2000] NZFLR 1047: The appeal related to a long-standing relationship in the nature of a partnership between a man and a woman. The unusual feature of the relationship was that for religious reasons, the couple did not cohabit or have any sexual relationship.

⁸⁴⁰ *Lynskey v Donovan* HC Blenheim CIV-2006-406-293 November 2010 BC201065304.

(e) The ownership, use and acquisition of property

Besides the financial aspects, the court shall also consider whether there is any ownership, use and acquisition of property among the cohabiting partners. This matter may also have weight within the decision of the court to determine the relationship.

(f) The degree of mutual commitment to a shared life

The court shall consider the degree of mutual commitment to a shared life. Thus, if a cohabiting relationship represents some form of commitment, that matter can be considered as one of the criteria to determine the cohabiting relationship. The commitment to the relationship is ostensible from the function played by the partners in the relationship. These functions may comprise sexual, reproductive, and economic functions and socialisation within the relationship, which has been discussed in chapter two.

(g) The care and support for children

The court could also consider the care and support for children, if there were any children in the case disputed.

(h) The performance of household duties

The court shall also give attention to the performance of household duties. Cohabitants who are engaged in household duties may reflect the functions carried towards the relationship.

(i) The reputation and public aspects of the relationship

Additionally, the reputation and the public aspects of the relationship can also be considered as an element to conclude the relationship.

Section 1 (3)

Subsection three stipulates that in determining whether two persons live together as a couple, the court shall take into consideration any of the combination of factor listed in subsection two. It should be noted that not all aspects underlined in subsection two must be comprehended. Some of the factors may seem appropriate to consider, while some may not. Therefore, the court may have regard to all the aspects highlighted in subsection two and thenceforth give weight to each and/or all aspects as may fit the situation of the relationship.

The Application of Section 1 to the Malaysian Context

In the case of *Loo Cheng Suan Sabrina v Khoo Oon Jin*,⁸⁴¹ the judge took into consideration the partners' functions in determining whether the couple could be considered as married (or equal to married relationship). The court's initial evaluation on this relationship was limited to four functions:

1. The couple had sexual intimacies;
2. A child was born out of the relationship;
3. The fact that the plaintiff had admitted that her mother and she herself treated the defendant as her husband; and,
4. The documentary evidences that the plaintiff was variously addressed as the defendant's wife.

This case illustrated the court's functional approach to the recognition of unmarried cohabitants as similar to married spouses and is a big step towards bridging the gap between marriage and unmarried cohabitation. Although the focus was primarily to examine the intention of the couple and of the use the property, whether as a matrimonial home, or rather as a gift, the judge recognised the parties' functions in the relationship as

⁸⁴¹ *Loo Cheng Suan Sabrina v Khoo Oon Jin* [1995] 1 MLJ 115: This case was previously discussed in chapter four.

unmarried cohabitants. Although the LRA 1976 was not applied to this couple (since they were not married), the court nonetheless gave an order as if the couple were married and/or the LRA 1976 was applied.

However, if this case were to be decided by having regard to the recommendation given above in section one, the court would have clear guidelines to assess the relationship, as in (1) to determine whether the couple were in a cohabiting relationship, (2) and taking into consideration the elements of ‘functionality’ within the relationship. Should section one applied to this case, the relationship would be perceptibly identifiable as a ‘cohabiting relationship’:

1. The couple were living for the duration of three years. This time limit could demonstrate the overall length of the relationship.
2. On the fact of the nature and extent of common residence, the couple were living together at the same residence for about three years. The defendant moved in to live with the plaintiff in 1972, when his marriage broke down, and they both ceased to live together in 1975.
3. There was as existence of sexual relationship, and this matter was also given consideration by Vincent J when making the order.
4. Subsequently, they had a daughter, Karen Khoo Su Lin. The presence of a child could establish the function of caring and support of children.
5. For the property in dispute, the defendant argued that the property was for the purpose of matrimonial home and that he has made financial contributions to the property. For example, all the assessments and quit rent outgoings were borne by the defendant from 1971 to the first half of 1984 and 1986, and assessment for second half of 1993.
6. The reputation and public aspect of the relationship could be highlighted, since the court acknowledged the fact that the plaintiff’s mother accepted the defendant as the daughter’s husband.

