

**MALAYSIA'S FAMILY LAW: CUSTODY AND RELIGION**  
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Malaysia is a unique country in that its political, sociological and legal systems reflect quite clearly the country's multi-racial and multi-religious culture.

By virtue of **Article 3 of the Malaysian Federal Constitution** [hereafter '**FC**']:

*"Islam is the religion of the Federation [i.e. Malaysia] but other religions may be practised in peace and harmony in any part of the Federation".*

Further, **Article 11 FC** states that:

*"(1) Every person has the right to profess and practise his religion, and subject to Clause (4) [regarding propagation of religions other than Islam amongst Muslims], to propagate it."*

Family law relating to non-Muslims is governed separately from family law relating to Muslims. The Civil High Courts (secular courts) have jurisdiction over family matters relating to non-Muslims in Malaysia, whereas Syariah Courts (so named under Islamic Law) have jurisdiction over family matters relating to Muslims.

By virtue of an amendment to the **FC**, that is **Article 121(1A)**, which came into force on **10<sup>th</sup> June 1988**, the Civil High Courts in Malaysia **have no jurisdiction** in respect of any matter that falls within the jurisdiction of the Syariah Courts.

This dual system of laws works perfectly well when lines are clearly demarcated and families stay within those lines; indeed, members of one family who practise the same religion would therefore be governed by one set of laws and come under the jurisdiction of one court.

The lines, however, begin to blur when one party to a civil marriage decides to convert to Islam and the other spouse does not, and has no wish to do so. The situation further turns into a legal and constitutional quagmire when the spouse who converts to Islam decides unilaterally to convert the children of the marriage without the knowledge of and/or without obtaining the prior consent of the non-converting spouse. Which Court would then have jurisdiction over the marriage, the children of the marriage, the divorce, and claims arising there from<sup>2</sup>?

### **The Marriage and the Divorce**

The statute governing non-Muslim marriages and divorces in Malaysia is the **Law Reform (Marriage & Divorce) Act 1976** (hereafter "**LRA 1976**"). This Act specifically excludes its application to persons professing the religion of Islam.

In a legislative move intended to address the dilemma created when one spouse converts to Islam and the other does not, **Section 51 of the LRA 1976** was enacted. This Section enables a non-converting spouse to petition for divorce in the Civil Courts against the converted spouse on the ground of conversion to Islam. Upon such a divorce, the non-converting spouse may seek child rights, financial support and property division orders against the converted spouse. In essence, the effect of **Section 51** is that it preserves the rights of the non-converting spouse to seek ancillary reliefs consequent upon a divorce against a converted spouse notwithstanding the general inapplicability of the **LRA 1976** to Muslims.

**Section 51** has, over the years since the **LRA 1976** was implemented in 1982, been the subject of much controversy. To begin with, the Section provides a remedy for the non-converted spouse. However, the right of the converted spouse to similar relief has been overlooked. He or she upon becoming a Muslim is precluded from seeking any relief in both the Civil Courts and the Syariah Courts, since the Civil Courts cannot entertain a divorce application from the converted spouse on the ground of conversion to Islam, and the Syariah Courts have no jurisdiction over the non-Muslim spouse.

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<sup>2</sup> i.e. including spousal support, child support and division of the matrimonial assets

According to Islamic law, the marriage is terminated upon the expiration of three months of the conversion if the other spouse does not convert to Islam. The converted spouse is thus free to marry according to his or her personal law that is Islamic law. But the anomaly that then presents itself is that the non-converting spouse remains, in the eyes of the Civil law, married to the converted spouse until a divorce is sought and granted *pursuant to a petition for divorce initiated by the non-converting spouse under **Section 51 of the LRA 1976***.

Indeed, several Malaysian cases including one to the Supreme Court<sup>3</sup> confirms that when the non-converting spouse does not petition for divorce, he or she remains a dependent of the converted spouse, entitled to a share of his estate and his pension upon the death of the converted spouse.

Much criticism has been directed at what appears to be a patent omission by Parliament when enacting **Section 51**. In failing to provide for the right of the converted spouse to seek a divorce and consequent ancillary relief and financial provision orders in the event the non-converting spouse refuses to do so, the converted spouse is currently left with no forum to seek a determination of any of the ancillary or financial issues.

