The Paradox of Women’s Rights: Malaysia’s Struggle Towards Legal and Religious Pluralism

by

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ABSTRACT

Family is the foundation society. Women are the backbone of families even in fundamental patriarchal society like Malaysia. However, Malaysia’s system of religious accommodation results in different rights available to individuals based on the states diverse religious affiliation. Contemporary family issues are inadequately addressed in current Malaysian Family Law: one for the Muslims and one for the non-Muslims. Most cases highlighted inconsistencies when conversion to Islam affected the rights of women during breakdown of marriage. In permitting a path to accommodate diversity, and to reach a new engagement between the civil and the Shariah courts, it is necessary to appreciate Malaysia’s history, sentiment, constraints and strengths. This paper proposes that not only Malaysia has adequate strengths to provide a strong platform to address the conflict, but possesses the mechanisms to create a dynamic set of joint governance of Family Laws to enhance religious accommodation.
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I. Introduction

Family is a foundation of a society. Women are always the backbone of families even in fundamental patriarchal society like Malaysia. Contemporary family issues especially in breakdown of families are not adequately addressed in current Malaysian Family Laws; one for the Muslims and one for the non-Muslims. Most cases highlighted inconsistencies when conversion to Islam affected the rights of women during breakdown of marriage. The objective of this paper is to establish that Malaysia does not only have adequate strengths to provide a good platform to address the conflict of dual Family Laws, but possesses the necessary facilities and mechanisms to create a dynamic set of joint governance of Family Laws to achieve religious accommodation. In pursuing this argument, this paper is divided into six key topics. Following the introduction, Part II provides an overview of legal and religious pluralism in Malaysia. The historic development of the dual legal system of justice, and a few court’s decisions and the issues faced by the women in particular, when the husbands whom they married under the civil law, convert to Islam, and without the consent of their non-Muslim spouse, convert the minor children as well. Part III will examine the state of Islamic Family Law in Malaysia, and focuses the essential validity of Muslim marriage and the law on conversion to Islam. Part IV will discuss the important elements of child custody or hadanah; the rulings of the Islamic religious scholars in traditional Islamic Family Law and the law applicable in Malaysia pertaining to child custody, together with child custody rights for the non-Muslims under the Malaysian statutes. Subsequently, the constraints and the strengths of
the present Islamic laws in Malaysia will be discussed in Part V. In Part VI and the concluding section, a response to legal and religious pluralism will be explored, together with institutional options. Taking into account the present mechanisms and facilities, Malaysia is able to propose a joint governance of Family Law to attain a true religious accommodation, thus resolving one of the most sensitive conflicts of laws lingering family institution the past decades.

Islam is a private and sensitive matter in Malaysia. Because it is private, to obtain public mileage to gain stronger support to put enough pressure on the government to reform the Family Laws is a daunting process. While the lack of urgency to reform by the policy makers is perceived to be because these are problems ‘between individuals’ or ‘personal’ in nature, the real struggle faced by the policy makers is to address the problems of multi ethnics societies who had adopted a pluralist system of justice in its attempt to preserve its diverse communities. To reform the present predicament to promote religious accommodation for Malaysia demands strategic approach, tackling not only the formal institutions, but informal institutions; which includes gender and cultural constraints, and historical contexts.

In September 2009, a paper, ‘Women And Religion’,¹ highlighted the lacuna in Malaysian Family Laws; disputes when one spouse in a civil marriage converts to the religion of Islam. Upon embracing Islam, “[t]he Muslim spouse becomes subject to

Islamic law and the Syariah courts while the non-Muslim spouse will continue to be governed by the civil law administered by the civil courts”.\(^2\) The conflict of laws was brought up in two highly controversial cases involving ethnic Hindu women, Shamala\(^3\) and Subashini\(^4\), in which “[t]he willingness of the civil courts to defer to, and thereby enlarge the jurisdiction of, the syariah courts has caused intense alarm amongst non-Muslims”.\(^5\) Both of the women had failed in their attempt to persuade the civil court to rule “that their newly-converted Muslim husbands’ secret and unilateral conversion to Islam of their infant children was invalid, and that they should be given custody of their children”.\(^6\) The ruling of the cases left non-Muslim spouse without any civil recourse, a dilemma lingering the future of non-Muslim families in multi-ethnic and multi-religious Malaysia.

There were attempts to conduct open forums by the Malaysian Bar Council to highlight the hardship caused to the non-Muslim spouse and children, and to propose a reform, however, strong protests from the pro-Islamists or Malay-Muslim movements had hindered productive discussions on the issues.\(^7\) The government is struggling to meet the pressing demand by the non-Muslim minorities and to manage the sensitivities of the Muslims or pro-Islamists groups who often feel provoked or threatened whenever Islam

\(^2\) Ibid at 21
\(^3\) Shamala a/p Sathiyaseelan v Dr. Jeyaganesh a/l C Mogarajah (also known as Muhammad Ridzwan bin Mogarajah) & Anor [2011] 2 MLJ 281. See also the High Court decision in Shamala Sathiyaseelan v Dr. Jeyaganesh C Mogarajah & Anor [2004] 2 MLJ 648
\(^4\) Subashini Rajasingam v Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1
\(^5\) Whiting, Amanda, ‘Gendered Vulnerabilities And The Juridification Of Identity In Malaysia”, Asia Insights: June 2008 1; ProQuest Research Library page 25 - 27
\(^6\) Ibid at 25
\(^7\) Debra Chong, “The Day The Loudest Won The Day…Or Did They?” The Malaysian Insider (9th August 2008), Online The Malaysian Insider <http://www.themalaysianinsider.com/malaysia/article/The-day-the-loudest-won-the-day...-or-did-they>
becomes a subject of public or open debate. Essentially, the call for reform is to enhance recognition of the rights of the non-Muslim spouse, especially women and children, because the current legal provisions in both the civil and Islamic Family Laws in Malaysia are not adequate to resolve some contemporary issues. One of Siraj’s recommendations is that the “[e]xisting laws must be amended to give specific jurisdiction in these cases or new laws may need to be passed”.\(^8\) Unfortunately, “despite numerous conventions and meetings between the government, non-governmental organisations (NGOs) and legal practitioners, there seems to be no satisfactory solution to the rising number of child custody disputes, especially between Muslims and non-Muslims”.\(^9\) Highlighting “[l]ack of political will and courage may be hindering the proposed amendments to Family Laws,”\(^10\) Siraj adds that “she had often been told by cabinet ministers that Family Law is about disputes between individuals and that the government was giving attention to other more pressing issues”.\(^11\)

Even if disputes between spouses are private matters between individuals - Family Law, a branch of law that regulates one of the most fundamental institutions in the society, is in itself a complex area of law that not only implicates the rights and responsibilities of individuals in the sphere of their home, but intimate relationships between spouses and children as well. Family Law detailed the rights and duties between spouses, and between

\(^8\) Supra note 1 at 21  
\(^10\) Ibid  
\(^11\) Ibid
parents and children, during and upon dissolution of a marriage. Therefore, when marriage falls apart, families, who are already broken down and confronted with emotional and economic hardships, are further judged by the conduct of one spouse. In most cases, women, who are already vulnerable and not full equals in a traditionally entrenched patriarchal society, suffer the most. Upon a spouse’s change of religion, the legal demand to protect the children’s welfare and best interests, recognised in international instruments and protected by statutes, no longer becomes the paramount consideration. The widest possible protection and assistance by the state, accorded to the children upon the divorced of their parents, are taken away by the conduct of another spouse.

The impact of these cases become worse when the unfavourable ruling against the non-Muslim spouse become a debate for further political cause. While the government sought ways to foster unity among Malaysians through various initiatives and campaigns to promote national identity and encourage integration amongst ethnicities, the legal framework, failed to do so. Islamic values like tolerance and religious accommodation now seems authoritative and arbitrary. Further, the call for reform is also to prevent Islam from abuse as an escapism for non-Muslim spouse, to claim protection by way of conversion of religion, to claim custody and rights not available to the person, as a non-Muslim. When victims of such dispute are unable to obtain adequate recourse from the civil court, legal practitioners and judiciary are also placed in awkward positions. Therefore, in a multi ethnic religious country with pluralist system of justice like Malaysia, the challenge is to propose a joint governance of Family Laws, that is dynamic and nuanced to accommodate personal choice of individuals. Given the chance to explore
and be more creative, Islam is not only able to solve contemporary problems of a pluralist society in a more open and resourceful manner, but Malaysia may be a good model on how a majority Muslim state is able to promote religious accommodation in the twenty first century.

II. Legal and Religious Pluralism in Malaysia, An Overview

The composition of three main racial groupings: the ethnic Malays who are the majority, the Chinese and the Indians together with other smaller ethnicities\textsuperscript{12}, has formed Malaysia as one of the most diverse and unique country in Asia. Ethnic Malays are Muslims. Meanwhile the ethnic Chinese and Indians are mainly Christians, Buddhists or Hindus. There are also Chinese, Indians, and other ethnic groups, who were born Muslim or embraced Islam. Islamic laws or \textit{Mohamaden} law and the local customs (\textit{adat}) has long been incorporated by the Malay rulers before colonisation. Fernando notes that the colonisation of the British, the application of the common law legal system in Malaysia and the intentions of the framers of the Malaysian constitution, had modified the existing Islamic structure based on revelation and customs, to a secular state.\textsuperscript{13} However, Malaysia is identified as a Muslim country because not only the majority of the population are Muslim, but “[i]f not for the British arriving on the Peninsula and exercising its influence on the Malay States, the Muslim laws would have ended up becoming the law of

\textsuperscript{12} Includes the indigenous ethnic in East of Malaysia or Borneo
Malaya”. Moreover, Islam’s position is further strengthened when the Malaysian Constitution recognises that Islam is the religion of the Federation even though other religions may be practised in peace and harmony in Malaysia, and Islam remains predominant and stands as an important institution in Malaysia. Although limited, the Constitution guarantees the implementation of Islamic law, together with the establishment of various Islamic institutions under the jurisdiction of the States. Because of the presence of other ethnicities and religions in Malaysia, freedom to profess and practice one’s religion is also a fundamental liberty protected by the Constitution.

Historically, one of the first recorded instances of ethnic and religious pluralism in Malaysia (then Malaya) began as early as the 15th century, when the Sultan of Malacca, Parameswara, embraced Islam, followed by the “laypeople and traders” in Malacca.

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15 Article 3 Federal Constitution of Malaysia - Religion of the Federation
Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation
17 The Muslims are governed by Islamic personal laws-that consists of family laws in respect of marriage, divorce, custody and guardianship, maintenance of children, matrimonial properties, and alimony. It includes the laws of succession, for instance, probate and administration, relating to distribution, as well as trust deed. There are also provisions on Shariah criminal laws, even though the conducts that constitutes crime within the criminal sphere, are conducts that demonstrates violation of the pillars of Islam, and this includes apostasy, not fasting during the Ramadan, not attending Friday prayers for men, or limited and confined to offences in respect of polygamous marriage, close proximity, indecent dressing and behaviour.
18 The Islamic institutions in Malaysia are the Shariah Courts and the Islamic religious councils such as the Baitulmal, Fatwa and Wakaf
19 Supra note 16 at 287
20 Article 11 Federal Constitution of Malaysia – Freedom of Religion
(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.
There is no compulsion for them to convert to Islam, as states by Yeoh, “[d]espite being the predominant religion in the kingdom of Malacca, Islam was not imposed upon its people and foreign traders, allowing people with different religions to co-exist together.”

