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**Judicial Dilemma: Secular or Syariah for
Inter-Faith Family Disputes in Malaysia**

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Abstract

This article begins with the introduction of Malaysian Legal System which has a parallel dual legal and judicial system. Secondly, it analyses the current status of the inter-faith family disputes between a Non-Muslim spouse and a converted Muslim spouse. Thirdly, it examines the jurisdictional conflicts between the civil courts and Syariah courts and legal framework at the Federal and State levels which appears to be an impediment in the dual legal system. Then it deliberates on the unilateral conversion of minors to Islam by a converted parent. Finally, it proposes jurisdiction divide between the civil court and Syariah court and legislative reforms both at Federal and State levels to resolve the problem of family disputes between Non-Muslim and a converted spouse.

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1. Introduction

Malaysia is a secular state which guarantees freedom of religion in its multi-racial and multi-cultural society. Although Islam is the official¹ religion of Malaysia, other religions are allowed to be practiced by its multi-ethnic population. Majority of its population are Malays who are legally sanctioned to profess the religion of Islam whereas Chinese, Indians and others ethnic groups may practice other religions like Hinduism, Buddhism, Christianity, Taoism and Sikhism². Malaysian citizens are as a matter of convenience divided into two categories based on religion, namely Muslims and Non-Muslims. Muslims are ethnic Malays and natives whereas Non-Muslims are those who profess religions other than Islam.

Traditionally, marriages are contracted between parties of the same race and religion. Muslims are prohibited by Syariah Law from entering into inter-faith marriages. However, inter-faith marriages have become a common practice among Non-Muslims for example a Buddhist is at liberty to marry a Christian without having to convert to Christianity unless he or she wishes to do so as a matter of choice, convenience or understanding between the parties. Non-Muslim marriages are monogamous and being governed by the civil law namely the Law Reform (Marriage and Divorce) Act, 1976 whereas Muslim marriages are governed by Syariah Law and polygamy is permitted with certain conditions prescribed by Syariah Law as reflected in State Enactments. A Non-Muslim wishing to marry a Muslim is required to convert and profess the religion of Islam before the marriage is contracted. There have been many cases of conversion³ to Islam by Non-Muslims for marriage purposes.

Problem arises when one of the spouses of a Non-Muslim marriage converts to marry a Muslim person before ending the civil marriage contracted under the civil law. On one hand, the Non-Muslim spouse who does not convert together with his or her spouse to Islam will file for a divorce, custody and care of children of the civil marriage together with maintenance at the Civil Court which has jurisdiction over Non-Muslim family disputes. On the other hand, the converted Muslim

¹ Article 3 (1) of the Federal Constitution of Malaysia, 1957 says that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

² The natives in East Malaysia of Sabah and Sarawak practice nature worship and conduct customary marriages.

³ A Muslim person is not allowed to convert out of Islam without the permission of the Syariah Court. It has been observed from case laws that conversion out of Islam is almost impossible due to the fact that the Syariah Court has the exclusive jurisdiction to determine whether a person is a Muslim or not.

spouse will seek recourse at the Syariah Court which is constitutionally vested with the jurisdiction over Muslim family matters. The natural outcome of these multiple applications to courts having different jurisdictions over different ethnicity is conflicting orders from the courts which has no legal bearing against the parties. Each spouse would upon obtaining orders from their respective courts, attempt to enforce the orders against each other without success. Hence, the judicial dilemma.

Custody battles is the most common issue where the Non-Muslim and Muslim spouses try to assert their legal rights to gain custody and care of the children of the civil marriage by filing applications separately in Civil court and Syariah court to get orders favorable to them. The problem becomes even more complicated when the converting spouse also converts his or her minor children without the knowledge and consent of the Non-Muslim spouse. The worst befalls when the children purportedly now a Muslim are snatched away by Islamic religious authorities from the Non-Muslim parent citing Syariah court orders in which a Non-Muslim does not have a right of representation.

The landmark case on conversion and custody dispute is the case of Shamala⁴. Shamala is a Hindu mother whose husband converted to Islam. They had been married for four years and they had two infant children. Unknown to her, he had converted their children to Islam. She filed for a custody order at the Civil High Court. The husband had appeared in the High Court and sought an adjournment, failing to disclose that he had applied to the Syariah court for a custody order. Subsequently, Shamala's husband obtained an ex parte custody order from the Syariah Court, when custody proceedings were already under way in the Civil High Court.

Thereafter the Civil High Court granted custody of the children to their mother, on condition that she raises her children as Muslims and not expose them to her own Hindu faith. The judge dismissed Shamala's application for a declaration that the conversion of her two children to Islam had violated her equal right, as their parent, to determine their religious upbringing. As the children were now Muslims, the Civil High Court held that a Syariah Court was the only forum to determine

⁴ Shamala Sathiyaseelan v. Dr Jayeganesh C Mogarajah [2004] 3 CLJ 516 High Court

the validity of their conversion⁵. However, the Syariah Court lacked the jurisdiction to hear Shamala, a non-Muslim. This left her with no legal redress and she has since left the country with the children.

There are many other cases in which the rights of the Non-Muslim parent and her unilaterally converted children seem to be disregarded by the Civil court in with its principle of non-interference with the jurisdiction of the Syariah Court. The issue is the existence of two distinctive court systems and two different sets of law; one for the Muslims and the other for the Non-Muslim which creates a situation for jurisdiction shopping by the parties, each subjecting themselves to the law and court favorable to them. However, it needs to be stressed that a Muslim is allowed representation in civil court unlike a Non-Muslim in Syariah court. The Federal Court being the highest court in the civil jurisdiction has yet to conclusively decide on the jurisdiction of courts in interfaith family disputes and the legislature has yet to enact laws to resolve this pressing issues leaving spouses, academics, policy makers, lawyers and judges in a dilemma.

This discussion paper aims to introduce jurisdictional conflicts between the Civil court and Syariah court in inter-faith family disputes in Malaysia to Japanese Family Law academics and researchers. The complexity of conflicting laws and court jurisdiction is explained by examining applicable laws and civil court cases. Religious rulings and proposed legislative reforms are discussed to show the current move to find a solution to inter-faith family disputes. Lastly, it attempts to suggest policy and legislative reforms to resolve the dilemma facing the spouses after conversion of one spouse and unilateral conversion of minors to Islam.

There is a noticeable absence of literature published locally that examines the practical solutions to jurisdictional conflicts in interfaith family disputes as it is perceived as a sensitive religious issue in Malaysia very little or no political will or judicial intervention to resolve this matter. Although the government has been promising legislative reforms for the past ten years as a permanent solution to the issue of unilateral conversions nothing is forthcoming. Even though the

⁵ Article 121 (1A) of the Federal Constitution of Malaysia, 1957 says that “the courts referred to in Clause (1) [Civil Courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

civil courts have been consistently called upon over the years to determine the issue of jurisdiction and applicable laws in conversion cases, the matter remains unresolved.

Najibah and Che Soh examined the child's right to determine his/her religious status when one parent converts to Islam and proposed joint custody as an alternative to the practice of sole custody in Malaysia but they acknowledged that it may create problems in the absence of penalties for non-compliance of court orders⁶. Loganathan explored whether there is a way to resolve the issues concerning the application of Civil Law and Islamic Law with respect to freedom of religion in a pluralistic society of Malaysia. He believes that the matter could be resolved with the understanding of parties and suggested the need for a system of mutual forbearance and compromise, which is the base of both legal and moral obligation⁷. There is still a gap in finding a feasible solution to conversion issue which this discussion paper attempts to address.

