

# **IMPLICATION OF THE CONVERSION CASES AND ARISING ISSUES**

**oleh:**

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**INTRODUCTION:**

Malaysia is a very unique country since it belongs to a multiracial citizen which had peacefully lived together for more than 50 years. As regards to this, Malaysia is known as one of the astounded countries in the world for the achievement in successfully managing and administering the affairs of a complex community that have their own beliefs and own culture that differ from each other. Among the reasons for this achievement, is the right on freedom of religions that is reserved and guaranteed in article 11(1) of the Malaysia Federal Constitution. However, although the right and freedom to believe and practice one's own belief is guaranteed, but the procedural issue, the effect and implication of such act still remains unresolved. Over the years, a number of cases decided in court like *Susie Teoh* (1990), *Chang Ah Mee* (2003), *Shamala* (2004) and *Subashini* (2008) have caused a lot of confusion to the masses. The latest case involving *Indira Gandhi and Pathmanathan* has made Malaysians more anxious.<sup>1</sup>

**IMPLICATION OF THE CONVERSION CASES AND ARISING ISSUES:**

Again, when a party to a non-Muslim marriage converts to Islam, the same old legal complications arise: the status of the marriage; maintenance for the children and former wife; custody, upbringing and education of the children; and the determination of the child's religion especially those under the age of 18, i.e. minors. The consequences of the whole issue have struck a nerve; the aforementioned case is prolonging the polemic, affecting the harmonious inter-ethnic relations of the nation.<sup>2</sup> Despite efforts to contain the resulting misrepresentation, distrust, hatred and prejudice, some have obstinately defied reasonable counsel.

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<sup>1</sup> Azhar, W. 'Conversion Of Children: A Legal Quagmire', (19<sup>th</sup> Mei 2009) The Star Available Online At [Http://Www.Ikim.Gov.My/V5/Index.Php/](http://www.ikim.gov.my/v5/index.php/), Accessed On 20<sup>th</sup> August 2010.

<sup>2</sup> Azhar, W. 'Conversion Of Children: A Legal Quagmire', (19<sup>th</sup> Mei 2009) The Star Available Online At [Http://Www.Ikim.Gov.My/V5/Index.Php/](http://www.ikim.gov.my/v5/index.php/), Accessed On 20<sup>th</sup> August 2010.

These had in fact lead to arising three controversial issues that somehow may alarming the racial and religious disagreement within our country. The issue are; first are concerning about which jurisdiction of court has greater right in ascertaining the marriage and divorce of non-Muslim marriage in conversion cases. Second, whether it is legally permitted to convert an infant without the consent of other spouse and finally, the issue relating to right of custody of the children.

### **JURISDICTION OF THE COURT TO ASCERTAIN THE DISSOLUTION OF NON-MUSLIM MARRIAGE IN CONVERSION CASES:**

Family law relating to non-Muslims is governed separately from family law relating to Muslims. The Civil High Courts have jurisdiction over family matters relating to non-Muslims in Malaysia, whereas Syariah Courts have jurisdiction over family matters relating to Muslims.<sup>1</sup> By virtue of an amendment to the Article 121(1A) of Federal constitution, which came into force on 10th June 1988, the Civil High Courts in Malaysia have no jurisdiction in respect of any matter that falls within the jurisdiction of the Syariah Courts. This dual system of laws works perfectly well when lines are clearly demarcated and families stay within those lines. Indeed, members of one family who practice the same religion would therefore be governed by one set of laws and come under the jurisdiction of one court.<sup>2</sup> The lines, however, begin to blur when one party to a civil marriage decides to convert to Islam and the other spouse does not, and has no wish to do so. The situation further turns into a legal and constitutional dilemma when the spouse who converts to Islam decides unilaterally to convert the children of the marriage without the knowledge of and/or without obtaining the prior consent of the non-converting spouse.

