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JURISDICTIONAL CONFLICT IN INTERFAITH CHILD CUSTODY DISPUTES: A LEGAL DISCOURSE IN MALAYSIAN COURTS*

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Abstract

Conflict of jurisdiction between the Civil and Syari'ah court is not a new issue in a dual legal system such as in Malaysia. Intense debate escalates when deciding on custodial rights after divorce in an interfaith marriage. The unilateral conversion to Islam by one party in a non-Muslim marriage has an impact on the status of the marriage and it is a legally recognised ground for divorce. A significant development is when the custody of a child is an issue since both parties are no longer subject to the same set of laws and courts for the purpose of adjudication. The current practice suggests that the converted parent is given preference in custodial rights by the Syari'ah court, which is consistent with the view of the Shafi'i school of law. The approach has caused dissatisfaction particularly among non-Muslim spouses who question whether the decision has served the best interest of the child especially in cases where the child is very young. This paper seeks to examine the extent of the jurisdictional conflict in interfaith custody disputes in Malaysia and the principle applied in the determination of each case. The research method employed in this study is mainly a textual analysis of relevant materials and resolved cases relating to interfaith custody disputes. The study also adopts qualitative analysis in examining the strength and weaknesses of the existing law in resolving the conflicts. Judicial

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interpretation and the judgments of the court are also analysed in identifying relevant principles adopted by both Civil and Syari'ah courts. The study concludes that of paramount importance is the best interest of the child which must be the guiding principle in deciding custodial rights in interfaith custody disputes, besides other dispute resolution mechanisms.

Keywords: child, conflict, interfaith custody, jurisdiction, best interest

Introduction

This article examines the jurisdictional conflict between the Civil and *Syari'ah* courts in Malaysia in matters pertaining to the custody of a child involving parents of different religions. Basically, the conflict of jurisdiction between the Civil and *Syari'ah* courts stems from the dual system of family law. Despite the introduction of English law, Islamic law and Malay custom are still applicable to Muslims in Malaysia but only in matters relating to personal law and the Islamic religion. Consequently, there are two sets of law governing matrimonial matters, namely Civil law for non-Muslims and Islamic law for Muslims and both are administered by different courts known as Civil Court and *Syari'ah* Court respectively. The conflict between the two laws is not so obvious until one of the parties to a non-Muslim marriage converts to Islam and they fail to reach an “out of court” settlement or mutual agreement regarding child custody.

Over the last few years, cases involving interfaith custody have received greater attention not only from legal practitioners but also the government, legal authorities, researchers, media and the public. In a custody dispute involving parties of different religions, the issue of conflict of law would normally arise as the parties are now being subject to different sets of court, applying different sets of law. In such a situation there are two main questions to be asked, namely, which court would assume jurisdiction and which law would be applied. In 2016, there was an announcement made by the then Prime Minister of Malaysia that provides for the amendment of the Law

Reform (Marriage and Divorce) Act 1976 whereby the jurisdiction to settle all matters pertaining to civil marriage including custody disputes will be vested in the Civil Court.¹ The amendment to the Law Reform Act 1976 was finally approved and gazetted by the government on 15 December 2018. Though the amendment is significant in resolving jurisdictional conflict, matters pertaining to custodial rights require a considerable concern where the fate of the child will be at the court's discretion in the absence of any agreement between parents.²

The right to custody of a child is closely related with the religious upbringing of the child and it has become a thorny issue which has caused much confusion and tension in multiracial Malaysia. The cases of *S. Deepa*,³ *M. Indira Gandhi*⁴ and *S. Shamala*⁵ are among the high-profile cases involving interfaith custody that have attracted concerns from the public. In most cases, the problem becomes more complicated when the child was converted to Islam by the converted parent without the knowledge of the non-Muslim parent. This situation has caused dissatisfaction among the non-Muslim community in Malaysia who feel that their rights have not been equally protected by the government and has sparked debate on the legal avenues of justice available to them. This study therefore seeks to provide several suggestions to resolve the jurisdictional conflict involving interfaith custody disputes where the overriding principle that shall be applied is the best interest of the child.

¹ Syed Jaymal Zahid, 25th August 2016, "PM: Civil courts will have precedence in interfaith divorces", Malay mail online, see <http://www.themalaymailonline.com/malaysia/article/pm-civil-court-will-have-precedence-in-interfaith-divorces#HICYM YxBipzB0dV0.97>. Accessed on 30.1.2018.

² Najibah Mohd Zin, Akta Membaharui (Perkahwinan dan Perceraian) (Pindaan) Akta 1976, *KANUN*, Jilid 30, Bil. 1 Januari 2018.

³ See *Viran a/l Nagapan v Deepa a/p Subramaniam* [2015] 3 MLJ 209.

⁴ See *Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan* [2015] 7 MLJ 153; [2014] MLJU 547; [2013] MLJU 735; [2013] 5 MLJ 552.