2. Multi-racial Society

Malaysia is a federation of 13 states⁸. The Federal Constitution of Malaysia of 1957 is the highest law of the land which prescribes that the Executive and Legislative powers are divided between the Federation and the States. Criminal and civil laws, including family law, are within the competence of the Federation, except for the Muslims, and native personal laws and customs which falls under the States' jurisdiction.

⁶ Mohd Zin, Najibah and Che Soh @ Yusoff, Roslina (2012) Legal disputes in Determining the Religion of the Child When One Parent Converts to Islam under Malaysian Law, Australian Journal of Basic and Applied Sciences, 6 (11). pp. 66-73. ISSN 1991-8178.

⁷ Krishnan Loganathan (2010) The Antithesis Between Civil Law And Islamic Law in a Pluralistic Society, Shariah Journal, Vol. 18, No. 2 (2010) 401-414.

⁸ 11 states, collectively known as Peninsular Malaysia or West Malaysia and 2 other states are Sabah and Sarawak or East Malaysia. It also includes the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

Malaysia is a multi-racial, multi-lingual, multi-religious and multi-cultural society with a total population of 30,949,962 (as of July 2016) comprising of ethnicity of Malays (50.1%) being the majority and followed by Chinese (22.6%), Indians (6.7%), Aborigines (11.8%)⁹ and other minority ethnicities (0.7%). People of different race speak in their mother tongue at home but almost all can speak the national language that is the Malay language known as Bahasa Malaysia. Malaysians are accustomed to diverse cultural practices as each race has its own customs and rituals which are practiced harmoniously in the multi-racial society. Due to the diversity, people of different racial background profess different religion with understanding and tolerance.

The Federal Constitution guarantees freedom of religion in Malaysia. Article 3 of the Malaysian Federal Constitution states:

“(1) 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”.

Article 11 of the Federal Constitution 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.

Malaysians grouped into the religion that they profess shows that majority of the population is Muslim (61%), followed by Buddhist (21%) Christian (9.2%), Hindu (6.4%), Traditional Chinese religion (1.3%), other religions (0.4%) and no religion or religion is unknown (0.8%). It is mandatory for the Malays to profess the religion of Islam. The Islamic Law known as Syariah Law does not allow a Muslim to convert to any other religion. The rest of the ethnicity namely the Chinese, Indians, Indigenous people and other minorities are allowed to profess any religion of their choice and/or to convert to Islam if they wish. The citizens of Malaysia could therefore be divided into two big religious groups; one is Muslims (61%) and the other is the non-Muslims (Christian, Buddhist, Hindu, traditional Chinese religion and others). The laws governing these two groups are different and are adjudicated by two distinctive but parallel legal systems.

⁹ The Ibans constituted 30.3% of the total citizens in Sarawak while Kadazan/Dusun made up 24.5% in Sabah.

3. Dual-Legal Systems

Two legal systems co-exist in Malaysia, namely, the civil law system for the Non-Muslims and the Syariah law system for the Muslims.

3.1 Civil Law and Syariah Law Systems

Civil Law or the secular law applicable to Non-Muslims and Muslims is comprised of the common law of England and the English rules of equity which were partially codified into legislation. The Federal Constitution is the supreme law of Malaysia and many statutes have been enacted in accordance with the principles of the constitution to keep law and order in the country. Judicial precedents form the main source of law in Malaysia and the old English common law principles and cases are still applied to a great extent by Malaysian courts in civil cases such as constitutional, administrative, employment, contract, tort, commercial and banking matters. Criminal law with the exception of behavioural problems like adultery and non-fasting falls under the secular law and applicable to Non-Muslims and Muslims alike.

Syariah Law or Islamic law applicable to Muslims contained in state legislation comprising administrative provisions and the substantive law based on the *Qur'an* and *Sunnah* (the primary sources) and authoritative interpretations (*fiqh*). It is a State matter where the State has exclusive jurisdiction to legislate and regulate its Muslim citizens. A brief explanation of the history of Islam in Malaysia is pertinent to understand the application of Syariah Law for the Muslim citizens.

Before the arrival of colonial powers, the Malay Sultanates of the various states governed the Peninsular and Borneo. In the 19th Century, the British entered into treaties with the Malay Sultanates and put in place in those territories British officers as advisors whose advice must be asked and acted upon.¹⁰ Although technically the Malay Rulers in the nine Malay States in the Peninsular remain sovereign, in reality the British officers, known as British Residents or Advisors dictate the governing of the states. Sabah and Sarawak which are situated in Borneo have a slightly

¹⁰ See Emerson, Rupert, *Malaysia: A Study in Direct and Indirect Rule* (Kuala Lumpur, University of Malaya Press; 1979).

different history.¹¹ The territories were under the Sultanates of Brunei and the territories constituting Sabah and Sarawak were given to James Brooke to govern in the case of Sarawak and to the North Borneo Company in the case of Sabah. Apart from Islam, the various ethnic groups in Borneo have their own customs and this gives rise to the setting up of the native court system that applies native customs.

The independence of Malaya in 1957 does not affect legally the sovereignty of each Malay State. This is because as a protected state, the Ruler remains as the Head of State although the British have the power over the defense and foreign affairs of the state. The Malayan Union project to convert the states into a union failed as it was replaced with the project towards an independent Federation of Malaya as contained in the Federation of Malaya Agreement¹²1955. Thus, when independence was declared on 31 August 1957, the nine Malay States remain as a sovereign state in a federation, together with two former Straits Settlements, namely Penang and Melaka. On 16 September 1963, Sabah and Sarawak joined the Federation to form Malaysia. The document that provides the Basic Law for the Federation, namely the Federal Constitution, provides the power to legislate on matters of Islam under States. Thus the 13 States have the power to establish their own Syariah Courts. The Federal Constitution also provides for the federation to have the power to legislate on Islamic matters for the federal territories.

Apart from being under the State matters, Islam is also closely connected with the institution of the Sultanate. When the British entered into agreements with the Malay Sultanates for them to receive a British adviser in their Royal Court, the agreement expressly excludes matters of Islam from the purview of the British adviser. The Federal Constitution of Malaysia reiterates this close connection by providing the Rulers as the Head of the Religion of Islam for their respective States.¹³

¹¹ See Yegar, Moshe, *Islam and Islamic Institutions in British Malaya: Policies and Implementation* (Jerusalem, The Magnes Press; 1979).

¹² 1 MLJ lviii at iii

¹³ See further Suffian, Lee and Trindade (Eds), *The Constitution of Malaysia: Its Development 1957–1977* (Kuala Lumpur, Oxford University Press; 1978).

3.2 Dual Family Law Systems

Family Law is administered via dual legal system whereby Civil Law or secular law is applied by the Civil High Courts to resolve family disputes of Non-Muslims whereas Syariah Law is applied to resolve that of Muslim couples.

In the past, various personal law systems existed, such as Islamic Law, Hindu Law, Chinese Customary Law, Aborigines customs and Christian rites. As Malaysia was once a British protectorate, common law is still applicable when there is no written law.¹⁴ English principles are also applied on custody and control of infants, except for variations, with regards to the parties' personal law.¹⁵ There was no uniform law applicable to the whole country until 1982, when the Law Reform (Marriage & Divorce) Act 1976, also known as the LRA, was enforced to govern all non-Muslim citizens domiciled in Malaysia,¹⁶ while the Muslims are governed according to Syariah laws.