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<sup>1</sup> Ngo, F.Y, 'Malaysia's Family Law ; Custody And Religion', Available Online At [Http://Lawasia.Asn.Au/Objectlibrary/17?Filename=Malaysia%27s%20Family%20Law.Pdf](http://Lawasia.Asn.Au/Objectlibrary/17?Filename=Malaysia%27s%20Family%20Law.Pdf) , Accessed On 20<sup>th</sup> August 2010.

<sup>2</sup> Ibid

In relation to this issue, it has been stated in Law Reform (Marriage & Divorce) Act 1976 (LRA 1976), in section 51, where the main intention of the provision to overcome the dilemma happened when one of the spouse convert to Islam. This Section enables a non-converting spouse to petition for divorce in the Civil Courts against the converted spouse on the ground of conversion to Islam. Upon such a divorce, the non-converting spouse may seek child rights, financial support and property division orders against the converted spouse. In essence, the effect of Section 51 is that it preserves the rights of the non-converting spouse to seek ancillary reliefs consequent upon a divorce against a converted spouse notwithstanding the general inapplicability of the LRA 1976 to Muslims. Section 51 has, over the years since the LRA 1976 was implemented in 1982, been the subject of much controversy. To begin with, the Section provides a remedy for the non-converted spouse.

However, the right of the converted spouse to similar relief has been overlooked. He or she upon becoming a Muslim is precluded from seeking any relief in both the Civil Courts and the Syariah Courts, since the Civil Courts cannot entertain a divorce application from the converted spouse on the ground of conversion to Islam, and the Syariah Courts have no jurisdiction over the non-Muslim spouse. In consequences of that, the act of converting party seeking relief in Syariah Court is not an option but it is the only way that provided in our legal procedure.

In the other hand, according to the Islamic law, in the event that one of the spouses who married under the non-Muslim law converts to Muslim, his marriage will automatically be dissolved. The marriage will be dissolved if the other spouse did not convert to Muslim within the period of *iddah*. An example taken here provision provided in Islamic Family Law Federal Territories Act 1984, whereby under Section 46(2) of the Act says;

“The 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 court herein refers to Syariah Court.”

In short, it states that the Syariah court has the power to determine the dissolution of the marriage of a non-Muslim party when one of the parties converts to Muslim. Thus, the marriage would not be automatically dissolved upon the conversion of the other party. If this occurs, there would be difficulty in the marriage if each of the spouses embraces different faith. Among the difficulty here could be seen when a converter is bound by his former personal law, but he is unable to exercise such rights.<sup>1</sup>

Therefore, clear distinction provided by the constitution between the jurisdiction of civil and syariah court make this issue became difficult when the tendency of both court to not interfere in both jurisdiction. All matters fall within the syariah courts jurisdiction is administered by separate system of syariah courts at state levels and in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan.<sup>2</sup> State laws also provides for the administration of syariah courts. Beside the given authority, states have no jurisdiction unless provided under the federal law. Accordingly, if the state law does not confer on the syariah court any jurisdiction to deal with a matter on the State List, the syariah court is precluded from dealing with the matter. Subsequently, the High Court may continue to exercise jurisdiction in those matters.<sup>3</sup>

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<sup>1</sup> Wu Min Aun, *The Malaysian Legal System*, (Longman 2<sup>nd</sup> Ed.)

<sup>2</sup> Ibid

<sup>3</sup> Ibid

## **RIGHT TO CONVERT AN INFANT WITHOUT CONSENT OF OTHER SPOUSE.**

A highlight as regard to this issue can be seen in the case of Susie Teoh,<sup>1</sup> were in this case, Susie Teoh was 17 years and 8 months when she became Muslim. Her father Teoh Eng Huat, a Buddhist, could not locate her and he took the Jabatan Agama in Kelantan to court. He applied for a declaration that, as father and guardian to the infant, he had a right to decide her religion, education and upbringing and that her conversion to Islam was invalid.<sup>2</sup> The case was covered by the Guardianship of Infants Act, 1961, a federal law of general application, Art. 11 (1) (freedom of religion), and Art. 12 (3), (4) (right to education) of the Federal Constitution. The High Court ruled that the father's right to decide the religion and upbringing of the infant (under 18) is allowed "subject to the condition that it does not conflict with the principles of the infant's choice of religion guaranteed to her under the Federal Constitution". In other words, the infant has a right to choose her own religion if she does it on her own free will. Susie Teoh was not in court to testify if she had voluntarily become Muslim "as her whereabouts were unknown".

