

## Legal Disputes in Determining the Religion of the Child when one Parent Converts to Islam under Malaysian Law

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**Abstract:** This paper examines the child's right to determine his / her religious status when one parents converts to Islam under Malaysian law. Determination as to the religious status of a child as well as custodial rights are very much in dispute between these parents as their marriage has to come to an end due to religious sanctions and lack of tolerance between them to come to a settlement. As opposed to custodial right, the issue is whether the welfare principle is still relevant in determining the religious status of a child. The current practice suggests that the father is the central focus in deciding the child's religion under the Federal Constitution as well as *Shari'ah* rules though lately there were arguments to allow both parents to have such power. Therefore this study will examine legal provisions pertaining to children's right to religion under Malaysian law and explore an equal position under the *Shari'ah*.

**Key words:** Conversion, 'unilateral', religious status, jurisdiction, conflict of law.

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### INTRODUCTION

This paper examines the status of child's religion in case of unilateral conversion to Islam. Determination as to the religious status of a child as well as custodial right are very much in dispute between these parents as their marriages have to end in a legal system where religion decides on the legality of the marriage such as Malaysia (Islamic Family Law (Federal territories) Act 1984, section 10). In most occasions their marital and religious conflicts have hindered the parties to work on amicable agreement though out of court settlement, in such cases, would be the best solution.

In normal circumstances, religious upbringing of a child below the age of 18 years (See Age of Majority Act 1971, section 2 and article 2 of the CRC provides for the age limit of a child as below 18 years unless the national laws recognize the age of majority is attained earlier) is associated with parental rights and duties. The United Nation Convention on the Right of the Child ('the CRC') guarantees the right of the child to freedom of thought, conscience and religion and the role of the parents to provide direction to the child in the exercise of his and her right in a manner consistent with evolving capacity of the child (See Article 14 of the CRC). In line with the Convention, the present law governing child's religion has been addressed in Federal Constitution ('the Constitution') by imposing responsibility on parent or guardian as religious protector. This provision works well in the absence of conflict where literal interpretation of the law would be sufficient. Nevertheless, in situation where parents of the child are of different religion, such law must be given its legislative intent and more importantly to serve justice to the litigating parties and the welfare of the child in dispute. Since religious upbringing is one of the important considerations in deciding child custody for Muslim, it further escalates the conflict, as the Constitution does not expressly provide for equality of right between parents and it would be subject to judicial scrutiny. Therefore, possible solutions are to resort to the best interests of the child as primary consideration in which the custodian will decide on child's religion or to retain the status quo of the child upon reaching adulthood, the argument, which is favourable by the non-Muslim parent (The Star, MCA: Child's Religion should stay status quo, 7 March 2009). Therefore this study will examine legal provisions and the cause of conflicts pertaining to children's' right to religion under Malaysian law with reference and comparison to the *Shari'ah*.

### MATERIALS AND METHODS

The study adopts library research in researching into the details of the classical Islamic law to provide theoretical foundation of the study. The purpose is to explore various legal interpretation of religious law and deduce the most acceptable legal solution to the existing problem. Content analysis of statutory provisions of several related laws namely the Federal Constitution, the Guardianship of Infants Act, Islamic Family law that provide the basis for fundamental rights and custodial arrangement is adopted to examine and determine

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legislative intent when drafting the provisions. This will serve as a useful guidance for further interpretation of constitutional provisions related to the conflict.

This study also adopts content analysis approach when dealing with decided cases to examine judicial interpretation and reasons for the judgment. Such exercise is done with the intention to study the manner the law being interpreted and applied.

**Results:**

The study proposes that the best interest principle as already in practice is the best solution to solve the problem in determining the legal status of the child and such approach is not contrary to principles of Islamic law. Though the issue of religion is important, but it is not the only criteria for consideration in case of conflict between parents of different religion.