Then, the second wave of pluralism followed during the colonization period, when the British invited the ethnic Chinese from China and the ethnic Hindus from India to work in the mining and plantation industries. At that time, the British let the ethnic Malays to remain in villages to work in the agricultural sector or for those educated, in the government sector, as part of their strategy to perpetuate dependency of the British policy, for fear that they will master the trade and rebel against the British. The ‘divide and rule’ ethnic policy strategized by the British had caused tremendous social and economic impacts; ethnic groups were divided according to economic needs and demands. The segregation had also caused a long term negative impact to the Malay Muslims, especially when the uneven economic distribution between ethnic groups had caused unrest leading to the May 1969 riot, which was the peak of their dissatisfaction towards poverty and poor economic arrangements. The ethnic and religious division initiated by the British had left long term impact on Malaysia’s legal and religious pluralism, when Malaysia is still struggling to find the best formula to balance the needs of all the citizens.

Apart from the socio-economic arrangement, the legal system was also modified by the British to support their policies and economic interests. The British preserved the power held by the Malay rulers, who were willing to co-operate with the British as long as the Ruler’s position as the head of Islam in their state was not compromised. As a result,

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22 Ibid at 4
the personal laws for the Muslims remain within the respective Malay states, while the
British created the common law legal institutions to adjudicate commercial and criminal
matters. A state of “legal pluralism” in Malaysia was therefore formed, as defined by
Kamal, “refers to a situation in which the state law co-exists with other laws, such as
customary law, religious law, and international treaties - officially recognized or
otherwise” or ”simply defined, legal pluralism refers to a situation in which two or more
laws interact.”

According to Shuaib “[i]n applying this principle, the British decided that
most issues involving criminal and commercial law would be resolved by the British
common law”. “However, certain issues, including issues concerning Muslim family
matters, were to be governed by Islamic law”. There were still connections between
Islamic law and common law as the Islamic law “disputes were resolved by the same
courts that resolved questions of civil law, which were staffed by British or British-trained
judges, who were instructed to apply Islamic law as best they could”. The segregation
did have its setback because while English common law developed in Malaya, Shuaib
claims “[a]ll these caused the Islamic law to be marginalized and hence Syariah courts
were also marginalized”. He further argues “[a]s a result, the Syariah court only tried
matters related to marriages and crimes such as failure to perform the congregational

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23 Kamali, Mohammad Hashim “Diversity and Pluralism, A Quranic Perspective” IAIS Journal 1 text 27
page 27 – 54 at page 50
Online <http://www.ICRplutojournals.com>
1, page 85-113 at page 88 citing Zainur bin Zakaria, The Legal System of Malaysia, in Asean Legal Systems
77 (1995)
25 Ibid
26 Ibid
Supplementary Series at page xli-lii at page xliii
Friday prayer and failure to fast during the month of Ramadhan”.

The situation continues when Malaysia obtained independence in 1957, where each state, according to Shuaib, “is free to establish its own version of Islamic law, and is free to establish its own state Islamic courts to adjudicate disputes arising under the state’s Islamic laws”.

Pre and post-independence religious pluralism had created a dual and multi-tiered family law legal system in Malaysia. The framework of the legal system in Malaysia is unique because the Muslim personal laws are governed under the Islamic laws while the non-Muslims personal laws are governed under the customary laws of the respective ethnics, which was later codified in the Law Reform Marriage and Divorce Act 1976 (“the LRA”). Siraj explains “[f]or non-Muslims there were then in force five statutes on marriage, an additional statute for the registration of marriage, and three for the dissolution of marriage, as well as the customary laws of the Chinese and Hindus and the natives of Sabah and Sarawak”. Siraj further claims that the need for reform of family law for the non-Muslims was to address issues in particular polygamous marriage which was allowed by the Chinese customs. Therefore, she further points out “[i]n 1971, a Royal Commission was appointed to study the existing laws and to propose amendments to reform and unify the marriage and divorce laws applicable to non-Muslims throughout

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28 Ibid
29 Supra note 23 at 91
31 Ibid at 562
Malaysia”\textsuperscript{32}. The study had resulted in a codification of the LRA for the non-Muslims, “which repealed all statutes on marriage and divorce”\textsuperscript{33}

In the earlier years of independence, there were no major issue on legal and religious pluralism in Malaysia. Despite challenges and struggles between different ethnicities, differences were overcome when Malaysians began to understand and appreciate each other’s faith and religious practices. The increased understanding of each religion’s ideologies and principles has led to a much tolerant society and it has become a pride of multi religious and multi ethnic Malaysian society. One theory is that in the earlier years after independence, the Shariah institution and Islamic laws were much weaker compared to the civil institution. Shuaib points out “[a]fter independence Syariah courts were marginalised because its administration prior to independence was maintained,”\textsuperscript{34} nevertheless, the courts “still lack in its human resource budgetary allocation”,\textsuperscript{35} and “still [lack] in terms of its officers, procedures and implementation of its orders”.\textsuperscript{36} The marginalisation of the Shariah courts, before and after independence, and that the Shariah’s appeal were still heard at the civil courts, had placed Shariah courts as secondary or perceived to be a lesser degree of hierarchy compared to the civil courts.

Because there were no clear jurisdiction between the civil courts and the Shariah courts, a series of civil court decisions in the 1970s had created embarrassing situations when the civil court Judges were not equipped with knowledge on Islamic laws, and had

\textsuperscript{32} Ibid at 563  
\textsuperscript{33} Ibid at 563  
\textsuperscript{34} Supra note 27 at page xliv  
\textsuperscript{35} Supra note 27 at page xliv  
\textsuperscript{36} Supra note 27 at page xliv
to deliver rulings on matters concerning Muslims and Islamic properties, or *wakaf*.\(^{37}\) To bring an end to the problem, and to avoid future conflict between the decisions of the Shariah Courts and the Civil Courts, in 1988 the legislature passed Article 121 (1A) of the Federal Constitution\(^{38}\). The objective of the Article 121(1A) is to manage the dissatisfaction of the decisions of the civil courts on matters that involves Islamic subject. The effect of Article 121(1A) is that a dual legal system was developed; the civil courts’ jurisdiction in respect to any matter within the jurisdiction of the Shariah courts was stripped, while exclusive jurisdiction given to the Shariah Courts to administer Islamic laws in the respective states. Both courts are now independent and operates separately from each other.

According to Ngo, “[t]he dual system of laws works perfectly well when lines are clearly demarcated and families stay within those lines”,\(^{39}\) “however the lines began to blur when one party to a civil marriage decides to convert to Islam and the other spouse

\(^{37}\) Section 2 Administration of Islamic (Federal Territories) Act 1993 defines and divides wakaf into two categories: ‘*Wakaf am*’ means a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognized by Islamic Law, and the property so dedicated; ‘*Wakaf khas*’ means a dedication in perpetuity or for a limited period of capital of property for religious or charitable purposes recognized by Islamic Law, and the property so dedicated, the income of the property being paid to persons or for purposes prescribed in the wakaf.

\(^{38}\) Article 121 Federal Constitution of Malaysia- Judicial power of the Federation.

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely –

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah courts.

The situation is made worse when a non-Muslim who converts to Islam while still legally married under civil law may attain custody rights unavailable to (and to the detriment of) the non-Muslim partner. As a result, the act of one spouse, whether intentionally or not, has reduced, deprived or diminished the existing rights of the non-Muslim spouse, and women and minor aged children are the ones who are disadvantaged by the inequalities enshrined in the diverse system of justice accommodated by the state.

Htun and Weldon claim that “[h]istorically, institutionalised relations between the state on the one hand, and organized religion, clans and cultural groups, on the other hand, have endowed the latter with authority over family law”, and because of that, a significant number of countries still uphold sexist family laws. A survey in Htun’s and Weldon’s research states that Malaysia is one of the countries which “apply strict version[s] of Islamic religious law in family matters” that still “keep many discriminatory laws on the books over the last four decades”. Although in theory, Malaysian women have equal opportunity, in reality, women regardless of ethnicities, have fewer opportunities than men in education, employment, property rights, political participation, and they are more vulnerable to physical violence, sexual and emotional abuse. Gender inequality, the struggle usually associated amongst the Malaysian Muslim

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40 Ibid at page 1
42 Ibid
43 Ibid at 158
44 Ibid at 158
women in Islamic family laws under the state-based Shariah laws,\textsuperscript{45} has now affected the rights of the non-Muslim women as well. The disputes within family members of different religions were caught in Malaysia’s dual-track legal system which had “led to overlaps and unresolved disputes that have fuelled minority unhappiness and raised political tensions in Malaysia.”\textsuperscript{46} As a result, non-Muslim women are perceived to be second-class citizens in reality, despite living in a constitutional democracy, where women are equals in theory in Malaysia.

In Subashini,\textsuperscript{47} a non-Muslim wife filed an injunction application in the civil court against the Shariah Courts order obtained by the husband for custody and conversion of their eldest child to Islam without her consent. The Federal Court held that because the civil court and the Shariah Courts are independent and could not interfere with each other’s jurisdiction, no injunction from the civil court could refrain a valid order obtained from the Shariah court. The wife’s application for an injunction was dismissed. Abdul Aziz Mohamed FCJ, however, dissented. His Lordship viewed the husband’s conduct in filing custody proceedings in the Shariah Courts, was wrong since the husband was aware that the Shariah Courts have no jurisdiction on matters involving custody of a non-Muslim marriage. His Lordship allowed the order of interim injunction against conversion of religion of the children, as he ruled the wife had an equal right not to want her child to be

\textsuperscript{45} See Anwar, Zainiah and Rumminger, Jana. S, “Justice And Equality In Muslim Family Laws; Challenges, Possibilities and Strategies For Reform” 64 Wash & Lee Law Review 1532 (2007) page 1529 – 1549 at page 1534 to 1535

\textsuperscript{46} Razak Ahmad, “Malaysia Top Court Hears Landmark Religious Dispute”, Reuters (3 May 2010), online Reuters <http://in.reuters.com/article/2010/05/03/idINIndia-48177820100503>

‘Malaysia’s highest court began proceedings on Monday on a landmark inter-religious child custody dispute whose outcome could further raise political tension in this mainly Muslim country’

\textsuperscript{47} Supra note 4
converted and the reason the wife sought the interim injunction against conversion is in order to preserve the status quo, so that there would be no risk of the child being converted before her petition was finally determined. Another issue ruled was on jurisdiction, whether a convert Muslim was still subjected to civil court since the marriage was solemnised under the LRA in which the Federal Court ruled that notwithstanding conversion to Islam by a spouse, the civil court continues to have jurisdiction as spouses are bound by the LRA.

