



**CHANGE OF RELIGION:  
EFFECTS ON MARRIAGE AND MAINTENANCE  
OBLIGATION-JUDICIAL RESPONSE IN MALAYSIA**

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## AUTHOR DECLARATION

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I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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## **ABSTRAK**

Kajian ini memberi penekanan terhadap isu pertukaran agama di dalam senario Malaysia. Kajian ini menggunakan kajian perpustakaan sepanjang tempoh kajian ini berlangsung. Kajian yang telah dibuat adalah untuk memberikan perbandingan bagaimana mahkamah membuat penghakiman mereka berkenaan dengan permasalahan ini. Selain itu, kajian ini memberi prinsip asas untuk mengenalpasti sama ada Mahkamah Syariah mahupun Mahkamah Sivil mempunyai bidang kuasa ketika berlakunya pertukaran agama sama ada pihak yang terbabit itu Muslim ataupun sebaliknya. Selanjutnya, kajian ini memberikan pemahaman yang lebih baik mengenai pertukaran agama melalui penghakiman yang telahpun diputuskan oleh mahkamah. Disepanjang kajian ini, penulis akan menghuraikan serta menjelajah permasalahan yang sering timbul mengenai pertukaran agama dalam ruang lingkup masyarakat Malaysia.

## **ABSTRACT**

This study emphasizes on the change of religion in the scenario of Malaysia. The writer uses the library research in this study. The study tries to make a comparison on how the court made their decision pertaining to this matter. Besides that, the study gave the general principles to identify whether Syariah Court or Civil Court have the jurisdiction when it comes to the issue of change of religion either by Muslim or Non-Muslim. Furthermore, this study seeks way to better understanding about the change of religion in Malaysia based on judicial response. Through this study, the writer will describe and explore the problems that existed regarding the change of religion among the Malaysian.

## ملخص البحث

هذه الدراسة تأكيد على تغيير الدين في سيناريو ماليزيا. يستعمل الكاتب بحث المكتبة في هذه الدراسة. الدراسة أن تجعل المحاولات لعمل المقارنة هكذا جعلت محكمة قرارهم يخصّ إلى هذه المسألة. إضافة إلى ذلك، أعطت الدراسة المبادئ العامة للتمييز سواء محكمة شريعة أو محكمة مدنية هما السلطة القضائية عندما يتعلق الأمر بقضية تغيير الدين أمّا من قبل المسلم أو غير المسلم. علاوة على ذلك، تريد هذه الدراسة طريقاً أن يحسّن أوضاع الفهم حول تغيير الدين في ماليزيا مستند على الرد القضائي. خلال هذه الدراسة، الكاتب سيصف ويستكشف المشاكل التي وجدت بخصوص تغيير الدين بين الماليزي.

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## Glossary

bigamy	: the offence of marrying someone while already married to another person
decree nisi	: a conditional decree of divorce, nullity or presumption of death. For most purposes the parties to the marriage are still married until the decree is made absolute
fasakh	: annulment of a marriage by reason of any circumstance permitted by the Islamic law
fatwa	: a legal decision on hukum syara' issued by a mujtahid
ipso facto	: dissolve on the spot
kitabiyah	: a woman whose ancestors were from Bani Ya'kub; or a Christian woman whose ancestors were Christians before the prophethood of the Prophet Muhammad; or a Jewess whose ancestors were Jews before the prophethood of the Prophet Isa
muta'ah	: consolatory gift that is reasonable according to Hukum Syara' which given to the divorced wife
hadhanah	: custody
Hadith	: the words, action, silent that relate to Prophet
redress	: remedy
Sahabah.	: companions
Shahada	: submission

## ABBREVIATION

AMR	All Malaysian Reports
CLJ	Current Law Journal
H	hijriyyah
MLJ	Malayan Law Journal
n.a	no author/no artist
n.d	No date
p.	Page
p.b.u.h	Peace be upon him
SAW	salla Allāh alayh wa sallam
SWT	subhānahu wa ta'ālā
vol.	Volume

## PROPOSAL

### **Background Of The Study**

The consequence of Moorthy's case or Moorthy @ Mohamad Abdullah has given controversy especially to the position and jurisdiction of Syariah Court and Civil Court. Moreover, it has touched many aspects including the constitution. This controversy is attention-grabbing because there are points of view that he is not a Muslim. But the Syariah High Court of Kuala Lumpur decided that Moorthy must be buried according to Hukum Syarak because he has been registered as a Muslim at Majlis Agama Islam Wilayah Persekutuan.

### **Statement To The Problem**

The main concern of this study is to find out how change of religion gives effects on marriage and maintenance.

### **Purpose Of The Study**

The purpose of the study is to identify whether Syariah Court or Civil Court have the jurisdiction when it comes to the issue of change of religion either by Muslim or Non-Muslim. Does the action of change of religion will effect on one status? For example, will it effect on his identity, validity of the marriage, obligation and personal possession?

### **Significance Of The Study**

This study seeks way to better understanding about the change of religion in Malaysia based on judicial response. It will emphasize on the cases that been decided by court either by Syariah Court or Civil Court. It will shows the way of judges decide those cases based on the evidence that bring up to the court. Through this study, the writer will describe and explore the problems that existed about the change of religion among the Malaysian.

### **Limitations Of The Study**

This study is limited to only judicial response in Malaysia. The writer will bring up the current cases that happened in Malaysia.

### **Review Of Literature**

According to Ahmad Ibrahim in *The Administration of Islamic Laws In Malaysia*, a person who has embraced Islam is still bound by his former personal law. Where one of the parties has embraced Islam and the other does not, it may be said that the marriage has broken down. It will be difficult for the parties to live together as there are many duties and obligations on a Muslim which cannot be carried together by the couple. Moreover, there may be problems relating to the custody, upbringing and education of the children and the right of succession on death.