**Discussion:**

***Shari'ah Position on Religious Status of A Child:***

It is an acceptable principle in the *Shari'ah* that the religion of the child will go along with his/her parents in the absence of conflict of religious status of the parents. However, the Muslim jurists differ in case when one parent adopts other religion than Islam. The majority including Shafiis, Hanafis, Hanbalis and Ibn Hazm view that the child shall adopt the religion of the Muslim's parent regardless of whether the parent is the father or mother. Nevertheless, they agree that the child may choose the religion that he/she feels comfortable with upon attainment of puberty on the premise that it is impossible for the child to choose religion other than Islam as the religion of *fitrah* (natural/inborn)(This presumption is based on a well known hadith that reads; "every child is born as a Muslim but the parent is responsible to make him a Jew or a Christian or a Majusi". This hadith is reported both in Bukhari and Muslim and the full version is also quoted in Ibn Qudamah, Al Mughni, wa al Sharh al Kabeer, p. 97. See also Badran Abu al Ainaini Badran, Al Alaqaq al Ijtima'iyyah baina al-Muslimin wa Ghairi al Muslimin, p.165). This view is also supported by Sufyan al Thawri (779 CE/161H)(Tabi'i Islamic scholars and the founder of Thawri mazhab) based on the practice of the Prophet who gave an option to the child to choose in case the father convert to Islam and the mother refused to convert. The Malikis on the other hand view that the child will follow the father regardless of religious status on the premise of a natural guardian and paternalistic status(See Ibn Qudamah, Al Mughni, wa al Sharh al Kabeer, p. 96. See also Badran Abu al Ainaini Badran, Al Alaqaq al Ijtima'iyyah baina al-Muslimin wa Ghairi al Muslimin, p.165).The above discussion shows that religious status of the parents is not the only consideration when deciding the religious status of a child in case of one parent is of different religion.

***Legislative Background:***

The study on several aspects of child related laws is significant in addressing the conflicts especially in the context of Malaysia as dualist state. The Constitution provides for a basic right to freedom of religion with a special clause for minor children.

Article 12 of the Constitution states:

(3) No person shall be required to receive instruction in or take part in any ceremony or act of worship of a religion other than his own.

(4) For the purpose of cl (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

The above provision indicates that it is a settled law in Malaysia that the religion of the child below the age of 18 years will be decided by his parent or guardian. The word parent in singular form has caused considerable uncertainty as to refer to a parent or both parents. The provision fits well if it were to be expounded on the basis of *Shari'ah* rules as previously mentioned that the one who is responsible on the child's faith and religious upbringing will be the father as natural guardian and it forms part of his primary duty. However, in case of unilateral conversion, the majority of the Muslim jurists view that the child will automatically follow (*tab'iyyah*) the religion of the Muslim parent(See for example al Nawawi, *Raudah al Talibin*, p.497 and al Sharbini, *Mughni al Muhtaj*, p. 606).There is only one person takes charge that is the Muslim parent or in the absence of parent, the state will assume the responsibility of a guardian. Therefore, the issue of conversion does not arise, as the children have no legal capacity to make decision except for those who have attained puberty age of 15 years but below the age of 18 years. Under the Administration of Islamic law, the person who is not a Muslim may convert to Islam if he is sound mind and has attained the age of 18 years. Otherwise, his parent or guardian must consent to his conversion(See for example Administration of Islamic Law (Federal Territories) Act, section 95. Other states also have similar provision though the section varies). This provision is consistent with Article 12(4) of the Constitution.

The Constitution emphasizes on the parent to take the role of a guardian, which is statutorily provided under the Guardianship of Infants Act, 1961 ('the GIA'). This Act applies only to non-Muslim. Prior to the amendment in 1999, the father was the natural guardian for the child(The Guardianship of Infants Act 1961,

section 3). However, after the amendment, the GIA accords equal rights to both parents in response to the protests made by many NGO's especially women groups due to the difficulties in dealings with administrative matters pertaining to children. It states:

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 the mother and father shall be equal.* (Guardianship of Infants Act 1961, section 5)

The above provision generally imposes on the custodial parent to be responsible on the child upbringing which will also include his religious upbringing. This is further supported in the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') where the law states:

An order for custody may be made on such conditions as the court may think fit to impose, and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody *to decide all questions relating to the upbringing and education of the child.* (Law Reform (Marriage and Divorce) Act 1976, section 89(1))