⁵ See *Shamala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2 MLJ 241

The Legal Background and Theoretical Framework

Malaysia is a country that adopts a dual system of law, namely Civil law and Islamic law and both are administered by different systems of court, i.e. the Civil and the *Syari'ah* courts. With regards to the *Syari'ah* Court, the Federal Constitution limits its jurisdiction only to persons professing the religion of Islam, and only over matters that have been conferred by the Constitution.⁶ Prior to the establishment of the *Syari'ah* Court, the High Court had jurisdiction to hear cases involving Muslims.⁷ For example, in *Roberts v Ummy Kalthom*,⁸ a case involving jointly acquired property of Muslims, Raja Azlan Shah J held that the High Court had power to hear and determine a claim to a Muslim's jointly acquired property, despite the fact that jurisdiction to hear and determine such a claim was conferred by the Administration of Muslim Law Enactment on the Kadi's court. Another case is *Myriam v Mohamed Ariff*⁹ concerning an application for custody of two children, a girl aged eight years old and a boy aged three years old. The application was made to the High Court despite a consent order made by the Kadi's court at Petaling Jaya giving custody of the children to the father in pursuant to Section 46(1) (b) of the Selangor Administration of Muslim Law Enactment 1952. In allowing the application, the High Court founded its jurisdiction to hear the mother's application on Section 45(6) of the Enactment which reads:

Nothing in this Enactment contained shall affect the jurisdiction of any civil court and, in the event of any difference or conflict arising between the decision of a court of the kathi besar or a kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail.¹⁰

After the establishment of the *Syari'ah* Court, *shariah* matters in

⁶ See List II (1), Ninth Schedule, Federal Constitution (Malaysia).

⁷ See for example *Ramah v Laton* (1927) 6 FMSLR 128; *Ainan v Syed Abu Bakar* [1939] MLJ 209.

⁸ [1966] 1 MLJ 163.

⁹ [1971] 1 MLJ 265.

¹⁰ S. 45(6) Selangor Administration of Muslim Law Enactment 1952.

particular matters relating to personal law fall within the jurisdiction of the *Syari'ah* Court. However, a problem arose in a situation where the decision of the *Syari'ah* Court is subject to a judicial review by the High Court and in the case of conflict between the decisions of both courts, the High Court's decision shall prevail. This state of law has given rise to some issues on the position of Islam and the extent of power and jurisdiction of the *Syari'ah* Court in Malaysia. To overcome such a conflict, Article 121 of the Federal Constitution was amended by inserting a new article 121(1A). Article 121(1A) provides, "the courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syari'ah* Courts." Clause (1) of Article 121 refers to the High Courts and the subordinate courts i.e., the Civil Courts. By virtue of this amendment, the *Syari'ah* Court shall have an exclusive jurisdiction over all matters within its jurisdiction and its decision will no longer be subject to judicial review by the Civil Courts. The reason for the amendment has been explained by Professor Ahmad Ibrahim as follow:

The important effect of the amendment is to avoid for the future any conflict between the decisions of the *Syari'ah* Courts and the Civil Courts which had occurred in a number of cases.¹¹

Notwithstanding the amendment made to Article 121 of the Constitution, the conflict between the Civil and *Syari'ah* courts remains unsettled. In *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus*¹², Edgar Joseph Jr. J (as he then was) said, *inter alia*:

...although the Administration of Muslim Law Enactment 1959 Penang does expressly confer general civil jurisdiction on the court of the kadi besar to hear and determine proceedings where the parties profess the Muslim religion and which relate, *inter alia*, to the guardianship or custody of infants, such jurisdiction is not exclusive.

¹¹ Ahmad Ibrahim, "The Amendment of Art. 121 of the Federal Constitution: Its Effect on the Administration of Islamic Law", [1989] 2 *MLJ* xvii.

¹² [1991] 3 *MLJ* 327.

Referring to the Administration of Muslim Law Enactment 1959 of Penang, the court in this case found that there is nothing therein which confers exclusive jurisdiction on the court of the Kadi Besar in matters relating to custody of Muslim children. Furthermore, by virtue of Sections 4, 23 and 24 of the Courts of Judicature Act 1964 which define the civil jurisdiction and powers of the High Court, the judge held that the said provisions confer a jurisdiction on the High Court to hear the application in this case unless the amendment to Article 121(1A) had been enacted with retrospective effect.¹³ Therefore, the court in *Shahamin* was of the view that the amendment to Article 121(1A) of the Federal Constitution does not affect the jurisdiction of the High Court since the amendment is not made with any retrospective effect. However, the decision in *Shahamin* was later overruled by the Supreme Court in *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib*.¹⁴ In *Habibullah*, the Supreme Court affirmed that the effect of the amendment was to take away the High Court's jurisdiction in matters that are within the jurisdiction of the *Syari'ah* Court.¹⁵ Harun Hashim S.C.J. in his judgment said:

From the very beginning, the makers of the Constitution clearly intended that Muslims should be governed by Islamic personal and family law as evident from item 1 of the State List of the Ninth Schedule to the Constitution. What Article 121(1A) of the Constitution has done is to grant exclusive jurisdiction to the *Syari'ah* Courts in the administration of Islamic personal and family law so as to prevent conflicting jurisdictions between the Civil courts and the *Syari'ah* courts.¹⁶

In *Dalip Kaur Gurbux Singh v Pegawai Polis Daerah Bukit Mertajam & Anor.*,¹⁷ the Supreme Court held that as a result of the

¹³ *Ibid.*, 331.

