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A Cross-Border Marriage: Rights of a Wife after Divorce in the case of Conversion to Islam under the Malaysian Family Law

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Introduction

Cross border marriage means marrying outside ones ethnicity and culture. It means two people with different background, different identity and probably different beliefs coming together as husband and wife. The paper will focus on the case of conversion of one party to a non-Muslim marriage to Islam. At present, in Malaysia, the legal issues around conversion to Islam have become the topic of concern. Issues such as who shall have the right to petition for divorce, the right of the wife to receive maintenance for herself from the convert husband, the wife's equal right as a parent to decide on matters relating to her child's upbringing, the right of the wife to inherit from the estates of her deceased convert husband and others. Recently, the Malaysian Federal Court in the case of *Subashini* has made its decision concerning the conversion; however, the decision in this case has been described as still unclear and confusing especially on the issue of jurisdiction of the court. Thus, the discussion in this paper focuses on the right of the wife upon the conversion of her husband to Islam i.e., her right to maintenance, division of matrimonial property and custody of children under the existing family law. In discussing those issues reference will be made to the provisions under the Law Reform (Marriage and Divorce) Act, 1976 (LRA), the Islamic Family Law Act/Enactment and other relevant statutes. Cases decided in the Civil and Shariah Courts will be discussed. The paper will also make some suggestions to the existing problem surround the conversion to Islam issues.

Right to Apply for Divorce

Presently, under the law the right is only given to the non-convert party to apply for divorce. Section 51 (1) of the Law Reform (Marriage and Divorce) Act, 1976 clearly states that where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce.¹ However, the petition can only be presented before the expiration of the period of three months from the date of the conversion.²

In *Subashini A/P Rajasingam v Saravanan A/L Thangathoray*,³ Nik Hashim J states:

“The wife’s petition was filed in contravention of the requirement under proviso to section 51 (1) of the 1976 Act in that it was filed two months and 18 days short of three months after the husband’s conversion to Islam.”

It is submitted from the above provision that if the non-Muslim party refuses to petition for divorce under section 51 (1) of the Act, the couple are still husband and wife and are still bound by their former law. It is understood that the conversion does not determine or automatically

¹ The above section was referred by Lee Hun Hoe C.J in the case of *Sivanesan v Shymala* [1986] 1 MLJ 400.

² Recently in the case of *Subashini A/P Rajasingam v Saravanan A/L Thangathoray* [2007] 2 MLJ 798 the Federal Court judge explained that the proviso imposes a caveat on the wife not to file the petition for divorce until a lapse of 3 months from the date of the husband’s conversion to Islam.

³ [2007] 2 MLJ 798

dissolve the marriage. This is different from the Shariah where conversion of non-Muslim party to Islam will automatically terminate the marriage.

The effect of section 51 (1) of the LRA is explained further in the case of *Easwari Visuvalingam v. Government of Malaysia*.⁴ In this case, the appellant married Visuvalingam Ponniah according to Hindu rites and the said marriage was registered on 15th November, 1950. Visuvalingam Ponniah embraced Islam on 16th July, 1978 and adopted the name of Abdul Hamid Abdullah. Visuvalingam was a pensioner under the Pensions Act, 1980. He died on 7th January, 1985. By a letter of 7th March, 1985, the plaintiff applied to the Public Services Department for derivative pension. On 16th April, 1986, the Pensions Department rejected the plaintiff's application on the same grounds as stated in the statement of defence by the husband.

The issue before the High Court was, as stated in the summons-in-chambers dated 8th June, 1987, for the court to deal with the question under Order 33 of the Rules of the High Court 1980 'whether the non-conversion of the plaintiff from her religion to that of Islam within three months of the conversion to Islam of her spouse dissolves the marriage between the plaintiff and her husband and thereafter disentitles her from being a 'dependant' within the definition contained in section 4 of the Pensions Adjustment (Amendment) Act 1983 and to a pension under section 15 of the Pensions Act 1980'.⁵ Section 15 (1) (a) of the Pensions Act, 1980 provides for derivative pension to persons prescribed in the Regulations.

Hashim Yeop Sani while delivering his decision in the Supreme Court observed;

“There is no evidence that the marriage has been dissolved. The appellant is suing as a widow as defined under the pension laws. The fact that the husband has converted to Islam does not in our view effect the appellant's rights under the Pensions Act, 1980 and the 1980 (Pensions) Regulations.

Similarly, Wan Adnan J. in the case of *Pedley v Majlis Agama Islam P. P*⁶ states;

“It is therefore clear that under the law a non Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not so converted to petition for divorce”.