In most cases, the debate is the conflict between the provision in the Guardianship of Infants Act 1961 ("the GIA"), which gives equal right to a mother and father on the upbringing and custody of their children\(^{48}\) as opposed to the state’s based Islamic law which gives rights to the Muslim for custody of the children regardless of gender. The issue here is that the LRA and the GIA only applies to the non-Muslims, and the Islamic law enacted by the states only applies to Muslims. Furthermore, Article 12(4) of the Constitution which states ".. the religion of a person under the age of eighteen years shall be decided by his parent or guardian." only provides a singular word ‘parent’ on who can decide the religion of a minor child, and the inconsistency of the word ‘parent’ and some Islamic state enactments, had been interpreted either way by the civil courts. In 2003, the High Court in Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam

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\(^{48}\) Section 5 of the Guardianship of Infants Act 1961 states that:

(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.
Sabah & Others\textsuperscript{49}, a case which according to Abdul Rahman, “is often cited to support the proposition of requirement of consent of both parents prior to the conversion of minor to Islam”\textsuperscript{50} favours equality of both parents in deciding the religion of the minor child. The husband converted to Islam without the knowledge of his wife while his civil marriage was still valid. He subsequently converted his child to Islam without the wife’s consent. Although the husband obtained custody order from the Shariah Court, the order was subsequently reversed at the Shariah High Court. The Civil High Court granted the wife custody of the infant, and the wife subsequently applied to declare the conversion of the minor children to Islam null and void. The husband’s challenged to the High Court claiming it lacked jurisdiction to hear and determine the application because he had converted to Islam and therefore he claimed he was subjected to Islamic law. His Lordship, Ian Chin J ruled the case not from a perspective of a person’s personal law: religion or jurisdiction, but he interprets section 68 of the Administration of Islamic Law Enactment 1992, applicable in the Sabah state, which states that consent from both parents are needed before an infant can be converted to Islam. Ian Chin J ruled that both parents have equal right over the person and property of an infant, despite the Constitution states the word ‘parent’ in a singular form as opposed to the state’s Islamic law enactment which state the word ‘parents’ in the plural form. His Lordship claims that to constitute otherwise would mean depriving the other parent of the constitutional right under Article 12(4) of the Constitution. Apart from that, His Lordship further cited that even the Quran

\textsuperscript{49} [2003] 5 MLJ 106
states that there shall be no compulsion in religion, upholding that each person has the right to make his or her own choice about embracing Islam.

Because rulings and decisions of a High Court is not binding on the other, Chang Ah Mee, although often quoted, is not often followed by the other High Courts of the same jurisdiction. In contrast, Shamala, a case where a Hindu wife, who contracted a civil marriage, failed to challenge the conversion of her two minor children of the marriage. The Shariah Court granted custody order to the husband without her consent and at the civil court, the wife argued against the custody and conversion order obtained by the husband at the Shariah court. In the argument of equality of right to decide the religion of the minor children, Faiza Tamby Chik J ruled that because section 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 provides the singular phrase ‘parent or guardian consents’, consent of both parents is not required by one parent to convert a minor children to Islam. His Lordship ruled that since the state’s Islamic law and Article 12(4) of the Constitution both provide the singular word ‘parent’, a parent is therefore legally permitted to consent to a child’s conversion to Islam without the consent of the other parent.

Presumably dissatisfied with the lack of justice, and assuming that there is no relief available for Shamala to reverse the conversion and the custody order, Shamala fled the country together with the two children. As a result of her action, the husband filed contempt proceedings in the civil court against the wife for alleged breach of the interim order. Because previously disputes on conversion of a spouse and minor child to Islam

51 Supra at note 3
had not reached the Federal Court level, the Court of Appeal posed five constitutional questions of law to the Federal Court, one of which was whether the state’s Islamic law was unconstitutional, as the provision was inconsistent with the GIA because both Acts are contradicting each other. The conflict is between the Administration of Islamic Law (Federal Territories) Act 1993 which allows one parent to determine the religion of the children, while the GIA gives equal right to both parents on the upbringing and custody of their children. Unfortunately, Shamala’s application for leave to appeal, whether in the interpretation of the phrase ‘parent or guardian’ as found in Article 12(4) of the Constititution where the wife had the equal right as that of the husband over the religion of the children - was not allowed, as the Federal Court held that her act in avoiding the contempt proceedings taken against her by the husband, would in effect grant her benefit without her having performed her part of the obligations for which she may be in contempt.

Cases after cases are filed in court without any drastic action taken by the policy makers to address the loophole of current family laws - except continuous calls for reform from the non-governmental organisations, the Malaysian Bar and minority religious groups. It was just in 2009 that the same issue reappear, when, Indira Gandhi, a Hindu mother of three minor aged children sought help from the Hindu Sangam religious community, after her Hindu husband, K.Patmanathan, or his Muslim name, Mohd Ridzuan Abdullah, embraced Islam. The husband converted their children to Islam
without the wife’s knowledge and consent.\textsuperscript{52} This case sparked public outcry, especially when the youngest child, who was three months old and still breastfeeding, was taken away by the father upon serving a Shariah Court order granting him custody of all the three children.\textsuperscript{53} Because of the inhumane factor and strong public’s protests, the Malaysian’s Cabinet, in a meeting, issued a statement that children must be raised in the common religion at the time of marriage when one of the parents opts to convert, as “religion should not be used as a tool to escape marriage responsibilities” and “the convert would have to fulfil his or her marriage responsibilities according to civil laws prior to the conversion.”\textsuperscript{54} The decision was welcomed by many, however, the ‘statement’ issued by the Cabinet itself does not hold weight when the law is not even amended by the legislature, eventhough there were assurances that the laws will be “looked at”. It is now only a matter of time before the same issue comes back, causing another uproar from the public.

The conflict of family laws demonstrates a daunting reality as opposed by Islam’s support to pluralism.\textsuperscript{55} As Mohamad points out, “[b]oth Sharia and civil legal instruments collude to delineate the boundaries of group identity by playing a gate-keeping role, defining who will be taken in as legitimate members of the group (in this case as Muslims) and who will be precluded as Others”\textsuperscript{56}. The state of ‘undoing of family,’ Mohamad

\textsuperscript{53} Ibid  
\textsuperscript{54} Ibid  
\textsuperscript{55} Supra at note 23 at page 29 and 51  
\textsuperscript{56} Mohamad, Maznah (2010 “Making Majority, Undoing Family: Law, Religion And The Islamization of The State In Malaysia” Economy and Society, 39:3, 360-384 at page 368
argues, is part of the sustaining the majority of Malay-Muslim ethnics in Malaysia.\textsuperscript{57}

Often, the non-Muslims are placed in predicament when they are advised by the civil courts to seek redress at the Shariah courts. Even if the non-Muslims are heard at the Shariah courts, it is doubtful how far the system of justice would be able to provide the non-Muslims with fair trial given that they have no jurisdiction to begin with. If the Cabinet is consenus that children of divorced parents should be raised in the religion of the time of their marriage, the courts unfortunately could only decide based on laws enacted by the Parliament. The delay taken by the legislature to finalise a reform on Malaysian dual family laws proves that its machinery lack competency and strategy to manage the problem. The task now is for the legislature to pursue mediated measures and come up with a dynamic joint governance of legal framework that would provide Malaysians with equal rights and a fair system of justice; but the challenge is to search for a sensitive approach to reform and the best mechanism to accommodate the complex dynamics inherent in a pluralist, post-colonial Malaysian society.

\textbf{III. Islamic Family Law in Malaysia; Essential Validity of Muslim Marriage And Conversion to Islam}

\textbf{(a) Islamic Family Law in Malaysia}

The Constitution provides that the Muslim’s personal laws are under the Islamic law accorded to the states, while the personal laws for the non-Muslims are the codified laws of marriage and divorce in the LRA. “Malaysia has a dual court system, with

\textsuperscript{57} Ibid page 364
shari’ah and fiqh based laws that apply only to Muslims and include matters specified in
the State List of the Federal Constitution such as matrimonial law, charitable endowments,
bequests, inheritance, and offences that are not governed by federal law (these includes
matrimonial offenses, khalwat (close proximity) and offenses against the precepts of
Islam).”

In the beginning of post-independence, the Malaysian Islamic law mainly dealt
with the administration of Islamic law while the substantive Islamic law is based of the
‘hukum syarak’ which means the Islamic Law. The hukum syarak as stipulated in the
enactments means that the primary sources of Islamic Law in Malaysia are the Quran and
the Hadith. However where there is no clear rule, ijma’ and qiyas are resorted to. There
are many schools of thoughts in Islamic jurisprudence, and Malaysia followed the
orthodox Shafii madzhab, one of the four orthodox schools from the Sunni group, which
is also one of the “most prevalent school followed by all Malays and many Arabs and
South Indian Muslims.” Ahmad Ibrahim points out, “[t]he Muslim law as administered
in the State of Malaysia is varied by Malay custom and applies to all Muslim but is subject
in its application to variations in accordance with the school of law to which the parties
belong.” In Malaysia, the Mufti is accorded power to issue legal rulings or fatwa, either
on the direction of the King or the Ruler or on the Mufti’s own initiative or upon request
on matters of public interest and Islamic subjects. A Mufti has the authority to issue

58 Supra note 45 at page 1532
59 Mohd Ibrahim, Ahmad “The Status of Muslim Women in Family Law in Malaysia and Brunei” 5 Malaya
Law Review 313 1963, pg 313-337 at page 313
60 Ibid
61 Ibid
62 Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), Section 33
rulings following the accepted views of the Shafie school of laws\textsuperscript{63}, however should he considers that following the accepted views of the Shafie school will lead to situation which is repugnant to public interest, the Mufti may follow the accepted views of the Hanafi, Maliki or Hanbali’s schools.\textsuperscript{64} If none of the accepted views of the four Mazhabs would lead to a situation, which is repugnant to public interest, the Mufti may then resolve the question according to his own judgment without being bound by the accepted views of any four Mazhabs.\textsuperscript{65}

Abdullah claims “the Islamic Family Law today not only touches on the requirements of marriage and divorce in the classical Islamic law, but also involves matters pertaining to administration\textsuperscript{66} and jurisdiction\textsuperscript{67}. For example, Siraj points out that matters pertaining to family law, “provided that hukum syarak (Islamic Law) would apply in those matters.”\textsuperscript{68} The irony, according to Siraj, is that “[t]he hukum syarak had to be determined from the various sources of Islamic Law.”\textsuperscript{69} This creates varieties of Islamic law as Anwar claims “[b]ecause there are thirteen states and one federal jurisdiction, there are fourteen different sets of Muslim laws in Malaysia.”\textsuperscript{70} Earlier, “[t]here had been little attempt to codify or modify the Muslim law,” and this had caused difficulties for the Muslims, especially women, who were unable to determine and