Perhaps, however, this 'omission' was not so much an oversight on Parliament's part, but simply because Parliament in its wisdom intended that the spouse who intends to convert should, prior to any such conversion and/or remarriage, take all necessary and proper steps to sort out his rights and obligations to his non-Muslim family under the civil law and in the civil courts, with the rationale that, by failing to do so, he or she deserves to bear the full brunt of being without a forum.

Malaysian Courts have repeatedly moved to preserve the rights of the non-converting spouse to financial and other relief against the converted spouse in matrimonial proceedings. Initially, in a case brought before the High Court<sup>4</sup>, the view taken was that the spouse (here the wife) should have filed for divorce on the ground of conversion under **Section 51** for the court to be empowered to make ancillary orders against the Respondent Muslim husband. As the wife had instead filed and obtained a divorce under general divorce provisions in the **LRA 1976** on the ground of irretrievable breakdown and the husband's desertion, the High Court ruled that it had no jurisdiction to make the ancillary relief orders sought against the converted Muslim spouse.

The Supreme Court in a later case<sup>5</sup> held that the aforesaid case<sup>6</sup> was wrongly decided, stating that, as the non-converting spouse's application concerned matters affecting both parties, legal obligations as non-Muslims and matters incidental to the granting of the divorce, the Civil High Court would have jurisdiction to hear and determine the ancillary proceedings despite the fact that the Respondent husband in the case before the Supreme Court had converted to Islam after the divorce but before the hearing of the ancillary application.

The Supreme Court arrived at its decision based on a construction of the general purpose of the **LRA 1976** taking into account what the Court perceived must have been the legislative intent behind **Section 51**.

The Supreme Court observed that: -

*"...It would seem to us that Parliament, in enacting sub-s.51(2) must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert...From the wording of S 51(2), the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam. In our opinion, by implication from s 51(2) above, the High Court, in the present reference, has jurisdiction to hear and determine the ancillary issues. The implications may arise from the language used, from the context or from the application of some external rule. They are of equal force, whatever their derivation. (Bennion's Statutory Interpretation (2<sup>nd</sup> Ed, 1992) at p 362). It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since the Syariah Courts do not have jurisdiction over non-Muslims. In the context of the legislative intent of s 3 and the overall purpose of the Act [i.e. the **LRA***

<sup>3</sup> *Eeswari Visuvalingam v Government of Malaysia [1990] 1 MLJ 86*

<sup>4</sup> *Letchumy v Ramadason [1984] 1 MLJ 143*

<sup>5</sup> *Tan Sung Mooi v Too Miew Kim [1994] 3 MLJ 117* at pages 123-125

<sup>6</sup> *Supra*, n.4

**1976], the respondent's legal obligations under a non-Muslim marriage cannot surely be extinguished or avoided by his conversion to Islam.”<sup>7</sup>**

The Supreme Court decision as aforesaid was much needed and welcomed by the non-Muslim community in that the rights of the non-converting spouse against a converted spouse arising from obligations contracted under a non-Muslim marriage remained intact.

Recently, however, the controversy over jurisdiction, legal rights and obligations when a party crosses over from one jurisdiction to another, resurfaced in a custody dispute between two parents who had contracted a civil marriage, both of whom were Hindus at the time of their marriage. The dispute arose when the Hindu father subsequently, without the knowledge of the wife, converted to the Islamic faith and six (6) days later, also without the knowledge of or obtaining the consent of the mother, converted their 2 sons, ages 3 and 2, to Islam.<sup>8</sup>

The mother, still unaware that the father had converted the 2 children, left the matrimonial home and filed an application in the Civil High Court for custody, care and control of the 2 boys. She had this custody application served on the father. Unknown to the mother, however, the father had already filed an ex-parte application in the Syariah High Court for custody of his 2 sons.

On the date fixed for the hearing of the custody application in the Civil High Court, the father, without informing the Civil High Court of his pending application before the Syariah Court, obtained a postponement of the civil proceedings, ostensibly to enable him to appoint solicitors to take conduct of the matter. In the meantime, also without informing the mother, the father moved the Syariah Court for an ex-parte order for custody of the children.

On the adjourned date of the hearing, the Civil High Court, after hearing submissions on a preliminary point, ruled that the Civil High Court, following the earlier Supreme Court case of **Tan Sung Mooi**<sup>9</sup>, retained jurisdiction to hear the matter. An interim order was thus made leaving the children in the *de facto* care and control of the mother with access to the father, pending final determination of all issues.