The Supreme Court overruled the decision of the High Court and held that "in all the circumstances and in the wider interests of the nation no infant shall have the automatic right to receive instruction relating to any other religion other than her own without the permission of the parent or guardian".

Suffice to say that consent of parent is a must in any case of minor conversion. The issue is who constitutes parent or guardian as specified under the

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<sup>1</sup> [1986] 2 *MLJ* 228

<sup>2</sup> Ahmad, S., 'A View On Infant Conversion To Islam', (2004), *Aliran Monthly*, Vol 24 Issue 9, Available Online At <http://Www.Alihan.Com/Oldsite/Monthly/2004b/9e.Html>, Accessed On 24<sup>th</sup> August 2010.

Enactments and the Federal Constitution? Is the word “parent” or “guardian” is interpreted singular or plural? Does the conversion of minor require the consent of either parent or both parents? The analysis on the construction of the wording “consent of parent or guardian” in the section 12(4) of the federal constitution. indicates “singular” and not “plural” meaning. In another case of *Genga Devi Chelliah v. Santanam Damodaram*<sup>1</sup>, it was held that as the respondent was the father of the children, he had the right to determine his children’s religion.

Applying the principle in *Shaik Zolkaffily bin Shaik Natar*<sup>2</sup>, the court had to determine the interpretation of the word “parents” in section 68 of the Sabah Administration of Islamic Law Enactment 1992 which provision required the consent of the parents to the conversion to Islam of a person below 18 years of age and the word “parent” as provided under Article 12(4) of the Federal Constitution, which requires the decision of parent or guardian in determining the religion of underage person.<sup>3</sup>

The husband in this case contended that the word “parent” in the Enactment shall have to be read as parent in the singular meaning. However, the court did not agree with the proposition. Ian Chin J held as follows:

*“The term parent in Art 12 (4) must necessary means both the father and mother. To construe otherwise would mean depriving, for example, a mother of her rights as a parent to choose the religion of the infant under Art 12 (4), if the father alone decides on the religion to be*

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<sup>1</sup> [2001] 2 CLJ 359

<sup>2</sup> *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai V Shaik Zolkaffily Bin Shaik Natar Dan Lain-Lain* [2002] 4 MLJ 130.

<sup>3</sup> Rahman, N.A, ‘Conversion Of Minor To Islam In Malaysia: Whither Consent Of Parents?’, *Shariah Journal*, Vol. 16, Special Edition (2008) 585-602, Available Online At [Http://Myais.Fsktm.Um.Edu.My/9585/1/CONVERSION\\_OF\\_MINOR\\_TO\\_ISLAM\\_IN\\_MALAYSIA\\_WHITHER\\_CONSENT\\_OF\\_PARENTS.Pdf](http://Myais.Fsktm.Um.Edu.My/9585/1/CONVERSION_OF_MINOR_TO_ISLAM_IN_MALAYSIA_WHITHER_CONSENT_OF_PARENTS.Pdf), Accessed On 25<sup>th</sup> August 2010.

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*followed by the infant. To allow just the father or the mother to choose the religion would invariably mean depriving the other of the constitutional right under Art 12 (4) as Art 12 (4) confers the right on both the father and the mother (when they are both living)."*

The court further held that the term parent in Art 12 (4) must be interpreted as plural and not singular, as follows:

*"The constitution does not discriminate against the sexes and since the father and mother have equal right over the person and property of the infant, the "parent" in Article 12 (4) must necessary means both the father and mother if both are living."*

The court finally declared that the conversion by the first defendant of the infant, i.e daughter and the issuance of the certificate by the second defendant is null and void.