The important of religious upbringing in case of non-Muslim is explained in *Chua Thye Peng v Kuan Huah Oong* ([1978] 2 MLJ 217, in which the religion the deceased parents practiced played a vital role in the award of custody. The above provision is taken verbatim in Islamic Family Law with slight modification to the extent that the religious value of a custodian is primary to decide on custodial right though it may not necessarily be the only consideration for such decision (See Islamic Family Law (Federal Territories) Act 1984, section 83(1)). It is interesting to observe that the civil courts also have given considerable attention to religious upbringing in case of unilateral conversion as one of the checklists in deciding what would be for the best interests of the child. For example in *Yip Fook Tai v Manjit Singh @ Mohd Iskandar Manjit Abdullah* ([1990] 2 CLJ 605) there was an agreement between parents that the eldest child will stay with the father while the youngest lived with the mother after the divorce took place under section 51 of the LRA due to the husband's conversion to Islam. Eventually, the mother applied for custody of the elder daughter and the Court has to examine on the suitability of the non-Muslim mother to care for the Muslim child. Considering the fact that the child is a Muslim following the father's religion, the Court concluded that it would be unsuitable for the mother to raise a Muslim child. Furthermore, the child herself expressed her desire to remain with the father.

#### ***Child's Right V Parental Right- A Historical Evaluation:***

Though the legal battle on child's religious status was not part of the argument in *In re Maria Huberdina A Hertogh; Inche Mansor Adabi v Adrianus Petrus Hertogh and Anor* [1951] 17 MLJ 164, the principle applied by the court is significant to address the conflict. In this case, the father claimed the custody of 13-year-old girl who was previously brought up in a Muslim environment from the age of five years and later on went through a Muslim form of marriage. He claimed that the marriage of her daughter to one Inche Mansor Adabi was null and void for lack of domicile, which was a requirement for a valid marriage. In the trial court the child expressed her desire to remain in the country of (Singapore) and continue in Muslim faith. The father, however, in his affidavit stated that 'he never consented and would never have consented' her daughter to become a Muslim (at page 167). Though this issue was not the subject matter in dispute, the appeal court eventually nullified the marriage despite the submission from the appellant that the child was a Muslim and had attained puberty (*baligh*) which is validly exercised under the Shari'ah law and therefore her marriage to the Muslim husband is a valid marriage. The judge on the other hand ignored the plea and ruled that the female infant in this case was domiciled in Holland and as there was no evidence that the domicile of Mansor Adabi was Singapore, the law of Holland would be applicable to determine the validity of the marriage. Therefore the custody of the infant was given to her parents and as a result she ceased to be brought up as a Muslim. Ahmad Ibrahim who was one of the counsels for the appellant criticized the judgement as being cruel in which the interests of the child as paramount has been ignored (Ahmad Mohamed Ibrahim, Superiority of the Islamic System of Justice [1994] 4 *IJUM Law Journal* 1).

A few years later, the principle in Maria Hertough's case was followed in *Re Chee Peng Quek* [1963] 1 MLJ p. 1xxix, where the court reaffirms the rule that the father of an infant is ordinarily the guardian of his person and property and is therefore, entitled to control his religion, education and upbringing. The case was about a minor girl, aged 16 years and 6 months, left her father's home and went to stay with a Malay man and his parents. Two days later, she was brought to the All-Malaya Muslim Missionary Society and there converted to Islam and given the name of 'Zahara binte Abdullah'. As a result of her conversion the name of her identity card was changed to her Muslim name. Her father tried to persuade his daughter to go back to him but she refused and the father therefore requested her detention in a place of safety. The Director of Social Welfare made an order for her detention, at first at the request of her father under section 145 (1) (a) of the Women's Charter, 1961, and subsequently after inquiry, under section 145(3) of the said Charter, the girl was detained at the Muslim Women's Welfare Home. At the time of her detention she was about four months pregnant. The father applied to the Court seeking several orders including that he be declared the lawful father and guardian for the

child with the right to control her religion, education and upbringing and thus the child's conversion without the consent of the father is null and void. The judge relied on the provision in Guardianship of Infant Ordinance, which is of general application and applies to Muslims and therefore the father of an infant would ordinarily be entitled to the guardianship of his person and property. This right of guardianship includes also the right to determine the religious upbringing and religious education of the infant. Thus, the judge ruled that he had no alternative but to hold that the father was entitled to the order he asked for. Support for this view is also to be found in Article 12(4) of the Federal Constitution, which provides in effect that the religion of a person under eighteen years shall be determined, by his parent or guardian. This case seems to suggest that the word 'parent' as enshrined in Article 12(4) of Federal Constitution should refer to the father as a lawful and natural guardian.