\textsuperscript{63} Supra note 62 Section 39(1)
\textsuperscript{64} Supra note 62 Section 39(2)
\textsuperscript{65} Supra note 62 Section 39(3)
\textsuperscript{67} Supra note 30 at page 565
\textsuperscript{68} Supra note 30 at page 565
\textsuperscript{69} Supra note 30 at page 565
\textsuperscript{70} Supra note 45 at page 1533
understand their legal rights.\textsuperscript{71} It was just recently that the \textit{hukum syarak} or the Islamic Law is codified into the state’s Islamic laws by way of state enactments. With the incorporation of Islamic law in the enactments, it is much easier for lawyers and parties to know their legal rights since “in the new enactments, the rights of all parties are spelled out.”\textsuperscript{72}

Despite the codification of the Islamic Law, it is still a state’s jurisdiction and applies to Muslims according to where they reside, in one of the thirteen states or one of the Federal Territories. According to Siraj, there were attempts to standardise and uniformise the Islamic Family Law including introducing a model draft of family law to bring about uniformity in the state laws.\textsuperscript{73} However, because the Rulers of the States did not agree to a uniform Islamic law, “eventually each state passed an enactment based on the model but with modifications that were deemed necessary by each state’s Religious Affairs Department.”\textsuperscript{74} For example, in the Federal Territories, the statute that governs marriage, divorce, maintenance, guardianship, and other matters connected with family life of Muslims is the Islamic Family Law (Federal Territories) Act 1984 (“the IFLA”). “Most of the state enactments have provisions that are similar or that differ in insignificant ways”\textsuperscript{75}, for instance “measures introduced to control polygamy\textsuperscript{76}” or sentencing for various crimes committed in violation of the pillars of Islam. Historically, this is part of the negotiation initiated by the British with all the Rulers in Malaya that they will only

\textsuperscript{71} Supra note 30 at page 565
\textsuperscript{72} Supra note 30 at page 565
\textsuperscript{73} Supra note 30 at page 565
\textsuperscript{74} Supra note 30 at page 565
\textsuperscript{75} Supra note 30 at page 565
\textsuperscript{76} Supra note 30 at page 565
allow the British to administer the Malay states if the Rulers retain their authority over Islamic law, which was later retained when Malaysia gain independence in 1957.

(b) Essential Validity of Muslim Marriage and Conversion To Islam

One of the key aspects of marriage and divorce in Islamic family law is the essential validity of a Muslim marriage. The Sunni jurists are consensus that difference in religion is a bar to marriage. Therefore, in Malaysia, only the Muslims can marry Muslims. ‘Muslim’ means a person who professes the religion of Islam; or a person either or both of whose parents were, at the time of the person’s birth, Muslims; a person whose upbringing was conducted on the basis that he was a Muslim; a person who had converted to Islam in accordance with the requirements of the enactment, a person who is commonly reputed to be a Muslim; or a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.\(^{77}\) A converted Muslim is legally referred to as a \textit{muallaf}\(^{78}\). Upon conversion to Islam, not only does a \textit{muallaf} become subject to the same duties and obligations as any other Muslim,\(^{79}\) the person shall be recognized and treated as a Muslim whether he is in the same state where he registered his conversion\(^{80}\) or any other states in Malaysia\(^{81}\). A non-Muslim may convert to Islam if he is of sound mind and has attained

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\(^{77}\) Supra note 62, Section 2  
\(^{78}\) Supra note 62, Section 86  
\(^{79}\) Supra note 62, Section 87  
\(^{80}\) Supra note 62, Section 91(1)  
\(^{81}\) Supra note 62, Section 91(2)
the age of eighteen years\textsuperscript{82}; or if he has not attained the age of eighteen years, his parent or guardian consents to his conversion.\textsuperscript{83}

The essence of being a Muslim in Malaysia is its associations of being Malays, who forms the majority of the population. The Federal Constitution defines Malay as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom.\textsuperscript{84} Therefore, all Malays in Malaysia are born Muslims and not allowed to opt out of Islam under the law, a situation particularly applicable in Malaysia. The strong sentiment of the Malay groups can be better understood whenever the non-Muslim propose changes or reforms of laws. Often, the Malays perceive the demands by the non-Muslims as attempts to limit their privileges and power, or threats to the institution of the Malay rulers and the Malay community as a whole.

There is one exception, however, that, “[u]nder the Muslim law a man may marry a Muslim woman or a \textit{kitabiyya}\textsuperscript{85} that is a person belonging to a revealed religion with a holy scripture, like Christianity or Judaism; but a Muslim woman cannot marry anyone except a Muslim”.\textsuperscript{86} All school of thoughts agrees that a Muslim woman may not marry a non-Muslim man unless he professes Islam. Similarly, Malaysia had codified the validity of marriage to only be between Muslims - no man shall marry a non-Muslim except a Kitabiyah, and no woman shall marry a non-Muslim.\textsuperscript{87} Kitabiyah as defined in the

\textsuperscript{82} Supra note 62, Section 95(a)
\textsuperscript{83} Supra note 62, Section 95(b)
\textsuperscript{84} Article 160 of the Federal Constitution of Malaysia
\textsuperscript{85} Al-Quran verse 5 Al-Maidah
\textsuperscript{86} Supra note 59 at page 328
\textsuperscript{87} Section 10 Islamic Family Law (Federal Territories) Act 1984
Malaysian Islamic Law are women whose ancestors were from the Bani Ya’qub, or a Christian woman whose ancestor were Christians before the prophethood of the Prophet Muhammad; or a Jewess whose ancestors were Jews before the prophethood of the Prophet Isa.  

The reasons why the rules are flexible on men but not on women is to be looked at from the requirement that children should be brought up and raised as Muslims. Since Islam is passed down through the male line, not the women line, a child born to Muslim father but non-Muslim kitabiya mother, is a Muslim. An Islamic scholar, Shaykh Khaled Abou El Fadl explains that “[t]echnically, children are given the religion of their father, and so legally speaking, the offspring of a union between a Muslim male and a kitabiyya would still be Muslim”. Secondly, “it was argued that Muslim men are Islamically prohibited from forcing their wives to become Muslim” since “[r]eligious coercion is prohibited in Islam”. Because a similar prohibition against coercion in Christianity and Judaism does not exist, “Christian men may force their Muslim wives to convert to their (husbands') religion”. “Since it was assumed that the man is the stronger party in a marriage, it was argued that Christian and Jewish men would be able to compel their Muslim wives to abandon Islam”. El Fadl continues “[h]owever, if a Muslim man would

88 Ibid, Section 2
89 El Fadl, Shaykh Khaled Abou “Fatwa’s by Dr. Abou El Fadl - On Christian Men Marrying Muslim Women” Online < http://www.scholarofthehouse.org/oninma.html>
90 Ibid
91 Ibid
92 Ibid
93 Ibid
94 Ibid
do the same, he would be violating Islamic law and committing a grave sin”. Therefore, if women are allowed to marry Christians or Jews, the concern is that the non-Muslim fathers would not possess the faith to bring up the children as Muslims.

Changes of religion do not automatically affect the status of the civil or Muslim marriage, as it requires court’s intervention upon application by a party. Section 46 of the IFLA, for example, provides the renunciation of Islam by either party to a Muslim 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. The same provision can be found in the LRA, with the exception that the word ‘conversion to Islam’ is used replacing the terms ‘renunciation of Islam’ in the IFLA- that 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. The LRA does not apply to Muslims or any person who is married under the Islamic law. It only permits the non-Muslim partner to petition for divorce after three months after the date of the conversion of the spouse. The provision in the LRA in providing ancillary reliefs for the non-convert spouse and children for the support, care and custody seems to demonstrate that the LRA intends to protect the spouses from being neglected upon marriage breakdown, although what remains unclear is why the LRA expressly allow the non-convert spouse to petition for a dissolution of marriage but not the converted spouse.

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95 Ibid
96 Section 51(1) Law Reform (Marriage and Divorce) Act 1976
97 Ibid, Section 3
98 Ibid, Section 51
According to the Islamic law, the civil marriage is terminated after the expiration of three months if the other spouse does not convert to Islam. A religious ruling or ‘fatwa’ issued by the National Fatwa Committee of Malaysia in 1975 ruled that a marriage of non-Muslim spouses would be dissolved when one of the spouse converts to Islam, unless if “the other spouse also converts to Islam during the period of iddah, which is the waiting period of three months after divorce.” The ruling further encouraged that explanation and advice be given on the effect and consequences of the conversion to the marriage, to ensure that the non-convert spouse be given adequate notice and opportunity to embrace Islam, should they want to. As pointed out by Mohd Awal, this scenario is open to abuse since it is possible that “there are two marriages in existence” when “the party that has converted is free to marry according to his or her personal law, i.e., Islamic law”, which will cause injustice and predicament to the non-Muslim spouse should any dispute on entitlement of the estate of the Muslim convert arise later on.

100 Ibid
101 Ibid
102 Ibid
104 Ibid
IV. Child Custody (*Hadanah*) In Islamic Family Law And Civil Law in Malaysia

A Muslim mother to a Muslim minor child is entitled to custody for the purpose of rearing the child (*hadanah*) by default until the child reach the age of discernment or *mumayyiz*. As elaborated by Mohd Zin, “[t]he period of *hadanah* applies to a child below the age of seven for boys and nine for girls or even until puberty according to some jurists.” She points out jurists had concluded that the custody of the infant should automatically go to the mother if the mother is legally capable to do so. At the *hadanah* stage, she adds, “the priority is given to the mother on the presumption that it is the mother who knows best how to nurture and educate the child.” The law is applied in Malaysia as evidenced in the IFLA, which also provides that the custody or *hadanah* of a child go to the mother. Mohd Zin adds, upon attaining “the age of discernment (*mumayyiz* i.e. 7 years old and above for boys and nine years old and above for girls), he or she is given the right to choose either to live with the mother or father. This Islamic law has also been reflected in the Malaysian Islamic enactments, among others, the IFLA, states “[t]he right of the *hadanah* to the custody of the child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years in the case of a female, but the Court may, upon the application of hadinah, allow her to retain the

105 Mohd Zin, Dr. Najibah “How The Best Interests of The Child Is Best Served In Islamic Law With Special Reference To Its Application in The Malaysian Shariah Court” Online Children’s International Website <www.childjustice.org/index> page 1-25 at page 4
106 Ibid at page 3
107 Ibid at page 4
108 Supra note 87, Section 81
109 Supra note 105 at page 14
custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female. After termination of the right of hadinah, the custody devolves upon the father, and if after the child has reached the age of discernment (mumayyiz), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders. Mohd Zin further notes that the view of the child is “overwhelmingly emphasised” when the child attain the age of mumayyiz. She argues that “[i]n case the mother is disqualified for reasons allowed under the Islamic law, the priority remains with a maternal relation, i.e, the grandmother then followed by the father and the maternal aunt.