⁴ [1990] 1 MLJ 86

⁵ The word 'dependant' is defined in s 4 of the Pensions Adjustment Act 1980 as 'a widow, widower, child, mother or father of a deceased officer.' The word 'widow' is defined in the Pensions Regulations, 1980 as 'the surviving spouse of a deceased officer whose marriage is recognized in Malaysia as a valid marriage under any written law, religion, custom or usage.'

⁶ [1990] 2 MLJ 307

In another case of conversion to Islam, the High Court in *Ng Siew Pian v. Abdul Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & Anor* had arrived at a similar opinion.⁷ It was held in this case that the Kadhi has no right to annul the marriage as it was contrary to the law and thus it has no legal effect. The court further said that conversion will not automatically determine the marriage but only provides a ground for divorce under section 51(1) of the LRA, 1976.

Recently, in the case of *Subashini A/P Rajasingam v Saravanan A/L Thangathoray*⁸ the Federal Court observed that the dissolution order of the civil marriage by the Syariah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of the dissolution of the marriage under the Islamic law in accordance with Hukum Syarak. Thus, the non-Muslim marriage between the husband and wife remains intact and continues to subsist until the Civil High Court dissolves it pursuant to a petition for divorce by the non-Muslims spouse.

Another relevant section to be discussed is section 3(3) of the LRA which states that the Act shall not apply to a Muslim or to any person who is married under Muslim law. In *Letchumy v. Ramadeson*,⁹ Vohrah J is of the view that section 3(3) of the LRA precludes the operation of the provision of section 77 of the same Act to the Muslims. However, in *Tey Siew Choo v Teo Eng Hua*¹⁰ the court pointed out that section 3(3) of the LRA was applicable to the convert spouse as the parties were married under the LRA. The decision in *Tey Siew Choo*'s case was followed in the case of *Johan Fairbairn Abdullah*¹¹ where the court held that the convert spouse is still subjected to the LRA.

In the recent case of *Yong Fuat Meng v Chin Yoon Kew*¹² the court held that since the petitioner in this case was not a born Muslim there was no prohibition for the petitioner to appear before the civil court to settle his obligations or liabilities that he himself had previously subscribed to by contracting a civil marriage under the LRA.

There is a question as to whether the right is given to the Muslim party to petition for divorce under the LRA. In the case of *Tey Siew Choo @ Nur Aishah Tey Binti Abdullah v Teo Eng Hua*¹³ among the issues deliberated are;

- 1) Whether the petitioner's conversion to Islam automatically ended their marriage.

⁷ [1992] 2 MLJ 425

⁸ [2007] 2 MLJ 798

⁹ [1984] 1 MLJ 143

¹⁰ [1997] 3 AMR 2779

¹¹ [1992] MLN 42

¹² [2008] 5 MLJ 226

¹³ [1999] 3 AMR 2779

- 2) Whether the petitioner could petition for divorce under the Act, in view of the fact that she had converted to Islam and the Act specifically exclude the Muslim.
- 3) Whether it is just and reasonable to allow the petition and dissolve the marriage.

It was held that a conversion of one party will not automatically dissolve the marriage under the Civil Law. Since, the marriage was a non-Muslim marriage; it did not automatically end when the petitioner embraced Islam, but need to be dissolved by the court. The judge further said that parliament could not have intended that a party to a non-Muslim marriage who had converted to Islam be denied of the same right enjoyed by the other party. Therefore, there was absolutely no legal impediment for her to make petition in this case. The petitioner status as a Muslim at the time of the presentation of the petition was irrelevant.

Based on the above case, it is submitted that the converted spouse may petition for divorce under the LRA. The Muslim spouse may petition for a divorce on the ground that the marriage has irretrievably broken down as stated under sections 53 and 54 of the LRA. Thus, if the convert spouse is the wife, she may petition for divorce under the above two sections of the LRA.

As suggested by Prof. Ahmad Ibrahim, it is submitted that to be fair to the converting as well as the non-converting parties, both should be given the same right to petition for divorce on the grounds of conversion to Islam.¹⁴ Prof. Ahmad emphasised that the best solution in order to secure justice for both parties, the conversion section of the LRA should be amended to read as;

‘Where one party to a marriage has converted to Islam, **either party** to the marriage may petition for divorce’¹⁵

At the same time, according to Prof. Ahmad necessary amendment should also be made to the application section of the LRA i.e., section 3(3).

