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# Protection of rights in divorce

Ikim Views

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## **Conversion can be no excuse for avoiding prior marriage obligations.**

WHEN a man embraces Islam just before a divorce, where will the matrimonial property go? This difficult question is only the tip of the iceberg of the current legal limbo in issues relating to conversion.

This and various other questions need to be answered, because in cases of conversion of one party to the marriage, the effect of the conversion is colossal - especially on other persons (spouse and children) who have some rights vested in them before the conversion.

Under the Law Reform (Marriage and Divorce) Act, 1976, the court has the power, when granting a decree of divorce, to order the division of property acquired by them during the marriage. The division of property does not involve any legal conflict because the division of the respective parties' acquired properties during their civil marriage does not involve the element of faith.

The genesis of the current legal route to solve this problem can be found in a 1994 Supreme Court (now renamed Federal Court) decision of Tang Sung Mooi vs Too Miew Kim. The appellant wife in this case had petitioned for a divorce in 1991 on the ground that the marriage had irretrievably broken down and was granted a decree by the High Court.

Pending the *decree nisi* being made absolute, she filed an application against the respondent under sections 76 and 77 of the Law Reform (Marriage and Divorce) Act, 1976 (LRA), Act 164 for an order of division of matrimonial property and for maintenance, respectively.

The respondent opposed the application because he had converted to Islam subsequent to the divorce but before the petitioner's application for an order for division of matrimonial assets and for maintenance. He contended that being a Muslim, the High Court no longer had jurisdiction over him and only the Syariah Court had jurisdiction in respect of matters ancillary to the divorce.

The Supreme Court decided that the High Court had jurisdiction to hear the application for ancillary relief, and explained two reasons for deciding the way it did.

Justice Mohamed Dzaidin SCCJ, delivering the judgment of the court, said the legislative intention of section 3 must be construed within the framework and the general purpose of the Act.

Section 3 (1) states that except as otherwise expressly provided, the Act applies to all persons in Malaysia and those domiciled in Malaysia. Section 3 (3) provides that the Act shall not apply to Muslims or Muslim marriages and only non-Muslim marriages may be solemnised or registered.

This, according to His Lordship, meant that the Act applied only to non-Muslim marriages, pointing out that both parties were non-Muslims when they contracted the marriage.

It follows that as the petitioner's application under sections 76 and 77 concerned matters affecting both parties' legal obligations as non-Muslims and incidental to the granting of the divorce, the High Court would have jurisdiction to hear and determine the ancillary proceedings despite the fact that the respondent's contention that in view of the opening words of sub-section 3 the Act shall not apply to a Muslim.

The court noted that the High Court had exercised its jurisdiction under section 24 (a) of the Courts of Judicature Act, 1964, which provides that the jurisdiction shall include "...jurisdiction under any written law relating to divorce and matrimonial matters..."

For the second reason, the learned judge referred to the wording of section 51 of the LRA 1976. It states there that where one party to a marriage has converted to Islam, the other party who has not converted may petition for divorce, and the court upon dissolving the marriage may make provision for the wife or husband and for the support, care and custody of the children of the marriage.

The Supreme Court further held that the High Court had jurisdiction to grant the wife an order for ancillary relief and that section 3 is not unconstitutional. According to his Lordship, the Parliament, in enacting section 51 (2), must have had in mind to give protection to non-Muslim spouses and the children of the marriage as a result of one party converting to Islam.

The court also pointed out that, perhaps in the Parliament's desire to accord such protection of the law, it failed to foresee a situation such as in this case where the parties remained non-Muslims until the marriage was dissolved, and then only one party converted to Islam.

His Lordship further contended that it would result in grave injustice to non-Muslim spouses and children, whose only remedy would be in the civil courts if the High Court no longer had jurisdiction, since the Syariah courts did not have jurisdiction over non-Muslims.

This important decision was followed in 1995 due to the principle of binding precedent in the case of Koh Yian Geok vs Zulkifli Tan bin Abdullah, where the petitioner wife sought a divorce on the ground of her husband's conversion to Islam. She also sought various ancillary orders pertaining to assets acquired during the marriage.

The High Court in this case did not have to deal with the question of its jurisdiction, and went on to dissolve the marriage and to decide on the division of assets.

It further dispels some allegations, especially those made by the Royal Commission on Non-Muslim Family Law Reform which drafted the Act that "married individuals, nearly always men, converted to Islam only to escape their obligations under their existing marriages."

Professor Tan Sri Ahmad Ibrahim in his comments on the judgment of Tang Sung Mooi's case agreed that insofar as the Act shall not apply to non-Muslims, it is consistent with Article 11 (1) of the Malaysian Constitution which provides that every person has the right to profess and practise his religion.

Although the clause (1A) of Article 121 has taken away the jurisdiction of the High Court, the Syariah court does not have jurisdiction over the petitioner who is a non-Muslim. Thus according to him Article 121 (1A) of the Constitution does not affect the jurisdiction of the High Court to hear the application under sections 76 and 77 of the Act.

To solve this inter-jurisdictional issue in relation to the division of matrimonial property out of conversion, it is best that the language of sections 3 and 5 of Act 164 be amended for precision so that it may be interpreted judiciously by the court.

Although conversion is a very sensitive issue in multi-religious and multi-cultural Malaysia, it should not be an excuse to not do anything.