3.2.1 Non-Muslim Family Law

Their respective personal laws had been codified into one federal law, namely, Law Reform (Marriage & Divorce) Act 1976 which aims to provide for monogamous marriages and the solemnization and registration of such marriage, to amend and consolidate the law relating to divorce; and to provide for matters incidental thereto. Besides, LRA also provides the law on maintenance for spouses and former spouses, and children, the custody of children, and matrimonial property. The States do not have power to limit or restrict the application of the LRA.

¹⁴ Section 3 of the Civil Law Act 1956 (Act 67)

¹⁵ Section 27 of the Civil Law Act 1956

¹⁶ Except the East Malaysian natives and the West Malaysian aborigines, unless they elect to marry under the LRA or contracted the marriage under the Sabah Christian Marriage Ordinance or the Sarawak Church and Civil Marriage Ordinance

3.2.2 Muslim Family Law

All the 13 States in Malaysia and the Federal Territory of Kuala Lumpur (Labuan & Putrajaya) may enact Family Law. Article 74(2) of the Federal Constitution provides that the Legislature of a State may make laws with respect to any of the matters enumerated in the State list.¹⁷ Among the matters listed is family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate, intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship and gifts. State laws are often referred to as enactments or ordinances. Listed below is the Enactments of the States.

- Federal Territories of Kuala Lumpur and Labuan – Islamic Family Law (Federal Territories) Act 1984¹⁸
- Kelantan – Islamic Family Law Enactment 1983¹⁹
- Malacca - Islamic Family Law Enactment 1983²⁰
- Kedah - Islamic Family Law Enactment 1984²¹
- Negeri Sembilan - Islamic Family Law Enactment 1983²²
- Selangor - Islamic Family Law Enactment 1984²³
- Perak - Islamic Family Law Enactment 1984²⁴
- Penang - Islamic Family Law Enactment 1985²⁵
- Terengganu – Administration of the Islamic Family Law Enactment 1985²⁶
- Pahang - Islamic Family Law Enactment 1987²⁷
- Sarawak – Islamic Family Law Enactment 1991²⁸
- Perlis - Islamic Family Law Enactment 1992²⁹

¹⁷ That is the second list set out in the Ninth Schedule of the Federal Constitution of Malaysia 1957.

¹⁸ Act 303

¹⁹ Enactment No 1 of 1983

²⁰ Enactment No 8 of 1983

²¹ Enactment No 1 of 1984

²² Enactment No 8 of 1983

²³ Enactment No 4 of 1984

²⁴ Enactment No 13 of 1984

²⁵ Enactment No 2 of 1985

²⁶ Enactment No 2 of 1985

²⁷ Enactment No 3 of 1987

²⁸ Ordinance No 5/1991

²⁹ Enactment No 4 of 1992

- Sabah - Islamic Family Law Enactment 1992³⁰
- Johor - Islamic Family Law Enactment 1990³¹

Although Syariah family law has been stipulated in different State enactments for each individual State, it is almost similar if not *pari materia* in substance. It is to be noted that any inconsistencies between the laws passed by the Parliament and the State Legislatures were to be resolved in favour of the federal law. This is in accordance with Article 75 of the Federal Constitution which states that a federal law shall prevail over any inconsistent State laws, including the Syariah law.³²

3.3 Dual Hierarchy of Courts

Due to the existence of a dual-legal system, there exist two distinctive judicial systems, namely, the civil courts and Syariah courts. Non-Muslim family disputes are adjudicated in civil court by judges trained in civil law whereas Muslim family disputes are resolved in Syariah courts by *Kadhis* (Islamic Religious Judge) well versed in Islamic law. Non-Muslim family matters are filed in Civil High Court (Family Division)³³ as the court of first instance and appeals are allowed to the Court of Appeal. A further appeal to the Federal Court being the highest court in Malaysia is only allowed with leave of the Federal Court which leave is only granted upon fulfilling a very high threshold.³⁴ Muslim family matters are generally commenced at the Syariah Magistrate Court with a right of appeal to the Syariah Sessions Court and a final appeal to the Syariah High Court.

³⁰ Enactment No 15 of 1992

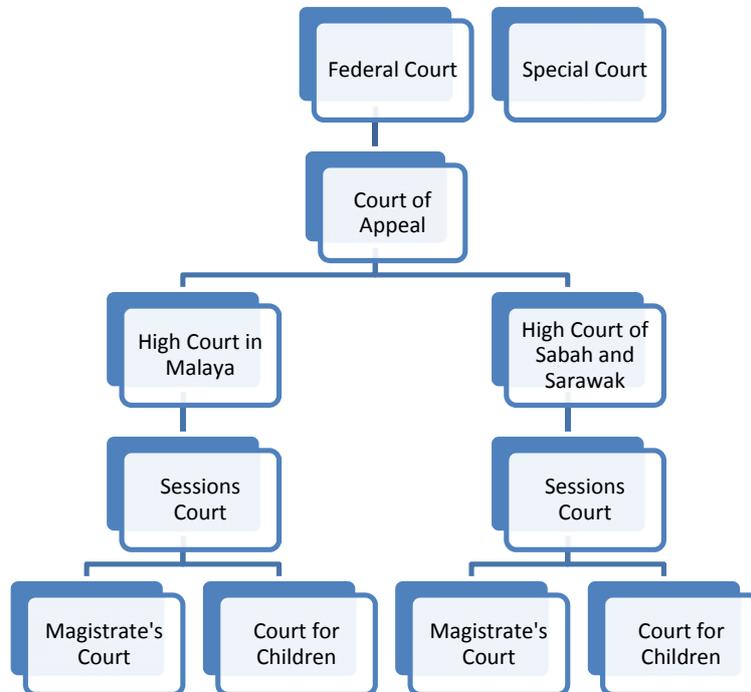
³¹ Enactment No 5 of 1990

³² Article 75 states “If any State Law is inconsistent with a federal law, the federal law shall prevail and the State law shall to the extent of the inconsistency, be void.”

³³ Unlike Japan, there is no Family Court in Malaysia. It is known as Civil High Court (Family Division).

³⁴ Section 96 of the Courts of Judicature Act, 1964 sets out condition of appeal where it states “Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court granted –
(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High the exercise of its original jurisdiction; and involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage;

Hierarchy of Civil Courts:



Hierarchy of Syariah Courts:



It is important at this juncture to highlight that cross-appeals are not allowed as the civil courts and Syariah courts have separate and distinctive jurisdiction. The issue of conflicting jurisdiction should not arise as each court is conferred by the Federal Constitution with certain powers which are very much distinctive in nature. Article 121 and the subsequently inserted Article of 121A are of prime importance to show the division of jurisdiction between the two court systems.

Article 121 of the Federal Constitution:

“.....the High Courts and inferior courts shall have such jurisdiction as may be provided by the federal law.”

Article 121A of the Federal Constitution which was inserted by way of an amendment came into force on 10th June 1988:

“The courts in clause (1) [namely Civil High Courts and inferior courts] have no jurisdiction in respect of any matter that falls within the jurisdiction of the Syariah Courts.”