¹⁴ [1992] 2 MLJ 793.

¹⁵ Abdul Hamid, "Civil and *Syari'ah* Courts in Malaysia: Conflict of Jurisdictions", [2002] 1 MLJ, p. cxxxv.

¹⁶ *Supra* n13, 803-804.

¹⁷ [1991] 1 CLJ 77 (Rep).

new Article 121(1A), the issue of whether a person was a Muslim or had renounced Islam before death is a matter which the *Syari'ah* Court had to determine. In this case, the appellant had applied for a declaration that her deceased son was not a Muslim and/or had renounced the Islamic faith during his lifetime. In dismissing the appeal, Mohamed Yusoff S.C.J. said that the question in issue would require consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence and the only forum qualified to do so is the *Syari'ah* Court.¹⁸ Hence, in this case, the court has recognised the jurisdiction of the *Syari'ah* Court in matters involving Islamic law.

It is noteworthy that after the 1988 amendment the issue of conflict of jurisdiction continues to exist. Generally, the cause of the conflict stems from the existence of grey areas between Articles 121(1) and 121(1A) in particular where one of the parties is a non-Muslim over whom the *Syari'ah* Court has no jurisdiction. The situation of conflict of law may arise in any areas of law, either civil or criminal, and the focus of this paper is conflict in the field of family law particularly in matters involving interfaith custody disputes.

Judicial Interpretation

The main reason for a conflict of law in matrimonial matters is due to a statutory provision under Section 51 of the LRA which provides for conversion to Islam as a ground to dissolve a non-Muslim marriage. Under the provision, where one party to a non-Muslim marriage has converted to Islam, the right to petition for divorce is only granted to the other party who has not so converted. Section 51(1) reads as follow:

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 after the expiration of the period of

¹⁸ Ibid., 78.

three months from the date of the conversion.¹⁹

The above provision clearly provides that a conversion to Islam does not have any effect in dissolving the non-Muslim marriage automatically but it should only be treated as a ground for dissolution of marriage. A similar position can be found under the Islamic Family Law Act/Enactments. Section 46(2) of the Islamic Family Law (Federal Territories) Act 1984 states:

The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

Based on the above-mentioned provisions both under Civil law and Islamic law, it can be concluded that with regards to the effect of conversion on the status of marriage, Islamic law is in agreement with Civil law in holding that a dissolution of a civil marriage on the ground of conversion can only be made by an order of court. Unless there is such an order, the marriage is still valid in the eyes of the law.

In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*,²⁰ the Federal Court was of the view that, by enacting Section 51, the legislature clearly envisaged a situation that where one party to a non-Muslim marriage converted to Islam, the other party who has not converted may petition for divorce to the High Court and seek ancillary reliefs. Nik Hashim, FCJ stated that:

A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect of divorce and custody of the children of the marriage and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.²¹

Based on the above judgment, it is clear that the conversion of one of the parties to a civil marriage does not automatically dissolve

¹⁹ S.51 (1) Law Reform (Marriage and Divorce) Act 1976.

²⁰ [2008] 2 MLJ 147; [2008] 2 CLJ 1.

²¹ *Ibid.*, 168 & 30.

the marriage. Until and unless the non-converting party petitions for divorce and the marriage is dissolved by the court, the marriage between the parties is regarded as still subsisting under the LRA. This position of law has to some extent contributed to the conflict between the Civil and *Syari'ah* courts because, in many cases, the converting party would normally commence proceedings in the *Syari'ah* Court for the dissolution of the marriage together with an order of custody of child. This is due to the fact that the right of the converting spouse to petition for divorce under the LRA is made unavailable not only under Section 51, but also under other provisions, for instance, Section 52 (divorce by mutual consent) and Sections 53 to 54 on the ground of irretrievable breakdown of the marriage.

