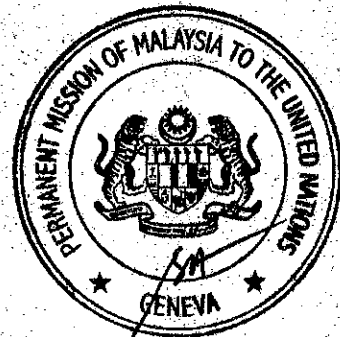


**FI 1/2017**

The Permanent Mission of Malaysia to the United Nations Office and Other International Organizations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and with reference to the Joint Communication, Ref: AL MYS 4/2016 of 18 April 2016, received from the Chairperson – Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on violence against women, its causes and consequences; and Special Rapporteur on freedom of religion or belief, has the honour to enclose herewith, the response from the Government of Malaysia to the aforementioned Joint Communication.

The Permanent Mission of Malaysia to the United Nations Office and Other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.



Geneva, 23 February 2017

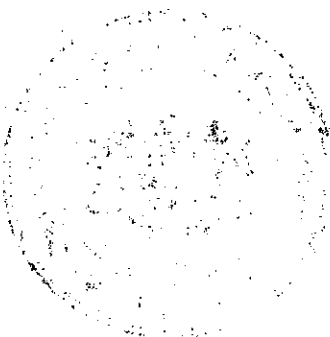
**Office of the High Commissioner for Human Rights  
Geneva**

Special Procedures Branch  
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**OHCHR REGISTRY**

**24 FEB 2017**

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**ISSUE 2 - The consequences of the decision taken by the Federal Court in the case of Ms. [REDACTED], which may justify and legitimize acts of gender-based violence as Ms. [REDACTED] history of abuse by her former husband as well as the alleged violent abduction of her son by him were not given due consideration during the judicial process regarding the custody of her children, and the lack of action from the Malaysian authorities including the police after Ms. [REDACTED] reported acts of abuse and domestic violence several times between 2007 and 2012**

3. The Government would like to reiterate that in deciding the issue of custody in the case of Ms. [REDACTED] the Federal Court has considered the welfare of the child as the first and paramount consideration as provided for under subsections 88(2) and (3) of Act 164 and to be weighted together with other relevant factors which are as follows:

- 3.1. the conduct of the parties;
- 3.2. financial and social status of the parties;
- 3.3. the sex and age of the child;
- 3.4. the child's wishes as far as they could be ascertained depending on the age of the child;
- 3.5. the confidential reports of a social welfare officer; and
- 3.6. 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 the other.

4. The children were interviewed in the Judge's chambers privately to determine their wishes and preferences of the custody order. In the circumstances, the court varied the custody order made by the High Court and decided that the custody of the first child remains with Ms. [REDACTED] while custody of the youngest child to be with her former husband.

**ISSUE 3 - In both cases, the abovementioned judicial decisions violate the equal rights and responsibilities of women in matters relating to their children and may impinge upon children's exercise of freedom of religion or belief**

5. The Government wishes to stress that based on the factors that had been taken into consideration by the Federal Court in Ms. [REDACTED] case, it is clear that there is no violation on the equal rights and responsibilities of women in matters relating to their children since the gender of the parents is not the only factor for the court to consider in deciding the custody of the child. In this respect, the child's welfare is the first and paramount consideration in determining the custody of the child. Therefore, the decision was made after taking into account various relevant factors for the best interest of the child. In addition, the Federal Court had also taken into consideration the presumption that custody of a child below the age of seven years would be better off with his/her mother unless there is change of circumstances to rebut that presumption as provided for under subsection 88(3) of Act 164.

6. The allegation that the decisions violate the equal rights and responsibilities of women in matters relating to their children is baseless. The rights of access to both children were granted to both parents and the Court had decided as follows:

*"With regard to right of access to both children, it is commendable that the parties have managed to work out the terms and accordingly we have recorded a consent order on the terms as agreed by the parties. Similarly, the parties have agreed that the monthly maintenance order of RM500 to be paid by the ex-husband to the ex-wife be varied to RM250, as [REDACTED] is now with the father since the order was made."*

**ISSUE 4 - The unilateral religious conversion of a child by only one parent, without the knowledge or the consent of the other one who is not converting, undermines Ms. [REDACTED] and Ms. [REDACTED]'s equal rights as parents in matters relating to their children**

7. The Federal Constitution guarantees freedom of religion under Article 11. However, with regard to the religion of a person under the age of eighteen years, Clause (4) of Article 12 of the Federal Constitution provides that it shall be decided by his parent or guardian.

8. The word "parent" has been defined by the Federal Court in the case of Subashini a/p Rajasingam v. Saravanan Thangathoray & Other Appeal [2008] 2 CLJ 1 ("Subashini's case") to mean a single parent. In this respect, the Federal Court has decided as follows:

*"Either husband or wife had the right to convert a child of the marriage to Islam. The word 'parent' in art 12(4) of the Federal Constitution, which stated that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. Therefore, art 12(4) must not be read as entrenching the right to choice of religion in both parents."*

9. The Court of Appeal in the case of [REDACTED] v. [REDACTED] & [REDACTED] ("[REDACTED] case") had also followed the decision on the interpretation of the word 'parent' in [REDACTED] case.