As to the jurisdiction of the courts, the Court of Appeal in the case of Subahsini³⁵ opined that “the Federal Constitution by virtue of Article 121(1A) recognizes the co-existence of the two systems of courts in the administration of justice in this country and each court has its own role to play. As such the two courts must be regarded as having the same standing in this country.”

A scrutiny of the court cases decided prior to the amendment of the Federal Constitution and the insertion of Article 121A, shows that the civil courts had encroached upon the jurisdiction of the Syariah courts from time to time. The civil courts applied the common law or legislation based on English law to the exclusion of Syariah law. For instance, in the Natrah Case,³⁶ the court held that the validity of a marriage between a Muslim man and Maria Hertogh, a Dutch girl, aged thirteen in 1950, who had been adopted by a Muslim family since she was five and brought up as a Muslim girl, must be determined by her *lex domicili*. As she was a minor during the purported marriage, the marriage was not valid because the law of Holland requires the consent of the Queen of Holland

³⁵Subashini Rajasingam v Saravanan Thangathoray [2007] 2 MLJ 798

³⁶ Re Maria Huberdina Hertogh (The Natrah Case) [1951] 17 MLJ 164

as a pre-condition for its validity. As the consent was not obtained, Maria's parents still had custody over her. However, according to Syariah law the marriage had been perfectly solemnised and valid.

Similarly, in the case of *Nafsiah*³⁷ the High Court held that not only it had jurisdiction over a matter on Muslim marriage but also awarded damages to a woman who begot a child after being seduced by a man on his promise to marry, which was decided as a contract, even though such an action would not lie under Syariah law. This was a clear ignorance of section 119 of the Malacca Administration of Muslim Law Enactment 1959, which made a special provision for betrothal. In the case of *Mariam*³⁸ the High Court applied the Guardianship of Infants Act 1961, which expressly provided that nothing in the Act which is contrary to Islam or Malay custom shall apply to any Muslim person below 18 years.

³⁷ *Nafsiah v Abdul Majid* [1969] 2 MLJ 175.

³⁸ *Myriam v Mohamed Ariff* [1971] 1 MLJ 265

4. Inter-Faith Family Disputes

Inter-faith family disputes in this context refer to matrimonial issues between spouses professing different religion. One needs to understand the institution of marriage and the types of marriages in Malaysia before looking at the inter-faith family disputes.

4.1 Marriage

A civil marriage is a contract between the parties who are both Non-Muslims. It has been a norm for parties of the same race and religion to marry according to their traditions and customs and then to register the marriage to comply with requirements of the LRA. However, inter-faith marriages have been on rise. Inter-faith marriages are contracted without one of the party having to convert and embrace the religion of his or her spouse. There have been many incidents where two marriage ceremonies are carried out to in order to appease both families practicing different religions. For example if a Hindu man marries a Christian woman, a Hindu customary temple wedding and a Christian church wedding would be held before or after a civil registration of the marriage. When a child is born to the parties of an inter-faith marriage, they have a right to reach a consensus on the religion of the child for the purpose of registration. In Malaysia, the race and religion of a person is registered with the National Registration Department and a child takes upon the religion chosen by his or her parents until he or she reaches the age of 18years old. For Non-Muslims, the issues of divorce, custody and care of the children of the marriage as well as spousal and child maintenance are also resolved pursuant to the LRA in civil courts.

Muslim marriages are known as “nikah”. A valid “nikah” is one contracted under the Syariah law as prescribed by the State Enactment where the parties are resident. Both parties to a “nikah” must be Muslims.³⁹ The child born to a Muslim couple must be registered and raised as a Muslim and the child is not permitted under Syariah law to change his or her religion at any age or for

³⁹ Section 10 of the Islamic Family Law (Federal Territory) Act, 1984 (this is an Act as it is legislated by the Parliament for the Federal Territory) states (1) No man shall marry a Non-Muslim except a Kitabiyah; (2) No woman shall marry a non-Muslim.

whatsoever reason. Divorce of the parties to a Muslim marriage and all other ancillary matters are governed by the Syariah law.

Mixed marriages are not allowed for Muslims in Malaysia. It simply means that a Muslim man cannot enter into a marriage with a Christian woman. A Non-Muslim person who wishes to marry a Muslim person has to convert to and embrace the religion of Islam prior to the “nikah”. Inter-faith marriage between a Non-Muslim and a Muslim is not permitted either under the civil law or the Syariah law.

The law appears to be unambiguous. Non-Muslim family issues are dealt in accordance with civil law by the civil court whereas the Muslims family disputes are resolved in pursuant to Syariah law by the Syariah courts. And, that Muslims are not allowed to marry Non-Muslims unless the Non-Muslim persons convert to Islam. What then is inter-faith family dispute? Why the issue needs political attention and legislative reform?

4.2 Inter-faith Family Issues

Problem arises when a Non-Muslim spouse converts to Islam while the civil marriage is existent. For instance, if a Non-Muslim man married to a Non-Muslim woman and has a Non-Muslim son aged 5 years old decides to convert to Islam and became a Muslim. And, the matter becomes more complicated if he also converts his 5 year old son to Islam without the knowledge of his Non-Muslim wife. The issues are firstly, dissolution of the civil marriage registered under the LRA. Secondly, the unilateral conversion of a Non-Muslim child to Islam without parental consent, namely, that of the Non-Muslim parent to change the religion of the child.

The more pertinent questions in conjunction to above issues are on the governing law and jurisdiction of the court; what law governs and which court has jurisdiction:

1. to dissolve the civil marriage;
2. to decide on the child’s custody and all ancillary matters; and
3. to decide on the child’s conversion to Islam.

4.2.1 Conflicting Jurisdiction

In most cases, the converted spouse would file for divorce and custody of the child at the Syariah court since now he is a Muslim and by his own choice wishes this matter to be adjudicated by the under Syariah law. The Non-Muslim spouse would naturally file for divorce and child custody at the civil court invoking the provisions under the LRA, which was the governing law when the parties contracted their civil marriage. It is obvious in the cases that I would discuss hereinafter that the Syariah court had granted divorce and custody of the child to the converted Muslim spouse and civil court dissolved the civil marriage and vested the custody of the child to the Non-Muslim spouse. As a consequence, there are two conflicting court orders; one from the Syariah court based on Syariah law and the other from the civil court decided pursuant to the civil law, the LRA. Which order takes precedence? Which order is to be enforced; Syariah court order or the civil court order and by which authority; Islamic religious authority, JAKIM⁴⁰ or the police?

Battle starts between the Muslim and Non-Muslim spouses each attempting to enforce the orders obtained from different court of jurisdiction on the same issue of divorce and child custody. The nation has witnessed numerous baby snatching cases by the religious authority and the struggle the Non-Muslim spouse has to go through due to inaction by the police to recover the child snatched from his or her custody.

It is therefore unclear if the civil court is rightfully vested with the jurisdiction to dissolve the civil marriage contracted before conversion of a Non-Muslim spouse to Islam and to determine the custody, care and control as well as the maintenance of the child. What more to determine conversion of a minor child to Islam which is considered as a religious issue falling outside the jurisdiction of civil courts.

In the case of Subashini, the Civil High Court held that from the moment of his conversion to Islam, the husband became a Muslim and is referred to as a “muallaf”. From then on, he became subject to the same duties and obligations as any other Muslim. As a person professing the religion of Islam, in matters of his personal law, unless expressly provided otherwise, he was subject to the

⁴⁰ The Department of Islamic Development Malaysia (JAKIM) established in 1977 to take over the role of BAHEIS which aim is to protect the purity of faith and the teachings of Islam.

jurisdiction of the Syariah court which has exclusive jurisdiction over persons professing the religion of Islam.