Although the Muslim party has the right to apply for dissolution of the marriage from the *Syari'ah* Court, any order of dissolving a civil marriage issued by the *Syari'ah* Court does not have any legal effect and this was decided in the case of *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor*.²² In this case, the Chief Kadi of Pulau Pinang had previously confirmed the wife's conversion to Islam and made the necessary arrangement to inform the husband that if he failed to convert within 3 months, the marriage would be dissolved. In his letter dated 10 April 1987, the Chief Kadi wrote to the plaintiff husband as follows:

Dimaklumkan berhubung dengan perkara yang di atas, bahawa isteri tuan yang bernama Oliven @ Olwen Patricia Newman K/P No 2542313 dulu alamat 4090 Jalan Pantai, Butterworth, Pulau Pinang telah memeluk ugama Islam pada 12 Januari 1987 bil. No Negeri 8/87, Daerah 2/87.

2. Oleh itu tuan adalah dinasihatkan supaya tuan turut sama memeluk ugama Islam dalam masa lebih kurang 90 hari dari tarikh isteri tuan memeluk Islam. Jika tidak tuan dianggap terputus hubungan di antara tuan dengan isteri tuan sebagai suami isteri yang sah mengikut

²² [1990] 2 MLJ 307.

*undang-undang Islam.*²³

When the case was brought by the husband to the High Court seeking for a declaration that the conversion of his wife had not determined their marriage, the High Court of Pulau Pinang referred to Section 51 of the LRA which provides the right to petition for divorce only to the non-convert spouse and thus, made a decision in favour of the plaintiff husband and declared that the letter issued by the Chief Kadi did not apply to him and had not affected their marriage. In delivering his judgment, Wan Adnan J said:

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 converted to petition for divorce.²⁴

A similar situation was also witnessed in *Ng Siew Pian v. Abdul Wahid b. Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain*²⁵ where the non-Muslim wife sought a declaration from the High Court that the order issued by the Kadi to dissolve the civil marriage was not effective.

Despite the conversion of one party to Islam, any order which is made by the Civil Court relating to the civil marriage is still enforceable against the party who has converted. In other words, the converted spouse cannot use his conversion to Islam as an excuse to escape responsibilities under the LRA. This is by virtue of Section 3(3) of the LRA which provides:

This Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the

²³ Ibid.

²⁴ Ibid., 308.

²⁵ [1992] 2 MLJ 425.

petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.²⁶

Thus, if a petition for divorce is made under Section 51, the Civil Courts continue to have jurisdiction in respect of the marriage and other matters ancillary to the divorce such as division of matrimonial assets, maintenance as well as custody and guardianship of children. In *Tan Sung Mooi v Too Miew Kim*,²⁷ in view of the conversion of the husband to Islam, the issue before the court was whether the High Court was entitled to exercise its jurisdiction to grant the ancillary relief to the non-Muslim wife. The Supreme Court answered it in the affirmative and decided that a wife who was already divorced could seek ancillary relief under the LRA after her husband's conversion to Islam.

With regards to the issue of custody, a conflict of laws situation arises when the parties fail to reach an agreement on the custodial right of the child outside the court. As the legal custodian will normally have the right to determine the religious upbringing of the child, in most cases, both parents would battle for the custody of the child in order to ensure that the child is brought up in accordance with their religious convictions. Consequently, the non-Muslim parent will claim their right of custody from the High Court whereas the Muslim parent seeks a custody order from the *Syari'ah* Court. This has given rise to two main issues; first, which court shall assume jurisdiction to determine the custodial right of the child and second, where both courts gave their orders on the same case, which court's order shall prevail.

In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*,²⁸ the parties to the case were originally Hindus who were married under the civil law and had their marriage registered under the Law Reform (Marriage and Divorce) Act 1976. Out of the marriage, there were two infant children, Dharvin Joshua aged 4 and Sharvin aged 2.

²⁶ S.3 (3) Law Reform (Marriage and Divorce) Act 1976.

²⁷ [1994] 3 MLJ 117.

²⁸ [2008] 2 MLJ 147; [2008] 2 CLJ 1.

The husband had later converted himself and the elder son to Islam on 18 May 2006. Subsequently, he commenced proceedings in the *Syari'ah* High Court for the dissolution of the marriage and custody of the elder son. The Federal Court in this case has clearly declared that despite a party's conversion to Islam, the Civil High Court has exclusive jurisdiction over the dissolution of a non-Muslim marriage and all ancillary reliefs.

In determining the right of custodianship, several factors will be taken into consideration by the court, and both *Syari'ah* and civil law recognise that the paramount consideration to decide the custody of a child is the welfare or interest of the child.²⁹ Many judicial pronouncements stress that the word 'welfare' or 'interest' covers wide-ranging matters. In the classical English case of *J. & Anor v C. & Ors.*,³⁰ the court viewed that in determining the welfare and interest of the child in custody disputes, the following process is involved:

...when all the relevant facts, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare.³¹

The above principle was followed in the Malaysian case of *Mahabir Prasad v Mahabir Prasad*,³² where the Federal Court in delivering its judgment relating to the interest of the child made the following statement:

Indeed in order to decide on the question of the welfare of an infant as of paramount importance it is necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his wishes as far as they can be ascertained depending on the age of the child, the confidential reports

²⁹ See Section 88, Law Reform (Marriage and Divorce) Act 1976 (Malaysia), Act 164; Section 86, Islamic Family Law (Federal Territories) Act 1984 (Malaysia), Act 303.

