



Rights of a Wife in the Case of Conversion to Islam under Family Law in Malaysia

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Abstract

This article focuses on the issues of conversion to Islam of one party to a non-Muslim marriage. In Malaysia, some legal problems need to be addressed, particularly concerning the rights of a wife to the ancillary claims after dissolution of the marriage such as maintenance, matrimonial property and custody. These issues have been discussed by the Malaysian courts in their judgments when they preside over cases involving conversion to Islam. Among the issues that have been raised is whether a non-Muslim wife is entitled to maintenance after her husband has converted to Islam and, if she is still entitled, for how long. Other problems concern which party shall be entitled to custody of any children as well as the legal status of the marriage. All these issues need to be discussed further as to whether amendment of the existing relevant law is necessary. This article analyses the legal provisions and the cases that have been decided by the Malaysian courts on conversion to Islam.

Keywords

women's rights; Islamic law; family law; conversion to Islam; Malaysian law

1. Introduction

At present in Malaysia, legal issues concerning conversion to Islam have become a topic of concern. Several such issues are who shall have the right to petition for divorce and what are the wife's rights after her husband has converted to Islam: i.e., will she receive maintenance for herself from her converted husband, will she have equal rights as a parent to decide on matters relating to her child's upbringing, will she have the right to inherit

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from the estates of her deceased convert husband, *et cetera*. In 2007, in the case of *Subashini A/P Rajasingam v. Saravanan A/L Thangathoray* the Malaysian Federal Court decided upon the issue concerning conversion; however, their decision has been described as still unclear and confusing, especially on the issue of the Court's jurisdiction. Thus, the discussion in this article focuses on a wife's rights upon conversion of her husband to Islam: i.e., her right to maintenance, division of matrimonial property and custody of children under the existing family law. In discussing such issues, reference will be made to the provisions under the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976), the Islamic Family Law Act/Enactment and other relevant statutes. Cases decided in the Civil and Shari'ah Courts will be discussed. This article will also make several suggestions concerning existing problems surrounding conversion to Islam issues.

2. Right to Apply for Divorce

Presently, under the law, the right to apply for divorce is only given to the non-convert party. Section 51(1) of the LRA 1976 clearly states that, where one party to a marriage has converted to Islam, the other party who has not converted may petition for divorce.¹ However, the petition can only be presented before the 3-month expiration period from the date of conversion.²

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

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

It is submitted from the above provision that if the non-Muslim party refuses to petition for divorce under Section 51(1) of the Act, the couple are still husband and wife bound by their former law. It is understood that

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

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

³ [2007] 2 MLJ 798.

conversion to Islam neither determines nor automatically dissolves the marriage. This is different under Shari'ah law where conversion of a non-Muslim party to Islam will automatically terminate the marriage.

The effect of Section 51(1) of the LRA 1976 is explained further in the case of *Easwari Visuvalingam v. Government of Malaysia*.⁴ In this case, the appellant married Visuvalingam Ponniah according to Hindu rites, and the said marriage was registered on 15 November 1950. Visuvalingam Ponniah embraced Islam on 16 July 1978 and adopted the name Abdul Hamid Abdullah. Visuvalingam was a pensioner under the Pensions Act 1980. He died on 7 January 1985. In a letter dated 7 March 1985, the plaintiff applied to the Public Services Department for derivative pension. On 16 April 1986, the Pensions Department rejected the plaintiff's application on the same grounds as stated in the statement of defence by the husband.

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

While delivering his decision in the Supreme Court Hashim Yeop Sani observed:

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

⁴ [1990] 1 MLJ 86.

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

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

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

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

In the case of *Subashini A/P Rajasingam v. Saravanan A/L Thangathoray*,⁸ the Federal Court observed that the order to dissolve the civil marriage by the Shari'ah High Court by virtue of conversion would have no legal effect in the High Court other than as evidence of the fact of dissolution of the marriage under Islamic law. Thus, the non-Muslim marriage between 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-Muslim's spouse.