Regarding the issue of the jurisdiction of court, it was held by the Federal Court in Subashini case that pursuant to Article 121(1A) of the Federal Constitution, the civil court would have jurisdiction upon matters involving a civil marriage although the husband had converted to Islam before the wife petitioned for divorce. The material time to be considered to decide on jurisdiction matters would be the time when both parties entered into a civil marriage contract⁴¹. The husband may not avoid his obligations in a civil law marriage on the ground of freedom of religion⁴² and it must be emphasised that both husband and wife were Hindus at the time of registering their marriage. Thus, the status of both parties at the time of registration were of material importance, otherwise would be injustice to the unconverted party and children. Furthermore, the High Court may exercise its civil jurisdiction by virtue of Section 24(a) of the Courts of Judicature Act 1964 which includes any written law relating to divorce and matrimonial causes upon the jurisdiction of the High Court. Therefore, the phrase ‘any written law’ must include the LRA⁴³.

4.2.2 Conflicting Laws

As explained earlier, the statute governing non-Muslim marriages and divorces in Malaysia is the LRA. This Act specifically excludes its application to persons professing the religion of Islam in Section 3 (3):

“This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act.....”

The above provision clearly dictates that the LRA does not apply to Muslim spouses and a “nikah” which is a Muslim marriage cannot be registered under this Act. The marriage that is being discussed in this research is a civil marriage which was registered when both parties were Non-

⁴¹ *ibid* para 18

⁴² Article 11(1) of the Federal Constitution

⁴³ *ibid* para 16

Muslim and although one of the spouses subsequently converted to Islam, the Act still applies to the converted spouse, for the purpose of determination of divorce, child custody and maintenance.

The LRA in Section 51 provides for dissolution of marriage on ground of conversion to Islam.

“(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.”

“(2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.”

This provision enables a non-converting spouse, namely, the Non-Muslim spouse to petition for divorce in the civil courts but deprives the converting spouse to do the same. There have been arguments that the converting spouse resorts to the Syariah court because he or she does not have a right to petition for divorce at the civil court. The lacuna in the law has to be remedied by a legislative reform and not by jurisdiction shopping. It is to be noted that the converting spouse can appear at civil court and his or her right of representation is guaranteed. It simply means that the non-converting spouse will have to petition for divorce after the expiry of three months from the date the other spouse converted to Islam and serve a copy of the petition to the converting spouse. The converting spouse can then appear personally or represented by a lawyer during the hearing of the petition. This process shows that any matrimonial disputes upon a conversion of a spouse can be heard and disposed off at the civil court and it is not necessary for the converting spouse to invoke the jurisdiction of the Syariah court.

However, the non-converting spouse cannot file for a divorce petition before the expiry of three months from the date of conversion. In the case of Subashini, the non-converting wife filed a petition for dissolution of marriage in two months and 18 days after the husband converted to Islam and the court held that “the proviso to s 51(1) of the 1976 Act clearly reflected the imperative requirement which must be complied with before a petition for divorce could be made. By its terms,

the proviso imposed a caveat on the wife not to file the petition for divorce until a lapse of three months from the date of the husband's conversion to Islam. It was the duty of the court to give effect to the words used by the legislature. Thus unless the proviso was complied with, the High Court would not have the jurisdiction to entertain the wife's petition.” And, therefore the wife’s application for dissolution of marriage was dismissed.

As for Syariah law, when a non-Muslim spouse converts to Islam, his spouse is given 3 month grace period to convert to Islam failing which their civil marriage is deemed dissolved automatically. After which the converted spouse is at liberty to marriage a Muslim person. But, as far as the civil law is concerned the civil marriage remains valid under the LRA until the non-converting spouse petitions for divorce and the marriage is dissolved by the civil court under Section 51 of the LRA.

This is reflected in the Federal Court⁴⁴ case of Subashini, where it was held that “the dissolution order of civil marriage by Syariah High Court can only be an evidence of the dissolution of marriage under Islamic law in accordance with Hukum Syarak, but carries no legal weight. 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 under Section 51 of the LRA.”

It is contended that the Syariah court does not have jurisdiction to dissolve a civil marriage in Federal Territory at least, if not in other States based on Section 45 of the Islamic Family Law (Federal Territory) Act which provides

“Save as is otherwise expressly provided, nothing in this Act shall authorize the Court to make an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a “talaq”⁴⁵ except –

- (a) where the marriage has been registered or deemed to be registered under this Act; or*
- (b) where the marriage was contracted in accordance with Hukum Syara’;”*

⁴⁴ [2008] 2 MLJ 147

⁴⁵ Under Syariah law “*Talaq*” refers to divorce.

Syariah court thus has jurisdiction only over marriages registered or deemed to be registered under the Federal Territory Act and the marriage must be one contracted under Syariah law. Since a civil marriage is not contracted pursuant to Syariah law and neither is it registered under the Federal Territory Act, Syariah courts in the Federal Territory would not have the jurisdiction to dissolve the marriage.

How then does Syariah court assume jurisdiction in inter-faith family disputes? It is based on the stance that the Syariah court has jurisdiction over persons professing the religion of Islam (Muslims) and their family affairs. The converting spouse usually converts his or her children to Islam and files for custody of the children at the Syariah court. Syariah court assumes jurisdiction by virtue of the fact that the converting spouse and children are Muslims. Naturally, the converting spouse is given the custody, care and control of the now purportedly Muslim children by the Syariah court.

The fact remains that the civil court hears both the non-converting and the converting party in deciding dissolution of civil marriage under Section 51 of the LRA and custody of the children born out of a civil marriage. However, Syariah court considers a civil marriage dissolved automatically and decides on the custody of the child in the absence of the non-converting spouse which decision cannot be challenged in Syariah court for lack of representation and not in civil court due to separate and distinctive jurisdiction. The non-converting spouse is left without any recourse.

4.3 Right of Representation

Another corresponding issue is a Non-Muslim spouse has no right of representation in Syariah courts. All the parties in Syariah court must be Muslims that include the judge, lawyers, litigants and witness. A Non-Muslim person cannot appear personally or appoint a lawyer to represent him or her if the converting spouse chooses to file his case at the Syariah court.

The Federal Court in Subashini case stated that “regarding the jurisdiction of courts, the case had to be tried in the civil courts and not the Syariah courts because the wife, being a non-Muslim, has

no locus in the Syariah court, whereas the husband has no impediment being tried in either the Syariah courts or civil courts. The personal jurisdiction of the wife was discussed in depth and the court arrived to the same decision that the wife's personal jurisdiction as a non-Muslim did not allow her to be tried in the Syariah court. In short, the Syariah court does not have jurisdiction if one of the parties is a non-Muslims due to the bar of personal jurisdiction."⁴⁶

5. Conversion of Minor Children

Conversion of minor children to Islam either by their own converting parent or by third parties has been sadly taking place in Malaysia for many decades now. When a Non-Muslim spouse converts to Islam, he or she usually converts the children born out of the civil marriage to Islam, unknown to the Non-Muslim spouse. Children as young as 18 months have been converted to Islam by the converting spouse.