Then Mimi Kamariah Majid in her book *Family Law In Malaysia*, if a non-Muslim couple converts to Islam simultaneously, they remain as husband and wife. A joint conversion or a simultaneously conversion occurs when one party recites the required verses before the other party completes reciting his. If a man converts to Islam, his wife has a period of three months to follow suit. Failing to do so, their marriage will dissolve from the moment the husband converts.

Hamid Jusoh in *Kedudukan Undang-Undang Islam Dalam Perlembagaan Malaysia : Suatu Rujukan Khas Terhadap Kes-Kes Konversi Dalam Undang-Undang Keluarga*, mentioned that usually someone convert to Islam as their faith or else intentionally convert to it to marry the Muslim. Both of these situations has emergence a conflict to the Malaysian Legal System.

**Research Methodology**

In undertaking this academic research, the writer has make use of one method of research only which is obtaining information from library research. In order to get more information and references, the writer do some research in a number of public and universities libraries such as National Library, Islamic Center, USIM, UKM and UIAM. The writer uses the secondary data collection plan such as journals, books, magazines and websites.

# CHAPTER 1

## CHAPTER 1

### AN OVERVIEW ON CHANGE OF RELIGION IN MALAYSIA

#### 1.1 Introduction

Religion and matters of faith play powerful roles in everyone's lives, including the lives of nonbelievers.<sup>1</sup> Meanwhile, conversion is understood differently in different religious and social contexts. What Christians call conversion or 'metanoia', Muslim would probably call 'submission' and Buddhists would speak of 'Going for Refuge'. In some countries (Egypt and some other Muslim countries, and until recently, Nepal) conversion is forbidden by law while other societies we encounter 'rice bowl conversion'.<sup>2</sup>

Islam require the act of submission to Allah to be made in the presence of witnesses, but clearly more than a recitation of the *shahada* – There is no god but God and Mohammed is His messenger – is envisaged. A convert is also expected to say yes to the full tradition of Quranic teaching, hadith and Syariah.<sup>3</sup>

When it comes to change of religion, it will automatically relate with laws. In fact, the provision is only stated that the change of religion is from or to Islam only on its implication.<sup>4</sup> There is no provision that mention about change of religion from other than Islam to another religion which is not Islam.

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<sup>1</sup> Roger J.R. Levesque. 2002. *Not By Faith Alone: Religion, Law And Adolescence*. New York: New York University Press. p. 159

<sup>2</sup> Christopher Lamb. 1999. *Religious: Contemporary Practices And Controversies*. London: Cassel. p.6-7

<sup>3</sup> *ibid.* p.8

<sup>4</sup> Dr. Hassan Bin Abd Rahman. 2006. "Kesan Pertukaran Agama Dari Menurut Perspektif Perundangan Malaysia". (Paper). *Pertukaran Agama Dan Kesan Dari Perspektif Syariah & Perundangan*. Kolej Universiti Islam Antarabangsa Selangor, Selangor Darul Ehsan. 15 July. p. 1.

Hence, the discussion will prolong to the effect of change of religion (from Islam to other religion) and other religion to Islam. The act of change of religion will give impact on one's status such as his identity, marriage status, obligation and also subject matter including the conflict of jurisdiction which court has the power to dispute the matter regarding the Muslim and the non-Muslim.

The problems will arise in many dimensions. This is the effect of the Item 1 of the state list states that Syariah Courts shall have jurisdiction only over persons professing the religion of Islam.<sup>5</sup> In fact, the law in Malaysia makes statutory provision for the mode of conversion to Islam, but there is no statutory provision for conversion to any other religion.<sup>6</sup>

With this background, change of religion according to the Malaysian law can be seen in the aspect of the personal law such as family law and inheritance.

When someone changes his religion, it will change his religion status that consequently relates with laws upon him. For example, if he is a Buddhist then the Law Reform (Marriage and Divorce) Act 1976 hereinafter LRA is affected on him. Once he is a Muslim, the LRA will no longer have an effect on him. In addition, this matter also has an effect on his obligation to others and vice versa.

Section 108 from the Administration of The Religion of Islam (State of Selangor) Enactment 2003 stated that by moment of conversion to the religion of Islam:

A person is converted to the religion of Islam and becomes a Muslim as soon as he finished uttering the two clauses of the Affirmation of faith provided that the requirement of Section 107

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<sup>5</sup> Farid Sufian Shuaib. 2003. *Powers And Jurisdiction Of Syariah Courts In Malaysia*. Singapore: Lexis Nexis. p. 89.

<sup>6</sup> Ahmad Mohamed Ibrahim. 2000. *The Administration Of Islamic Law In Malaysia*. Kuala Lumpur: IKIM. p. 332

are fulfilled; and that person shall thereupon be referred to as a muallaf.

From the same Enactment, Section 109 provided the duties and obligations of a (muallaf) that professes as a Muslim:

From the moment of his conversion, a muallaf becomes subject to same duties and obligations as any other Muslim

Next, Section 113 (1) and 113 (2) of the same enactment mentioned the recognition of Muallafs as Muslim:

(1) A person who has converted to the religion of Islam and has been registered in the Register of Muallafs shall, for the purposes of any Federal or state law, and for all time, be treated as a Muslim

(2) A person whose conversion to the religion of Islam has been registered under any law of any state shall, for all purposes in the State of Selangor and for the purposes of implementing the provisions of any law in the State of Selangor, be treated as a Muslim

Hence, if a convert (muallaf) that was registered during his life past away and there is no heir (also Muslim) that will bury him accordance to syarak, and then it is a responsibility to Muslim society or religious authority to deal with it.