Another relevant section to be discussed is Section 3(3) of the LRA 1976 which states that the Act shall not apply to a Muslim or to any person who is married under Muslim law. In *Letchumy v. Ramadeson*,⁹ Vohrah J is of the view that Section 3(3) of the LRA 1976 precludes operation of the provision of Section 77 of the same Act to the Muslims. However, in *Tey Siew Choo v. Teo Eng Hua*¹⁰ the Court pointed out that Section 3(3) of the LRA 1976 was applicable to the convert spouse as the parties were married under the LRA 1976. The decision in the *Tey Siew Choo* case was followed in the case of *Johan Fairbairn Abdullah*¹¹ where the Court held that the convert spouse is still subjected to the LRA 1976.

⁶ [1990] 2 MLJ 307.

⁷ [1992] 2 MLJ 425.

⁸ [2007] 2 MLJ 798.

⁹ [1984] 1 MLJ 143.

¹⁰ [1997] 3 AMR 2779.

¹¹ [1992] MLN 42.

In the case of *Yong Fuat Meng v. Chin Yoon Kew*,¹² the Court held that, since the petitioner in this case was not born a Muslim, there was no prohibition for the petitioner to appear before the civil court to settle his obligations or liabilities that he himself had previously subscribed to by contracting a civil marriage under the LRA 1976.

There is a question as to whether the right is given to the Muslim party to petition for divorce under the LRA 1976. In the case of *Tey Siew Choo @ Nur Aishah Tey Binti Abdullah v. Teo Eng Hua*¹³ some of the issues deliberated are:

- (1) whether the petitioner's conversion to Islam automatically ended their marriage;
- (2) whether the petitioner could petition for divorce under the Act, in view of the fact that she had converted to Islam and the Act specifically exclude the Muslim; and
- (3) whether it is just and reasonable to allow the petition and dissolve the marriage.

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

Based on the above case, it is submitted that the convert spouse may petition for divorce under LRA 1976. The Muslim spouse may petition for divorce on the ground that the marriage had irretrievably broken down as stated under Sections 53 and 54 of LRA 1976. Thus, if the convert spouse is the wife, she may petition for divorce under the two above-mentioned sections of LRA 1976. However, in order to qualify to petition for divorce under those sections, the marriage must have been made no less than two years earlier and it is on the petitioner to provide evidence of the marriage's breakdown.

¹² [2008] 5 MLJ 226.

¹³ [1999] 3 AMR 2779.

As suggested by Ahmad Ibrahim, it is submitted that, to be fair to the convert as well as to the non-convert party, both should be given the same right to petition for divorce on the grounds of conversion to Islam.¹⁴ Ahmad Ibrahim emphasised that, in order to secure justice for both parties, the relevant conversion section of LRA 1976 should be amended to read: “Where one party to a marriage has converted to Islam, **either party** to the marriage may petition for divorce”.¹⁵ At the same time, according to Ahmad Ibrahim, necessary amendment should also be made to the application section of the LRA 1976, i.e., Section 3(3).¹⁶

3. Rights after Divorce on Conversion of the Husband to Islam

Section 51(2) of the LRA 1976 provides that the Court upon dissolving the marriage may make provisions for the wife or husband and for the support, care and custody of the children, if any, of the marriage, and may attach as it sees fit any conditions to the decree of the dissolution. Based on the above provision, there are certain rights that can be claimed by the wife: namely, the right to matrimonial property, maintenance of wife and the custody of children. These rights of the wife will be discussed below.

3.1. Right to Matrimonial Property (*Harta Sepencarian*)

The right to matrimonial property is provided for under Section 76 of the LRA 1976, which gives the Civil Court the power to order the division of matrimonial assets. At the same time, provisions under the Islamic Family Law Act/Enactments also empower the Shari‘ah Court to order division of *harta sepencarian*, i.e., matrimonial assets. The concept of *harta sepencarian* under Islamic Family Law is similar to that of the matrimonial assets under the LRA 1976 although they differ in some practical details.¹⁷

The principle of division of matrimonial property was applied in the case of *Koh Yian Geok v. Zulkifli Tan Abdullah*.¹⁸ It was held that the marriage was dissolved upon conversion of the respondent to Islam. As for the

¹⁴ Ahmad Ibrahim: “The need to amend Section 51 of the Law Reform (Marriage and Divorce) Act 1976”, 1 *MLJ* (1990) Iviii.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Najibah Mohd Zin, “Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law”, *LR* (2007) 65.