In deciding whose custody a child should be placed, the paramount consideration of the court shall be the welfare of the child and subject to that consideration, the Court shall have regard to the wishes of the parents of the child, and the wishes of the child, where he or she is of an age to express an independent opinion. All the above provisions apply to Muslim families, where the child and the parents are all Muslims, as the Shafii school of thoughts which has been adopted in the IFLA restricts the right of hadanah to Muslims. The IFLA further provides that right of hadanah of a woman is lost by her marriage with a person not related to the child, by her gross and open immorality, by her changing her residence, so as to prevent the father from exercising the

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110 Supra note 87, Section 84(1)
111 Supra note 87, Section 84(2)
112 Supra note 105 at page 16
113 Supra note 105 at page 6, and Supra note 87, Section 81(2)
114 Supra note 87, Section 86(2)
115 Supra note 87, Section 86(2)(a)
116 Supra note 87, Section 86(2)(b)
117 Supra note 87, Section 82(a)
necessary supervision over the child, by her abjuration of Islam and by her neglect of or cruelty to the child.\textsuperscript{118} The restriction on giving the right of hadanah to Muslim women is absolute under Shafii, therefore, regardless of the tender age, best interest, welfare and wishes of the child., non-Muslim spouse, or a spouse who had left Islam would not be granted minor child custody by the Shariah court.

Although the above restriction of hadanah is meant for Muslim mothers, there is no legal provision in both the Malaysian family laws whether a non-Muslim mother is entitled to custody of her minor children who had been converted to Islam by another spouse in this current issue. Kuek and Tay claim “[a]ccording to the Shafi’is and Hambalis, the custodian must be a Muslim as they are concerned that a non-Muslim custodian may lead the child to denounce Islam by his or her teaching and this is a great detriment in Islam.”\textsuperscript{119} This is in line with the rationale of the flexibility of the validity of marriage between Muslim men and the non-Muslim women, which is to ensure that the children of the marriage be born Muslims and raised as Muslims. For instance, a marriage between Muslim men and non-Muslim women are only permitted if the families live in a Muslim state. To a certain extent, this is reflected in a \textit{fatwa} issued in Malaysia in 1980 on the validity of a marriage of a Muslim man and a kitabiyah woman who’s status whether they are the true Christians or Jews is in doubt, which echoes the importance of the requirement of raising and bringing up children in an Islamic community. The \textit{fatwa} stipulates that as long as the children and the family live in an Islamic community and

\textsuperscript{118} Supra note 87, Section 83(a) to (e)
brought up as Muslims in accordance to Islamic teachings, the marriage of Muslim man and women to doubtful Christians or Jews, continues to be valid.”

This is because Islam focuses the role of the father as the leader in the family as he would have a greater degree of influence of his children compared to the mother. Shaykh Khaled Abou El Fadl points out, “Importantly, the Hanafi, Maliki, and Shafi'i jurists held that it is reprehensible for Muslim men to marry a kitabiyya if they live in non-Muslim countries”. They argued that in non-Muslim countries, mothers would be able to influence the children the most, and there is a high likelihood that the children will not grow up to be good Muslims unless both parents are Muslim. Some jurists even ruled that Muslim men are prohibited from marrying a kitabiyya if they live in non-Muslim countries.

Resorting to “ijtihad” as proposed by Kahar and Mohd Zin may provide a more flexible approach to provide religious accommodation in Malaysia. They claim “Since the issue of conversion is not settled to date, especially when it pertains to the custodial rights of children, it has been suggested again that the opinion of Maliki and Hanafi schools could be taken into consideration between parents to assist Shariah Courts in Malaysia.” They further contend that “[i]n fact this provision has been regulated in the Muslim countries who apply Hanafi’s school such as in Tunisia whereby the non-Muslim mother could be given custody and she would loss such right after the child reached [five

121 Supra note 89
122 Supra note 89
123 Supra note 89
124 Supra note 89
years old unless there was no fear of her being brought up according to the religion other than Islam.”

Therefore, since the Malaysian Islamic Law allows the Mufti to issue rulings following the accepted views of the Hanafi, Maliki or Hanbali or the Mufti’s own judgment if the views would lead to a situation, which is repugnant to public interest, ‘ijtihad’ may be resorted to. The main issue here is whether all the Islamic institution at the state level and the civil institution at the federal level agree that the conversion issue in Malaysia family laws is a serious matter that generates public interest and to what extent both the Islamic and the civil legal system could be balanced to protect the minority non-Muslim women.

In determining child custody for the non-Muslim spouses, the LRA provides that upon the dissolution of marriage, there is a rebuttable presumption that a child below the age of seven years is to be with his or her mother, even though this presumption is rebuttable by the father. The LRA further states that in deciding whether that presumption applies to the case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. Similar to the IFLA, in deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard to the wishes of the parents of the child; and to the wishes of the child, where he or she is of the an age to express an

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126 Ibid
127 Supra note 62 Section 39(2)
128 Supra note 62 Section 39(3)
129 Supra note 96 Section 88(3)
130 Supra note 96 Section 88(3)
independent opinion.\textsuperscript{131} However, there is no express provision in the LRA on the rights of a non-Muslim spouse or mother to consent or to be consulted on conversion of the child’s religion to Islam when the other spouse converts to Islam. If the child’s conversion to Islam had taken place, then the children are subjected to the jurisdiction of Islamic law and the mother is automatically stripped from her rights as to the custody of the child. However, the situation may be slightly different if the child’s religion remains the religion of the non-Muslim parent’s at the time of the civil marriage. A non-Muslim spouse may have a better chance to gain custody of the child, and this right had been provided in section 51(2) which states that the spouse who has not converted to Islam may petition for divorce upon the other spouse’s conversion which empowers the civil court to make provision for the wife or husband, and for the support, care and custody of the children of the marriage. Therefore, it is implied in the said section that the civil court has the power to grant custody order of the children whether they have become Muslims or not, to the non-Muslim spouse in these circumstances. Although it is still unclear whether Muslim children are still subjected under the LRA, but based on Subashini’s ruling, the Federal Court had ruled that notwithstanding conversion to Islam by a spouse, the civil court continues to have jurisdiction, as spouses are bound by the said Act. Therefore children from non-Muslim marriages should also be subjected to the LRA. Although the legal position is still unclear, section 51(2) could at least accord a reasonable form of legal protection to the non-Muslim spouse under the Malaysian family laws.

\textsuperscript{131} Supra note 96 Section 88(2)
The crux of this dispute is a *fatwa* issued in June 2009, when the Malaysian Fatwa Committee ruled that minor children could be solely converted by the Muslim converted spouse together with granting of custody.\(^\text{132}\) The Muftis ruled based on “the scholars (Hanafi, Shafii and Hanbali) consensus that ‘Amr bin A’idz Almuzani reported, Prophet Mohammad (peace be upon him) as saying, “Islam is placed higher than any other religion and there is no better religion than Islam”\(^\text{133}\). In addition, the Fatwa Committee further ruled that the wording of Article 12(4) of the Constitution, which provides a singular form of either ‘parent’ or ‘guardian’, shall be sufficient to decide the religion of minor children.\(^\text{134}\) The said ruling follows another fatwa issued by the committee earlier in 2002, when the Muftis responded to the proposed amendment to the Guardianship of Infant Act 1961, granting women or mother’s equal rights to determine the guardianship and custody of the children.\(^\text{135}\) The proposal to grant equality to Muslim women, were rejected by the Muftis as it was “against Islamic law”.\(^\text{136}\) Instead, the committee urged the policy makers to review the applicability of the equality provisions to Muslims in Family Law.\(^\text{137}\) Because the GIA is not applicable to the Muslims, and Muslim women are subjected to the states’ Islamic law, the Muslim women are not considered in the gender equality when the law was amended to grant equality right to women. Therefore, although the non-Muslim women seem to have better gender right than Muslim women in Malaysia, the

\(^\text{133}\) Ibid  
\(^\text{134}\) Ibid  
\(^\text{136}\) Ibid  
\(^\text{137}\) Ibid
outcome is not much different, as the non-Muslim women are placed in a worse legal position when the spouse converts to Islam.

Legal pluralism has also resulted in lack of uniformity on child custody law in Malaysia. It is against the principles of equity and justice to allow a converting spouse to neglect his responsibilities under the civil marriage solely on the ground that he has converted to Islam. While there are adequate provisions of law in each system of justice, the link between LRA and IFLA are missing upon the changes of a person’s religion. Further, some provisions lack common sense, for example, section 51 of the LRA allows the non-convert spouse to initiate the divorce petition but the law does not provide the same for the Muslim spouse. If the non-Muslim spouse does not intend nor has no means to file for divorce, the converted Muslim spouse will be left with no legal recourse. This would leave both spouses in embarrassing situation especially for those who has little or no access to legal services. Furthermore, because there is no provision to prevent the convert spouse to contract a new marriage as a Muslim until his civil divorce hearings are concluded, the convert spouse, whether the man or woman would be committing an act of polygamy or bigamy, which is a criminal offence in Malaysia; by having two spouses in existence at one time. When this happens, the non-Muslim spouse and the children’s rights toward maintenance, support and the estate of the Muslim converts may be severely prejudiced. Even the position of the Muslim wife and family who contracts a marriage with the newly convert Muslim is uncertain and could also be another legal conflict waiting to unfold. The legal loophole which has not been addressed to date would encourage the new converted Muslim to begin his new life with a bad start; permitting
him to abandon his duties and responsibilities to the family he left behind, a situation not encouraged by Islam.