If section 1 of the proposed model were applied to assess the couple's relationship, it would reflect a more comprehensive approach since every function of the couple is given importance. This statutory provision would guide the court from an overall perspective to evaluate other functions as well (apart from the four functions), which the couple embraces in the cohabiting relationship. If the court had applied section one to assess the relationship and subsequently for making the order, the plaintiff and the defendant would undoubtedly be identifiable as 'unmarried cohabitants'.

Although the cohabiting relationship is given more consideration in the Civil court than it would be in the Sharia court, this matter demonstrates Malaysia's approach which creates the possibilities for acknowledging unmarried cohabitation on a par with a married relationship, and thus, to potentially legislate in a way that would protect the interests of cohabitants to relationship property. Although there are no special clauses in the Malaysian Federal Constitution that advocate cohabitants' property rights protection, or establish a constitutional duty to treat other family forms (unmarried cohabitation) similar to married relationship, however, the constitution does not forbid the courts or the legislator from granting cohabitants certain rights in order to provide some degree of protection. Drawing from the court's response to the case discussed above,⁸⁴² the statutory framework that adopts a 'functionality approach', could apply to non-Muslim cohabitants within the Civil system. In the context of Muslims, since matrimonial-like matters can only be dealt within the Sharia system, this research could not cover the arguments for decriminalising cohabitation between Muslims or take legal actions at the Sharia courts, as cohabitants, or seeking equal rights as married spouses. Nevertheless, to reiterate, this model based on the 'functionality' approach could fit well into the Civil system.

To treat unmarried cohabitants equally to married spouses in the divisions of the relationship property, the court would need to give consideration to the overall outlook of the relationship. Therefore, the following section clarifies this further.

⁸⁴² Ibid.

Section 2(1) and 2(2)

In New Zealand, the courts determine the existence of de facto relationships using the functionality criteria in section 2D. If the couple were found to fall under this heading, the equal sharing regime would apply. Thus, in the event of a relationship breakdown, both the partners would be able to receive an equal share out of the relationship property. By contrast, the MCA 1973 in England provides the court with considerable discretionary power to order a property division that does necessarily result in an equal outcome to the parties.

The provisions recommended in this thesis, specifically section 2, lean towards the English (section 25 of the MCA 1973) approach, whereby the court has wide discretion to determine the existence of the cohabiting relationship and subsequently order the division of the relationship property. This provision does not suggest equal property-sharing between the cohabiting couple, but merely states that a cohabiting couple's property should be divided in a manner which is equal to how the property would be divided for married couples, corresponding to the purpose of the legislation (that is, to treat unmarried cohabitants as equal to married couples).

Subsection 1 emphasises the measures that the court may take into account in order to determine the shares to both the partners in the breakdown of the relationship. Among the features are the needs and resources of each of the parties. In cases where one of the partners are working while the other was a home maker, as an effect from the break up, the non-working party may need to find another accommodation and a job. The court in this case shall consider both the parties' needs and resources before making an order. The result of the order should not cause injustice to either party.

Besides that, the financial resources of both parties shall be taken into account. For instance, the court shall consider matters such as whether either or both parties are working or gaining any benefits from the property they owned. This property comprises of both the 'relationship property' and the 'separate property'.

Further, the effect of the order on the wellbeing of the partner and children is also considered. For instance, where the home that the partners have been living in together with their children is contested as the relationship property; both have equal rights over the property. If the court orders the sale of the property and the shares to be divided equally among the partners, the consequences of the order upon the children and the parties shall be assessed.

Additionally, in making an order, the court shall consider the contributions of the partners to the relationship. Among the rudiments is the care of the child in the relationship, whether the parties have provided care of any other dependent of either partner. The management of the household and the performance of household duties shall also be taken into consideration. Besides that, whether the parties have been involved in the acquisition of relationship property, and as well the payment of money to maintain or increase the value of the relationship property, or the separate property of the other partner, and the performance of work or services to the relationship property or the separate property of the other partner shall also carry weight to determine the contributions of one of the partner to the other partner.

Moreover, the forgoing of a higher standard of living than would otherwise have been available to the partners and the giving of assistance or support to the other partner, including, but not limited to enabling the other partner to acquire qualifications or aiding the other partner in carrying on to his or her occupation or business is also essential in determining the contribution of the parties to the relationship. For instance, in cases where one of the partners may need to relocate his or her job in order to follow the other partner who would want to further his/her studies.