¹⁸ [1995] 2 AMR 1525.

claim of ancillary reliefs, after deliberating the laws of division of matrimonial property under Section 76 of the LRA 1976 and the evidence adduced, the court decided that the petitioner was entitled to the beneficial owner of the matrimonial property and the respondent was to deliver vacant possession of the same and the respondent was to return the set of jewellery to the petitioner and its equivalent value of the time of purchase.

It is submitted that in the case of conversion of one party to Islam there is no conflict between the LRA 1976 and Shari'ah in the division of matrimonial property as the provisions of both laws are the same except in matters concerning the Employee Provident Fund (EPF) and insurance. This is because the Shari'ah Courts in Malaysia do not recognize assets in EPF and insurance as matrimonial property, while the Civil Courts recognize them as matrimonial property.¹⁹

3.2. *Right to Maintenance*

Section 77 of the LRA 1976 provides that a court may order a man to pay maintenance to his wife or former wife. The same section also provides that the court can order a woman to pay maintenance to her husband or former husband if he is partially or wholly incapacitated from earning a livelihood.²⁰

The above provisions show that a husband is obliged to give maintenance to his wife during the subsistence of their marriage and this obligation continues after dissolution of the marriage. Under the LRA 1976, the husband is responsible for his former wife's maintenance until her remarriage or if she is adulterous.²¹ These provisions are contrary to the principles of maintenance under Islamic Law. In Islam, the obligation of a Muslim husband to pay maintenance to his former wife will end upon expiry of the period called *'iddah* which is generally about three months. Moreover, in Islam, a Muslim wife is not obliged to give maintenance to her husband under whatsoever situation, even if he is either physically or mentally incapacitated.

The question arises as to how to resolve the above conflict of law on the principle of maintenance between the Shari'ah and the LRA 1976. It is not

¹⁹ Now the Shari'ah courts in some States in Malaysia recognize that EPF as *harta sepencarian*; see Najibah Mohd Zin, "Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law", *LR* (2007) 65.

²⁰ Section 77(2) of the LRA.

²¹ Section 82 of the LRA, 1976.

easy to resolve such a conflict as it involves two different principles of law. In Malaysian courts, the practice thus far seems to decide in favour of the non-convert wife by recognizing her rights to claim for her ancillary reliefs after the conversion of her husband to Islam. However, in the earlier case of *Letchumy v. Ramadeson*²² Vohrah J. states:

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

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

Not long after the decision in Letchumy's case, another case with the same issue was brought to the Civil Court for its deliberation, and the decision in the case of Letchumy had been commented and criticized.²³ In *Tan Sung Mooi v. Too Miew Kim*,²⁴ the Supreme Court held that:

By looking to the intention of the Parliament while enacting Section 51(2), i.e., to give protection to the non-Muslim spouse and children against the Muslim convert, the court therefore, has a jurisdiction to hear and determine the ancillary status despite the fact that the divorce was not granted under Section 51.

Nuraisyah observes that the judge in the above case construed the application of the LRA 1976 differently and held that the LRA 1976 only applies to non-Muslims and non-Muslim marriages. She further remarks that the word 'Muslim' in Section 3(3) of the LRA 1976 was construed as a Muslim at the time of the marriage and not at the time the case was petitioned. Thus, the judge in the above case held that since the convert spouse was not a Muslim at the time of the marriage, he shall be governed under the LRA 1976.²⁵

²² [1984] 1 MLJ 143.

²³ *Tan Sung Mooi v. Too Miew Kim* [1994] 3 MLJ 117.

²⁴ [1994] 3 MLJ 117.

²⁵ Nuraisyah Chua Abdullah, "Conversion to Islam—Effect on Status of Marriages and Ancillary Reliefs", *ILBS* (2004) 22-23.