³⁰ [1970] AC 668.

³¹ [1970] AC 710-711.

³² [1982] 1 MLJ 189.

which a social welfare officer may put up and whether in the long run it would be in the greater interest, welfare and happiness of the child to be with one parent rather than with the other. But always it is the welfare of the child which is of paramount importance.³³

Under the LRA, Section 88(2) clearly provides that in deciding the child's custody, the paramount consideration shall be the welfare of the child with due regard to the wishes of the parents of the child and the wishes of the child where the child is of an age to express an independent opinion. A similar provision is also provided under Section 86 of the IFLA. Section 86(2) of the IFLA reads as follow:

In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and, subject to that consideration, the Court shall have regard to-

- a) the wishes of the parents of the child; and
- b) the wishes of the child, where he or she is of an age to express an independent opinion.

Both the LRA and IFLA include consideration of the wishes of the parents and wishes of the child as a statutory requirement as shown in Sections 88(2) and 86(2) respectively. However, if the wishes of the parents are not in line with the interests of the child, such wishes will not be followed by the court. In *Teh Eng Kim v. Yew Peng Siong*,³⁴ the Federal Court in granting the right of custody to the mother had observed the following:

As the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim. Parental rights are overridden if they are in conflict with the welfare of the child.³⁵

In this case, the mother had previously obtained a divorce on the grounds of her husband's adultery. She made an application for

³³ Ibid., 192.

³⁴ [1977] 1MLJ 234.

³⁵ Ibid., 239.

custody of the children and also permission to take the children to Australia. Taking into consideration that the welfare of the children could be best served with the mother, the Federal Court allowed the mother's application although normally the court would be reluctant to allow the children to be taken out of the jurisdiction.

With regard to the wishes of the child, the court will only follow a child's opinion if the child has attained the age when he or she is able to express an independent opinion and such opinion given is consistent with the child's best interest. In *Mohammed v. Azizah*,³⁶ there was agreement that the child would be surrendered to the father upon remarriage of the mother. However, after being convinced by the principal of the school that the child was making good progress and that her progress will be affected if her home surroundings were disturbed, the judge in this case gave the custody to the mother. Moreover, the court also took into consideration the wishes of the child who had expressed her preference to stay with the mother and her reluctance to stay with the father. In *Mohamed Koyamo v. Sapura*,³⁷ the father made an application of custody of three children, two boys aged 9 and 13 years and a girl aged 12 years. The children were under the custody of the mother with the other three siblings. In making its decision, the court considered the children's opinion since all of them had reached the age of discernment. They expressed their wish to stay with the mother and consequently, the father's application was dismissed.

Section 89(1) of the LRA and Section 87(1) of the IFLA further provides that an order for custody may be subject to certain conditions relating to the child's upbringing and education and this includes the religious upbringing of the child. Although the religion of the parties is one of the main considerations to decide on the welfare of the child, it should not be the sole factor to determine the right of custody. In *Re McGrath (Infants)*,³⁸ Lord Justice Lindley explained the interpretation of the child's welfare as follow:

The dominant matter for consideration of the court is the welfare of the child. But the welfare of a child is not to

³⁶ (1979) 1 JH 79.

³⁷ (1984) 5 JH 352.

³⁸ [1893] 1 Ch. 143.

be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.³⁹

In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*,⁴⁰ the High Court held that the overriding principle in determining the custodial right is the welfare or interest of the child. In this case, the non-Muslim wife applied to the High Court for the right of custody of her two minor children who had been converted to Islam by her Muslim husband without her consent and knowledge. After considering the interest of the two infant children to be under the physical custody of their mother, the court decided that the actual custody of the children was to be given to the mother while the legal custody was given jointly to both parents. This meant that the right of religious practice of the two children was to be exercised equally by the father and mother. However, the award of actual custody to the non-Muslim mother is qualified with a condition that she will not influence the children's religious belief or else she would lose the right to actual custody. The court in this case relied on Section 5 of the Guardianship of Infants Act 1961 in acknowledging equal parental rights and authority in the custody and upbringing of the children.⁴¹ In this case, the court made an important remark that in a proceeding relating to custody, care and control of children, the welfare of the children should be paramount and the issue of religion is merely one factor to be balanced against the others. Although the above judgment is inconsistent with the principle of Islamic law as it allows the non-Muslim spouse to have the custody of a child, it would be a challenge for the parents to observe their duties and responsibilities and to work together for the best interest of the child.

With regard to the principle of the best interest of the child, in

³⁹ *Ibid.*, 148.

⁴⁰ [2004] 3 CLJ 516; [2004] 5 AMR 75.