Lastly, the court must also consider the responsibilities the parties carry from the on-going daily care of any (children) or any other dependent, an example of the latter is the elderly parents of the parties.

Subsection 2 stipulates that in determining the property divisions to both the partners, the court shall take into consideration any combination of the criteria in subsection 1 as necessary. The court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case. The elements highlighted in subsection 1 may act as a guide to the court in making an order that will best suit the situations of both the parties in the cohabiting relationship after the relationship breakdown.

Rather than having a three-year minimum duration of the cohabiting relationship to fall within the equal sharing regime, as in the New Zealand system, all these factors mentioned above in section 2 (1) should determine and guide the court to divisions of the relationship property. The present system in New Zealand does not provide the court with an extensive power to assess the relationship of cohabitants. If cohabitants could prove their relationship, and if that particular relationship has extended the minimum three-year period, de facto partners have rights for equal sharing regime. Unfortunately, de facto partners, who do not fulfil the minimum duration requirement, are not afforded the same protections (as married couples). The New Zealand courts in this matter have no extensive power to decide beyond the limitation provided by the PRA 1976. Consequently, de facto partners are not treated exactly equal to married couples. Therefore, to reiterate, instead of the narrow legislative provision, this thesis suggests a provision for Malaysia that would provide the court with an extensive power to determine the cohabiting relationship in light of section 2 (1), and thereafter, the court can decide how the division of the relationships property can be divided (irrespective of the relationship duration).

7.3 Case Study

For the purposes of illustrating section 2, four Malaysian cases are referred to illustrate the differences to the position of unmarried couples should the proposed model legislation were applied.

1. The Sharia case of *Normah binti Muda v Daud bin Awang Min*⁸⁴³ (discussed in chapter four).

In the divorce petition, the plaintiff (Normah binti Muda) claimed for equal shares in the matrimonial property. The court decided property divisions of 1/3 for the plaintiff and defendant received 2/3.⁸⁴⁴

If the proposed model section 2 were applied to this case, the court would be obliged to consider other circumstances of the relationship. This would include the court's analysis of:

1. The needs and resources of each of the parties. In this case, the plaintiff was a homemaker. As an effect of the divorce, she would need to look for a job and a different accommodation. In making the order, the court would consider the effect of the order on the plaintiff who would be in a far worse situation than the defendant who was working, and solely owns property no (2) (the gift from his father).
2. The court would then consider the financial resources of each of the parties. In this case, the plaintiff was not earning any income, since the defendant bought property (2), for which the plaintiff sold the van used for her business to cover the cost.
3. The court would take into account the effect of the order on the well being of the partners and children. In this case, plaintiff and their five children would need to be relocated, and the probability that it would bring an effect to the children could not be overlooked.

⁸⁴³ *Normah binti Muda v Daud bin Awang Min* Case No 11100-017-0449-2009 Sharia High Court of Kuala Terengganu.

⁸⁴⁴ Islamic Family Law (Federal Territories) Act 1984, s 122(4): The court has the power to make an order while having regard to the welfare of the family, which are by looking after the home and caring for the family. In subject to those welfare, the court may divide the assets or proceeds of the assets as the court thinks reasonable, but in any case, the party by whose efforts the assets were acquired, shall receive a greater proportion than the party who did not make any financial contribution. Taking into account the non-financial contributions, the court decided that plaintiff should receive 1/3 of the property.

4. The court would need to examine the extent of contributions made by the parties.

Among the contributions to be considered are:

- i. The plaintiff has cared for the children and educates them at home;
- ii. The management of the household and performance of household duties; and,
- iii. The giving of assistance or support to the plaintiff had enabled him to carry on his occupation.

5. The responsibilities for the on-going daily care of the children in the marriage, for which the plaintiff would continue to undertake.

The application of section 2 demonstrates that the plaintiff had made extensive contributions to the relationship and the court could address this matter, besides the needs and financial resources, the effect of the order on the well being of the parties and the children and the responsibilities for the on-going daily care of the children. In comparison to the initial court decision that merely highlighted the three mentioned-above contributions, the application of the model section 2 shows that there are other important matters to be considered as well, in dividing the matrimonial property. Based on this perspective, the court would probably decide for an equal property division, rather than the initial decision, whereby, the plaintiff was only entitled for 1/3 and the defendant received 2/3.