The above case shows that the Malaysian Civil High Courts have jurisdiction to hear and determine the ancillary issues including maintenance of the wife. The LRA 1976, i.e., Section 51, is clearly intended to provide ancillary relief to the non-Muslim spouse to avoid injustice being caused to the wife in particular. Judge Dato' Faiza Thamby Chik has stated that: "conversion to Islam cannot be used as a ground for avoiding (a Muslim convert's) legal obligation under the non-Muslim marriage".²⁶

However, one should note that the legislature as well as the judiciary in their eagerness to ensure justice for the non-Muslim wife must also equally ensure that the right of the convert wife is protected. Thus, under the LRA 1976, she is entitled to her maintenance after the expiry of the period of *'iddah* from her non-Muslim husband until her right to maintenance ceases. However, under Section 77(2), the convert wife can be ordered by the court to pay maintenance to her non-convert husband if he is partially or wholly incapacitated from earning a livelihood. As stressed above, this is contrary to Islamic law where a Muslim wife is not obliged to pay maintenance to her former husband. It is felt that this provision is unfair to the wife as a woman to be responsible for her husband's maintenance. One cannot imagine that the wife would convert to Islam in order to evade her responsibilities and duties specified under the LRA 1976 as normally alleged in the case of the convert husband. However, no case has been reported with regard to application of the above provision.

3.3. *Right to Child Custody*

Both the LRA 1976 and the Shari'ah state that custody of the child should be decided based on the interest or welfare of the child. The welfare of the child is paramount in determining the custodial rights after divorce including if the marriage is dissolved because of the conversion.²⁷ Both laws also recognize that the custody of a younger child should be given to the mother because mothers are thought to be more affectionate and loving to children. Furthermore, a mother is more experience and knowledgeable in handling a small infant, especially in cases where an infant is being breastfed. Section 88 of the LRA 1976 states: "There shall be a rebuttable

²⁶ Faiza Thamby Chik, "Legal Effect of Conversion to Islam: An Experience from the Malaysian Court," A Keynote Address, International Family Law Conference 2007 (16-17 January 2007), organized by the IIUM and Department of Shari'ah Judiciary Malaysia, p. 5.

²⁷ Section 88 of the LRA and Section 87 of the Islamic Family Law Act.

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

In the case of *Yip Fook Tai v. Manjit Singh S/O Mohar Singh @ Mohammad Iskandar Manjit Bin Abdullah*,²⁸ it was held that order of custody could be made by the court. However, in deciding custody of the children, whether it should be given to the converted or non-converted party, consideration on the welfare of the child is still paramount. Thus, the elder daughter in this case remained with the convert father while custody of the younger child was given to the mother.

Based on the welfare principle, in *Nur Aishah Suk Bte Abdullah @ Sukwinder Kaur A/P Sajhan Singh v. Harjeet Singh*,²⁹ after taking into account the report of the welfare officer concerning the background of both parties and considering the child's welfare, the court decided that custody of the child should be given to the applicant, i.e., the converted mother. In the case of *Genga Devi Chelliah v. Santanam Damodaram*,³⁰ the husband converted to Islam. His wife was dissatisfied with the decision made by the Shari'ah Court Alor Setar, Kedah to give custody of their only child to the husband. The wife then tried to obtain a declaration that the order made by the Shari'ah court should be overturned. In this case the court that:

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

One can observe that Malaysian courts, in deciding upon child custody cases, base their rulings on the child's welfare as well as on other factors, e.g. such as education, religion, culture, financial stability, health, care and support, attitudes of the parents and others. In the case of *Shamala Sathiyaseelan v. Dr Jeyaganesh C. Mogarajah*,³¹ the court awarded custody to the mother, while giving access to the father. The court held that the right of religious practice of the two infant children shall be exercised equally by both parents as laid out in the Guardianship of Infants Act 1961.

²⁸ [1990] 2 CLJ 605.

²⁹ [2000] 7 MLJ 547.

³⁰ [2001] 2 CLJ 359.

³¹ [2007] 2 MLJ 798.

4. Suggestions and Recommendation

Section 51(1) of the LRA 1976 only allows the non-convert party to petition for divorce. It is submitted that, as already suggested by many, both the convert and the non-convert must be given the same right to petition for divorce on the grounds of conversion to Islam. Thus, Sections 51(1) and (2) of the LRA 1976 need to be amended to allow the convert party to petition for divorce.