The same argument was raised in the Malaysian case of *Teoh Eng Huat v Kadhi, Pasir Mas & Anor*(1990) 2 MLJ 300)where the appellant father discovered that his daughter, who had been missing, had been converted as a Muslim by the first respondent. His daughter was almost 18 years old, and a minor under the civil law. The appellant brought an action in the Kota Bharu High Court seeking a declaration that he, as the lawful father and guardian, has the right to decide the religion, education and upbringing of his infant daughter based on section 3 of the GIA that declares the father as the guardian of the child as well as Article 12(4) of the Constitution. The High Court dismissed the application of the appellant. The appellant appealed to the Supreme Court where the decision of the High Court was reversed on the basis that no infant shall have the automatic right to receive instruction relating to any religion other than his own without the permission of his parent or guardian. As the law applicable to the infant at the time of the conversion was the civil law, the right of religious practice of the infant should therefore be exercised by the guardian on her behalf until she attains the age of majority. A person under the age of 18 does not have that right and in that case of non-Muslims, the parent or guardian normally has the choice of minor's religion.

In the meantime, the girl had reached the age of majority in which the judgment of the Supreme Court is purely of academic interest as the child is no longer an infant. However, the judgment remains fundamental in seeking a balance approach between a child's right and parental authority and to provide basis for further argument should the same problem arise. The above-cited cases are examples of conflicts between parents and the children who have attained puberty under the Shari'ah law but still considered as minors under national law. The court has no option but to interpret the law as it stands on the wider interest of the nation rather than the child best interests (See also criticism in Yong Chui Mei, *The Aftermath of Suzie Teoh- Are Parental Rights Supreme?* [1991] *JMCL*138). This is particularly true when the applicable law is the highest law of the country such as the Federal Constitution.

#### ***Non-Muslim V Muslim Parent:***

Determination of child's religion becomes more complicated in case of unilateral conversion to Islam as the parent who is awarded custody order will have a better chance to decide on religious upbringing of the child. As shown in several cases that were decided in the civil courts, the issue of religion is equally important to decide on the welfare of the child beside the capability of the custodian to raise the child in a more suitable and conducive environment (See *Yip Fook Tai Tai v Manjit Singh @ Mohd Iskandar Manjit Abdullah* [1990] 2 CLJ 605 and *Nur Aisha Suk bte Abdullah* [2000] 7 MLJ 574). The Shari'ah court will give preference to the religious status of the custodian, as one of the important criteria as expressly provided for under the Islamic Family law, though the issue of religion for the custodian in Islamic jurisprudence, is subjective. This is quite understandable as the issue of faith is fundamental for Muslims.

The conflict could be seen in *Genga Devi a/p Chelliah v Santanam a/l Damodaram*[2001] 1 MLJ 526,where the applicant mother was married to the respondent father under the Law Reform Act 1976 and in accordance with the Hindu rites. The respondent went missing for some time and subsequently reappeared and took away the child from the mother. The mother obtained a custody order but was not observed by the father. The mother petitioned for divorce and two years after she obtained a decree nisi, the father had converted to Islam together with the child and obtained a custody order from the *Shari'ah* court. In response to that, the mother had filed an originating summons praying, inter alia, for a declaration that the order granted by the *Shari'ah* court in relation to the rights of child custody to be struck off and invalid. The respondent had raised a preliminary objection that the applicant's application was irregular and contrary to the procedure and law, as this court did not provide the jurisdiction to strike out the order granted by the *Shari'ah* court. Though the issue of jurisdiction is the focus of the argument, the High court acknowledged that on the issue of religious upbringing, the respondent was the natural father of the child and as the natural father; he had a right to determine the religion practiced by his child. The *Shari'ah* Court also had acted within its exclusive jurisdiction by granting the right to custody to the respondent and validating the conversion of the child to Islam.