2. In the Civil case of *Ng Bee Lee v Liew Kam Cheong*.⁸⁴⁵

The appellant claimed for:

1. The matrimonial asset (Kemensah property) to be held on trust by appellant and respondent for both children until they attained 21 years of age; and,
2. That the medical expenses of the appellant to be borne by the respondent upon being furnished with proof of payment.

⁸⁴⁵ *Ng Bee Lee v Liew Kam Cheong* [2010] 6 MLJ 858.

Allowing the appeal, the court held that the appellant receive 35 per cent whilst the respondent receive 65 per cent of the 'Kemensah' property.

If the proposed model section 2 were applied to this case, the decision of the court would probably remain the same, however taking section 2 into account would have meant that the court would have a range of factors as a guide to consider the divisions of the property and created new precedent.

1. The court would look at the needs and resources of both parties. In this case, the respondent was working and by order of the earlier court decision:
 - i. He was ordered to pay maintenance for the respondent and their two children;
 - ii. The education, medical and dental expenses of the appellant to be borne by the respondent.
2. With regards to financial resources, the appellant was working after the divorce and able to invest in a few properties, which she solely owned. The respondent on the other hand, had no other property apart from 'Kemensah', since the property in 'Cheras Perdana' was sold and equally shared by both the appellant and respondent.
3. The court would also examine the effects of the order for the children and the responsibilities of the spouses from the on-going daily care of the children.
4. The contributions of the couple are also highlighted, for example, the care of the child and the management of household and the performance of household duties.⁸⁴⁶

⁸⁴⁶ The proposed section two could also apply to customarily married non-Muslim couples in Malaysia, if their marriage is validated under the provisions of the Law Reform (Marriage and Divorce) Act 1976: *Re Estate of Chong Swee Lin; Kam Soh Keh v Chan Kok Leong & Ors* [1997] 4 MLJ 464.

By considering these factors highlighted in the proposed model section 2, the court would have a broad view on the important matters that need to be taken into account in deciding the property division and it may have reached a different decision.

3. In the civil court case of *Liew Choy Hung v Fork Kian Seng*⁸⁴⁷ (as discussed in chapter four).

The court had to decide on the proportions of beneficial interests of the plaintiff and the defendant (unmarried cohabitants) in the ownership of the home, which they have acquired in their joint names. The court decided that on the basis of trusts, for which the proportions of the beneficial interests the parties had were dependent on each of their monetary contributions to the acquisition of the property.

Should the proposed model section 2 be applied to this case, the outcome could have been different. (Foremost, the cohabiting relationship would need to be proved and applying the proposed section 1 could do this.) In applying section 2, the court would have a scope of factors to determine the division of shares between the plaintiff and the defendant of their relationship property. Among those factors would be the needs and resources of the parties, both their financial resources and the contributions of the partners to the relationship. These contributions comprise of:

1. The management of household and the performance of household duties;
2. The acquisition of the relationship property;
3. The payment of money of the property; and other features in the relationship.

It should be noted that none of these contributions or factors to determine the property divisions were mentioned in the instant case. If these matters were considered at all, the functions of the partners would be observed from a wide perspective, hence, the court would have a list of factors in order to consider the divisions of the relationship property, instead of applying the strict rules of resulting trusts.

⁸⁴⁷ *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635.

4. The civil court case of *Heng Gek Kiau v Goh Kuan Suan*⁸⁴⁸ (discussed in chapter four).

Goh was a Singaporean businessman and Heng was his mistress for approximately 20 years, and had a son by him. During the relationship, he bought a house in her name, in order to meet her for intimacy. Abdul Malik Ishak J (High Court) held that there was unshaken evidence in the absence of any inherent improbability that he had provided the full purchase price for the property, registered it under her name and that she held it on trust for him. The Court of Appeal overruled the decision and ordered Goh to hand the title of the deed of the property to Heng. If the proposed model were to be applied to this case, the High Court would have reached an outcome, perhaps similar to the Court of Appeal.

Applying the model section 1, the relationship would have fallen within the definition of cohabitation. The court would be directed to examine the couple's functionality, for instance:

1. The duration of 25 years that the partners were living together;
2. The existence of sexual relationships and a child out of the relationship;
3. The presence of financial interdependence;
4. The fact that they were living at the common residence.

Once the relationship is established, the court would then divide the relationship property contested for. In deciding the division, the proposed section 2 could guide the court further. The court would examine:

1. The needs and resources of each of the parties. In this case, Goh was a businessman, while Heng was not working. She merely depended on Goh's financial assistance.
2. The court would look at the effect of the order would have had on Heng and their son.