Subsequent to and despite the existence of the Interim Order of the Civil High Court, the father proceeded to the Syariah High Court and obtained a final order for custody of the 2 boys.

Two applications then came up for determination in the Civil High Court:

1) The Wife's application for Declarations that the conversions of the children were null and void as the conversions were made without the knowledge of and consent of the wife, the natural mother and the other parent of the minors, contrary to:

(i) the wife's constitutional right to determine the religion of the minors under **Article 12(4) of the Malaysian Constitution**; and

(ii) equal rights given to a mother and a father under **Section 5 of the Malaysian Guardianship of Infants Act 1961** (hereafter "**GIA**");

2) The Wife's application for custody, care and control of these children and for the father be ordered to pay for their maintenance.

**Article 12(4) of the Federal Constitution** gives a minor's parent or guardian the right to determine the religion of the minor below the age of 18 years, and **Section 5 of the GIA** gives a mother the same rights and authority as the law allows to a father in the custody or upbringing of an infant and the rights and authority of the mother and father shall be equal. 'Infant' is defined as a child below the age of 18 years, if a Muslim, and 21 years, if a non-Muslim.

The High Court Judge dismissed the application for the declarations sought by the Wife. In his ruling the Judge held the view that the consent of a single parent is enough to validate the conversion of the minor.

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<sup>7</sup> supra, n .5, at page 124

<sup>8</sup> This is the recent and controversial case involving Shamala Sathiyaseelan (the wife) and Dr Jeyaganesh C.Mogarajah (the husband). A number of applications were made by both parties in this dispute. The decision regarding the validity of the children's conversion can be found at [2004] 2 CLJ 416.

<sup>9</sup> Supra, n.5

In coming to his decision, the Judge declined to adopt the *ratio decidendi* enunciated by another High Court Judge<sup>10</sup> when considering the ambit of the term 'parent' within the context of **Article 12(4) of the FC**. The High Court in that case<sup>11</sup> held that 'parent' in **Article 12(4) of the Constitution** must necessarily mean both the father and mother living. The Judge said:

*“To allow just the father or mother to choose to depriving the other of the constitutional right under Article 12(4).”*

In the circumstances, the High Court in the present case ruled that the issue of the validity of the conversions by the father was within the purview of the Syariah Court and that the Syariah Court was the only qualified forum to determine the status of the 2 minors, notwithstanding the Wife had no right of audience before that forum.

As regards the custody application, the Judge awarded legal custody jointly to both father and mother, with care and control to the mother, subject however to the caveat that the mother would lose the right to care and control if, in His Lordship's words, *“there are reasonable grounds to believe that she would influence the children's present religious (i.e. Muslim) beliefs, for example teaching them the articles of her faith and making them eat pork”* (which is contrary to the school of Islamic teachings practised in Malaysia). The father was granted visitation rights and ordered to pay maintenance.

The Mother has appealed the earlier decision dismissing the declarations sought and the father has appealed the later decision on custody.

The Mother and the 2 children have in fact disappeared from the jurisdiction.

### **Conclusion**

The aforesaid case<sup>12</sup> (widely termed 'the Shamala case' after the name of the Mother) has reopened old wounds and raised new concerns. At stake are issues of equality guaranteed by the **Federal Constitution** to a parent, that is reinforced in the **Guardianship of Infants Act, 1961**, as to the choice of the religion of his or her child. Adding fuel to this controversy is the provision in some Islamic State legislations that a child is automatically converted upon the conversion of the father.

The other major issue of concern is whether the lines of demarcation between the 2 jurisdictions, lying where they are, works injustice to the parties.

In this, it appears appropriate to quote a principle which was applied in the Supreme Court Case of **Mohamed Habibullah bin Mahmood v Faridah Dato Talib (1992) 2 MLJ 793**<sup>13</sup> (which incidentally was cited by the High Court Judge in the 'Shamala Case'<sup>14</sup>) where it was said:

*“...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...”*

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<sup>10</sup> see *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah [2003] 5 MLJ 106*

<sup>11</sup> Ibid

<sup>12</sup> Supra, n.8

<sup>13</sup> citing Lord Diplock in the case of *Hunter v Chief Constable of the West Midlands Police (1982) AC 529* at p 536

<sup>14</sup> Supra, n.8