⁴¹ Najibah Mohd Zin, "Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law", *The Law Review*, 2007, 71.

Re D (Justices' Decision: Review),⁴² Dunn J made the following statement:

When custody or upbringing of a minor is the central issue, the court in deciding that question shall regard the welfare of the minor as the first and paramount consideration. It has been said that the welfare principle is applied “first, last and all the time” and that it is the “golden thread” which runs through the whole of the court’s custodial jurisdiction.⁴³

This means that the minor’s interests or welfare override the wishes of his/her parents. Thus, if there is any conflict between the best interest of the child and the parental rights, the former will prevail. Furthermore, in determining the best interest of the child in terms of religious upbringing, the court should take into consideration all relevant factors with the best interest of the child as a paramount consideration. The court should not prefer one religion over the other and it is not for the court to decide the religion of the child.

The issue of conflict of jurisdiction and the best interest of the child had been considered thoroughly by the Federal Court in delivering their judgment in the case of *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals*.⁴⁴ In this case, the parties contracted their marriage under the LRA and had two children, a girl named Shamila (11 years old) and a boy named Mithran (8 years old). The husband converted himself and his two children to Islam and later applied for the dissolution of his civil marriage at the *Syari'ah* High Court where the court granted the order together with temporary custody of his two children and subsequently granted permanent custody order of the children to him. In the meantime, the non-Muslim wife filed a petition for divorce at the High Court and she was granted permanent custody of the children. The situation became worse when Mithran was abducted by his father from the mother’s custody. The non-Muslim wife then applied for recovery

⁴² [1977] Fam 158.

⁴³ *Ibid.*, 163.

⁴⁴ [2016] MLJU 05.

order before the High Court.

On appeal by the husband against the decision of the High Court, two main issues arose. The first issue was whether the Civil Court had jurisdiction to make a conflicting order in a case where a custody order had been made by the *Syari'ah* Court, and the second was whether the High Court had properly exercised its discretion in granting order of custody of the children to the wife. With respect to the first issue, the Federal Court declared that the Civil Court had the exclusive jurisdiction regarding all matters pertaining to civil marriage under the LRA. Thus, it is an abuse of process for a converted spouse to file custody proceedings in the *Syari'ah* Court in respect of children of the civil marriage.

As regards the issue of custody, the court referred to Section 88(3) of the LRA and decided that the paramount consideration in determining the custody of a child is the child's welfare. In determining the welfare of the child, matters such as the conduct of the parties, their financial and social status, the sex and age of the child and his/her wishes need to be taken into account. The court also acknowledged that a custody order is never final or irreversible. Taking into consideration the welfare of the children as of paramount importance, the court was of the view that there was a need to consider the wishes of the children and balance it with their interest. Consequently, the Federal Court varied the custody order granted by the High Court and ordered that the daughter shall remain with the mother while custody of the son was given to the father.

Another controversial case involving the issue of unilateral conversion of children to Islam is *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals*.⁴⁵ This case was an appeal against the decision of the learned Judicial Commissioner's (JC) ruling that the conversion to the religion of Islam of the children of the appellant and respondent in the first appeal was unlawful, unconstitutional, void and of no effect. The appellant and the respondent were married in 1993 under the LRA. The appellant converted to Islam in 2009 and thereafter successfully converted the three children of the marriage aged 12, 11 and 11 months respectively. At the time of the husband's conversion, the two elder children were residing with the wife while

⁴⁵ [2016] 1 CLJ 911.

the youngest child was with the husband. The appellant was also granted a permanent custody order over the children by the *Syari'ah* Court. The Federal Court in allowing the appeal ruled that the conversion of the children was effected in accordance with the law on the grounds that it had neither contravened the Enactment nor the Constitution. The Federal Court also held that the learned Judicial Commissioner had no jurisdiction to determine the issue of the children's conversion to Islam as jurisdiction thereof lay exclusively with the *Syari'ah* Court.

However very recently, in the three appeals by Indira heard together by the Federal Court on 29 January 2018, the court had unanimously declared that the unilateral conversion of Indira's children was unlawful as the consent of both parents was needed to convert a minor.⁴⁶ The Federal Court in this case had departed from the decision in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals*,⁴⁷ and further held that under Article 12(4) either parent had the right to convert a child in the marriage to Islam. The court in *Subashini* took a literal approach in interpreting the word 'parent' in Article 12(4) to mean a single parent.⁴⁸ However, the court in *Indira* was of the view that such interpretation as propounded in *Subashini* was unsupported and erroneous. In coming to the conclusion that the consent of both parents was required before a certificate of conversion to Islam can be issued in respect of the children, the court based their judgment on a purposive interpretation of Article 12(4) read with the 11th Schedule of the Federal Constitution that promotes the welfare of children.⁴⁹ In addition, the

⁴⁶ Ida Lim, 1st February 018, "Simplified: The Federal Court's ground-breaking Indira Gandhi judgment", Malay mail online at <http://www.themalaymailonline.com/malaysia/article/simplified-the-federal-courts-groundbreaking-indira-gandhi-judgment#tuYG5QyobVsjtWDW.99>. Accessed on 1.2.2018.