## 1.2 Right To Freedom Of Religion

The modern concept of freedom of religion is the product of the Universal Declaration of Human Rights (UDHR) of United Nations (UN) of 1948 which are being applied through constitutional as well as international law. Hence, the international guarantee of freedom of religion in 2001 is 53 years old only.<sup>7</sup>

In Malaysia, conflicts and tensions that have rocked the federation have taken various forms. Some have been ethnic in nature, while others have been based on regional interest, religion, culture and development.<sup>8</sup> In most cases, conflicts and tension have been the result of interplay of several factors, instead of being based entirely on any one factor alone.

According to Article 3(1) of the Federal Constitution mentioned that:

Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation

Article 3 of the Federal Constitution declares that Islam is the religion of the federation. That provision was added to the original draft of the Reid Constitutional Commission upon the recommendation of the Alliance Party. The recommendation from the Alliance Party was accepted and the Article 3 has appeared with the necessary qualification that other religions may be practised in peace and harmony in any part of the federation<sup>9</sup>.

The infant who is below 18 years old do not had capacity to choose his or her own religion. In the case of *Teoh Eng Huat v Kadhi Pasir Mas & Anor*<sup>10</sup>, it is the right of the father and lawful guardian to decide religion, education and upbringing of infant. As the

<sup>7</sup> Dr. Abm. Mahbulul Islam. 2002. *Freedom Of Religion In Shariah: A Comparative Analysis*. Kuala Lumpur: A.S Noordeen. p. 55

<sup>8</sup> Jayum A. Jawan. 2003. *Malaysian Politics & Government*. Selangor: Karisma Publication. p. 104

<sup>9</sup> Wan Arfah Hamzah. 2003. *An Introduction To The Malaysian Legal System*. Selangor: Penerbit Fajar Bakti. p. 143

<sup>10</sup> [1990] 2 MLJ 300

law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes major.<sup>11</sup> In short, a person under 18 years old does not have right to choose his or her own religion and in the case of non-Muslim, the parent or the guardian normally has the choice of the minor's religion.

Article 11 contains the right to freedom of religion which, under the provision, consisted of (i) the right to profess (ii) to practice and (iii) to propagate one's religion. It is to be noted that the rights under Article 11 may be claimed by both individuals and groups. Unlike the preceding provision, the rights under Article 11 are available to persons, citizens and non-citizen alike. Apart from the above rights, an individual also has the right not to be compelled to pay any tax that may be used, wholly or in part, for the purposes of a religion other than his or her own.

Article 11(3) provides that every religious group has the right (i) to manage its own religious affairs, (ii) to establish and maintain institutions for religious and charitable purposes and (iii) to acquire and own property and hold and administer it in accordance with law.

It appears that the right to religious freedom under Article 11 is subject to certain limitations such as to the position of Islam and the Muslims as well as the legal restrictions pertaining to public order, public health or morality. What appear to be limitation on the basis of Islam is the prohibition of propagating religions other than Islam to Muslim to be found in the Article 11(4). It is to be noted that the constitution does not provide similar provision for the non-Muslim. Given the limitations to be found in Article 11(5) this view seems viable but the end result still favours Islam which, coincidentally, is in line with the history and socio-political realities in country.

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<sup>11</sup> Tun Dato' Seri Abdul Hamid Omar. 1996. *On The Bench: Judgments Of Tun Abdul Hamid Omar*. Selangor: Pelanduk Publications. p. 219

On religious pluralism, no compulsion in religion, freedom of religion, freedom to change religion and duty of the Muslim to obey Islamic injunctions and order their lives and to structure their social and political life according to the command of Allah SWT there are clear verses of the Quran. They are set out below in three different classifications according to the subject matter dealt with by them.

In the holy Quran mentioned about freedom of religion or no compulsion in religion:

“Let there be no compulsion in religion: Truth stands out clear  
from error”<sup>12</sup>

In the other verse, it is mentioned about freedom to change one’s religion and the consequences for changing from Islam to another religion:

“And if any of you turn back from their faith and die in unbelief,  
their works will bear no fruit in this life and the hereafter: They  
will be companions of the fire and will abide therein”<sup>13</sup>

Then it is a Muslim’s duty to obey the injunctions of the Quran and Sunnah, the duty to propagate Islam, and the duty to order, and the right to be enabled to order life according to Islamic injunctions:

“O you who believe! Obey God, and obey the Messenger, and  
those charged with authority among you. If you differ in any  
anything among yourselves, refer it to God and His messenger, if  
you do believe in God and the Last Day: That is the best and most  
suitable for final determination”<sup>14</sup>

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<sup>12</sup> Al-Quran. Al-Baqarah 2:256

<sup>13</sup> Al-Baqarah 2:217

<sup>14</sup> Al-Nisaa 4:59

### 1.3 The Scenario In Malaysia

Malaysia has maintained as an excellent record of religious harmony, understanding, respect and tolerance for each other's religious beliefs and practices. It is imperative to keep the momentum of this tranquil environment in order to sustain and strengthen political and social stability, and peace and understanding for achieving all round progress.<sup>15</sup>

Legislation has been enacted in some countries whereby conversion to Islam by either of the spouses would not *ipso facto* dissolve the marriage. Rather such legislation allows the unconverted spouse to petition for divorce.<sup>16</sup>

The case of *Kalliamal vs Majlis Agama Islam Wilayah Persekutuan, Hospital Kuala Lumpur and Government of Malaysia*<sup>17</sup> is the best example to refer the effect on identity. In this case, M. Moorthy (Mohamad Bin Abdullah) has been buried according to Hukum Syarak based on the decision of Syariah High Court of Kuala Lumpur. The argument that being upheld that he (Moorthy) has been registered as a convert (muallaf) at Majlis Agama Islam Wilayah Persekutuan. Meanwhile if there is a person that originally a Muslim practice the way of life contrary to Islam such as worships other god than Allah and do acting of devotion like a Buddhists, whenever he passed away the responsibility to handle his corpse according to Islam is no longer on the Islamic Religious authority but to his heir which is non-Muslim.