There is no reference being made to Article 12(4) of Federal Constitution as the mother is more interested in the custody of the child and challenging the *Shari'ah* court's decision, which is also a competent court. However, it is reasonable to conclude from the above judgment that religious upbringing is one of the rights of the father as natural guardian.

The battle between parents continues in *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors*[2003] 5 MLJ 106. The case concerned the legality of an infant girl's conversion to Islam and the High Court's jurisdiction to interpret state law concerning the administration of Islamic Law. The infant's father converted to Islam on 23 January 1998 without the knowledge of his wife (the plaintiff) who is the infant mother. On 17 July 1998, the infant was also converted to Islam without the plaintiff's consent. On 28 July, the father obtained an order from the *Shari'ah* lower court declaring his marriage null and void and granting him custody of the infant. The *Shari'ah* High Court subsequently reversed this order on 4 November 1998. On 13 November 1998, the High Court at Kota Kinabalu granted the plaintiff custody of the infant. The plaintiff subsequently applied to declare null and void the infant's conversion to Islam on 17 July 1998 by the first defendant. In her application, the plaintiff questioned the legality of the infant's conversion whereas the defendants questioned the High Court's jurisdiction to hear and determine the application. In determining the case, the High Court had to, inter alia, interpret the word 'parent' in section 68 of the Sabah Administration of Islamic Law Enactment 1992 ('the Enactment') which provision required the consent of parent to the conversion to Islam of a person below 18 years of age. The defendants argue that the word 'parents' in s 68 had to be interpreted as the singular 'parent'. According to the defendants, if s. 68 were to be read to require the consent of both parents, it would be inconsistent with art 12(4) of the Federal Constitution, which claimed the defendants, required only the consent of a parent for matters pertaining to the choice of an infant's religion.

In dealing with the above arguments by both parties, the Court takes note of few important legal issues, which are interrelated. The first issue is regarding the interpretation of Article 12(4) of the Federal Constitution as to the word 'parent' whether to mean one or both parents. The Court resorted to the Guardianship of Infants Act 1961 that provides for both father and mother an equal right to be the guardian. Such right must be exercised jointly unless one parent has died. This is in line with the requirement under s. 68 of the Enactment that provides:

For the purpose of this Part, a person who is not a Muslim may convert to Islam if he attains the age of *baligh* according to Islamic law and provided that if a person is below (18) years of age consent shall be obtained from the parents or his guardian.

The above provision though may not be directly matched to the case in dispute as the initiative to convert was made by the parent rather than the child himself, nevertheless, the Court finds that the provision supports Article 12(4) of Federal Constitution as to refer to both parents rather than just one parent's consent. Furthermore, the court viewed that by virtue of section 69 of the Enactment, the two-year-old infant had to be able to utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith and to know their meanings as well. It is recognized by the Enactment that in order to recite and to know the meaning of the clauses, a person must be of the age of *baligh* – meaning of full age or adulthood. In the instant case, the infant was clearly not of the age of *baligh* and thus her conversion was against the Enactment.

Another issue that was pointed out by the judge is pertaining to legal rulings on child custody itself in which the custodian will be responsible to decide all matters relating to the upbringing and education of the child, which would include religious education. Since the mother has been given the right to custody, the judge viewed that it is the mother's right to decide on religious education. Apart from that the judge went on to declare that the conversion to Islam of the infant is null and void for lack of legal capacity and the consent of both parents as required under section 68 of the Enactment. The above judgment concludes that the child's religion will be decided by parent who is awarded the custody of the child. By doing so, the Court seems to contradict itself by giving the right only to one parent rather than both parents.

In contrast, the court takes a different approach in *Nedunchelian V Uthiradam v Nurshafiqah Mah Singai Annal & Ors*[2005] 2 CLJ 306 in which the plaintiff father made an application seeking primarily to invalidate a Syariah Court order obtained by the 1<sup>st</sup> defendant mother converting their minor children from the Hindu faith to the Islamic faith. The 1<sup>st</sup> defendant converts the children after converting herself. A preliminary objection (PO) was raised on behalf of the defendants on whether this court had the jurisdiction to hear the application. Though the Court reaffirms the supremacy of Article 121 1A of the Federal Constitution since the mother has obtained the *Shari'ah* court's order, the judge has to examine Article 12(4) of the Constitution as to whether the word 'parent or guardian' would mean one parent or both parents. The plaintiff argued that the word 'parent' in art. 12(4) must be read in the plural in that both parents' consent is needed for the conversion of the children's religion to Islam. The Court viewed that the word 'parent' is framed in the singular. Although the singular includes the plural under art. 160(1) Constitution, the word 'parent' in the singular clearly gives rise as to whether it was intentionally inserted to read in the singular.