⁸⁴⁸ *Heng Gek Kiau v Goh Kuan Suan* [2007] 6 CLJ 626.

3. Heng's contribution to the relationship would not be denied. She was the homemaker, and took care of their son.

Having regard to sections one and two, it is highly likely that the court would have reached the decision that demonstrates a similar order of the court of appeal.

In the cases illustrated above, the model sections 1 and 2 would clearly have guided the court to identify the cohabiting relationship and order the division of property in a manner resembling a married couple. This is analogous to the purpose of the proposed model that is to achieve equality between unmarried cohabitation and marriage.

7.4 Conclusion

The purpose of the proposed model legislation is to treat Malaysian cohabitants the same as Malaysian married couples in relation to the division of relationship property. Clearly, cohabitants should be recognised in the legislation, which will aid the identification of their claims to relationship property. A legal definition of 'cohabitants' is important in order to determine who will fall under the proposed model.

Based on the theory of functionality, the proposed model argues that married and unmarried couples should be treated equally. Given that the term "functionality" may be very broad, the model provides guidelines that the court shall adopt in determining cohabitants' functions within the relationship. The factors given in section 1(2) and 1(2) will assist the court to determine the relationship, for instance, the degree of mutual commitment, the nature and extent of common residence, the existence of sexual relationships, adopting financial dependence or interdependence, performance of household duties, the duration of the relationship and other criteria would influence the court to assess the relationship.

The definition and provisions proposed in this chapter encourages the implementation of the principles of equality between relationships when it comes to the division of relationship property.

Chapter 8: Conclusion

This thesis has argued that Malaysian law relating to cohabiting couples, especially in the division of property is in need of urgent attention. In order to respond to this, a model legislative framework has been suggested drawing on the Property (Relationships) Act 1976 (New Zealand), Matrimonial Causes Act 1973 (England) and Law Reform (Marriage and Divorce) Act 1976 (Malaysia) which could be adopted into the Malaysian context. Discussion was also presented on the manner in which the model legislative framework would operate by citing previously decided case law in Malaysia (discussed in chapter seven). In some of the cases discussed, had the model framework been adopted within those cases, the outcome would have seen far more equality in the court's decision concerning the division of property. Clearly, in Malaysia, cohabiting couples are not afforded the same rights and protections as married couples, even though the functionality of their relationships is identical to married couples.

Functionality is a crucial aspect, which underpins the model legislative framework in chapter seven. Chapter two presented an overview of the literature pertaining to the theoretical paradigm of functionality. It was also illustrated in that chapter that functionality is a vital mechanical structure in any discussion concerning the division of property for cohabiting couples. This was further demonstrated within the New Zealand legal system in Chapter six. New Zealand's radical approach to the division of property for cohabiting couples under the PRA 1976 is built upon the foundations of the theoretical principles of functionality (and equality).

In respect of unmarried couples, the Malaysian courts have referred to functionality within their decision making process and have made orders that tend to parallel the orders given to married couples (evidence of which was presented in chapter four). However it must be remembered that there is a lack of formal recognition within the Malaysian legislation for unmarried couples. These matters fall within a wide discretionary power of the Malaysian Civil courts and the absence of consistency of its judgments is apparent (discussed in depth in chapter four). In order to investigate the

present legal position of unmarried cohabitants and how they could be recognised in terms of functionality of their relationship, the laws of marriage and cohabitation of England and New Zealand was analysed.

This thesis submits that formal recognition of functionality within Malaysian law would provide the courts with greater powers to treat property disputes between cohabitants in a more equitable manner. However, the challenges inherent in this proposal are not to be underestimated. Malaysia operates a complex pluralistic system, which recognises both the operation of Civil and Sharia legal systems, simultaneously. Chapter three explains in detail that the operation of this dualist system overlaps between the jurisdictions and the difficulties of cohabitants, who practise the Islamic faith within this framework. As a result of this, it is submitted that the proposed model legislation framework cannot be adopted yet into Sharia law given the criminal nature of cohabitation between Muslim couples. Additionally, Malaysia is more conservative in relation to adopting statutory measures due to its Malaysian (Islamic and Asian) values. Whilst taking into consideration these complexities, the proposed legislative model framework is designed to offer better protection for unmarried non-Muslim cohabitants in Malaysia and/or within the Civil jurisdiction.