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<sup>15</sup>Mohammed Imam. 1994. "Freedom Of Religion Under Federal Constitution Of Malaysia- A Reappraisal". [1994] 2 CLJ. p. 1x

<sup>16</sup>Muhammad Altaf Hussain Ahangar. 1994. "Effects Of Change Of Religion On Marriage And Maintenance Obligation: Judicial Responses In Malaysia". *IIUM Law Journal*. Selangor: IIUM Press. Vol. 4. No. 1 & 2. p.127

<sup>17</sup>Dr. Hassan Bin Abd Rahman. 2006. "Kesan Pertukaran Agama Dari Menurut Perspektif Perundangan Malaysia". (Paper). *Pertukaran Agama Dan Kesan Dari Perspektif Syariah & Perundangan*. Kolej Universiti Islam Antarabangsa Selangor, Selangor Darul Ehsan. 15 July. p. 3.

In the case of *Nyonya Tahir*<sup>18</sup> that happened in Negeri Sembilan early in year 2006 has clearly show that the Syariah High Court of Seremban held that she was not a Muslim at the time she passed away. Her family handed over her corpse according to the Buddha's ritual.

However, the written law that existed convokes heated discussion in ascertaining the status of one when he or she (who is a Muslim) claims that he or she is no longer a Muslim without the declaration from the Syariah Court which has the jurisdiction in it.

In the case of *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors*<sup>19</sup>, the appellant which is a Muslim had renounced Islam and embraced Christianity. Thereupon the appellant applied to change her Muslim name in her NRIC into Lina Joy. After the second application, she was successful to change her name and proceeded to efface the word "Islam" in her NRIC. However, the Appeal Court dismissed the appeal.

The case of *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*<sup>20</sup>, the appellant who was brought up as a Sikh has converted to Islam without the knowledge and consent of his widowed mother while he was still a minor. Upon reaching 21 years of age, he went through a baptism ceremony into the Sikh faith, thereby renouncing Islam. He then executed a deed poll in which he declared unequivocally that he was a Sikh. Subsequently, he filed an originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim. Counsel for the Jabatan Agama Islam Kedah raised a preliminary objection against the application contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the syariah courts. The learned High Court judge upheld the objection and dismissed the application. The appellant appealed.

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<sup>18</sup> Kes No. 05100-099-0021-2006

<sup>19</sup> [2005] 4 CLJ 666

<sup>20</sup> [1999] 1 MLJ 489

In the case of *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor*<sup>21</sup>, this appeal arose from the dismissal by the High Court Penang on 16 October 1991 of an application by the appellant for a declaration that her son, Gurdev Singh s/o Guruvak Singh, was at the time of his death on 3 October 1991 not a Muslim and had renounced the Islamic faith and also for the consequential declaration that she was entitled to claim the body of the deceased from the district hospital mortuary, Bukit Mertajam.

#### 1.4 The Problems Arose Due To Change Of Religion

Whenever someone has converted to Islam, it will warrant their immediate governance by the rules of Islamic law. The rules of Islamic law will be consisting of every sphere of life such as marriage, worship, obligatory alms (zakat) and so on.

Succession is concerned with the transfer of property on death, particularly through disposition by will and succession on intestacy. Although accounts of law traditionally deal with wills before intestacy is relatively compact and far less extensive than the law relating to wills.<sup>22</sup>

On the death of any person issues arise both in relation to the administration of his or her estate and relation to succession, that is to say, to the distribution of the deceased's property. In regard to the administration of the estate of the deceased, debts will have to be dealt with and matters of maintenance in relation to potential beneficiaries may arise.<sup>23</sup> This can be seen in the case of *Majlis Agama Islam Wilayah Persekutuan lwn Lim Ee Seng & satu lagi*.<sup>24</sup>

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<sup>21</sup> [1992]1 MLJ 7

<sup>22</sup> Andrew Barkowski. 2002. *Textbook On Succession*. New York: Oxford University Press. 2<sup>nd</sup> Edition. p.1

<sup>23</sup> RH Hickling. 1995. *Conflicts Of Laws In Malaysia*. Kuala Lumpur: Butterworth. p. 198

<sup>24</sup> [2000] 2 CLJ 597

# CHAPTER 2

## CHAPTER 2

### JUDICIAL RESPONSE: EFFECTS OF CONVERSION ON MARRIAGE

#### 2.1 Introduction

Issues pertaining to religion are always sensitive among the Malaysian public, what more when there involves a Muslim abdicate his religion.<sup>25</sup> In a multi-religious society like Malaysia, conversion from one religion to another is not a new phenomenon.

Since Islam is the religion of the Federation, conversion to Islam is actually propagated and encouraged. However, conversion in itself does not terminate a marriage which was contracted under the non-Muslim law but one party must apply to the court to have it terminated. This is where Section 51 of the LRA plays an important role.<sup>26</sup>

It is generally assumed that according to Sunni School of law, a Muslim man may marry a Muslim woman or a *kitabiyah*. A *kitabiyah* is defined as a woman who believes in a heavenly or revealed religion with a kitab or a divine book that has come down to the followers of that religion.