It is suggested that the Civil, but not Shari'ah, Court should have the power to dissolve a marriage in the case of conversion because, since the marriage was contracted under the LRA 1976, only the Civil Court can hear and decide upon the case. At present, as ruled upon by the Federal Court in the case of *Subashini*, the State's Shari'ah Courts do not have jurisdiction over non-Muslims. Likewise, in matters which fall within the State's Shari'ah Court jurisdiction, the Civil High Courts have no jurisdiction over Muslims. Moreover, Section 3(3) of the LRA 1976 clearly excludes its application to Muslims. Under the current structure of the legal system in Malaysia, and also because of Article 121(1A) of the Federal Constitution,³² perhaps setting up a special tribunal to resolve matters that arise from conversion to Islam might provide the best solution for issues regarding the court's jurisdiction.

It is proposed that a special tribunal set up for the purpose of cases involving conversion to Islam must comprise both Muslim and non-Muslim experts and experienced judges. Such a tribunal is considered to provide the best solution to avoid overlapping of jurisdictions between Shari'ah and Civil Courts. In this regard, new laws, rules and regulations must be introduced for the purpose of setting up the proposed tribunal. This is important because when one spouse in a non-Muslim marriage converts to Islam, all issues such as maintenance, custody, matrimonial property and inheritance must be settled or decided upon immediately. Any duties and liabilities of the convert husband that are still due for the wife should be settled before or at the time when the marriage is dissolved.

It is submitted that regarding a wife's right to custody of their child(ren), the existing provisions are adequate, as the issue is based on the principle of child welfare that is recognized under both Muslim and non-Muslim law. When deciding which parent should be awarded custody, the court

³² Art. 121(1A) of the Federal Constitution excludes the jurisdiction of the civil courts on any matter within the jurisdiction of the Shari'ah Courts.

should consider all factors and base its decision on which parent will be better able to provide care and protection for the child. It is suggested that joint custody, as arranged in other jurisdictions such as Australia, should be practised by the Malaysian courts to encourage both parties to work together for the child's best upbringing.

It has been suggested that Section 3(3) of the LRA 1976 specify that, consistent with Section 51 of the LRA 1976, the courts may make any ruling relating to pertinent matters, including the division of matrimonial property, maintenance for the wife, custody and maintenance for the children and all ancillary claims after divorce.³³ This is important to safeguard the rights of a non-convert spouse, usually the wife, after the husband has converted to Islam.

It is also suggested that the court be able to order the convert husband to pay maintenance to his non-Muslim wife not only during the period of *iddah* but also even after expiration of that period. It is not contrary to the principles of the Shari'ah if, after divorce, the wife is exposed to hardship and unable to maintain herself especially if she does not receive any support from her own family.³⁴ One can adopt the opinion of Hanafi scholars who favour transferring property in the form of financial support to the divorced wife to safeguard her welfare. Furthermore, unlike the case of a Muslim wife, there might not be such a family support system responsible for the financial support of a non-Muslim wife after divorce.³⁵ Payment can be in the form of a one-off, instead of monthly, payment or in the form of a consolatory gift/payment.

5. Conclusion

To ensure that the wife's rights are protected in the case of conversion to Islam, review of relevant laws relating to conversion to Islam is needed. More importantly, Sections 3(3) and 51(1) and (2) of the LRA 1976 should be amended to allow the convert spouse to petition for divorce and subsequently to allow his wife to apply for ancillary claims after divorce.

³³ Memorandum on safeguarding the rights of wives and children upon conversion of their husbands to Islam, submitted by the Joint Action Group for Gender Equality (JAG), 5 February 2007.

³⁴ Najibah Mohd Zin, "Resolving the conflicts in family disputes involving conversion of a spouse to Islam under the Malaysian law", *LR* (2007) 65.

³⁵ *Ibid.*

Accordingly, other relevant provisions need to be reviewed and amended. Without clear provisions regarding converts to Islam, the wife's rights in family law, whether she is non-Muslim or Muslim, will not be safeguarded. Furthermore, to ensure that due right is given to the wife, it is the Malaysian judiciary's task to evaluate the facts and decide according upon the correct principles of both laws, i.e., the LRA 1976 and Shari'ah law. It is felt that the best solution for cases involving conversion to Islam is to settle any disputes/conflicts between the parties involved amicably. This matter can be resolved amicably through ADR processes such as mediation (*sulh*) or arbitration (*tahkim*) rather than through the process of litigation.