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Appendices



LAWS OF MALAYSIA

ACT A1261

ISLAMIC FAMILY LAW (FEDERAL TERRITORIES) (AMENDMENT) ACT 2006

Date of Royal Assent : 11 January 2006
Date of publication in the Gazette : 2 February 2006
Date of coming into operation:

ARRANGEMENT OF SECTIONS

[Preamble](#)

- Section 1. [Short title and commencement](#)
- Section 2. [Amendment of section 2](#)
- Section 3. [Amendment of section 9](#)
- Section 4. [Amendment of section 13](#)
- Section 5. [Amendment of section 14](#)
- Section 6. [Amendment of section 23](#)
- Section 7. [Amendment of section 28](#)
- Section 8. [Amendment of section 31](#)
- Section 9. [Amendment of section 38](#)
- Section 10. [Amendment of section 42](#)
- Section 11. [Amendment of section 47](#)

- Section 12. [Amendment of section 52](#)
- Section 13. [Deletion of section 58](#)
- Section 14. [Amendment of section 59](#)
- Section 15. [Amendment of section 61](#)
- Section 16. [Amendment of section 73](#)
- Section 17. [Amendment of section 79](#)
- Section 18. [Amendment of section 81](#)
- Section 19. [Amendment of section 107](#)
- Section 20. [New section 107A](#)
- Section 21. [Amendment of section 114](#)
- Section 22. [Amendment of section 121](#)
- Section 23. [New section 122](#)
- Section 24. [Amendment of section 127](#)
- Section 25. [Amendment of section 130](#)
- Section 26. [Amendment of section 134](#)
- Section 27. [New section 134A](#)

Act A1261
Islamic Family Law (Federal Territories) (Amendment) Act 2006

Section 23. New section 122

New section 122

The principal Act is amended by inserting after section 121 the following heading and section:

“Division of *Harta Sepencarian*

Power of Court to order division of harta sepencarian

122. (1) The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during their marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the powers conferred by subsection (1), the Court shall have regard to—

(a) the extent of the contributions made by each party in money, property, or labour towards the acquiring of the assets;

(b) any debts owing by either party that were contracted for their joint benefit; and

(c) the need of the minor children of the marriage, if any,

and, subject to those considerations, the Court shall incline towards equality of division.

(3) The Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole efforts of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the powers conferred by subsection (3), the Court shall have regard to—

(a) the extent of the contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family; and

(b) the need of the minor children of the marriage, if any, and, subject to those considerations, the Court may divide the assets or the proceeds of sale in such proportions as the Court deems reasonable, but, in any case, the party by whose efforts the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include the assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.”.



LAWS OF MALAYSIA

REPRINT

Act 164

LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976

Incorporating all amendments up to 1 January 2006

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**LAW REFORM (MARRIAGE AND DIVORCE)
ACT 1976**

Date of Royal Assent 6 March 1976
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PREVIOUS REPRINTS

<i>First Reprint</i>	1981
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<i>Third Reprint</i>	2001

Legitimacy Act 1961 shall apply *mutatis mutandis* to such petition but the court shall not make such a decree unless satisfied by the petitioner that both or either of the parties to the marriage reasonably believed that the marriage was valid as not being in any way contrary to section 71.

(7) In this section the following expressions have the meaning hereby assigned to them, that is to say—

“void marriage” means a marriage declared to be void under sections 6, 10, 11, subsection 22(4) or section 72;

“disposition” has the same meaning as in the Legitimacy Act 1961,

and any reference in this section to property is a reference to any real or personal property, or any interest in such property, which is limited by any disposition (whether subject to a preceding limitation or charge or not) in such a way as to devolve as nearly as the law permits, whether or not the property or some interest in the property may in some event become severed from it.

PART VII

MATTERS INCIDENTAL TO MATRIMONIAL PROCEEDINGS

Power for court to order division of matrimonial assets

76. (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to—

- (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (b) any debts owing by either party which were contracted for their joint benefit;
- (c) the needs of the minor children, if any, of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to—

- (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
- (b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Maintenance of spouse

Power for court to order maintenance of spouse

77. (1) The court may order a man to pay maintenance to his wife or former wife—

- (a) during the course of any matrimonial proceedings;
- (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
- (c) if, after a decree declaring her presumed to be dead, she is found to be alive.

(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.