The validity of this rule has been challenge in the Syariah Court in Singapore in the case of *Abdul Razak v Lisia Binti Mandaai alias Maria Menado*.<sup>27</sup> Unfortunately, the judgment in that case was a consent judgment and therefore the question at issue was not argued. It appeared that in that case the wife was at the time of the marriage a

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<sup>25</sup> Suwaid Bin Tapah. 1996. "Pemeluk Islam: Perbincangan Daripada Perspektif Undang-Undang Di Malaysia". *Jurnal Syariah*. Kuala Lumpur: Fakulti Syariah Akademi Islam Universiti Malaya. Vol.. 4. No. 1. January. p. 107

<sup>26</sup> Noor Aziah Hj Mohd Awal. 1999. "Section 51 Of The Law Reform (Marriage And Divorce) Act 1976: An Overview". *IKIM Law Journal*. Kuala Lumpur: IKIM. Vol. 3. No. 2. Jul-Dec. p.127

<sup>27</sup> [1965] 1 MLJ XVI

Christian but that her ancestors were not originally Christians but were converted to Christianity after the coming of the prophet of Islam.

Islamic law allows marriage with the women of *ahl al-kitab* (people of the book) but not vice versa.<sup>28</sup> In the states of Malaya and Singapore however it would appear that a marriage between a Muslim and a non-Muslim cannot be solemnised or registered either under the Muslim law or under the civil law. The various states enactments dealing with the solemnization and registration of Muslim marriages only deal with marriages between Muslims.<sup>29</sup> It is undoubtedly true that the marriage with a non-Muslim is frowned upon in Muslim law.

## 2.2 Effect of conversion on marital status by the Islamic Law in Malaysia

Section 46, Islamic Family Law (Federal Territories) Act 1984 provided that:

- (1) The renunciation of Islam by either party to a marriage or his or her conversion to a faith other than Islam shall not by itself operate to dissolve the marriage unless and until so confirmed by the court.
- (2) 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.

Although Syariah Court has the power to dissolve this marriage, it cannot give an order to the husband such as order to give maintenance, *muta'ah*, *hadhdanah* and *harta sepencarian* (jointly acquired property). This is because the Syariah Court has no jurisdiction to the non-Muslim.

With this provision although the Syariah Court have the power to dissolve the marriage, it (Syariah Court) cannot give an order upon the apostate husband such as

<sup>28</sup> Abdur Rahman I. Doi. 1989. *Shariah: The Islamic Law*. Kuala Lumpur: A.S. Noordeen. p. 460

<sup>29</sup> Ahmad Ibrahim. 1990. "The Need To Amend Section 51 Of The Law Reform (Marriage And Divorce) Act 1976". *Malayan Law Journal*. Kuala Lumpur: xxx. 29 June 1990. p. 1viii

maintenance, muta'ah and hadhanah. This is because the Syariah Court do not have jurisdiction on the non-Muslim.

In the view of fiqh, the scholars are unanimous about this matter. According to Mazhab Syafiee, Hanbali and Maliki, if the husband or the wife apostate before the consummating, the marriage can be nullified and fasakh. This also happen whenever both of the party altogether apostate. The second situation is if they apostate after consummating, the marriage is fasakh with legal retirement (iddah). If they repented and show the action to become a Muslim during the iddah period, their marriage will be continuously. However, if they failed to believe in Islam until to the end of iddah period they must be separate. In case if there is a sexual intercourse during the iddah period, they will not convict to zina which the execution is hudud but they will receive takzir by the reason of syubhat.

According to Mazhab Hanafi, if it is confirmed about the act of apostate, both of the party must be break up. Besides that according to Imam Abu Hanifah and Imam Abu Yusuf, fasakh is directly happen without waiting the judgment from the judge.

In the leading Shafiee textbook, the *Minhaj at-Talibin* of Imam Nawawi, it is stated to the effect that:

“A non-Muslim of whatever religion who is converted to Islam while married to a woman whose religion is founded upon some holy scripture keeps her as his wife; but if she is an idolatress or fire-worshipper, and is not converted with him, separation takes place immediately *ipso facto*, where the marriage has not yet been followed by cohabitation. Otherwise the continuation of the marriage depends upon whether the woman embraces the faith before the end of her period of legal retirement (iddah). If, before the expire of this period the wife's conversion has not taken place, the marriage is considered to have been dissolved from the

husband's conversion; and the same rule is observed if it is the wife who is converted, while the husband remains in his former faith. Where on the other hand both parties embrace the faith at the same time, the marriage remains valid"

The conclusion is the laws that related with the procedure to go outward from Islam is still unfixed and not in detail. Hence, the person who desires to apostate simply cannot change his or her religion. Commonly in Malaysia, the person who wants to change his religion to other religion will not be approved by the law and consequently he is still bound to the Syariah Court.

### **2.3 Effect of conversion on marital status under LRA**

There are cases in Malaysia that show non-Muslim couples that convert to Islam. According to Islamic law, if one party converts to Islam, the wife is given three months to follow her husband converting to Islam. Otherwise, their marriage will be dissolved. But in Malaysia, the person that converts to Islam does not have the right to dissolve his marriage only if the other party makes a petition to the Civil Court.

Section 4 in the Law Reform (Marriage and Divorce) Act 1976 (hereinafter LRA) provided that:

- i) Nothing in this Act shall affect the validity of any marriage solemnised under any law, religion, custom or usage prior to the appointed date.
- ii) Such marriage, if valid under the law, religion, custom or usage under which it was solemnised, shall be deemed to be registered under this Act.
- iii) Every such marriage, unless void under the law, religion, custom or usage under which it was solemnised, shall continue until dissolved-
  - (a) by death by one of the parties

- (b) by order of a court of competent jurisdiction; or
- (c) by a decree of nullity made by a court of competent jurisdiction.