Rights after Divorce on Conversion of the husband to Islam

Section 51(2) of the Law Reform (Marriage and Divorce) Act, 1976 provides that 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. Based on the above provision, there are certain rights that can be claimed by the wife namely, the right to the matrimonial property, maintenance of wife and the custody of children. These rights of the wife will be discussed below.

¹⁴ Ahmad Ibrahim, ‘The need to amend section 51 of the Law Reform (Marriage and Divorce) Act 1976’ [1990] 1 MLJ, Iviii.

¹⁵ Ibid.

Right to Matrimonial Property (*harta sepencarian*)

The right to the matrimonial property is provided for under section 76 of the LRA which gives the civil court the power to order the division of the matrimonial assets. At the same time the provision under the Islamic Family Law Act/Enactment also give the power to the Shariah Court to order division of *harta sepencarian* i.e., matrimonial assets. The concept of *harta sepencarian* under the Islamic Family Law is similar to that of the matrimonial assets under the LRA though they differ in some practical details.¹⁶

The principle of division of matrimonial property was applied in the case of *Koh Yian Geok v Zulkifli Tan Abdullah*.¹⁷ It was held that the marriage was dissolved upon the conversion of the respondent to Islam. As for the claim of ancillary reliefs, the court after deliberating the laws of division of matrimonial property under section 76 of the LRA, and the evidence adduced decided that the petitioner was entitled to the beneficial owner of the matrimonial property and the respondent was to deliver vacant possession of the same and the respondent was to return the set of jewellery to the petitioner and its equivalent value of the time of purchase.

It is submitted that in the case of conversion of one party to Islam there is no conflict between the LRA and Shariah in the division of matrimonial property as the provisions of both law are the same except in matters concerning the Employee Provident Fund (EPF) and insurance. This is because the Shariah Courts in Malaysia do not recognize assets in EPF and insurance as matrimonial property while the civil courts recognize them as matrimonial property.¹⁸

Right to Maintenance

Section 77 of the LRA provides that a court may order a man to pay maintenance to his wife or former wife. The same section also provides that the court can order a woman to pay maintenance to her husband or former husband if he is partially or wholly incapacitated from earning a livelihood.¹⁹

The above provisions show that it is an obligation of a husband to give maintenance to his wife during the subsistence of the marriage and this obligation continues after the dissolution of the marriage. For his former wife, the husband under the LRA is responsible over her maintenance

¹⁶ Najibah Mohd Zin, 'Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law' [2007] LR 65

¹⁷ [1995] 2 AMR 1525

¹⁸ Now the Shariah courts in some States in Malaysia recognize that EPF as *harta sepencarian*, see Najibah Mohd Zin, 'Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law,' [2007] LR 65

¹⁹ Section 77 (2) of the LRA

until the remarriage of the wife or if she is living in adultery.²⁰ These provisions are contrary to the principles of maintenance under the Shariah. In Islam, the obligation of a Muslim husband to pay maintenance to his former wife will end upon the expiry of the period of *'iddah* which is generally about three months. In Islam too, a Muslim wife is not obliged to give maintenance to her husband under whatsoever situation including if the husband is incapacitated either physically or mentally.

The question arises as to how to resolve the above conflict of law on the principle of maintenance between the Shariah and the LRA. It is not easy to resolve this conflict as it involves two different principles of law. The practice in the Malaysian courts so far seem to decide in favour of the non-convert wife by recognizing her rights to claim for her ancillary reliefs after the conversion of her husband to Islam.

However, in the earlier case of *Letchumy v. Ramadeson*²¹ Vohrah J. states;

“Section 3(3) precludes the operation of the provision of section 77 to the Muslim and as the respondent (husband) is now a Muslim, I do not think that they can be made applicable to him. It would have been different if the divorce had in fact been granted under section 51 where in that case, the court would have been enabled by the specific provision of section 51(2) to make provision to the petitioner’s maintenance”.

In the above case, since the respondent was then a Muslim, the claim for ancillary relief could not be granted to the petitioner. The court further held that the claim can only be made on the ground of conversion to Islam.

Not long after the decision in Letchumy’s case, another case with the same issue was brought to the civil court for its deliberation and the decision in the case of Letchumy had been commented and criticized.²² The Supreme Court in *Tan Sung Mooi v. Too Miew Kim*²³ held that “By looking to the intention of the Parliament while enacting section 51(2) i.e., to give protection to the non-Muslim spouse and children against the Muslim convert, the court therefore, has a jurisdiction to hear and determine the ancillary status despite the fact that the divorce was not granted under section 51.”