10. Based on the abovementioned cases, the Federal Constitution clearly provides that the religion of a person under the age of eighteen years may be decided by his/her parent or guardian.

**ISSUE 5 - Existence of an inconsistent dual legal system of civil and Syariah law, especially regulating marriage and family matters, which results in gender-based discrimination against Ms. [REDACTED] and Ms. [REDACTED] in these areas, by undermining their access to justice and right to remedy as well as their equal rights in matters relating to their children and their custody**

11. In Malaysia, by virtue of Clauses (1) and (2) of Article 74 of the Federal Constitution, the civil law and the Syariah law co-exist as a parallel legal system. Under the Federal Constitution, the constitution, organization and procedure of the civil court and Syariah court are subject to the power and jurisdiction of the Federal and the State respectively. Further, the Ninth Schedule of the Federal Constitution provides that the civil court will have jurisdiction over all persons in the Federation whilst the Syariah court only over persons professing the religion of Islam.

12. In this regard, for the purpose of Syariah law, the power of the State Legislature to make laws are confined to "Islamic law and personal and family law of persons professing the religion of Islam" and this includes inter alia, succession, betrothal, marriage, divorce, maintenance, adoption, guardianship, trusts, Islamic religious revenue and mosques. With regard to Islamic criminal offences, the State Legislature may only make laws "for creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List".

13. In order to clearly determine the jurisdiction of the civil court and the Syariah court in Malaysia, the Parliament had inserted Clause (1A) to Article 121 of the Federal Constitution which came into effect on 10 June 1988. The amendment is inserted to prevent conflicting jurisdiction between the civil court and Syariah court. Hence, the civil court is prevented from interfering with the matters that fall within the jurisdiction of the Syariah court.

14. The Federal Court in [REDACTED] case decided that Clause (1A) of Article 121 was introduced not for the purpose of ousting jurisdiction of the civil court. It was introduced in order to avoid any conflict between the decision of the Syariah court and the civil court which had occurred in a number of cases before.

15. Based on the above authorities, it is clear that the insertion of Clause (1A) of Article 121 of the Federal Constitution is to prevent future conflict between the civil court and Syariah court. In this respect, the civil court shall have no jurisdiction to vary, amend or interfere with the decision of the Syariah court.

16. Therefore, the Government contends that there is no inconsistency of the dual legal system of civil law and religion-based law that results in the violation of women's rights to equality in law, to access justice, to remedy and non-discrimination in marriage and family relationship.

17. In addition, with regard to the allegation that non-Muslims are not able to seek redress before the Syariah Court nor a civil court and undermines their access to

justice, the Government would like to highlight the decision of the Court of Appeal in the case of Kalliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors [2011] 2 CLJ 165 as follows:

*"[19] The assumption that a non-Muslim is barred from suing in the Syariah Court, arises from the provision that the Syariah Court has no jurisdiction over non-Muslims. Whether this assumption stands up to scrutiny turns upon Item 1 List II of the Federal Constitution which states as follows:*

*... the constitution, organisation and procedure of Syariah Courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph....*

*[20] The question of jurisdiction however relates to the power of the court to exercise compulsive authority over a person or on a subject matter.*

*[21] The fact that a person who seeks relief in a Syariah Court may not be a person who is subject to the compulsive authority of the Syariah Court would not, in our view, preclude such person from going to the Syariah Court to try to obtain relief. In this case the appellant is not prevented from applying to the Syariah Court to try to set aside the ex parte Order made by it, giving the said court occasion to address the relevant issue concerned and deliver a fair and just decision in accordance with the religion of Islam and Islamic law."*

18. Based on the above authority, although the Syariah Court has no jurisdiction over non-Muslims, non-Muslims are not prevented from applying to the Syariah Court to try to set aside any order made by the Syariah Court.

**ISSUE 6 - Detailed information on the measures that the Malaysian authorities intend to take to ensure that Ms. [REDACTED] and Ms. [REDACTED] have access to justice and to remedy, and therefore, able to exercise their equal rights in matters relating to their children, as set in international human rights law**

19. All matters pertaining to non-Muslim marriages and ancillary reliefs are provided for under Act 164. Therefore, any aggrieved party can seek for remedy and redress as provided for under the Act.

20. In relation to the above, Malaysia notes the references made to international instruments on this matter, particularly to Article 8 of the Universal Declaration of Human Rights ("UDHR") which provides for the rights of all individuals to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to the individual by the constitution or by law. Further, Article 4 (d) of the United Nations Declaration on the Elimination of Violence against Women stipulates that

*Education Act 1996 in the year 2002, primary education in Malaysia is made compulsory. In addition, the Government of Malaysia provides monetary aid and other forms of assistance to those who are eligible."*

24. Article 14 of the CRC sets out the right of the child to freedom of religion and as outlined in paragraph 3, the right to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

25. Article 14(2) obligates the States to "respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child".

26. As stated in issue 4 above, freedom of religion in Malaysia is constitutionally guaranteed under Article 11 of the Federal Constitution. The religion of a person under the age of eighteen years is nonetheless governed by clause (4) of Article 12 of the Federal Constitution which provides that it shall be decided by his/her parent or guardian.