## **2.4 Decided cases**

### **2.4.1 Pedley v Majlis Agama Islam Pulau Pinang and Anor<sup>30</sup>**

Section 51(1) of Law Reform (Marriage and Divorce) Act 1976 mentioned that:

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.

In the case of *Pedley v Majlis Agama Islam Pulau Pinang and Anor*, the facts were that the plaintiff, a Roman Catholic has married a Roman Catholic lady according to Catholic rites on the 12<sup>th</sup> February 1966. On 12 January 1987 the wife embraced the religion of Islam without the plaintiff's knowledge and assumes a Muslim name.

It appeared that on the 12<sup>th</sup> April 1987 the Chief Kadi of Penang wrote to the plaintiff to the effect that his wife has embraced Islam and therefore he was advised also to follow her and embrace Islam within 90 days. The letter stated that if he not do so, the relationship between him and his wife as husband and wife would be terminated according to Islamic Law. The husband applied for a declaration that the conversion of his wife had not determined the marriage.

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<sup>30</sup> [1990] 2 MLJ 307

The learned judge of the High Court held that the assertion of the Chief Kadi did not and will not affect the plaintiff's legal position in the eyes of his own personal laws and civil laws of the country. Under the civil 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 of divorce.

The effect of a declaration by a Kadi under Section 46(2) of the Islamic Family Law (Federal Territories) Act, 1984 or its equivalent in other states has been considered in some cases in Malaysia.

The power of the court to make a declaratory judgment is discretionary. The court will not make a declaratory judgment when the question raised is purely academic. In fact, the court should not be required 'to answer academic questions'.

The judge find that the declaration request for is purely academic. The plaintiff is not going to benefit in any way from the declaration. He is not asking for any consequential relief. He is only asking for a declaration of a mere legal right.

In the view of the judge, the assertion of the said Kadi Besar did not and will not affect the plaintiff's legal position in the eyes of his own personal laws and the civil laws of the country. He will therefore not benefit in any way by the declaration prayed or request for.

Wan Adnan J therefore dismissed the application.

#### 2.4.2 U Viswalingam v S Viswalingam<sup>31</sup>

The position of *kitabiyah* under the Islamic Law in Malaysia was referred to in the English case of U Viswalingam v S Viswalingam. The facts in that case were that the husband had embraced Islam but the wife was a Christian originally from Ceylon.

The mufti of the Federal Territory gave an opinion that the marriage between the parties was dissolved under the Islamic Law as the wife was not a *Kitabiyah* and she had not agreed to follow the husband in embracing Islam. The opinion was accepted in the High Court and the Court of Appeal as laying done correctly the law relating to such a case in Malaysia.

The position under the Islamic Law in Malaysia is that if the husband or wife embraces the Islamic faith and the other party does not follow him or her during the period of iddah, the marriage automatically comes to an end. In the Islamic Law (Federal Territories) Act, 1984, it is stated however in Section 46(2) as follows:

“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”

In 1977 the wife filed her petition seeking a decree of dissolution of marriage from her husband the appellant, on the grounds of his unreasonable behaviour. It was alleged on behalf of the husband that the marriage had already ceased to exist because he had embraced the Muslim faith.

At the trial a *fatwa* from the *Mufti* of the Federal Territory of Kuala Lumpur was accepted which stated that the marriage had ceased to subsist by reason of the husband's conversion to Islam and the failure of the wife to follow suit. The learned trial judge held

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<sup>31</sup> [1980] 1 MLJ 10

that although by Malaysian Law the marriage had ceased to exist on the date of the husband's conversion to Islam.

The court in England was not bound to recognise the happenings in Malaysia as having already put an end to the marriage and, in the exercise of its residual discretion, the court should grant a decree of divorce on the ground of the husband's unreasonable behaviour and make an award of a lump sum to the wife.

Three questions arise on this answer. First, was the marriage brought to an end by the husband's conversion to Islam, according to the law of the Federal Territory? Second, if so, is this court bound to accept that the marriage has come to an end, or is there what has been called a "residual or remaining" discretion to decline recognition? Thirdly, if there is such discretion should it be exercised in favour of the husband or the wife?

Under the Shafii rules a member of the Anglican Church is not *kitabiyah*, apparently because it is held that the Anglican Church was not in existence at the time of the birth of the prophet Mohammed. Dr Yaacob (the lawyer for the husband) supported his argument by reference to a document, called a *Fatwa*, which was issued by the Mufti, the highest authority in Malaysia on such problems. Having accepted Dr Yaacob's evidence on these matters, the learned judge found as a fact that the marriage had automatically come to an end on the husband's conversion to Islam. For the purposes of this appeal we must accept this as proof of the relevant law.

In this case the material date for determining the question of domicile, in the view of the judge, is the date of the husband's conversion to Islam. 13 August 1976 at which time the learned judge found and it is not disputed, that the wife retained her domicile of choice in Malaysia, or, more precisely, in the Federal Territory. She was still intending to return to Kuala Lumpur when the boys' education in England had been completed.

Omrold LJ subsequently examined some features in the facts of the case which he thought would result in serious injustice to the wife if a change in her status were to be recognized by the court. Amongst the features were the secrecy which the husband has kept his conversion, and the unsatisfactory circumstances in which the fatwa was obtained by the husband. The appeal dismissed with costs.