V. Constraints and Strengths of The Development of Islamic Law in Malaysia

(a) Constraints of the development of Islamic Law in Malaysia

One of the constraints towards the development of Islamic law in Malaysia is the limitation of its application to personal laws, and that the Islamic law applicable is only state based. First, not only that the application of the Islamic law is limited to Muslims, the areas of laws are further reduced to namely a few; marriage, divorce, estate and inheritance, and punishment for violations against the pillars of Islam. The limitation itself prevents Islamic law from being associated with a more contemporary and sophisticated sectors, such as economic and education for example, which are equally important and encouraged to be explored and pursued in Islam. When Islam and Shariah laws are detached and separated from other contemporary aspect of lives, a simple debate about the rationale of religious pluralism, which demands appreciation of history and contemporary issues faced by the society, is a big challenge. Moreover, the amendment of the constitution to a dual legal system facilitates the process of isolation and disconnects Islamic law from the rest of the plural society, including the dhimma. Even modern Muslim communities at times perceive Islamic law as sets of laws with restrictions and prohibitions, instead of opportunities. All these factors had contributed towards making Islamic law unattractive to the non-Muslims and restricts its developments.
Kurzman claims, “[i]n historical terms, Islam has consisted of countless varied interpretations, among these a tradition that voices concerns parallel to those of Western liberalism”. ¹³⁸ “Exponents of this tradition have expressed resentment that their positions ‘have been generally ignored by Western scholars and members of the media who appear to prefer to highlight the sensationalism of extremist discourse that captures the attention of the Western audiences’”. ¹³⁹ He continues that “[a]mong the concerns of this neglected tradition are opposition to theocracy, support for democracy, guarantees of the rights of women and non-Muslims in Islamic countries…”¹⁴⁰ Ultimately, Islam is at the losing end because it is perceived to be rigid, authoritative, non-tolerant and insensitive towards the minority ethnics. In Malaysia, Islam is further constrained by the conception of religious pluralism, although, according to Imam, “[r]eligious pluralism is not only enjoined by the Quran, but it has been the essential characteristic of Islam, Islamic societies and Islamic States.”¹⁴¹ “Even from the time of the Prophet Mohammed (SAW), notwithstanding the rapid spread of Islam to far and distant territories and the issues of Dhimmis and Jiziya, it can safely be maintained that religious minorities existed and were tolerated and respected in the territories under Muslim hegemony”.¹⁴² The debate whether Malaysia is an Islamic country in a secular setting or a secular country in an Islamic setting continues to be more

¹³⁸ Kurzman, Charles, Liberal Islam and its Islamic Context from Liberal Islam, A Sourcebook, Oxford University Press 1998 at page 4
¹³⁹ Ibid and Yvonne Yazbeck Haddad, Islamists and the Challenge of Pluralism (Washington D.C : Center for Contemporary Arab Studies and Center for Muslim-Christian Understanding, Georgetown University, Occasional Papers (1995) page 4
¹⁴⁰ Ibid
¹⁴² Ibid
complicated because a hybrid dual system of justice like Malaysia requires a different legal treatment compared to other ‘straightforward’ legal system in many countries.

In Malaysia, the marginalisation of Islam becomes worse because the public tend to believe that only the religious scholars, the ulamas and imams possess intellectual knowledge to discuss all issues pertaining to Islam and Islamic Law. Attempts by other organizations or individuals to engage in debates about Islamic principles, are often met with resistance or even threats of legal implication. For example, a non-governmental organisation comprising professional Muslim women, Sisters in Islam also known as SIS, proposes reform or changes based on reasons and arguments, and they struggle to be accepted by the Malay Muslims. In his article, Moustafa argues that in Malaysia, “when women’s rights organizations push for reform of family law codes, … they almost invariably encounter stiff resistance due to the widespread but mistaken understanding that Muslim family law, as they are codified and applied in Muslim-majority countries, represent direct commandments from God that must be carried out by state.”

“SIS has always maintained that Islam is a religion of compassion and mercy, and one, which celebrates diversity and the rights, and dignity of individuals and minorities” and “acknowledges that Muslims from different contexts have interpreted Islamic sources according to specific social and historical circumstances.” As per Noor’s argument “[t]he different interpretations towards what constitute justice and equality between male

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145 Ibid
and female on issues concerning family law arise from the fact that the primary sources on Sharia law, Quran and Hadith only provide basic foundation on how to implement and administer justice.”

“How the Shariah law particularly regarding the rights and duties of men and women are interpreted closely relate to the intellectual knowledge of the ulama (religious scholars) and the willingness of the umar’ (authorities and legislators) to codify the accepted principles as a binding statute in one’s country.” Noor further argues that although “[t]he provisions of family law are primarily found in the Quran and Hadith,” “… these two sources do not specify the details.” “They only contain some rulings and indications that lead to the cause of these rulings.” “On the basis of these rulings and indications, the jurists had developed the rules by employing the legal theory to discover the judgment of an unprecedented case.” She adds, “[t]he expansion of Muslim territories with multi-ethnic population from different cultures and backgrounds imposed countless new problems which need to be addressed accordingly.” This was the scope where the role of mujtahids is necessary in matters of law and religion using their own methodology of ijtihad.

Noor points out that even “[e]arly jurists who had formed independent opinions never claimed finality to their opinions and even admitted the possibility of errors.”

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146 Noor, Zanariah. “Gender Justice And Islamic Family Law Reform Malaysia” Kajian Malaysia or Journal of Malaysian Studies 25(2) : 121-156, 2007 at page 122
147 Ibid
148 Ibid at 134
149 Ibid at 134
150 Ibid at 134
151 Ibid at 134
152 Ibid at 134
153 Ibid at 134
154 Ibid at 134

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“They encouraged other scholars who were qualified to practice ijtihad to form their own conclusions based on their own knowledge and abilities.”\textsuperscript{155} Fadel argues that “in the quest of salvation and conceiving the basic of the ethical good life, Islamic theology and ethics placed relatively greater emphasis on the procedural integrity of inquiry rather than its substantive conclusions”\textsuperscript{156} and “Islamic law, as a historical matter recognized the legitimacy of public reason arguments, or at the very least, recognized the legitimacy of arguments that are consistent with public reason.”\textsuperscript{157} The importance of reason and argument is further stressed by Wali Allah who argues in a humanistic response “that Islamic law-while divinely inspired- must be adapted for the needs of different peoples and eras”\textsuperscript{158} as “time has come that the religious law of Islam should be brought into the open fully dressed in reason and argument.”\textsuperscript{159} Islam would struggle to be relevant if it’s legal principles are often met with resistance from the larger community and the religious minorities. Therefore, reformation of laws should stem from genuine internal transformation, not by way of coercion or outside forces. The fact that Islam has many jurists or mujtahid with their own thoughts and opinion of Sharia principles demonstrates that there is no one answer to every contemporary problem, and different rules could apply to different society depending on the culture and historical background. One advantage of Islamic law in Malaysia, is its flexibility as it allows the adoption of other Islamic school of thoughts if the legal position is of ‘public interest’ in a pluralist society. Despite the

\textsuperscript{155} Ibid at 134
\textsuperscript{156} Fadel, Mohammad “The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law, Canadian Journal of Law and Jurisprudence 5 2008 page 2
\textsuperscript{157} Ibid at 2
\textsuperscript{158} Supra note 138 at page 7
\textsuperscript{159} Translated in Aziz Ahmad “Political and Religious Ideas of Shah Wali Ullah of Delhi”, Muslim World Volume 52, No. 1, Jan 1962 page 26, cited in supra note 138 at page 7
flexibility, the reluctance of Malaysian Muslims to allow the non-ulamas to advocate on Islamic issues with more robust reasons and arguments, remains one of the main constraints towards the future of pluralism and religious tolerance in Malaysia.

As part of the democratic process, any important decisions affecting the liberties of the citizens should have fair participatory process. Another constraint of the development of Islamic law in Malaysia is lack of participation from the key players of Islamic institution. Whenever there were attempts to discuss freedom of religion and expression in Malaysia in open forums together with religious minorities, the key players of Islamic institution who are more respected by the Muslim community at large, are reluctant to take part. Language or presentation style could be barriers, or even in some cases, limitation on knowledge on contemporary and current issues may be the cause, and even basic matters like constitutional rights and freedom are rarely discussed. Furthermore, the pro-Islamists Malay groups resent when Islam becomes a topic of discussion by the non-Muslims. While measures should be done to control and manage the sensitivities of the Muslims, non-participation of Muslim religious leaders in scholastic and open debates had excluded the opportunity for Islam to share the concerns of the religious minorities or demonstrate its support for pluralism. The duties of the Muslim religious scholars should not solely focus on Muslim affairs, but they should be encouraged to work together with the non-Muslims to propose the best strategy to accommodate differences by taking into account the sentiment of the religious minorities as well. Diversity should be celebrated in Islam by encouraging ulama or religious scholars in Malaysia to participate, debate, and deliver sound reasons, arguments or ijtihad, on contemporary issues affecting all
Malaysians. The challenge is for the Malaysian religious scholars to come out and engage in open discussions and debates as part of their role to contribute to the dynamic of Islam in contemporary context. If the religious scholars are not ready to engage in debate - instead of resisting these organizations, they should be more open to support and work together with other Muslim groups who are more able to express their views.

Another challenge faced by Malaysia is its reluctance to allow, to encourage or to give incentives to the non-Muslims to learn and study about Islam. It had continued what colonization had left Malaysia with, strict separation of all religion and ethnics, strategy which is no longer effective as different ethnicities merge and overlap. When the minorities and the non-Muslims do not have the opportunity to learn about Islam, they will not be able to appreciate the reasons and the rationale of the Islamic principles, and therefore should not be blamed for the misunderstandings. Therefore, Malaysia should be amenable and open the doors to non-Muslims to learn about Islam, with certain reasonable controls. Moreover, Islam does not exclude non-Muslims from studying about the religion, or the legal system. The progress of Islamic law can be better celebrated when both the Muslims and the non-Muslims respect and acknowledge its relevancy and applicability in the state.

Despite a considerable increase of educational opportunities and grants, Islamic studies remain unattractive and low profile. There are lesser grants and research for scholars to pursue knowledge and study in Islamic law compared to other academic disciplines. These limitations place Islamic law studies as a second-class in reality and not attractive in the employment sector. In particular since the Islamic Law in Malaysia is still
state based, there is less motivation or incentives to place Islamic law at par with common law. Studies on Islamic law are confined largely to the theological or religious aspects of Islam. Apart from Islamic banking and finance which is now gaining considerable mileage in Malaysia, not much research is done on Islam and dual family laws, on how the laws should respond to the Malaysian unique background and set up. In actual fact, there has been considerable success of Islamic law in Malaysia, the challenge is, as argued by C Clark B. Lombardi and R. Michael Feener, the studies of the success “had focused simply on issues of the jurisdiction, structure, powers and procedures of their Shariah courts.”\textsuperscript{160} On the other hand, “little published on the training and professional culture of judges and advocates working in the Islamic sectors of the legal systems of modern South East Asian states…”\textsuperscript{161} Both of them propose that if there is more opportunity to “understand the background training, intellectual assumptions, and work experience of these judges and lawyers in Indonesia, Malaysia, and Singapore, we may better understand some of the directions along which Islamic law might develop in the twenty-first century.”\textsuperscript{162} No doubt the Islamic institution has considerably progressed not only in Malaysia, but also its few neighbouring countries, but because lack of attention given to the details of its growth and success, Islamic law continues to be perceived to be inferior than other legal systems in Malaysia.