²⁰ Section 82 of the LRA, 1976

²¹ [1984] 1 MLJ 143

²² *Tan Sung Mooi V. Too Miew Kim* [1994] 3 MLJ 117

²³ [1994] 3 MLJ 117

Nuraisyah observes that the judge in the above case construed the application of the LRA differently and held that the LRA only applies to non-Muslims and non-Muslim marriages. She further remarks that the word 'Muslim' in section 3(3) of the LRA was construed as a Muslim at the time of the marriage and not at time of the petition of the case. Thus, the judge in the above case held that since the convert spouse was not a Muslim at the time of the marriage, he shall be governed under the LRA.²⁴

The above case shows that the Malaysian Civil High Courts have jurisdiction to hear and determine the ancillary issues including maintenance of the wife. The LRA i.e., section 51 is clearly intended to provide ancillary reliefs to the non-Muslim spouse to avoid injustice being caused to the wife especially. Dato' Faiza Thamby Chik has made the statement that "conversion to Islam cannot be used as a ground for avoiding (a Muslim convert's) legal obligation under the non-Muslim marriage."²⁵

However, it is to note that the legislature as well as the judiciary in their eagerness to ensure justice for the non-Muslim wife must also equally ensure that the right of the convert wife is protected. Thus, under the LRA she is entitled to her maintenance after the expiry of the period of *'iddah* from her non-Muslim husband until her right to maintenance ceases. However, under section 77(2) the convert wife can be ordered by the court to pay maintenance to her non-convert husband if he is partially or wholly incapacitated from earning a livelihood. As stressed above, this is contrary to the Islamic law principle where a Muslim wife is not obliged to pay maintenance to her former husband. It is felt that this provision is unfair to the wife as she is being a woman to be responsible over her husband maintenance. It cannot be imagined that the wife would convert to Islam in order to evade her responsibilities and duties specified under the LRA as normally alleged in the case of the convert husband. However, there is no reported case to see the application of the above provision.

Right to Child's Custody

Both under the LRA and the Shariah that the custody of the child should be decided based on the interest or welfare of the child. The welfare of the child is paramount in determining the custodial rights after divorce including if the marriage is dissolved because of the conversion.²⁶ Both laws also recognize that the custody of the younger child should be given to the mother. This is because of the fact that the mother is more affectionate and loving to children. Furthermore, she is more experience and knowledgeable in handling a small infant especially in the case where she breastfeeds the infant. Section 88 of the LRA states that "there shall be a

²⁴ Nuraisyah Chua Abdullah, *Conversion to Islam-Effect on status of marriages and ancillary reliefs*, ILBS, 2004, pp. 22-23.

²⁵ Faiza Thamby Chik, "Legal Effect of Conversion to Islam: An Experience from the Malaysian Court," A Keynote Address, International Family Law Conference 2007 (16-17January 2007), organized by the IIUM and Department of Syariah Judiciary Malaysia, p. 5.

²⁶ Section 88 of the LRA and section 87 of the Islamic Family Law Act.

rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother...”

In the case of *Yip Fook Tai v. Manjit Singh S/O Mohar Singh @ Mohammad Iskandar Manjit Bin Abdullah*²⁷ it was held that order of custody can be made by the court. However, in deciding the custody of the children, whether it should be given to the converted or non converted parties, the paramount consideration is still on the welfare of the child. Thus, the elder daughter in this case remained with the converted husband while the custody the younger one was given to the mother.

Based on the welfare principle, the court in *Nur Aishah Suk Bte Abdullah @ Sukwinder Kaur A/P Sajhan Singh v. Harjeet Singh*²⁸ after taking into account the report of the welfare officer concerning the background of both parties and the child welfare, decided that the custody of the child should be given to the applicant i.e., the converted mother. In the case of *Genga Devi Chelliah v. Santanam Damodaram*²⁹ the husband converted to Islam. The wife was dissatisfied with the decision made by the Syariah Court Alor Setar, Kedah to give the custody of their only child to the husband. The wife then tried to get a declaration that the order made by the Syariah court to be set aside. The court in this case held that;

“By virtue of Article 121(1A) of the Federal Constitution, the Civil Court has no jurisdiction and the matters falls under the jurisdiction of the Syariah Court. Thus, the father who is a Muslim has a full right to decide the religion of the child and the custody was given to him.”

It is observed that the courts in Malaysia in deciding on the custody of the child decide based on the interest of the child and at the same time other factors, such as education, religion, culture, financial stability, health, care and support, attitude of the parent and others are taken into consideration. In the case of *Shamala Sathiyaseelan v Dr Jeyaganesh C. Mogarajah*³⁰ the court awarded custody to the mother with access to the father. The court held that the right of religious practice of the two infant children shall be exercised equally by both parents as laid out in the Guardianship of Infants Act, 1961.

