

RUU 164

Apakah implikasinya?

DR. ZULFAKAR BIN RAMLEE SMP
ASSOCIATE PROFESSOR
Department of Legal Practice
AHMAD IBRAHIM KULLIYAH OF LAWS
INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA



18th century: British colonization

- 1786 in Penang.
- 1824 Malacca and Temasik (singapore)
- 1874 Perak , 1895 Selangor and Pahang.
- 1909 all Malay states.

- **The Introduction of:**
- English Common Law and Courts/judicial system

Syariah Court:

- Prior to 1948, In Federation of Malay States (Pahang, Perak, Selangor & N 9), Syariah Court was recognised and put under the hierarchy of court's structure. But was lower than 2nd class Magistrate Court.

Post 1952:

- New Muslim enactments were introduced:
- Selangor 1952
- Pahang 1956
- Negeri sembilan 1957
- ie. All matters fall under family or personal affairs except inheritance & succession were put under Syariah Court.
- Note: S'gor dan N9:Ada peruntukan sesiapa nak masuk Islam kena berumur lebih 18 tahun. (N9 2003, kekal S.117)

however:

“ANY CONFLICT BETWEEN THE DECISIONS OF
CIVIL COURT WITH **SYARIAH COURT**, THE
FORMER WILL PREVAIL”

Akta Membaharui Undang2 (Perkahwinan & Penceraian) 1976 = LRA 1976

- Berkuatkuasa pada 1 Mac 1982.
- Terpakai bagi Bukan Islam
- Berdomisil di Malaysia
- Kecuali perkahwinan adat di Sabah & Sarawak
- Monogami.

Seksyen 51 (1) LRA 1976

- Suami atau isteri yang tidak memeluk agama Islam dibenarkan untuk mengemukakan petisyen perceraian selepas tiga bulan dari tarikh salah satu pihak memeluk Islam.
- BAGAIMANAPUN, Pihak yang memeluk agama Islam **tidak boleh** mempetisyen di bawah LRA kerana sekatan dalam seksyen 3(3) LRA 1976.
- Pembubaran perkahwinan di bawah seksyen 51(2), boleh memperuntukkan terhadap nafkah dan syarat-syarat tambahan yang dirasakan perlu.

Implikasinya:

- Jika pihak yg belum Islam tidak membubar perkahwinan ini, maka perkahwinan sivil ini masih sah dari sisi undang2.
- Jika pihak yang masuk Islam tidak membubarkan perkahwinan tersebut di Mahkamah Syariah maka, perkahwinan itu masih sah. (s. 46(2) Akta 303 WP 1984.
- Jika Mahkamah Syariah membuat keputusan pun ianya masih boleh dicabar dan dibatalkan oleh Mahkamah Sivil.

1988 amendment FC: Article 121(1)(A)

The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Subashini v Saravanan

[2008] 2 MLJ 147 FC

Can SC nullifies the civil marriage?

Can SC hears the custody claim?

Can Civil Court hears the claim on maintenance etc.

See AILM at p. 240-282

Brief fact:

- The parties were originally Hindus husband and wife; they were married pursuant to a civil ceremony of marriage that was registered on 26 July 2001 pursuant to the Law Reform (Marriage and Divorce) Act 1976 (the 1976 Act). There were two children of the marriage, both boys: Dharvin Joshua aged 4 and Sharvin aged 2. The husband converted himself and the elder son to Islam on 18 May 2006. Later, the wife received a notice dated 14 July 2006 from the Registrar of the Syariah High Court Kuala Lumpur informing her that her husband had commenced proceedings in the Syariah High Court for the dissolution of the marriage and custody of the elder son. He filed the application in the Syariah High Court on 23 May 2006. An interim custody order in respect of the converted son was issued to the husband by the Syariah High Court. On 4 August 2006, which was 2 months and 18 days after the husband's conversion and knowing that the husband had taken proceedings in the Syariah High Court, the wife filed a petition for the dissolution of the marriage pursuant to s. 51 of the 1976 Act coupled with an application for custody and ancillary reliefs in the High Court. The wife did not object to the husband's conversion to Islam.

Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals

- [2016] MLJU 05
- FEDERAL COURT (PUTRAJAYA)
- RAUS SHARIF PCA, ZULKEFLI AHMAD MAKINUDIN CJM, ABDULL HAMID EMBONG, SURİYADI HALIM OMAR AND AZAHAR MOHAMED FCJJ
- In this case, the ex-husband and the ex-wife were Hindus at the time of their marriage. By contracting the civil marriage under the LRA they are bound by its provisions in respect of divorce as well as custody of the children of the marriage.

Held:

- Matters under the LRA are within the jurisdiction of the Civil Courts and the Civil Courts continue to have jurisdiction over them, notwithstanding the ex-husband's conversion to Islam. Thus, the matter of dispute between the ex-husband and the ex-wife in this case is not a matter within the jurisdiction of the Syariah High Court.
- It follows that Article 121(1A) which removes the jurisdiction of the Civil Courts in respect of any matter within the jurisdiction of the Syariah Courts does not operate to deny the Civil Courts jurisdiction in respect of the matters set out in section 51 of the LRA.

Also held:

- The Civil Courts have the exclusive jurisdiction to grant decrees of divorce of a civil marriage under the LRA and to make all other ancillary orders including custody care and access of the children born out of that marriage and all other matters ancillary thereto. It is an abuse of process for the spouse who has converted to Islam to file for dissolution of the marriage and for custody of the children in the Syariah Courts.
- **This is because the dispute between parties is not a matter within the exclusive jurisdiction of the Syariah Courts.** Therefore, Article 121(1A) of the Federal Constitution which deprives the Civil Courts jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts is not applicable in this case.

Kesannya:

- Perkahwinan dibawah LRA masih wujud melainkan ianya dibubarkan oleh Mahkamah Sivil.
- Jika pihak yang belum Islam tidak mahu membatalkannya maka.....
- Jika yang masuk Islam itu si isteri.....apa yang bakal berlaku?

Maka.....

- Seperti yang dicadangkan oleh Almarhum Tan Sri Prof. Ahmad Ibrahim lebih 30 tahun lalu.....
- Benarkan pihak yang masuk Islam untuk membuat petisyen/permohonan untuk membubarkan perkahwinan tersebut.

Amendment to S.51 of Act 164

- On Aug 10, the Dewan Rakyat passed the bill that granted the rights to husband or wife who have converted to Islam to file a petition for divorce, to dissolve his or her civil marriage under subsection 51 (1) of the Bill.
- It is also aimed at safeguarding the interest and giving justice to both parties to resolve all issues arising from the dissolution of the marriage, **including the welfare of the children** and their future.

Seksyen 51 Akta ibu dipinda—

- (a) dengan menggantikan subseksyen (1) dengan subseksyen yang berikut:

“(1) Jika satu pihak kepada sesuatu perkahwinan telah masuk Islam—

- (a) **salah satu pihak** boleh mempetisyen untuk perceraian di bawah seksyen ini atau seksyen 53; atau
- (b) kedua-dua pihak boleh mempetisyen untuk perceraian di bawah seksyen 52.”;

Isu hadanah/penjagaan anak?

- Melainkan jika pihak yang tidak masuk Islam hilang kelayakan untuk menjaga anak maka penghakiman Mahkamah boleh diperolehi. Jika tidak....
- Pendamaian. ADR/ Mediation/ Sulh.

Hadanaah anak kecil?

- Ibu lebih berhak.
- Jika ibu masih belum Islam?
- Mazhab Maliki dan Hanafi membolehkannya.

Cadangan pindaan: S.88A

88A. (1) Jika suatu pihak kepada sesuatu perkahwinan telah masuk Islam, agama mana-mana anak dari perkahwinan itu hendaklah kekal sebagai agama pihak-pihak kepada perkahwinan itu sebelum penukaran agama itu, kecuali jika **kedua-dua pihak kepada perkahwinan itu bersetuju** akan penukaran agama anak itu kepada Islam, tertakluk kepada keinginan anak itu apabila dia telah mencapai umur lapan belas tahun.

Bercanggah dengan Perlembagaan?

- Art. 12(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided **by his parent** or guardian.
- Keputusan Mahkamah Persekutuan dalam kes Subasini lwn Saravanan bhw. “parent” means either father or mother.

Status anak yang belum Islam?