\textsuperscript{160} Lombardi, Clark B & Feener, R. Michael “Why Study Islamic Legal Professionals?” 2012 Pacific Rim Law & Policy Journal Vol 21 No. 1 page 1 - 12 at page 11
\textsuperscript{161} Ibid
\textsuperscript{162} Ibid at page 12
(b) **Strengths of Islamic Law in Malaysia**

The last two decades had seen progress and development of the institution of Islamic law in Malaysia. According to Shuaib, “[i]n recent decades all the states that make up Malaysia have chosen to exercise their power to create Islamic laws more assertively and have established an increasing number of regulations that are binding on Muslims within their borders.”\(^{163}\) “Over time, constitutional amendments have given state courts that adjudicate dispute arising under Islamic law an increasing amount of autonomy.”\(^{164}\) This, Shuaib continues, “had led to an increasing amount of Islamic legislation being passed by Malaysian states”.\(^{165}\) Although Shuaib argues that the Islamic law in the states are developed because the federal government “did not show any desire”\(^{166}\) to do so at the national level, there has been initiatives to standardize Islamic legislation, among others, by the Department of Islamic Development of Malaysia (JAKIM) in 1997 and the establishment of the Department of Islamic Judiciary Malaysia (JKSM) in 1998 to streamline the administration of justice in Syariah courts.\(^{167}\)

Although “[t]he federal government has largely resisted pressure from Islamists to make Malaysia’s national law more Islamic”,\(^{168}\) “all of Malaysia’s states (and the Federal Territories) have begun to exercise more aggressively their constitutional power to

\(^{163}\) Farid, S Shuaib, ‘The Islamic Legal System In Malaysia’ Pacific Rim Law And Policy Journal Volume 21 No. 1, 2012 page 85-113 at page 91
\(^{164}\) Ibid at page 91
\(^{165}\) Ibid at page 91
\(^{166}\) Ibid at page 93
\(^{167}\) Ibid at page 93
\(^{168}\) Ibid at page 113
regulate the lives of Muslims within their territory." The growth of the Islamic institution had transformed Islamic law from an inferior to a much stronger legal system of justice. The initiatives by the states in developing Islamic law was not only because of the constitutional amendment in 1988 which accords the Shariah courts more autonomy, but the desire by the states to expand their power which was earlier marginalised during the colonization period. That the states are able to and have the means to improve and reform the laws and administration of Islamic law, has its advantages. First, it indicates that Islamic law institution could, given the chance and proper platform, develops and works towards uniformity. Second, it demonstrates that there is a desire to transform the Islamic law from its traditional state to a more sophisticated and organized institution. Thirdly, the key players behind the growth of Islamic law, for example, the religious leaders, the Sharie Judges and the Shariah lawyers are now better equipped, well trained and more well versed in Islamic law, or have the means and better access to increase their knowledge, expertise and share best practices. The positive growth shows that Islamic law is dynamic and nuanced, and gives hope that future reforms in Family Laws are possible.

Even the development of Islamic law through the “seemingly unilateral actions of the state’s official Mufti” may be able to provide some recourse on how to approach the current Family Laws predicament. It is time that Muftis should not just be knowledgable in traditional Islamic Law, but other areas of disciplines as well, including the present common law or civil laws. “The Mufti sits as the head of an organization that is collectively responsible for creating an official religious rulings or fatwa, which will

169 Ibid at page 113
170 Ibid at page 107 and 108
represent the binding interpretation of Islamic law within the state."\textsuperscript{171} And the Mufti’s role is to assist the judge in deciding cases. In Malaysia, a state’s official Mufti controls the Islamic Council or the Islamic Department. “Once appointed, either the Mufti of a state or a state fatwa committee can issue interpretations of Islamic law that, will be binding on Muslims and enforced by the state’s Syariah courts, once they are published in the official gazette”.\textsuperscript{172} A body called the National Council of Fatwa, comprising Mufti of the respective state can collectively issue their legal opinion or religious rulings (fatwa) at a national level.

The issuance of legal rulings is allowed as the Mufti has the power to do so, either on the direction of the King or the Ruler or on his own initiative or upon request\textsuperscript{173} on matters of public interest and Islamic subjects. It is within the Mufti’s authority to issue the rulings following the accepted views of the Shafie school of laws\textsuperscript{174}, however a Mufti could, if the accepted views of the Shafie school will lead to situation which is repugnant to public interest, choose to follow the accepted views of the Hanafi, Maliki or Hanbali’s schools\textsuperscript{175}. Furthermore, the Mufti may resolve the question according to his own judgment without being bound by the accepted views of any four Mazhabs, if none of the accepted views would lead to a situation, which is repugnant to public interest.\textsuperscript{176} As discussed earlier, as long as the issue on conversion to Islam in Malaysian civil laws is treated as a matter of ‘public interest’ within the definition of the Administration of

\textsuperscript{171} Ibid at page 110
\textsuperscript{172} Ibid at page 109
\textsuperscript{173} Supra note 62, Section 33
\textsuperscript{174} Supra note 62, Section 39(1)
\textsuperscript{175} Supra note 62, Section 39(2)
\textsuperscript{176} Supra note 62, Section 39(3)
Islamic Law (Federal Territory) Act 1993, and all parties are committed to improve the current legal provision to accord fair protection to the *dhimma*, the Mufti’s institution, in particular the National Fatwa Committee, would be able to contribute significantly to resolve this issue. Because it is clear that the Muftis have a very important role in the development of Islamic law in Malaysia, it is proposed that their role be enhanced and expanded towards the development of family laws both from both the Islamic and civil, with legal and religious pluralism objective in mind. In other words, the Mufti’s institution should be brought up to a higher level than it is now, and they should be encouraged to be an integral part of the development of the legal system in the Malaysian civil laws as well.

One unique development of the integration of legal pluralism in Malaysia is the law of inheritance and succession for the Muslims. The Ninth Schedule of the Constitution had specified that the Islamic law in respect of succession, testate and intestate of persons professing the religion of Islam are within the state’s matters. However, in practice, the Muslim law of inheritance is still within the jurisdiction of the civil courts. Shuaib argues the “[s]tate government also have the authority to establish their own body of Islamic law to regulate inheritance.”177 “To date, however, there is no codification of substantive Islamic inheritance law in any state, although several states do enact regulations concerning certain aspects of Islamic inheritance law.”178 Shuaib continues “[s]ince federal law control property rights, Syariah courts and civil courts must cooperate in cases of Muslim inheritance.”179 “When a Muslim dies intestate and leaving an estate of less

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177 Supra note 163 at 94
178 Supra note 163 at 94
179 Supra note 163 at 94
than two million Malaysian ringgit, the matter may be resolved by Shariah Court alone without the need to go to the civil courts.” "However in cases where the value of a deceased Muslim’s estate is more than that, the civil court will issue a letter of administration of the estate or a letter of probate under the Probate and Administration Act of 1959 and the Small Estate Distribution Act 1955.” The common pattern of cooperation between the courts in such cases is that the Shariah court certifies the allotted shares of the property to be distributed, and the civil court carries out the prescribed division of shares in effecting the transfer of property.” The Shariah institution acknowledges that the administration of property is a civil court’s jurisdiction; likewise, the civil court acknowledges that Muslims are subjected to Shariah personal laws and requires certain documentation before a probate or administration letter is issued. The cooperation demonstrates a dynamic joint governance between the civil and the Shariah courts, and the dependency between these two legal system, despite jurisdictional restrictions. This therefore open possibilities for future dynamic interactions in Malaysian Family Laws.

There have been cases where civil courts judges apply principles of Islamic law in their grounds of judgment as part of the law of equity; to act fairly and justly. Historically equity is used to tamper the harshness of common law. Shuaib claims that “[s]ince independence, national law has been drawn primarily from statute and judge-made

180 Supra note 163 at 94
181 Supra note 163 at 94
182 Supra note 163 at 94
common law."183 "Admittedly, some judges had tried to draw upon Islamic principles as well as common law precedents when interpreting statutes or developing common law."184 In Yong Fuat Meng v Chin Yoon Kew185, a dispute involving a newly convert Muslim husband seeking to divorce his non-Muslim wife, Abu Backer JC ruled that the husband could appear before the civil court to settle his obligations or liabilities that he himself had previously subscribed to by contracting a civil marriage after His Lordship states he had "gone through the standard text books of eminent scholars in Islamic Jurisprudence while writing [the said] judgment."186 His Lordship claims that "equity in Islam plays a significantly important role in the administration of Justice, than the common law."187 Therefore, the role of a Judge is also "to exercise equity in the best interest of the nation."188 In the end, His Lordship ruled that the civil courts have jurisdiction for matters relating to conversion, all depends on the facts of the case, despite other civil court judges reluctance to assume jurisdiction on conversion disputes.

Applying Islamic principles in the Malaysian legal system is not something new because during the colonial period, the civil courts with British judges or British trained judges were prepared to rule matters on Islamic law since there was a right to appeal from the state’s Shariah court to the civil court. If the present civil judiciary are encouraged to apply Islamic principles, and the courts have the opportunity to refer and consult the experts in complex Islamic law matters - a harmonization of Islamic law and common law

183 Supra note 163 at page 93
184 Supra note 163 at page 93
185 [2008] 5 MLJ 226
186 Ibid
187 Ibid
188 Ibid
is possible. This possibility is even supported by Shuiab when he further argues the “[f]ederal government of Malaysia could, without violating the Constitution, choose to apply throughout the country an Islamized body of law and could in theory choose to require that its judiciary be trained in Islamic law.” By giving adequate training, incentives and empowerment to the civil court to apply the principles of Islamic law in order to act fairly and justly, would encourage a more competent and well-versed judiciary in Islamic law, regardless of their ethnicities. Because the issue between equality and freedom of religion is a constitutional matter, Civil Court judiciary with adequate knowledge and background in Islamic law would be able to adjudicate and able to make independent research or at least possess the capacity to refer to experts in case of doubt of any Islamic legal principles.

Another harmonization between Islamic law and civil law is the development of Islamic banking and finance in Malaysia. The past two decades has seen a growth of Islamic commercial law, namely Islamic banking products and institutionalizing Islamic finance, regulatory and compliance. The move was initiated when Malaysian’s foreign policy shift towards a strong pro-Arab and pro-Islam stance in the early 1980s to strengthen Malaysia’s relationship and position with Muslim countries. The government had insisted that Islamic banking as an alternative to co-exist with conventional bankings, given the background and pluralist political situation of Malaysia.