However, this issue was decided differently in the similar case of *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor*<sup>1</sup>. Faiza Thamby Chik J in the course of judgment delivered as follows:

*"With respect, I do not agree with such an interpretation on Art. 12 (4) made by my learned brother colleague. It is to be noted that section 68 of the Sabah Administration of Islamic Laws Enactment 1992 uses the word 'parents'. It is spelt 'p-a-r-e-n-t-s' in the plural sense, whereas Art 12 (4) of the Federal Constitution uses the word 'parent'. It*

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<sup>1</sup> [2004] 2 MLJ 648.



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*is spelt 'p-ar-e-n-t' without the alphabet 's'. It is used in the singular sense”.*

Therefore, in my point of view, in dealing with this issue, the current singular terminology for “parent” must be changed to read “parents” as in plural thereby requiring the consent and knowledge of both parents should one spouse decide to register their minor children as their converted religion. This amendment to the Federal Constitution, thus clarifying specifically Article 12(4) to include both parents is feasible to prevent the issue of unilateral conversion from exploding into a neither political issue nor emotional court battle unnecessarily, thereby polarizing the various religious communities of Malaysia.

If both parents fail to reach an agreement as to the minor children’s faith, it should then remain as status quo as in the religion at time of birth, or the common religion at time of marriage. When the minor children reach the age of majority, i.e. 18 years, then the minor children will determine the religion they wish to profess.

### **RIGHT TO HAVE CUSTODY OVER THE CHILDREN:**

In determining the issue of which parent will have the right of custody over a child is a very difficult matter since the children is the one most suffered over this issue. In March 2010, The Ipoh High Court has made a landmark ruling that it has the jurisdiction to hear family matters involving custody of children although one party has converted to Islam. Justice Wan Afrah Wan Ibrahim allowed the application of a 35-year-old Hindu mother custody to her three children who were converted to Islam by her 41 year-old husband, who had also converted to Islam.

After a one-year legal battle, kindergarten teacher M Indira Gandhi has won custody of daughter Tevidarsiny, 13, son Karan Dinish, 12, and daughter Prasana Diksa, 2.

However, a week after the Cabinet decision and 96 hours after the Ipoh High Court orders, Indira Ghandi, who had caused the Cabinet to come out with a policy decision to end controversial conversion cases which create not only gross injustices in trampling on parental rights and destroying family integrity but also cause deep divisions in our multi-racial and multi-religious nation, is still pining for her year-old baby girl as Pathmanathan/Ridzuan and Prasana seem to have disappeared altogether.

However, a decision by the Cabinet denies the courts, be it shariah or civil, its rightful role. It denied at least one parent his or her right and by so doing, denies the children their rights as well. There was disagreement with the decision by the Cabinet for these reasons. It short-circuits the process and like all short circuits, gives rise to bigger problems.

The “letter to the editor” of New Straits Times by an academician in Islamic theology and philosophy in a local university, entitled “No religious basis to convert baby” did give another point of view from Islamic perspective on this issue. This letter, by Dr. Ibrahim Abu Bakar, Associate Professor of the Department of Theology and Philsophy, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia, expressed very strong views that Pathmanathan/Ridzuan should return Prasana to her Hindu mother, that he is a bad Muslim if he does not hand back Prasana, even proposing that the police should arrest him if he is reluctant to deliver the baby girl back to Indira after the Ipoh High Court interim custody order in favour of the mother.

Dr. Ibrahim wrote: “Islamic theology does not impose any religious duty on the father to take away the baby girl from her Hindu mother. This baby should not

be prohibited by her father from being breastfed by her mother. If he does, he is wrong and evil in Islamic theological view because Islam does not impose any religious duty on any baby regardless whether she was born to a Hindu or Muslim mother. Islam imposes Islamic religious duties upon mature men and women, not upon babies and children. Please let this baby girl be breastfed by her mother.