The Court agreed to the contention that the four children, being below 18 years of age and statutorily prohibited from electing the religion of their choice were merely following the religion of their mother who had converted to Islam. That was permissible and did not in any way offend the provision of Article 12(4) of the Constitution. Further, s. 2(1) of the Islamic Family Law Enactment 1990 (Johor) conferred the *Shari'ah* court jurisdiction over the four children. Case authorities too have repeatedly stressed and established that the High

Court in its civil jurisdiction cannot challenge, dispute, vary, strike out, declare and/or injunct the execution of an order of the Syariah Court. (See *Genga Devi a/p Chelliah v Santanam a/l Damodaram* [2001] 1 MLJ 526).

The above argument explains that Article 12(4) of the Constitution is a restatement of the law that the religion of a person below the age of 18 can only be determined by his parent or guardian, it does not state or cover the situation where a minor follows the religion of his parent as happened here where all the four children did not make an independent election of converting to Islam but as held by the Syariah Court 'merely followed the religion of the mother who had converted to Islam'. The court further elaborated that 'in short, art. 12(4) does not prohibit the minor from following the religion of his parent – the word parent herein being framed in the singular. The intention of such is reinforced in the context of children below 18 years of age being prohibited from electing the religion of their choice as their choice must surely be subordinated to the religion of their parent. Being subordinate to the religion of their parent interpreted singularly as reasoned aforesaid it follows in the context herein that upon the mother's conversion the four children being below 18 years of age and statutorily prohibited from electing the religion of their choice is merely following the religion of the mother who has converted to Islam, which to my mind is permissible and does not in any way offend the provisions of art. 12(4) of the Federal Constitution'.

The judge invoked the concept of 'following the parents religion, which is more relevant for young infants as they do not have the legal capacity to convert to Islam. Therefore, following *Chan Ah Mee's* case, since the mother is the custodian for the children, she is responsible to decide on religious upbringing of the children.

Prior to *Nedunchellian's* case, there was another dispute in which the court has to grant joint custody order for both parents as a mean to resolve the conflict. In *Shamala Sathiyaseelan v Dr. Jeyaganesh C Mogarajah* [2004] 3 CLJ 516, there was an *inter parte* custody application by the mother of two infant children of a Hindu marriage after the father had converted himself and the infant children to the Islamic faith without her consent. This court had earlier ruled the following: (1) that the *ex parte* order for custody obtained by the father from the Selangor *Shari'ah* High Court was not binding on the mother as she was a Hindu; (2) that the Hindu marriage of the parties was not dissolved upon the father converting to Islam and that it only provided a ground for the mother to petition for divorce; and (3) that the civil court had no jurisdiction to hear the mother's application for a declaration that the conversion of the infant children to Islam was null and void.

In coming to a conclusion, the Court acknowledged equal parental rights and authority in relation to custody and upbringing of the children by strictly relying on section 5 of the GIA. Therefore, by converting the children unilaterally to Islam, the father has infringed section 5 of the GIA for failure to consult the mother before converting the infant children, as the mother was still his legal wife. The Court, however, does not rule that the conversion of an infant to Islam is null and void as in *Chan Ah Mee's* case though the subject matter is almost identical.

Citing the law as it should be, the Court recognizes that the infant children were now *muallaf*. They had been issued with temporary certificates of "Akuan Sementara Pengislaman". On the other hand, there was the present custody application by the mother in accordance with the LRA. In the circumstances, legal custody should be given jointly by both parents, which means that they had to discuss and agree on the issue about the infant children, for example, choosing the method of education, choice of religion and administrating the children's property. Actual custody that entailed daily care and control of the infant children should be given to the mother. However, the mother would lose the right to actual custody if there were reasonable grounds to believe that she would influence the children's religious beliefs, for example, teaching them the articles of her faith or making them eat pork. The award of joint custody order sounds practical in such a case where both parents could work together for the betterment of their children as in ordinary divorce cases. However, it may lead to a tug of war situation if both parents fail to compromise.