On numerous occasions the issue of unilateral conversion of minor child by the converted parents was raised at the civil courts and the decisions had been sometimes favourable to the a Non-Muslim spouse but more often than not the civil courts have refrained from assuming jurisdiction with the reasoning that conversion is a religious issue rightfully to be determined by the Syariah court.

In the landmark case of *Re Susie Teoh*⁴⁷, the father discovered that his daughter, who had been missing, had been converted to Islam by the Syariah court judge. His daughter, Susie Teoh was born on April 5, 1968 and was working as a clerk at a legal firm in the State of Kuala Terengganu until December 18, 1985 when she was discovered missing by her boyfriend. After a futile search for her, a police report was lodged on the matter on December 21, 1985 and had subsequently

⁴⁶ *ibid* para 16

⁴⁷ *Re Susie Teoh; Teoh Eng Huat v Kadhi of Pasir Mas Kelantan* [1986] 2 MLJ 228

telephoned the Syariah court office to inquire whether Susie Teoh had recently been converted as a Muslim and was told that she had in fact been so converted on December 22, 1985.

The father filed a case at the Civil High Court challenging the conversion of a minor child without parental consent asserting that as the guardian of the infant he has a right among others to decide on her religion. The Civil High Court held that the conversion was valid and its reasoning was that “if the *Kadhi* was satisfied that a person was a major according to Hukum Syaria (Syariah law), he may register the person as a convert to the Islamic religion”. As “a major according to Hukum Syaria is a person who has attained puberty, which under Islamic law is at the latest 15 years of age”, and as the child in question was past that age when the conversion took place, the Civil High Court judge ruled that the conversion was valid. The matter went on appeal to the then Supreme Court⁴⁸ which held that the conversion was invalid as with regards to the legal capacity of an infant at the time of conversion, the law applicable to her immediately prior to her conversion is the civil law thus, the right of religious practice of the infant should therefore be exercised by the guardian on her behalf until she attains the age of majority, which is 18 years old. As the infant has not attained the age of 18 years old at the time of her conversion, the conversion was invalid. However, it is to be noted that although the appeal was allowed, no declaration was made, as the daughter was no longer an infant then. The decision of the Supreme Court although became academic but was regarded as a strong message to the religious authority not to entertain conversion of Non-Muslim minor children to Islam unless it is consented to by the guardian.

In the case of Shamala,⁴⁹ she is a Hindu mother whose husband converted to Islam. They had been married for four years and they had two infant children. Unknown to her, her husband had converted to Islam and converted their children to Islam. She filed for a custody order at the Civil High Court. The husband had appeared in the civil court and sought an adjournment, failing to disclose that he had applied to the Syariah court for a custody order. Subsequently, Shamala’s husband obtained an ex parte custody order from the Syariah court, when custody proceedings were already under way in the civil court.

⁴⁸ [1990] 2 MLJ 300

⁴⁹ *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 3 CLJ 516.

Thereafter the civil court granted custody of the children to their mother, on condition that she raises her children as Muslims and not expose them to her own Hindu faith. The judge dismissed Shamala's application for a declaration that the conversion of her two children to Islam had violated her equal right, as their parent, to determine their religious upbringing as the children were now Muslims. The civil court held that a Syariah Court was the only forum to determine the validity of their conversion. However, the Syariah Court lacked the jurisdiction to hear Shamala, a non-Muslim. This left her with no legal redress and she has since left the country with the children.

The latest development of law upon unilateral conversion issues decided by the Federal Court can be seen in the case of *Viran Nagapan v. Deepa Subramaniam & Another Appeal*⁵⁰. The background facts of the case are as follows. The Appellant (ex-husband) and Respondent (ex-wife) contracted a civil marriage under the LRA. They had 2 children together. In late 2012 and early 2013, the ex-husband converted him and his 2 children to Islam and respectively. Upon the conversion, he applied to the Syariah High Court for dissolution of civil marriage, and the Syariah Court granted the order for dissolution of the said marriage and subsequently the permanent custody order of both children. The ex-wife was allowed visitation rights and access under the said order. In December 2013, the ex-wife filed a petition for divorce at the Civil High Court to dissolve the civil marriage and was granted the divorce and permanent custody of both children in April 2014. Another incident arose when Mithran (the elder son) was taken away by the ex-husband from the ex-wife's house. The ex-wife then applied for a recovery order where the High Court made orders against the Inspector General of Police ('IGP') to recover and bring Mithran back to the ex-wife.

One of the issues rose before the Federal Court was whether in the context of Article 121(1A) of the Federal Constitution, where a custody order was made by the Syariah Court or the Civil Court on the basis that it had jurisdiction to do so, whether there was jurisdiction for the other court to make a conflicting order. The ex-husband argued that the Civil High Court did not have jurisdiction because his children and him were already Muslims when the petition for divorce was filed,

⁵⁰ [2016] 2 MLRA

whereas the ex-wife argued that the Civil High Court would nevertheless have jurisdiction on matters of custody and divorce despite her ex-husband's conversion to Islam.

The court looked at Section 3(3) of the LRA which excludes Muslims to file for petition of divorce and held that the courts have always precluded the converting party to use conversion to escape from responsibilities in a civil marriage⁵¹. The court found no reason to depart from its previous decisions and was of the view that civil marriages do not dissolve automatically after one party converts to Islam. Both parties were bound by the LRA under the Civil Court's jurisdiction once they contracted the civil marriage.

The court clarified that the purpose of Article 121(1A) amendment was not to oust the jurisdiction of the Civil Courts, but to avoid any conflicts of jurisdiction between the Syariah Courts and Civil Courts. Both courts are creature of statutes⁵², and it must be statutes that will be the reference to decide where their jurisdiction and boundaries lie. In passing, the court agreed with Abdul Hamid Mohamad FCJ (as he then was) in *Latifah Mat Zin v. Rosmawati Sharibun & Anor*⁵³ that should legislatures made laws with strict compliance to the Federal List and State List as provided in the Federal Constitution, conflicts on jurisdiction would not arise.

Section 4 and Section 45 of the Islamic Family Law (Negeri Sembilan) Enactment 2003 clearly provides that the said Enactment was only applicable to Muslims, and the Syariah Court can only grant orders on matrimonial issues if the marriage was registered under the Enactment. Section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 does not enable a Syariah Court to grant dissolution of civil marriage where one party has converted to Islam⁵⁴. It is an abuse of process for the ex-husband to file for dissolution of marriage and custody of children in the Syariah Courts because it is not a case where the Syariah Courts have exclusive jurisdiction.

⁵¹Tey Siew Choo v. Teo Eng Hua [1999] 2 MLRH 610, Viran Nagapan v. Deepa Subramaniam & Another Appeal 214 [2016] 2 MLRA; Kung Lim Siew Wan lwn. Choong Chee Kuan [2003] 1 MLRH 439, Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah [2003] 3 MLRH 645).

⁵² Federal Constitution, Acts of Parliament, State Enactment

⁵³ [2007] 1 MLRA 847

⁵⁴ supra Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals

In February 2016, the case went on appeal where the Federal Court ruled that “custody and divorce matters in a civil marriage should be adjudicated by the civil courts and not the Syariah Courts, unless both parties to the marriage are Muslims.” However, the Federal Court did not address the issue of unilateral conversion of the child by the converting father. The Federal Court then went on to divide the custody of the son and the daughter after interviewing them, granting custody of the son to the Muslim convert father and the daughter to the mother who remains a Hindu.