27. In relation to this, apart from Subashini's case, the Supreme Court in Teoh Eng Huat v. The Kadhi of Pasir Mas, Kelantan & Anor [1990] 1 CLJ (Rep) 277 held as follows:

*"In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instructions relating to any other religion than his own without the permission of the parent or guardian.*

*Reverting to the issue before this Court, the crucial question remains whether the subject, an infant at the time of conversion, had legal capacity according to law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is civil law. We do not agree with the learned Judge's decision that the subject although below 18 had capacity to choose her own religion. As the 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 a major. In short, we hold that a person under 18 does not have that right and in the case of non-Muslims the parent or guardian normally have the choice of the minor's religion."*

women who are subjected to violence should be provided with access to the mechanisms of justice and as provided for by national legislation, to just and effective remedies for the harm that they have suffered.

21. In addressing issues pertaining to interfaith custody conflicts between Muslim and non-Muslim parents, the Government has tabled a bill in Parliament on 21 November 2016 to amend the Law Reform (Marriage and Divorce) Act 1976. The amendments which are being deliberated on seek to put in place legal safeguards against unilateral conversions of minors to Islam include a new provision for the religion of the child as follows:-

- 21.1. the insertion of Section 88A (1) which stipulates that if a parent converts to Islam, the religion of their children shall remain the same, unless both parents have agreed to the conversion of the children to Islam;
- 21.2. their children are also free to choose their religion once they reach 18 years of age;
- 21.3. Section 51 (1) of the Act will be amended by removing the clause: "Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce". The amendment will see a new section, Section 51 (1) and (2), which allows "either party" or "both parties" to file a divorce petition. The words of Section 3 will also be amended for the same purpose; and
- 21.4. on inheritance, a new provision, Section 51A, will be introduced to allow the next-of-kin of the person who converts to Islam, who dies before the marriage is dissolved under the civil law, to have the right to inherit the matrimonial assets.

**ISSUE 7 - Information on the measures taken to ensure that the children of Ms. [REDACTED] and of Ms. [REDACTED] can exercise their right of freedom of religion or belief**

22. Malaysia notes the reference made to the Convention on the Rights of the Child (CRC), which Malaysia acceded to on 17 February 1995. Malaysia's current reservation to CRC is as follows:

*"The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia."*

23. In relation to Article 28 (1) (a), Malaysia has made a declaration as follows:

*"With respect to article 28 paragraph 1 (a) of the Convention, the Government of Malaysia wishes to declare that with the amendment to the*



**ISSUE 8 - Detailed information on any measures taken, such as legal reform, to avoid any violation of women's rights to equality and non-discrimination in marriage and family relationships deriving from the existence of a Malaysian dual legal system, between civil law and Syariah law, in light of international human rights legal standards**

28. With regard to the references made to the international human rights legal standards on this matter, the Government emphasizes that as a State Party to the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), Malaysia respects and ensures the rights provided under the CEDAW subject to reservations made.

29. At present, Malaysia's existing reservations on CEDAW include Article 16 (1) (a), (c), (f) and (g) which concern certain rights relating to equality and marriage in family relations. The reservations were made on the grounds that the said provisions are not compatible with the Federal Constitution and Islamic law as codified in all States in Malaysia.

30. The Government further notes the concluding comments of the CEDAW committee on Malaysia on discrimination against women, particularly in the field of marriage and family relations due to the existence of the dual legal system of civil law and Syariah law as well urging Malaysia to undertake a process of law reform to remove inconsistencies between civil law and Syariah law.

31. Currently, the spouse who has converted to Islam does not have the equal right to petition for divorce in civil court under Act 164. The right to dissolve such marriage is only given to the spouse who has not converted into Islam. Therefore, so long as the spouse who has not converted into Islam does not file a petition for divorce in the civil court, the civil marriage of the spouses still subsists under Act 164.

32. Since the spouse who has converted to Islam does not have the right to file a petition for divorce under Act 164, he/she does not have the right to make an application for other ancillary reliefs such as maintenance, custody of children, and division of matrimonial assets. As Act 164 does not provide remedies for the converting spouse, remedies are sought by filing an application for divorce and other ancillary reliefs in the Syariah court.

33. In order to address the issue arising out of the conversion to Islam of one party to a marriage, amendments have been proposed in regard to Act 164, the Administration of Islamic Law (Federal Territories) Act 1993 [Act 505] and the Islamic Family Law (Federal Territories) Act 1984 [Act 303] to resolve issues of jurisdictional conflicts between the Syariah and civil courts.