- Ayat 256 surah al-Baqarah:
- لَا إِكْرَاهَ فِي الدِّينِ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ
- Antara sebab penurunan ayat ini.
- Kaum Ansar masuk Islam, **anak-anak** mereka bersama yahudi bani Nadir. Membesar dikalangan yahudi dan menganut agama yahudi.
- **Anak2** ini ada yg diberikan masa lahir lagi dan ada juga budak2 dihantar untur belajar dan tinggal bersama mereka.

Ahli Fitrah

- Jika mati sebelum baligh!
- Apa status anak-anak ini?

ومجمل القول في ذلك ان المسألة على ثلاثة

أقوال:

www.dorar.net

القول الأول: أن أطفال المشركين في الجنة، واحتج لهذا بما احتجوا به في أطفال المسلمين.

أولاً: أنهم على الفطرة، ((كل مولود يولد على الفطرة))

ثانياً: أنهم لم يفعلوا ما يؤاخذون به، ولم يفعلوا ما يعذبون به، فهم إذاً على
الطرة القويمة السليمة، فاللائق بعدل الله - سبحانه وتعالى - **أنهم من أصحاب
الجنة.**

ثالثاً:

احتجوا بالرواية التي وردت في حديث إبراهيم -عليه السلام-
فقال بعضهم: إن أطفال المشركين مثل أطفال المسلمين في
الجنة.

(كَانَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - مِمَّا يَكْثُرُ أَنْ يَقُولَ اللَّهُ لِأَصْحَابِهِ : قَالَ : هَلْ رَأَى أَحَدٌ مِنْكُمْ مِنْ رُؤْيَا ؟ قَالَ : فَيَقْصُّ عَلَيْهِ مَنْ شَاءَ اللَّهُ أَنْ يَقْصَّ . وَإِنَّهُ قَالَ ذَاتَ غَدَاةٍ : إِنَّهُ أَتَانِي اللَّيْلَةَ آتِيَانِ ، وَإِنَّهُمَا ابْتَعَثَانِي ، وَإِنَّهُمَا قَالَا لِي انْطَلِقْ ، وَإِنِّي انْطَلَقْتُ مَعَهُمَا . . . (فذكر أشياء رآها ثم قال) فانطلقنا ، فَاتَيْنَا عَلَى رَوْضَةٍ مُعْتَمَةٍ ، فِيهَا مِنْ كُلِّ لَوْنِ الرَّبِيعِ ، وَإِذَا بَيْنَ ظَهْرِي الرَّوْضَةِ رَجُلٌ طَوِيلٌ لَا أَكَادُ أَرَى رَأْسَهُ طَوِيلًا فِي السَّمَاءِ ، وَإِذَا حَوْلَ الرَّجُلِ مِنْ أَكْثَرِ وَلَدَانٍ رَأَيْتُهُمْ قَطُّ ، . . . (ثم كان مما عبره له الملكان) :

وَأَمَّا الرَّجُلُ الطَّوِيلُ الَّذِي فِي الرَّوْضَةِ فَإِنَّهُ إِبْرَاهِيمُ ، وَأَمَّا الْوِلْدَانُ الَّذِينَ حَوْلَهُ فَكُلُّ مَوْلُودٍ مَاتَ عَلَى الْفِطْرَةِ ، فَقَالَ بَعْضُ الْمُسْلِمِينَ : يَا رَسُولَ اللَّهِ ! وَأَوْلَادُ الْمُشْرِكِينَ ؟ فَقَالَ : وَأَوْلَادُ الْمُشْرِكِينَ) رواه البخاري (7047)

عن النبي صلى الله عليه وسلم أنه قال: ((النبي في الجنة، والشهيد في الجنة،
والمولود في الجنة، والوئيد -أي: الموءود-
في الجنة))

Riwayat Ahmad , Menurut Ibn Hajar , isnad hadis ini bertaraf Hassan.

Rumusan:

- Kita ada dua sistem perundangan
- Bukan Islam tidak boleh jadi pihak2 di Mahkamah Syariah
- Bukan Islam boleh jadi penjaga/Hadin
- Nak masuk Islam kena berumur 18 tahun (Perlembagaan, Enakmen Negeri2)
- Ahli Fitrah Ahli Syurga
- Pelbagai pandangan (ikktilaf ulama)