### **2.4.3 Ng Siew Pian v Abd Wahid Bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu lagi<sup>32</sup>**

In the case of *Ng Siew Pian v Abd Wahid Bin Abu Hassan, Kadi Daerah Bukit Mertajam & Satu lagi*, the plaintiff and the second defendant who were Buddhists were married under the Civil Marriage Ordinance, 1952. Subsequently the husband, the second defendant embraced Islam and he applied to the Qadi's Court to annul the marriage on the ground that the plaintiff, his wife, had refused to embrace Islam with him.

The first defendant, the Qadi, gave notice to the plaintiff, to attend at the court of the Qadi. Subsequently the first defendant in the absence of the plaintiff annulled the marriage on the ground that the plaintiff had refused to follow the second defendant in embracing Islam.

The defendant husband had converted to Islam and the wife remained a Buddhist. The husband applied to the Syariah Court in Bukit Mertajam for a decree of dissolution of marriage on the ground that he had converted to Islam. The court, in the absence of the plaintiff wife, dissolved the marriage.

The plaintiff applied, inter alia, for a declaration that the Syariah Court in Bukit Mertajam had no jurisdiction to make the order of dissolution of marriage. Abdul Hamid Mohamed J decided that the relevant Syariah Court did not have jurisdiction to entertain the application of the defendant husband when he requested for dissolution of his

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<sup>32</sup> [1993] 1 CLJ 391

marriage because his wife was not a Muslim and the relevant Pulau Pinang Enactment requires both parties before the court to be Muslims.

When discussing whether the High Court had jurisdiction to do so, his Lordship referred to Section 51 and noted that Section 51 only allows the non-converting party to petition for a divorce. The converting party cannot seek a decree of divorce on the ground of his or her conversion.

In a situation like in this case, there is a lacuna in the law. The learned judge suggested that the High Court should be empowered to dissolve such a marriage since the marriage was a non-Muslim one and the Syariah Court does not have jurisdiction to dissolve such a marriage. An amendment to Section 51 is therefore urgently needed.

#### **2.4.4 Public Prosecutor V David John White Alias Abdul Rahman<sup>33</sup>**

A person who enters into a marriage relationship with a woman according to monogamous rites (the practice of being married to or having a sexual relationship with only one person at a time) takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of “husband” in a monogamous marriage and he cannot, whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognised form of marriage with another woman.

Held, applying the principle above pronounced clearly that the first marriage being a monogamous one, the accused had committed the offence of bigamy.

On 10 January 1936, his wife being alive, the accused and Miss Webb were converted to Mohammedanism by Haji Mohamed, the Kadhi of Seremban, and thereupon

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<sup>33</sup> [1940] MLJ 214

the accused and Miss Webb, having been named Abdul Rahman and Aisha respectively, were married according to Mohammedan law by the Kathi in the presence of witnesses. The accused in his statement from the dock admits the facts.

Section 494 of the Penal Code punishes the offence, known as bigamy and is in these terms:—

“Whoever, having a husband or wife living, marries in any case in which such marriage is void/not valid by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, shall also be liable to fine.

Exception. — This section does not extend to any person whose marriage, with such husband or wife, has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been beard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge.”

Horne J convicted the accused with the offence of bigamy (the offence of marrying someone while already married to another person).

#### 2.4.5 Tey Siew Choo v Teo Eng Hua<sup>34</sup>

The issue in this case are whether marriage dissolved upon Tey Siew Choo (hereinafter the petitioner) converted to Islam. Secondly, whether the marriage still subsisted and could the petitioner resort to civil law for redress or remedy.

The court held that under the Syariah law, the petitioner's marriage immediately dissolves upon her conversion because she has become subject to Muslim personal and religious laws. Notwithstanding the marriage between the petitioner and the respondent remains unaffected and still subsists. Hence, it requires a judicial pronouncement to end the marriage.

Generally, it is accepted that when only one of the parties of a non-Muslim couple embraces Islam, in the eyes of Syariah law, not only is that earlier marriage avoided against the converted person but the unconverted party loses all holds over the former unless within three months he or she follows suit.

Sections 3(3), 4 and 51(1) of the LRA and the authorities make it clear that the unconverted spouse may petition for a divorce. Section 3(3) mentioned that this Act shall not apply to Muslim or to any person who is married under Islamic law. Section 4 stated that subsisting valid marriages deemed to be registered under this Act and dissoluble only under this act.

Regardless of the change in the petitioner's religious and social status, which by itself would make it just and reasonable to pronounce a decree of dissolution, the High Court is statutorily required to have regard to one of the proofs of breakdown under Section 54 of LRA.

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<sup>34</sup> [1999] 6 CLJ

In this case, the petitioner, apart from admitting her conversion also adverted to the statutory “fact” of Section 54(1) (d) as the fact alleged as causing or leading to the breakdown of the marriage. The evidence showed, however, that the respondent had not bothered to reply her affidavit pertaining to this matter. Legally he was therefore deemed to accept that fact.

This is also meant that without that contest the petitioner had, *prima facie*, proved that the marriage had irretrievably broken down. In the circumstances, it was just and reasonable to dissolve the civil marriage. The petition allowed and marriage pronounce dissolved.

#### **2.4.6 Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor<sup>35</sup>**

This was an application by the plaintiff Hindu wife sought, inter alia, for a declaration that the conversion of her two children to Islam by the defendant husband without her consent was null and void. The marriage between the parties has been performed according to Hindu rites at a temple in Alor Setar, Kedah and the marriage has been registered under the Law Reform (Marriage and Divorce) Act 1976.

The children of the marriage were Hindus at the time of birth. The husband then converted to Islam and subsequently converted the children (who were minor) to Islam without the consent of the wife. At the outset of this hearing, the husband raised two preliminary objections where were only one was relevance herein, ie, whether this court, being a civil court, had a jurisdiction to hear this application.