This case is heavily criticised by lawyers as the Federal Court has separated the siblings. It was done in an unprecedented way that is after conducting an interview with the children at appellate level. The most pressing Issue of unilateral conversion has not been addressed by the highest court of the land. It appears that the Federal Court having had the opportunity eluded from making a decision on an issue the whole nation was waiting for.

5.1 Parental Consent to Change of Religion

Parental consent to decide on the religion of minor children is stipulated under Article 12(4) of the Federal Constitution which states:

“The religion of a person under the age of eighteen years shall be decided by his parent or guardian.”

In the earlier discussed case of *Re Susie Teoh*, the Supreme Court set the precedent that a Non-Muslim parent or guardian has the right to decide the religion of an infant or a minor below the age of 18 years old. However, the court did not explain whether the word “parent” refers to one single parent is enough to take part in the decision of a minor’s religion, or there must be both parents to give consent to the religion of a minor, if both parents are still surviving at the time of conversion.

The Judicial Commissioner Lee Swee Seng JC in the case of *Indira Gandhi v Mohd Ridzuan Abdullah* [2013] 5 MLJ 552 discussed the various possible different interpretations in English and Bahasa Malaysia of Article 12 (4). His stated that:

“It covers both the father and the mother of the child. The father is the parent of the child and so is the mother. It envisages and enjoins parents to act as a whole in unison. It can be said that the two persons of father and mother are found in the word “parent”. The Malay language captures this especially well in the translation for “parent” as the word “ibu bapa” (mother father).”⁵⁵

He supported his line of interpretation by referring to Article 160(1) of the Federal Constitution, which refers to the application of the Interpretation and General Clauses Act 1948. Section 2(95) of the Interpretation Act, states that in regard to construction of singular and plural, words in the singular include the plural and words in the plural include the singular. With this, he was of the opinion that the word “parent” in Article 12 (4) refers to both father and mother and thus the right to decide the religion of the minor should be exercised by both father and mother⁵⁶.

It can be concluded therefore that unilateral conversion of the child to Islam by one single parent in the absence of the consent of the non-converting spouse is not an accepted practice. However, to the Non-Muslim community’s dismay, the Federal Court in its 2016 judgement in Subashini case held that “either husband or wife had the right to convert a child of the marriage to Islam. In the case of Subashini⁵⁷, the husband converted to Islam and converted their elder son aged four years old to Islam. The Non-Muslim wife complained that the husband had no right to convert the child of the marriage to Islam without her consent as the mother of the child. She said the choice of religion is a right vested in both parents by virtues of Article 12(4) and Article 8 of the Federal Constitution and Section 5 of the Guardianship of Infants Act 1961.

The Civil High Court held [and its decision affirmed by the Federal Court in 2016] that either the husband or wife has the right to convert a child of the marriage to Islam. The word 'parent' in Article 12(4) of the Federal Constitution, which stated that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. Therefore, Article 12(4) must not be read as entrenching the right to choice of religion in both parents.” It is observed

⁵⁵ Reference made to Kerstin Steiner, “The Case Continues? The High Courts in Malaysia and Unilateral Conversion of a Child to Islam by One Parent”. Australian Journal of Asian Law, 2013, Vol 14 No 2, Article 10: 1-15.

⁵⁶ Ibid

⁵⁷ Subashini v Saravanan [2008] 2 MLJ 147

that the Federal Court has adopted a very strict interpretation of the Article 12(4) of the Federal Constitution in contravention of the Interpretation Act when it decided that “parent” in Article 12(4) must be interpreted to be in singular form.

In the case of *Indira Gandhi*⁵⁸, in 2009 Indira’s husband converted to Islam and had unilaterally converted their 3 children (then aged 12 years, 13 years and 18 months) to the Islamic faith, but the said application was made in the children’s absence. In 2010, the Civil High Court granted custody of the children to Indira. The Muslim father forcefully took away the 3rd child from the Non-Muslim mother. The other 2 children remained with the mother.

The matter proceeded to full trial on the children’s conversion to Islam. The Civil High Court nullified the religious conversion of their 3 children. The judge had declared the conversion ‘unlawful and unconstitutional’ as it was done without the mother’s consent, breaching Article 3⁵⁹, Article 5⁶⁰ and Article 11⁶¹ of the Federal Constitution.

However, on appeal the Court of Appeal in its majority decision stated that “conversion to Islam is exclusively under the jurisdiction of the Syariah court and the civil court has no jurisdiction over that issue.” The effect is the unilateral conversion of the three children by ONE parent is valid. An appeal on the decision of the Court of Appeal is pending to the Federal Court.⁶² The whole nation is awaiting a profound decision from the Federal Court.

A Committee is said to have been appointed to resolve the conversion issue and jurisdictional conflict between the civil court and Syariah court but to date nothing has been conclusively recommended.

⁵⁸ *Indira Gandhi v Mohd Ridzuan Abdullah* [2013] 5 MLJ 552

⁵⁹ Article 3 states while Islam is the religion of the Federation of Malaysia, other religions may be practised in peace and harmony in any part of the Federation.

⁶⁰ Article 5 states no person shall be deprived of his life or personal liberty, save in accordance with the law

⁶¹ Article 11 states that every person has the right to profess and practise his or her religion.

⁶² In October 2016, the non-converting spouse has obtained leave to appeal to the Federal Court.

6. Related Developments

6.1 Religious Rulings

In July 2016, the Perlis Fatwa Committee has issued a *fatwa*⁶³(ruling) which states that the custody of a child is given to the more suitable parent, regardless of religion. A child's welfare takes priority over religion in custody battles involving Muslim convert and non-Muslim parents. If going by the Syariah court, custody is unquestionably given to the Muslim parent. The Religious Head of the State (*Mufti*) is of the view that "This is actually not right, as there is no basis for that sort of ruling, whether in the *Al - Quran* or *hadith*. The courts need to judge which parent was more suitable by studying their background and lifestyle, as well as taking into consideration the choice of the child when child is old enough to decide". The *Mufti* proposed that the ruling be adopted as a guideline by Syariah judges in the State of Perlis.

In December 2016, Perlis State Assembly passed an amendment to the Administration of the Religion of Islam Enactment 2006, allowing one parent to convert a child to Islam.

Section 117(b) of the enactment:

"that a child who had not reached the age of 18, may be converted to Islam with the consent of both "father and mother" or the guardian."

The amendment:

"Father and mother" was replaced with "father OR mother"

The impact of this amendment is that a converted parent can unilaterally convert his or her children to Islam in the State of Perlis. It is an alarming move as it vests statutory power on a parent to unilaterally change the religion of his or her child. The consent of the other parent has been legislatively eliminated. This undermines the whole concept of tolerance and consensus in a family where both parents decide jointly for the well-being and best interests of their children.

⁶³ *Fatwa* is Islamic legal verdicts/opinions issued by Islamic scholar. In Malaysia *fatwa* is State-based and regulated by the Federal Fatwa Committee but other States are not bound to follow unless it is adopted by their Fatwa Committee.

6.2 State Enactments

Each State in Malaysia has its Islamic Family Law Enactment as described above and it may have similar provisions to deal with family issues. However, only the State of Negeri Sembilan and the Federal Territories have explicit provision confining the jurisdiction of Syariah court to marriages registered under the Enactment thus preventing Syariah courts from deciding on matrimonial issues in respect to a civil marriage.