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189 Supra note 163 at 92
190 For readings on Islamic Banking in Malaysia, see Ariff, Mohamed & Rosly, Saiful Azhar “Islamic Banking In Malaysia, Unchartered Waters” Asian Economic Policy Review 2011, 6, 301-317
Even though Malaysia has no foundation on commercial aspect of Shariah, conventional banks were encouraged to offer a fully Shariah compliant Islamic banking products. This move proven to be a success, because in the end, the dynamics of the Islamic banking products attracts not only the Muslim customers, but a large number of non-Muslim customers as well. The success is also because of the “ethical content of Islamic products”\textsuperscript{192} and “there is more to Islamic banking than the elimination of riba, as the Islamic instruments are free from all forms of deceit, exploitation, and ambiguity”.\textsuperscript{193} They claim that “[s]uch universal values means a lot to nearly all, regardless of religiosity.”\textsuperscript{194}

The Islamic banking products requires the commercial contracts to be drafted within the Islamic principles to ensure it is Shariah compliant. However, no substantial changes are made on the legal system in Malaysia to accommodate disputes of Islamic banking. This is because “[t]he subject matter that is being dealt with in the civil courts in Islamic financing cases is financing and not Islam.”\textsuperscript{195} Therefore, the jurisdiction to hear disputes pertaining to Islamic banking products are filed at the Civil Court, without any major changes of legal framework or the capacity of judges to adjudicate. According to Azahari, “[t]he mechanical operations of Islamic finance transactions remain largely within the purview of conventional laws as one of the remedies provided for financiers

\textsuperscript{192} Ariff, Mohamed & Rosly, Saiful Azhar “Islamic Banking In Malaysia, Unchartered Waters” Asian Economic Policy Review 2011, 6, 301-317 at page 305
\textsuperscript{193} Ibid
\textsuperscript{194} Ibid
\textsuperscript{195} Azahari, Fakihah, “Islamic Banking: Perspectives On Recent Case Development”, [2009] 1 MLJ page xci-cxxviii at page cxiii
under the National Land Code.” \footnote{Ibid at page cxiv} “The application of the National Land Code is in conformity with the Shariah since the Shariah allows its application under the principles of ‘al-‘aadatu muhkam’ meaning practices or cultures which do not contradict Shariah principles and are considered as part of Shariah.” \footnote{Ibid at page cxiv} In addition, to ensure there is a point of reference in case of doubt, the regulator set up the Shariah Advisory Council (SAC), an institution under the purview of the Malaysian Central Bank, to issue rulings on complex Islamic banking and finance matters. This provides a forum for non-experts in Islamic banking to refer to the Shariah Advisory Council including the availability of the council for the judges to refer issues on Islamic commercial law in court. Although there were some problems in the beginning, constant reviews and improvements were made to integrate and conform Islamic banking in the commercial and legal settings. Over time, judges in the civil court are familiar with Islamic products and their grounds of judgment reflects their familiarity with Islamic commercial law. The success of Islamic banking institutions are not only attributable to the swift action taken by the country’s policy makers, but also evidence on how the Islamic institution and the common law or the civil legal system can be harmonized to achieve common goals.

VI. Responding to Legal and Religious Pluralism and Institutional Options

It is time to seek deeper religious accommodation for the benefit of all citizens as part of the negotiation and agreement between ethnicities when Malaysia gained
independence in 1957. Law, equity and procedural controls need to harmonize to achieve equality for all Malaysians. The guarantee of equal rights for all Malaysian citizens is best demonstrated by tackling and resolving the most intimate and sensitive dispute involving gender, minor children and one’s religious obligations. The task is challenging, but Malaysia not only possesses adequate strengths to provide a good platform to address the conflict of dual Family Laws, but already has the necessary facilities and mechanisms to create a dynamic set of joint governance of Family Laws to further religious accommodation.

In opting which court would be the most appropriate, the laws applicable should be the one applicable to both the Muslims and the non-Muslims. The civil court, which is still the court of general jurisdiction for all Malaysians, should be accorded sole jurisdiction to hear Family Law disputes, especially matters pertaining to religious conversion and constitutional protection. Unless a revise legal framework is instituted at the Shariah court consider constitutional protection to all Malaysians, in particular to the non-Muslims, the Shariah court is not the suitable forum to hear such disputes. Given the present limitation of the scope of jurisdiction in the Shariah court, the non-Muslims would less likely to be accorded fair trial at the Shariah court - not because the court will not be fair to them, but because the present Islamic law in Malaysia will grant custody and upheld any conversion order to the Muslim spouse based on the present religious rulings issued by the Muftis and the state Islamic enactments. Furthermore, lack of uniformity of the present state-based Shariah institution is another reason why the civil court is a more suitable forum, to ensure consistency of rulings and certainty in Family Law disputes. However, it is not that the
Shariah institution does not have a role in this objective, because legal reforms will not be successful if the Shariah institutions do not take part. Instead of looking at the weaknesses of the Shariah institutions and expecting them to change and standardized, it is proposed that the Muftis are accorded a bit more responsibility and authority, that apart from representing the Muslim community, they should also be accountable to the non-Muslims or dhimma as well, being the dhimma’s trustees and guardians given the dynamic context of Malaysian historical background. Giving the Muftis additional power and bigger responsibilities to include protecting the welfare of all ethnicities, regardless of religion, will encourage them to be more dynamic, and robust in their rulings. Doing so, the institutions of the Muftis and the fatwas issued will be much respected, not only by the Muslims but by the religious minorities as well.

Next, there is a need to develop and enhance common understanding by all Malaysians that Islam supports religious pluralism, especially in a diverse and multi-religious country like Malaysia. Therefore, it is time that the National Fatwa Committee review all the earlier religious rulings pertaining to this conflict, and come up with more solid ijtihad, based on real present issues or abuses that had arisen so far. There are a lot of lessons that could be learned from past experiences, incidences and court rulings. Tighter procedural measures can be taken to prevent repetition of abuse, in some cases, there is a need to work together with the civil institution to see how the law can be co-ordinated, harmonized and tightened. Proper counselling to newly convert Muslims on how best his non-Muslim family affairs can be managed to ensure justice and fairness to the families who does not wish to convert should be make compulsory. Access to Alternative Dispute
Resolution forum, for example, Mediation, is another way to ensure that non-Muslim spouses has a forum to voice their side of their stories. The advantage of Mediation is that it is informal and could be attended by both the Muslims and non-Muslim parties, together with social welfare representatives. These are some additional measures on how proper institutions could be created to support the initiatives and achieve the common goal to resolve this conflict. As long as all parties are compassionate towards protecting the women, minor aged children, and the sanctity of the family institution, there are still a lot of rooms to manage these conflict of Family Laws.

In order to achieve the dual objective to protect the non-Muslim spouse and minor children from being deprived of their constitutional rights in these conflict of Family Laws and to ensure Islam is not used as escapism for errant spouse who try to obtain unilateral orders from the Shariah Courts; one of the first move is to amend two key legislations; the Law Reform (Marriage and Divorce) Act 1976 and the Guardianship of Infant Act 1961. For matters pertaining to marriage and divorce, children and religion, all newly converted Muslims should remain subjected to these two civil laws jurisdiction despite the ‘change of personal laws’ to the Islamic law. By retaining the jurisdiction, the non-convert spouse would be legally protected and would also preserve the status quo of any pending civil litigation pertaining to the marriage and dissolution, and provides more sense to other ancillary provisions under the LRA.

Law is enacted to set legal boundaries to provide some means to ensure these boundaries would be maintained. The role of law is to reduce conflicts and ensure people
lives in harmony with each other. Therefore one way to respond to legal and religious pluralism in Malaysia, requires correcting misconceptions, that non-Shariah Malaysian civil laws, are non-Islamic or ‘foreign’. Too often the labelling and name calling on what constitutes Islamic and what is not - by the government, legislature, political parties, non-governmental organizations and scholars, are damaging the present dual legal institution which otherwise could be a fascinating dual legal system. The \textit{Quran} and \textit{Hadith} provides the key principles of Islamic law, however, a country is at the liberty to come up with procedural and administrative control, together with contemporary laws to set legal boundaries and meet the demand of the society. Just because a state does not apply the comprehensive Islamic law stipulated in the \textit{Quran} and \textit{Hadith}, that does not mean the rest of the legal system is non-Islamic. Good and best practices, cultures and custom, and setting boundaries to ensure progress, are all Shariah, as long as they are not contradicting the key principles of Islamic law. Once this ‘joint governance’ is better understood and appreciated, it is much easier to reach religious accommodation. For instance, the harmonization of the law of estate and inheritance, demonstrates that the Islamic law, could be applied in civil court without any major changes. The joint governance is possible when both the Civil and the Shariah courts are more open and accommodating each other’s constraints and strengths. Should the Shariah institution thinks that matters on administration and distribution of property at the civil court are non-Islamic, and believers will be committing sins for adhering the civil court orders, the Shariah institution would be the first to enact laws on inheritance and succession matters for the Muslims. However, the Shariah institution opts to co-operate and work together with the civil courts. This
unique integration is not only already in practice, but it demonstrates how both laws can be harmonized and that future co-operation is open waiting to be explored.

The joint governance can further be learnt from Malaysia’s success on how it successfully regulates Islamic banking and finance, within the common law setting into strong institutional framework, in a short period of time. This is a continuous complex task involving funds, assets and finance, locally and internationally. Since Malaysia is able to come up with a regulated institution combining these two legal systems, proposing another set of dynamic Family Law institutions to coordinate special category of disputes, would be an interesting experiment. The Shariah Advisory Council set up by the Malaysian Central Bank comprising academicians, experts and Muftis, demonstrates how consultation plays an integral part and complements the adversarial common law legal system. Similary, a new model of ‘Family Law Advisory Council’, an institution comprise of experts from diverse background can be created for parties or courts to consult on dual Family Law disputes. A compilation of Islamic Family Law rules can be used as legal reference to address various family matters involving Muslim and newly convert Muslim, in order to equip the civil courts for their new comprehensive function. No doubt Malaysia has the necessary precedent to create a similar structured institution comprising experts of Family Law from both legal systems; academicians, religious leaders, representatives from non-governmental organisations, lawyers or judges. This new body would be a point of reference for the policy makers either at the Federal or State level to draft or review current laws that is hindering the progress of religious accommodation. Once set up, the Family Law Advisory Council can provide a fascinating experiment on how both laws can
be structurally harmonized to balance the needs of both Muslim and non-Muslim family members.

VII. Conclusion

Women and children are the strengths of future generation because they are the backbone of families. In almost all cases, women are the one who are disadvantaged by the inequalities enshrined in the various legal orders accommodated by the state. While more structured institutions had been developed to make women more competitive in economic and education sectors, not much success has been achieved in protecting women and children in family disputes, conversion of religion and custody issues in Malaysia. The resistance is from the Muslim communities itself, who are reluctant to experiment ways and means to achieve a true sense of religious accommodation because of the effect of colonisation. When families falls apart and women and minor aged children started to seek assistance from non-governmental organisations on an ad hoc basis, it is an indication that the government lack mechanism and competency to address the conflict. Instead of leading and setting an example, and has all the opportunities to prove that Malaysia can be the best model of true and contemporary Islamic state, it has gain less popularity and causes frustrations from many non-Muslim citizens.

Malaysia’s system of religious accommodation results in different sets of rights that are available to individuals in marriage and divorce based on the states religious and ethnic affiliation, and it possesses a complex dynamics inherent in a pluralist, post-colonial society which call for a sensitive approach to reform. Therefore, the new
engagement between the Civil and the Shariah Courts that could permit a path to accommodating diversity and equality has to take into consideration the constraints and strengths possess by Malaysia to date. The country in fact is well equipped with the necessary mechanism and strategies to address the conflict of Family Laws and able to provide an exemplary model of religious accommodation. To come up with a reasonable solution on the dispute of Family Laws requires not only a comprehensive research of both civil and Islamic law, but appreciation on Malaysia’s history, background, challenges, sentiments, constraints and strengths, and a bit of internal realisation, that sometimes, changes can benefit the society and strengthen Islam, the religion itself. The trial period would be demanding and over time there will glitches, but once all these challenges are identified and developed, Malaysia could provide an exemplary model of dual Family Laws protecting the sanctity of religion, women and children in the pluralist society.
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