The court held that the use of the singular word “parent” in both Article 12(4) of the Federal Constitution and Section 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (‘Act 505’) renders the consent of a single parent enough to

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<sup>35</sup> [2004] 2 CLJ

validate the conversion of a minor to Islam. Section 5 of the Guardianship of Infant Act 1961 ('Act 351') on equality of parental rights did not apply to the husband by virtue of Section 1(3) of the same as he was now a Muslim.

The husband was the natural father of the two children. He was also a muallaf or a person converted to Islam. The wife never questioned the validity of the husband's conversion. Article 12(4) of the Federal Constitution read in conjunction with Section 95(b) of Act 505 gave the husband as a natural parent and Muslim father the capacity to convert the two children to Islam.

The two temporary statutory Certificates of Conversion issued in respect of the two children, although temporary, were conclusive proof of the facts stated therein by virtue of Section 90 of Act 505. Section 91 of Act 505 provides that a person whose conversion to Islam has been registered in the Register of Muallafs, shall for the purposes of any Federal or State Law, and for all time, be treated as a Muslim. Section 92 of Act 505 is a written law made for the Syariah Court for the Federal Territories to determine whether a non-registered person is a muallaf.

In fact, the children in the present case were already temporarily registered as muallaf. The wife, however, was not a Muslim. Therefore, she could not take advantage of Section 92 and the Syariah Court had no jurisdiction to hear her. It was not for this court to legislate and confer jurisdiction to the Civil Court but for the parliament to provide the remedy.

The only way open to the wife was to seek the help of Majlis Agama Islam Wilayah Persekutuan since the two children were now considered as "saudara baru" or "muallaf". It followed that by Article 121(1A) of the Federal Constitution, the Syariah Court was the qualified forum to determine the status of the two children.

# CHAPTER 3

## CHAPTER 3

### JUDICIAL RESPONSE: EFFECTS OF CONVERSION ON MAINTENANCE OBLIGATION

#### 3.1 Introduction

Maintenance is the right of one's wife and children to get food, clothing, a residence and some other essential services and medicine even if the wife happens to be a rich lady.<sup>36</sup> Where both spouses are above the age of puberty, it is the duty of the husband.

In some western countries nowadays the husband supply his wife and children with food, clothes and lodging on a scale commensurate with the social position of the partners and in accordance with the customs and habits of the society in which they live.

#### 3.2 Right to maintenance

##### 3.2.1 Concept of maintenance of wives

In maintenance cases, there are some circumstances when the claimant, usually the wife, may not able to produce evidence. This is due to the fact that support is one of the infernal affairs in the marriage. While generally, women in Malaysia are more reserved and prefer not to disclose their marital problems to other people. As a consequence, some of them, who are genuine claimants, fail in their trials in upholding their rights.<sup>37</sup>

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<sup>36</sup>Abdur Rahman I. Dor. *Shariah: The Islamic Law*. Kuala Lumpur: A.S. Noordeen. p. 204

<sup>37</sup>Zaleha Kamaruddin. 2004. *Islamic Family Law: New Challenges In The 21<sup>st</sup> Century*. Kuala Lumpur: IIUM. Vol. 2. p. 217

Maintenance is an ordained duty of the husband upon his wife. Most of the great Muslim scholars have not made a stringent or exhaustive definition of support. However, it or nafaqah is described and explained by them in the light of Quranic verses, Sunnah as well as Ijma'. The Muslim scholars also unanimously agreed that it is an obligation on each husband to provide maintenance to his wife unless the latter is disobedient to her husband (nusyuz).

In the holy Quran Allah says:

*“Let the man of means spend according to his means: and the men whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He has given him”<sup>38</sup>*

This verse indicates that Allah has not burdened His servants by prescribing something which we could not afford. Accordingly, every man has to spend according to his status and wealth. This also includes the payment of maintenance where the husband pays based on his resources. This is in line with the Hadith of the Prophet (s.a.w) to the effect:

*Aishah told that Hind, a daughter of Utbah said “O Prophet! Abu Sufian does not give me and my son enough maintenance except what I take from him without his knowledge.” The prophet replied, “Take what is enough for you and your son to the extent which is recognized by law”*

This hadith is a clear injunction that the responsibility to pay maintenance is obligatory on the husband. This can be inferred by the permission of Prophet (s.a.w) to Hind to take the wealth of her husband even without his knowledge. However, can this

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<sup>38</sup> Al-Quran. Al-Talaq 65:7

act can be considered as stealing, or does this hadith allow us to steal the money in the case of emergency? The writer opines that the above hadith is only to acknowledge that if her husband fails to pay maintenance to her, a wife can make a complaint to the authority to preserve her right.

In another verse Allah says:

*“The husband shall bear the cost of their food and clothing on equitable term”<sup>39</sup>*

This verse also prescribes that it is the husband who bears maintenance of the wife and the children. The Prophet (s.a.w) also has said and narrated by Jabir Bin Abdullah, to the effect that:

*“Fear Allah regarding women. Verily your married them with trust of Allah and made their private parts lawful with the word of Allah. You have got rights over them that they entertain nobody to your bed, which you dislike. If they do this, give them beating without causing injury. They have got right over you in respect of their food and clothing according to means agreed” Sahih Al-Bukhari*

The above mentioned hadith indicates that the responsibility of the husband to pay maintenance to his wife arises from their marital bond. Based on this hadith, when the wife surrenders herself to her husband, she has the right to get her support.

### **3.2.2 Maintenance of children**

Under the law, the father is obliged to pay for the maintenance of his children. The law provides for the court to take into account the financial means of the father.

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<sup>39</sup> Al-Quran. Al-Baqarah 2:233