⁴⁷ [2008] 2 CLJ 1.

⁴⁸ See also, *Nedunchelian V Uthiradam v. Nurshariqah Mah Singai Annal* [2005] 2 CLJ 306; *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911.

⁴⁹ "Indira Gandhi Federal Court Grounds of Judgment," <http://www.loyarburok.com/wp-content/uploads/2018/01/Grounds-of-Judgment-by-Zainun-Ali.pdf>. Accessed on 1.2.2018.

court also applied Sections 5 and 11 of the Guardianship of Infant Act 1961 which provides for equal rights of both parents in child custody.

Proposed Dispute Resolution Mechanisms

The finding of this study suggests that even though the issue of conflict of jurisdiction between the Civil and *Syari'ah* courts in matters involving interfaith custody has stood unresolved for many years, to date there is no specific instrument or mechanism to resolve the problem. Although amending the current laws is one of the options, any proposed amendment should be examined thoroughly and diligently so as to make it acceptable to both Muslims and non-Muslims. The recently passed Law Reform (Marriage and Divorce) (Amendment) Act 2017 (Act A1546) can be seen as one of the government's efforts to end the jurisdictional conflict between the Civil and *Syari'ah* courts. This Amendment Act received Royal Assent on 9 October 2017, was gazetted on 17 October 2017 and enforced on 15 December 2018. The main objective of the Act is basically to end the issue of conflict of jurisdiction between the Civil and *Syari'ah* courts by giving an exclusive jurisdiction to the Civil Court to decide on all matters pertaining to dissolution of civil marriage and all matters incidental thereto.

The Amendment Act provides for amendment of several provisions of the Act 164 and among the main provisions that have been amended in order to resolve the issue of jurisdictional conflict are the amendments to Sections 3(3) and 51. The amendment to Section 3(3) gives an exclusive jurisdiction to the Civil Court to decide on all matters pertaining to dissolution of marriage and all matters incidental thereto. The amended section reads as follow:

This Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage one of the parties of which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court **from having exclusive jurisdiction over the**

dissolution of a marriage and all matters incidental thereto including granting a decree of divorce or other orders under Part VII and Part VIII on:(a) A petition for divorce under section 53 where one party converts to Islam after the filing of the petition or after the pronouncement of a decree; or (b) a petition for divorce either under section 51, 52 or 53 on the petition of either party or both parties to a marriage where one party has converted to Islam; and such decree and orders made shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.⁵⁰

Further, Section 51(1) of the Act 164 was amended by substituting for subsection (1) the following subsection:

S.51 (1): Where one party to a marriage has converted to Islam –

- (a) either party may petition for a divorce under this section or section 53; or
- (b) both parties may petition for a divorce under section 52.

As can be seen, the new subsection gives an equal right to both parties of the marriage to petition for divorce on the grounds of conversion to Islam and the petition may be made either under Section 51, 52 or 53. Unlike the previous provision which gives right to petition for divorce only to the spouse who has not converted, under the new provision the right of the converted spouse to make an application to dissolve the marriage at the Civil Court is also upheld. As a result, there will be no more occasions where the converted spouse files a separate application to dissolve the civil marriage at the *Syari'ah* Court and consequently the issue of conflict of jurisdiction would be resolved particularly in matters pertaining to dissolution of marriage involving parties of different religions.

⁵⁰ S.3 (3), Law Reform (Marriage and Divorce) (Amendment) Act 2017.

Although the above-mentioned amendment has addressed the issue of jurisdictional conflict, the issue surrounding interfaith custody disputes is still there in particular the issue of religious upbringing of children in the event of conversion of one party to a non-Muslim marriage to Islam. The problem becomes more complicated when there is unilateral conversion of children by the converted parent without the consent of the other parent. It is worthy to note that before the Amendment Act was passed, it had gone through several stages and changes. In its first draft, the proposed amendment had included the new section 88A which seeks to provide for the status of the religion of the child in the event his father or mother converts to Islam. It provides as follow:

S.88A. (1) Where a party to a marriage has converted to Islam, the religion of any child of the marriage shall remain as the religion of the parties to the marriage prior to the conversion, except where both parties to the marriage agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she has attained the age of eighteen years.

(2) Where the parties to the marriage professed different religions prior to the conversion of one spouse 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.⁵¹

The intention of the above provision was basically to prevent the incidence of unilateral conversion of minor children to Islam. By virtue of this new provision, if one parent converts to Islam the religion of the children of the marriage shall remain as the religion of the parties to the marriage prior to the conversion unless both parents have agreed to the conversion of the children to Islam. Furthermore, it also provides the child with the right to choose his or her religion upon attaining the age of majority.