Section 4 and Section 45 of the Islamic Family Law (Negeri Sembilan) Enactment 2003 clearly provides that the said Enactment was only applicable to Muslims, and the Syariah Court can only grant orders on matrimonial issues if the marriage was registered under the Enactment.

Section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 does not enable a Syariah Court to grant dissolution of civil marriage where one party has converted to Islam.

A strict adherence to these provisions would definitely prevent disputes of jurisdiction between the civil courts and the Syariah Court. Insertion of similar provisions by way of legislative reform in other States would help resolve the current practice of jurisdiction shopping by the converted spouse.

6.3 Proposed Legislative Reform

In an attempt to resolve the ongoing civil and Syariah court conflicts, the federal government tabled for its first reading The Law Reform (Marriage and Divorce) (Amendment) 2016 with the following proposals for amendment to the LRA in respect of unilateral conversion of a child to Islam:

1. The inclusion of a new Section 88A that explicitly states that “both parties” in a civil marriage must agree before the conversion of a minor to Islam can occur.
2. The child to remain in the religion of the parents at the time of marriage until the child is 18 years old, when he may choose his own religion.

3. Where the parties to the marriage are of different religions before one spouse converted to Islam, "a child of the marriage shall be at liberty to remain in the religion of either one of the prior religions of the parties before the conversion to Islam".

The following is the proposed amendment to Section 51 of the LRA with respect to equal right to file for divorce:

1. The amendment to LRA entitles a husband or wife who has converted to Islam to file a petition for divorce to dissolve their civil marriage provided under Section 51 (1) of the bill.

These amendments are timely and welcomed to resolve the issues of unilateral conversion by the converted parent and guarantee equal right to converted spouse to dissolve a civil marriage. Insertion of Section 88A will assure constitutional rights of parents to determine the religion of their minor children and guarantee freedom of religion to child as they could remain in the religion chosen by their parents until they reach 18years old.

It is submitted that Section 51 of the LRA should be revised in order to be fair to both parties to a non-Muslim marriage when either party converts to Islam. There should be only one forum to deal with this matter. This is unlike the current practice, where the non-converting spouse may petition for divorce in the civil High Court pursuant to Section 51 of LRA and the spouse who has converted to Islam will apply to the Syariah Court which jurisdiction does not extend to a Non-Muslim.

7. Recommendations and Conclusion

7.1 Jurisdiction Divide

There must clear and unambiguous provisions in the LRA and Islamic Family Law Enactments of all the 14 States that civil marriages can only be dissolved by civil courts and not by the Syariah courts. All ancillary and incidental matters to a civil marriage such custody of children, guardianship, maintenance, distribution of matrimonial properties and inheritance must be dealt with by the civil courts when a Non-Muslim spouse converts to Islam. This will ensure a clear separation of jurisdiction between the civil courts and Syariah courts. It will prevent jurisdiction shopping by the converted spouse as both parties need to appear at one forum to settle their disputes.

7.2 Legislative Reform

7.2.1 Equal Rights to File Divorce

At present the converted spouse is not allowed to file for divorce by citing his or her conversion to Islam as a ground for divorce and has to wait for the Non-Muslim spouse to initiate the divorce. There is a *lacuna* in law and it is often cited by the converted spouse to file for divorce at the Syariah court. The LRA has to be amended to allow the Non-Muslim and the converted spouse to file divorce. This is to guarantee equal rights to both the spouses to petition for divorce when one of them converts to Islam. It will deter the converted spouse from filling a petition at the Syariah court.

7.2.2 Consent to Convert Minor Children

The converted parent unilaterally changing the religion of minor children of a civil marriage by converting them to Islam without first obtaining the consent of the non-converting spouse has been a common trend. The LRA has to be amended to prevent the converting parent from unilaterally changing the religion of the child. The consent of both parents must be required by the law to change the religion of the children of a civil marriage. This is to protect minor children from being

treated like chattels. If the Non-Muslim parents refuses consent for the conversion of the child to Islam then the child should remain in the religion registered at birth by the parents. It guarantees freedom of religion for the child and ensures both parents jointly decide on the religion of their children.

7.3 Reform of State Enactments

As religion and conversion are State matters, the Family Law Enactments in all the 14 States has to be revised to reflect the changes made to the LRA in respect of the dissolution of civil marriage and parental consent for conversion to Islam of minor children. This is necessary because although both the LRA and Family Law Enactments are statutes having the equal legal status, they do not bind each other as they belong to different legal systems. Syariah courts having a separate and distinctive jurisdiction are not bound by the provisions of the LRA. The changes must be stipulated clearly in the Family Law Enactments for it to be adopted and applied by the Syariah courts. Islamic Religious Authorities must be prohibited from allowing and registering conversion of minor children by the converted spouse in the absence of express consent from the Non-Muslim parent.

7.4 Mediation

There is no Family court in Malaysia and mediation is offered only as an option. Family mediation seldom takes place as parties are traumatized by the separation proceedings. For the above proposed amendments to be well implemented, family mediation must be provided at civil courts prior to divorce proceedings and custody or visitation applications. It is especially necessary in inter-faith family disputes to allow parties to negotiate and settle their disputes smoothly instead of snatching away children from one another and place the children under trauma. Well trained mediators need to facilitate the mediation session advising on the law and interests of all parties concerned and allow the parties themselves to make decisions most appropriate. Matters like who gets the custody, right of visitation, religion of the minor children, division of matrimonial

properties and eventually inheritance rights of the non-converting children from their converted parent must be discussed and agreed upon by the parties.

7.5 Conclusion

Dissolution of marriages and custody battles of inter-faith nature in a conflicting legal and court system has caused the citizens to lose faith in the legal and judicial system. The Parliament has not enacted any laws to resolve the problem and the tabled amendments remains a bill to date. Legislative reform and policy formulation is lacking political will that no serious actions have been taken to resolve the problem. It is submitted that for a harmonious settlement of inter-faith family matters, the legal and judicial systems have to function without conflicts and it can be achieved by harmonizing the laws and court jurisdiction.

Reference:

1. Ahmad Ibrahim (1997), *Parent and Child*
2. Mimi Kamariah Majid (1999), *Custody and Guardianship*.
3. Mohd Zin, Najibah and Che Soh @ Yusoff, Roslina (2012) Legal disputes in Determining the Religion of the Child When One Parent Converts to Islam under Malaysian Law, *Australian Journal of Basic and Applied Sciences*, 6 (11). pp. 66-73. ISSN 1991-8178.
4. Krishnan Loganathan (2010) The Antithesis Between Civil Law And Islamic Law in a Pluralistic Society, *Shariah Journal*, Vol. 18, No. 2 (2010) 401-414.
5. Emerson, Rupert, (1979) *Malaysia: A Study in Direct and Indirect Rule*, Kuala Lumpur, University of Malaya Press.
6. Yegar, Moshe, (1979) *Islam and Islamic Institutions in British Malaya: Policies and Implementation*, Jurusalem, The Magnes Press.
7. Suffian, Lee and Trindade (Eds), (1978) *The Constitution of Malaysia: Its Development 1957–1977* , Kuala Lumpur, Oxford University Press.
8. Kerstin Steiner, (2013) “The Case Continues? The High Courts in Malaysia and Unilateral Conversion of a Child to Islam by One Parent”. *Australian Journal of Asian Law*, Vol 14 No 2, Article 10: 1-15.



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