

Press Release

## Marriage and Custody in Malaysia: Judges made new rules which are against Allah's rules

On 10/02/2016, the Federal Court ruled that it is the civil court, and not the Shariah Court that should decide the custody of children who had converted to Islam. The Shariah Court only has jurisdiction in marriage and divorce when both parties are Muslims, the apex court said. A five-man bench chaired by Court of Appeal president, Tan Sri Raus Sharif also ruled that a non-Muslim marriage does not dissolve when one party embraced Islam. The other panel made up of Chief Judge of Malaya Tan Sri Zulkefli Ahmad Makinudin, and judges Tan Sri Abdul Hamid Embong, Tan Sri Suriyadi Halim Omar and Datuk Azahar Mohamed unanimously issued the custody order after ruling that the Shariah Court has no jurisdiction to make custody order in marriage-dissolution involving a Muslim convert and a non-Muslim.

This decision ends the long conflict of jurisdiction faced by civil and Shariah Courts with regards to non-Muslim marriage where one spouse thereafter converts to Islam. The decision has at the same time become the binding law of the land. The couple in that case, N. Viran and S. Deepa, married in March 2003 under Hindu rites. Izwan Abdullah (N. Viran) who became a Muslim in 2011, converted their two children (Nabil and Nabila) without his wife's knowledge in the same year. Subsequently in April 2012, he obtained an order from the Seremban Shariah Court for custody of the children. However, the wife was then awarded custody of the children by the Seremban High Court on April 7, 2014. In its decision on the custody issue, the Federal Court granted the custody of eight-year-old Nabil to Izwan while Deepa retained daughter Nabila, 11. "We are guided by the best interest of the children as stated under section 88 (1) of the Law Reform Act (Marriage and Divorce) 1976", Raus said.

In this regard, Hizb ut Tahrir / Malaysia would like to assert that the Federal Court's rules, without surprise, are clearly against Allah's rules in all aspects. The decision proves nothing except manifesting the secular nature of this country where civil courts always prevail over the Shariah Courts, in addition to the fact that the existence of a dualistic court system is itself a clear proof of the country's secular nature. Are those Muslim judges challenging the rules that Allah (swt) when they ruled that the marriage is not dissolved upon the conversion of one spouse to Islam, when it is crystal clear in Surah Mumtahanah (60) verse 10, that the marriage is automatically dissolved in such a case!? Are those judges challenging the rules of Allah (swt) when they granted the custody of Nabila (who is a Muslim) to her Hindu mother, when it is clear in Islam that the custody and guardianship of such a grown-up child is vested upon her Muslim father!?

The divine rule with regards to the custody and guardianship of children is explicitly clear in Islam. If a child is still under the age of distinction and does not comprehend things and does not realise the difference between the conduct of his/her mother and his/her father, in such that he is still at the age of suckling or weaned or beyond, then the child is not given a choice but to be united with his/her mother, regardless of her religion provided that the mother is proven more entitled to the custody of the child. There are plenty of hadith

regarding the matter. However, it is to be clearly understood the difference between custody (*hadaanah*) and guardianship (*wilaayah*), where a non-Muslim parent can have custody over a Muslim, but not guardianship. This is because custody only denotes raising and services (nursery) towards a child whereas guardianship is a matter of ascendancy. The principles of guardianship do not apply in the issue of nursery.

However, when the child is above the age of nursing, such that he/she is at the age or above the age where he/she no longer need to be suckled, and no longer require nursing, then the child is not given a choice but to be given to the Muslim parent, whom the custody and guardianship are vested upon. If the wife was the Muslim then the child would be given to her and if the husband was the Muslim then the child would be given to him, due to His (swt) words «وَلَنْ يَجْعَلَ اللَّهُ لِلْكَافِرِينَ عَلَى الْمُؤْمِنِينَ سَبِيلًا» **“And Allah will never allow an authority to the disbelievers over the believers”** [An-Nisa: 141] and also due to the words of Rasulullah (saw) «الإِسْلَامُ يَغْلُو وَلَا يُغْلَى» **“Islam will always dominate and nothing shall dominate over it”** [Narrated by Al-Daraqutni]. Based on the divine authorities and considering the ages of the children in this particular case, the custody over them must be given to a Muslim parent. Keeping the child under the custody of the disbeliever who will teach them disbelief is not allowed, and for that reason the child must be taken from the disbeliever and placed under the custody and guardianship of a Muslim parent.

O Judges! We would like to remind that you must strictly rule by what Allah (swt) has revealed. Take heed that Allah (swt) Who is the Judge of all judges, Who shall call all judges to account, has decreed that you judge by nothing other than what He has revealed and that when you judge, you must judge with justice. Nonetheless, your decisions in the aforementioned case has not been derived from what Allah has revealed and above all, has put the faith of the child in jeopardy, and you are fully aware of this. We remind you not to turn your backs on the Words of Allah (swt), and do remember a stern warning from Rasulullah (saw) to you:

«الْفُضَاءُ ثَلَاثَةٌ وَاحِدٌ فِي الْجَنَّةِ وَاثْنَانِ فِي النَّارِ فَأَمَّا الَّذِي فِي الْجَنَّةِ فَرَجُلٌ عَرَفَ الْحَقَّ فَقَضَى بِهِ وَرَجُلٌ عَرَفَ الْحَقَّ فَجَارَ فِي الْحُكْمِ فَهُوَ فِي النَّارِ وَرَجُلٌ قَضَى لِلنَّاسِ عَلَى جَهْلٍ فَهُوَ فِي النَّارِ»

**“Judges are of three types, one of whom will go to Paradise and two to Hell. The one who will go to Paradise is a man who knows what is right and gives judgment accordingly; but a man who knows what is right and acts tyrannically in his judgment will go to Hell; and a man who gives judgment for people when he is ignorant will go to Hell”** [Narrated by Abu Dawud].

Finally, we would like to remind all Muslims in general, that we cannot just simply pray and hope that the judges or this country will one day become good by themselves. We have to work hard to realize our hopes. For tens of years we have witnessed the rules of Islam being set aside in this country. Hence, it is our obligation to continually account and urge the rulers, the judges, the politicians, the armies and all those in authority to truly implement Islam. We must also, at the same time, be cognizant of our responsibility to re-establish the Righteous Khilafah State (Caliphate) upon the method of the Prophethood in order to implement Islam in its entirety.

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