The first draft of the Amendment Bill was tabled at the House of Representative (*Dewan Rakyat*) on 21 November 2016. However,

⁵¹ S.88A Law Reform (Marriage and Divorce) (Amendment) Act 2016.

after receiving various feedback and comments in particular relating to Section 88A, the tabling of the Bill was postponed.⁵² When the Bill was tabled for the second time at the *Dewan Rakyat*, it was tabled without Section 88A and subsequently it was passed by the Parliament on 21 August 2017.⁵³ Thus, it can be said that by removing Section 88A, the issue of religion of a child and unilateral conversion in interfaith custody disputes was not addressed sufficiently by the recent amendments.

The finding of this paper suggests that besides amending the law, there are several other methods and mechanisms that may be considered to address the issues in the current setting of the legal framework.

First, the establishment of a tribunal to deal specifically with family cases involving interfaith parents is worthy of being considered. The tribunal shall be empowered to decide on all matters involving interfaith custody disputes and other related issues such as the unilateral conversion of a child. The panel of members of the tribunal should be selected from among persons who possess knowledge in both areas of the law i.e. civil law as well as Islamic law. Hence, they would have a better understanding of the concept of the best interest of the child under both sets of law and there would be no issue of biasness in their decision. Its establishment and procedures would require further research.

Second, it is proposed that the parties should be encouraged to settle their disputes through an extensive mediation process. Instead of going through a litigation process which is more costly and time consuming, the parties should be convinced that matters can be settled amicably through a mediation process conducted by an experienced mediator. The main function of the mediation process is to help the parties to come to an agreement to settle the matters out of court guided by the principle of the best interest of the child. Through

⁵² Mazwin Nik Anis, 6 April 2017, "Amendments to Marriage and Divorce Act Postponed," The Star Online, <http://www.thestar.com.my/news/nation/2017/04/06/amendments-to-marriage-and-divorce-act-postponed>. Accessed on 16.1.2017.

⁵³ Bernama, 21 August 2017, "Dewan Negara passes Act 164 (Amendment) Bill, says Azalina," Malay mail online, <http://www.themalaymailonline.com/malaysia/article/dewan-negara-passes-act-164-amendment-bill-says-azalina#Whr7CHAvISTE86t.97>. Accessed on 30.8.2017.

a mediation process, the parties would have more rights in determining the details of the agreement relating to the custody of the child, for instance the right of visitation, education, religious upbringing, financial support etc. Indirectly, it can preserve the good relationship between both parents which is of great importance to the emotional well-being of the child concerned. In order to avoid non-compliance the agreement must be properly drafted. Awareness programmes on the advantages of a mediation process must be conducted in encouraging the public to choose mediation as an alternative to litigation.

Third, looking at the current situations and challenges there is a need to develop a harmonised law to deal with disputes involving two different jurisdictions. The harmonisation of Islamic and Civil law can be done in respect of the determination of child custody since both laws are in agreement that the welfare and interest of the child shall be the main consideration in determining the right of custodianship.⁵⁴ Since the issue of religion is a disputable issue both under Civil and Islamic law, it is better to leave the matter to be decided by the court on the basis of the best interest of the child, unless there is agreement between the parents. Harmonisation of the law will ensure that there is certainty in the law because no matter where the case is brought to and which forum determines the case, the same principles will be applied and the same results would follow.

Finally, as parents share responsibilities towards their children, the change of religion of either parent should not be the reason why they cannot maintain a good relationship. Although the marriage has come to an end, they have to ensure that the best interest of the child is not affected by their separation. The award of joint custody could therefore be another alternative to solve the interfaith custody issue where both parents will have an equal right of access to their children. This will provide the children with the feeling of love and

⁵⁴ See Section 88, Law Reform (Marriage and Divorce) Act 1976 (Malaysia), Act 164; Section 87, Islamic Family Law (Federal Territories) Act 1984 (Malaysia), Act 303. See also a discussion in Najibah Mohd Zin, Roslina Che Soh, 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): 66-73.

affectionate from both parents which is of great importance to their mental and emotional development. This will be consistent with established principles in Islamic law, Civil law and international standards.

Conclusion

The issue of jurisdictional conflict between the Civil and *Syari'ah* courts was an unsettled issue in Malaysia for many years until the coming into force of the recent amendments. The purpose of the current study is to determine the extent of the conflict between these two courts and its cause, particularly in the case of interfaith custody disputes. The need for a permanent settlement in child custody cases involving interfaith parents is obvious since the issue implicates religious sensitivity and has become a matter of public interest. Although the amendment of law is the most awaited solution to the problem, other mechanisms should also be considered. Further research in this field would be of great help in determining the best mechanisms and procedures to resolve the problem of conflict involving interfaith custody disputes. In this the best interest of the child should prevail as the guiding principle to bring about the best solutions.

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