The same argument was raised in *Subashini Rajasingam v Saravanan Thangathoray & Other Appeals*(2008) 2 CLJ 1. The parties to the present three appeals were originally Hindus who were married pursuant to a civil ceremony of marriage registered under the LRA. Two male children were born of the marriage: Dharvin Joshua on 11 May 2003 and Sharvind on 16 June 2005. The husband converted himself and the elder son to Islam on 18 May 2006, and the wife subsequently received a notice from the Registrar of the *Shari'ah* High Court informing her that her husband had commenced proceeding in the *Shari'ah* High Court for the dissolution of the marriage and custody of the elder children. On 4 August 2006, two month and 18 days after the husband's conversion, 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 meanwhile applied for and obtained an *ex parte* injunction against the husband, who then filed an application to set aside the said injunction. The wife also argued that the husband had no right to convert either child of the marriage to Islam without the consent of the wife due to the fact that the choice of religion is a right vested in both parents by virtues of Articles 12(4) and 8 of the Federal Constitution and section 5 of the Guardianship of Infant Act 1961.

Construing the evidence before him, the Court recognizes that both husband and the elder had converted to Islam on 18 May 2006. The certificates of conversion to Islam issued to them under s. 112 of the Administration

of the Religion of Islam (State of Selangor) Enactment 2003 ('Selangor Enactment') conclusively proved the fact that their conversion took place on 18 May 2006. By embracing Islam, the husband and the son become subject to Muslim personal and religious laws and it was not an abuse of process if he, being a Muslim, sought remedies in the *Shari'ah* High Court as it was his right to do so.

The Court acknowledges that either husband or wife has the right to convert a child of the marriage to Islam. The word 'parent' in art. 12(4) of the FC, which states that the religion of a person under the age of 18 shall be decided by his parent or guardian, means a single parent. Hence, the conversion of the elder son to Islam by the husband under the Selangor Enactment did not violate the Constitution. Also, reliance could not be placed on s. 5 of the Guardianship of Infants Act 1961, which provides for equality of parental right since s. 1(3) of the same Act has prohibited the application of the Act to such persons like the husband, who had become a Muslim.

That being so, Article 8 of the Constitution is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in *Nedunchelian's* case. Also, reliance cannot be placed on section 5 of the Guardianship of Infant Act 1961, which provides for equality of parental right since section 1(3) of the same Act prohibited the application of the Act to such a person like the husband who is now a Muslim. The court referred to the judgment in *Shamala's* case.

### **Conclusion:**

The above judgment has caused considerable uncertainty in looking for legal accuracy in interpreting the law and to expound on the best approach principle. In the light of the above decision it appears that the law as it stands now is as follows:

1. One parent can convert a child from one religion to another.
2. The custodial parent is responsible on child's upbringing including religious upbringing
3. When that conversion is to Islam, the non-Muslim spouse may have no remedy because of the difficulties faced by non-Muslims in challenging the other party's legal status as a 'Muslim' due to various laws and court decisions.

The above discussion basically concerns about young infants who are below the age of majority and unable to understand any religious instruction. The law regulating conversion as in States law is not applicable for infants as the requirements for a valid conversion include legal capacity, which obviously excludes a minor. Therefore, as pointed by the judge in *Nedunchelliah's* case that the children follow the religion of the parent (mother) who is in fact the custodian is consistent with the Islamic rulings in protecting the interests of the infant. Therefore, the best interests of the child as a mechanism to decide on religious upbringing would be the best solution to the extent that both parents will be scrutinized by the judge to decide on their competency to look after the children and this option is not contrary to both civil and the *Shari'ah*. This may, however, create a tug of war situation if the process is not properly observed in terms of its compliance. Therefore, the award of joint custody could be another alternative where both parents will have an equal access to their children. This new pattern of custody arrangement needs to be nurtured before it could become a culture and properly codified to avoid noncompliance.

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