The “Islamness” of the children is not taken into account in Islamic theology. Islamic theology will count on the “Islamness” of human beings who are mature. The Islamic terms for mature, sensible and responsible human beings are “aql” and “baligh”. Patmanathan has been supported by some ignorant Muslims on the pretext of protecting the purity of Islam and his three children. These Muslims are wrong.

There is no Islamic legal basis for Muslims to help someone take away a baby from her mother and then convert that baby to Islam. Islam does not count on the converted babies and Islam does not reward those who have converted the babies to Islam. The babies have no Islamic religious duties and, therefore, they are neither rewarded nor punished for such actions.”

However, in order to reach a fair and just decision and mutual consensus from both spouses, I did agree with the suggested idea made by Members of Parliament of Shah Alam, Khalid Samad in Malaysian Insider, that the question of custody should be decided in the manner it is decided in any other case. The religion of both parents need to put aside and the welfare of the children become the primary issue when making the decision. The rights of both parents to teach their children their respective religion is acknowledged and the court is to ensure that both parents are to provide their fullest cooperation in this matter. The children then decide for themselves their religion of choice when they come of age.

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## **CONCLUSION AND RECOMMENDATION:**

In conclusion, in my point of view, all the issue that arises in conversion cases can be solve without creating hatred and prejudice in our multiracial and beliefs in this country. The main effort that need is actually regarding the fundamental problem arising in the issue of conversion is the problem lies in a situation where the two court systems do not talk to one another as though they exist in two different worlds.

As regard to this issue, I in line with the view proposed by Mr. Hashim Kamali, the Islamic law expert, has recommended establishing a special court of mixed jurisdiction where both Shariah and civil judges would adjudicate disputes involving Muslims and non-Muslims on issues such as child conversion and custody.

By having this special court, all the arising issue in conversion cases can be faced without disregard any of the party in the case. The membership of the court also needs to be fully independent from all influences and tendency either to a religion or races.

## **LIST OF REFERENCES:**

Azhar,W. 'Conversion Of Children: A Legal Quagmire', (19<sup>th</sup> Mei 2009) The Star Available Online At [Http://Www.Ikim.Gov.My/V5/Index.Php/](http://www.ikim.gov.my/v5/index.php/), Accessed On 20<sup>th</sup> August 2010.

Ngo,F.Y, 'Malaysia's Family Law ; Custody And Religion',Available Online At [Http://Lawasia.Asn.Au/Objectlibrary/17?Filename=Malaysia%27s%20Family%20Law.Pdf](http://lawasia.asn.au/objectlibrary/17?filename=Malaysia%27s%20Family%20Law.Pdf) , Accessed On 20<sup>th</sup> August 2010.

Wu Min Aun, The Malaysian Legal System, (Longman 2<sup>nd</sup> Ed.)

Ahmad, S., 'A View On Infant Conversion To Islam', (2004), Aliran Monthly, Vol 24 Issue 9, Available Online At [Http://Www.Aliran.Com/Oldsite/Monthly/2004b/9e.Html](http://www.aliran.com/oldsite/monthly/2004b/9e.html), Accessed On 24<sup>th</sup> August 2010.

Rahman,N.A, 'Conversion Of Minor To Islam In

Malaysia: Whither Consent Of Parents?', *Shariah Journal*, Vol. 16, Special Edition (2008) 585-602, Available Online At

[Http://Myais.Fsktm.Um.Edu.My/9585/1/CONVERSION\\_OF\\_MINOR\\_TO\\_ISLAM\\_IN\\_MALAYSIA\\_WHITHER\\_CONSENT\\_OF\\_PARENTS.Pdf](http://myais.fsktm.um.edu.my/9585/1/CONVERSION_OF_MINOR_TO_ISLAM_IN_MALAYSIA_WHITHER_CONSENT_OF_PARENTS.Pdf), Accessed On 25<sup>th</sup> August 2010

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[2004] 2 *MLJ* 648.

[2001] 2 *CLJ* 359

[1986] 2 *MLJ* 228