Suggestion and recommendation

Section 51 of the LRA only allows the non-converting part to petition for divorce. It is submitted that as suggested by many both parties the converting and the non-converting must be given the

²⁷ [1990] 2 CLJ 605

²⁸ [2000] 7 MLJ 547

²⁹ [2001] 2 CLJ 359

³⁰ [2007] 2 MLJ 798

same right to petition for divorce on the grounds of conversion to Islam. Thus, section 51 of the LRA need to be amended to allow the converted party to petition for divorce.

There is suggestion that the court that should have the power to dissolve the marriage in the case of conversion is the civil court. The reason is that since the marriage was contracted under the LRA only the civil court can hear and decide on the case. At present, as decided recently by the Federal Court in the case of Subashini, the States Shariah Courts do not have jurisdiction over non-Muslims. In matters within the States Syariah courts' jurisdiction, the Civil High Courts have no jurisdiction over the Muslims. Moreover, section 3(3) of the LRA clearly excludes its application to the Muslims. Under the current structure of the legal system in Malaysia and also because of the article 121 (1A) of the Federal Constitution perhaps, the setting up of a special tribunal to resolve matters that arise from conversion might be the best solution to the jurisdiction of court issue. This special tribunal must comprise of those experts and experienced judges from both Muslims and non-Muslims. This is considered as the best solution to avoid interference of jurisdiction between shariah and civil courts. In line with this, it is necessary to introduce new law, rules and regulation for the purpose of setting up of the proposed tribunal. This is important as when one spouse to a non-Muslim union converted to Islam all issues such as maintenance, custody, matrimonial property and inheritance must be settled or decided upon immediately. Any duties and liabilities of the convert husband that are still due on the wife should be settled before or at the time when the marriage is dissolved.

It is submitted that on the right of the wife to the custody of the child, the existing provisions are adequate as it is based on the principle of the child's welfare which is recognized under both law, i.e., Muslims and non-Muslims. The court in deciding which parent that should be awarded with the custody order should consider all factors and decide based on which parent that will be able to provide better care and protection of the child. It is suggested that joint custody to both parents as practised in other jurisdictions should be practised by the Malaysian courts to encourage the parties to work together for the best upbringing of the child.

It has been suggested that section 3(3) of the LRA specify that, consistent with section 51 of the LRA, the courts may make any order relating to pertinent matters, including the division of matrimonial property, maintenance for the wife, custody and maintenance for children and all ancillary claims after divorce.³¹ This is important to safeguard the right of non-convert spouse, usually the wife, when the husband converts to Islam.

It is also suggested that the court can order the convert husband to pay maintenance to the non-Muslim wife not only during the period of *'iddah* but it can be extended even after the expiry of the period of *'iddah*. This is not contrary to the principles of Shariah if the wife after divorce is

³¹ Memorandum on safeguard rights of wives and children upon conversion of husbands to Islam submitted by the Joint Action Group for Gender Equality (JAG), 5 February 2007.

exposed to hardship and unable to maintain herself especially if she does not receive any support from her own family.³² The opinion of Hanafi scholars can be adopted who are in favour of giving out property in the form of financial support to the divorced wife to ensure her welfare is protected. Furthermore, unlike Muslim wife there is no such family support system that will be responsible to financially support the non-Muslim wife after divorce.³³ The payment can be in the form of a one-off payment instead of monthly payment or it can be in the form of consolatory gift/payment.

Conclusion

To ensure the right of the wife is protected in the case of conversion, a review of the relevant laws relating to conversion to Islam is desired. More importantly, sections 3(3) and 51 of the LRA need to be amended to allow the convert spouse to petition for divorce and subsequently to allow the wife to apply for the ancillary claims after divorce. Accordingly, other relevant provisions need to be reviewed and amended. Without clear provisions on conversion, the right of the wife in family law, either as a non-Muslim or Muslim, will be not be safeguarded. To further ensure that due right is given to the wife, it is on the judiciary to evaluate the facts and decide according to the correct principles of both laws i.e., the LRA and Shariah law. It is felt that the best solution to the conversion issues is to settle the disputes/conflicts amicably between the parties involved. This matter can be resolved in amicable way through mediation, *sulh*, arbitration or special tribunal rather than through court.

³² Najibah Mohd Zin, 'Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law' [2007] LR 65.

³³ See, Najibah Mohd Zin, 'Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law' [2007] LR 65.