

## AMENDMENTS OF ACT 164: SECTION 88A IS UNCONSTITUTIONAL

By

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Under the present provisions of the Law Reform (Marriage and Divorce) Act 1976 (Act 164), the party who does not convert to Islam may petition for divorce under section 51. Both parties may jointly petition for divorce under section 52. (Whether, in practice, these provisions are resorted to or not, is another matter.)

Section 51(2) provides:

*“(2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.”*

Similarly, section 52 provides that *“....the court may, if it thinks fit, make a decree of divorce on being satisfied that..... proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage.....”*.

What are the factors that the Court should consider in deciding the issue of custody? Section 88, inter alia, provides.

*“(2) 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—*

*(a) to the wishes of the parents of the child; and*

*(b) to the wishes of the child, where he or she is of an age to express an independent opinion.”*

Note that under these provisions, the converting party is not denied the right to have the custody of the child. The child is not denied the right to choose to be under the custody of the converting party. The child is not denied the right to choose whatever religion he or she wishes to profess, including that of the converting party, Islam. The paramount consideration of the court is the welfare of the child followed by the wishes of the parties and the child. The court may, after considering all those factors, decide to which party the custody of the child should be given, including to the converting party.

That is the existing law.

It must be remembered that the converting party could be the husband or the wife. Just because in the previous cases that had gone to court, the converting party had been the husband, we should not be thinking that that is the rule and that an amendment should be made to protect the wife. That is wrong.

Let us now look at the proposed amendments. This is provided for in section 88A:

**“88A.** (1) *Where a party to a marriage has converted to Islam, the religion of any child of the marriage shall remain as the religion of the parties to the marriage prior to the conversion, except where both parties to the marriage agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she has attained the age of eighteen years.*

(2) *Where the parties to the marriage professed different religions prior to the conversion of one spouse to Islam, a child of the marriage shall be at liberty to remain in the religion of either one of the prior religions of the parties before the conversion to Islam.”.*

The first thing I will say is that this provision is one sided in favour of the party not converting to Islam. Even though it does not deny the right of the converting party to have the custody of the child of the marriage, the effect is that it is quite impossible for the converting party to get custody of the child.

This is because, section 88A requires the child to remain in the religion of the parents before the conversion, if they had a common religion, or the religion of one of them if they belonged to different religions. The effect is that the child is prohibited from becoming a Muslim. The converting party is a Muslim. It will be a very strong argument for the non-converting party to put forward to court when it considers the issue of custody of the child to say that it is detrimental to the welfare of the non-Muslim child to place him under the custody of the Muslim party. There is a danger that the child may be converted to Islam when the law requires the child to be a non-Muslim. The court has no choice but to give custody of the child to the non-converting party.

Secondly, I say that section 88A is unconstitutional on the following grounds:

1. The law prohibits the child from becoming a Muslim. That is unconstitutional under Article 11 of the Constitution.
2. The law effectively deprives the converting party from having custody of the child on ground only of religion. That is unconstitutional under Article 8(2) of the Constitution

Section 88A is unconstitutional and must be removed or amended.

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