

UNILATERAL CONVERSION OF A CHILD'S RELIGION AND PARENTAL RIGHTS IN MALAYSIA

The issue of unilateral conversion of a child to Islam by one parent who has embraced Islam and the subsequent tussle over the custody of the child between the disputing parents in the civil court and the Syariah Court has of late ignited controversy in Malaysia. This article seeks to examine the extent of the non-Muslim parent's right to determine the child's religion, the impact of the unilateral conversion of the child to Islam on the parents' custodial right in a family dispute and how the existing legal and judicial systems in Malaysia can be strategically used to achieve one's aim.

KUEK Chee Ying

*LLB (Hons) (University of Malaya), LLM (University of Malaya);
Lecturer, Faculty of Business and Law, Multimedia University.*

TAY Eng Siang

*LLB (Hons) (University of Malaya),
LLM (Distinction) (University of Malaya);
Lecturer, Faculty of Business and Law, Multimedia University.*

I. Introduction

1 Malaysia is a multi-ethnic and multi-religious country.¹ The Federal Constitution of Malaysia guarantees freedom of religion where every person is granted the right to profess and practise, and, subject to certain restrictions,² to propagate his or her religion.³ Though not

1 According to the Population and Housing Census 2010, the total population of Malaysia was 28.3 million, of which about 91.8% were Malaysian citizens. Of the total Malaysian citizens, Bumiputera (Malays and other indigenous people) comprised 67.4%, Chinese 24.6%, Indians 7.3% and others 0.7%. The same census also revealed the proportion of persons embracing different religions, namely, Islam (61.3%), Buddhism (19.8%), Christianity (9.2%) and Hinduism (6.3%). See: "Population Distribution and Basic Demographic Characteristic Report 2010" (Updated 5/8/2011-Corrigendum) <http://www.statistics.gov.my/portal/index.php?option=com_content&view=article&id=1215%3Apopulation-distributionand-basic-demographic-characteristic-report-population-and-housing-census-malaysia-2010-updated-2972011&catid=130%3Apopulation-distribution-and-basic-demographic-characteristic-report-population-and-housing-census-malaysia-2010&lang=en> (accessed 25 February 2012).

2 Article 11(4) of the Federal Constitution of Malaysia provides that state law and, in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal
(cont'd on the next page)

expressly stated, it may be implied that such right shall include the right to change one's religion or belief. Otherwise, it will render the freedom of religion as enshrined in Art 11 of the Federal Constitution illusory or ineffective⁴ and fall short of the international human rights standards.⁵ However, the religion of a person under the age of 18 years shall be decided by his or her parent or guardian.⁶

2 The issue of unilateral conversion of a child to Islam by one parent who has embraced Islam has of late ignited controversy in Malaysia. The problem is compounded when the disputing parents commence the legal tussle over the custody of the child in the civil court and Syariah Court respectively. Indeed, legal pluralism in Malaysia is reflected by the dual legal system of civil and Syariah. The civil courts being courts of general jurisdiction administer laws which are of general application. On the other hand, the Syariah Courts administer Islamic laws as contained under the various enactments passed by the state legislatures, which are applicable to persons professing the religion of Islam.⁷ In other words, the Syariah Courts do not have jurisdiction where one of the parties involved is a non-Muslim.⁸

law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

3 Article 11(1) of the Federal Constitution of Malaysia provides that "every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it".

4 In *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2004] 2 MLJ 119 at [7]; [2004] 6 CLJ 242 at 247, Faiza Tamby Chik J gave a very restrictive interpretation to Art 11 of the Federal Constitution of Malaysia by distinguishing between freedom of religion and freedom of choice and concluded that Art 11 referred only to the former but not the latter. For a critique of this case, see Thio Li-Ann, "Apostasy and Religious Freedom: Constitutional Issues Arising from the *Lina Joy* Litigation" [2006] 2 MLJ i.

5 Article 18 of the Universal Declaration on Human Rights provides that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief". Article 18 of the International Covenant on Civil and Political Rights ("ICCPR") also recognises that the right to freedom of thought, conscience and religion "shall include freedom to have or to adopt a religion or belief of his choice". Paragraph 3 of the Human Rights Committee's General Comment No 22 on Art 18 of the ICCPR states that the said provision "does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice". Meanwhile, Art 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that freedom of thought, conscience and religion includes "freedom to change his religion or belief".

6 Article 12(4) of the Federal Constitution of Malaysia. In Malaysia, a person attains the age of majority at 18-years-old, as provided in s 2 of the Age of Majority Act 1971 (Act 21).

7 In Malaysia, Syariah Courts only have jurisdiction over persons professing the religion of Islam. See Second List, Ninth Schedule of the Federal Constitution of Malaysia.

8 Ahmad Ibrahim, "The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law" [1989] 2 MLJ xvii at xxi. The late
(cont'd on the next page)

3 Questions arise as to what extent a non-Muslim parent has the right to determine the religion of the child if the spouse embraces Islam and the impact of the child's conversion to Islam on the custody dispute between the parents. Such questions, if left unattended, will lead to social tension and disintegrate the religious cohesion in the country, which is detrimental to the national unity.

4 This article seeks to examine this legal muddle arising out of the competing interpretation of the Constitution and related laws, the dual legal and court system in Malaysia as well as the litigation strategy which might be employed to achieve one's aim in such custody dispute.

II. Conversion to Islam of one spouse and the child's religion

5 Non-Muslim marriages in Malaysia are governed by the Law Reform (Marriage and Divorce) Act 1976 ("LRA").⁹ The LRA specifically excludes its application to Muslims, except where a petition for divorce is filed by the non-converting spouse against the converted spouse on the ground of conversion to Islam as provided in s 51 of the LRA. Hence, conversion to Islam of one spouse can be a ground for the non-converting spouse to petition for divorce and seek ancillary relief.¹⁰

6 However, it is observed that the Islamic law as contained in the various state enactments and the federal statute have distinguished the parental right over a child's religion based on the religion of the parents, particularly the converted parent, at the time the child is born. It seems that the non-converting parent has no right to determine the child's religion if such child is born after another spouse embraces Islam and

Professor Ahmad Ibrahim was described as the prime mover behind the amendment to Art 121 of the Federal Constitution of Malaysia, which included the insertion of Art 121(1A). See *Latifah bte Mat Zin v Rosmawati bte Sharibun* [2007] 5 MLJ 101 at 117–118; [2007] 5 CLJ 253 at [50] (FC). Article 121(1A) of the Federal Constitution provides that the two High Courts referred to in Art 121(1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

9 Section 3(3) of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) provides that the Act shall not apply to a Muslim or any person who is married under Muslim law except s 51 whereby the court may grant a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam.

10 In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2008] 2 MLJ 147; [2008] 2 CLJ 1 at [15] (FC), it was stated that:

The legislature, by enacting s 51, clearly envisaged a situation that where one party to non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. Further, it would seem to us that Parliament, in enacting subsection 51(2), must have had in mind to give protection to non-Muslim spouses and children of the marriage against a Muslim convert.

the civil marriage has not been dissolved. This is because the various state enactments in Malaysia define “Muslim” as, *inter alia*, “a person either or both of whose parents were at the time of the person’s birth, a Muslim”.¹¹

7 In other words, a child who is born after one of his or her parents converts to Islam will automatically be a Muslim within the meaning of the relevant state enactments and the federal statute. It operates by way of law and not by the personal choice of the parents especially the non-Muslim parent. It appears that there is no reported case which challenges the constitutionality of the said provision, in the context of equality between the parents of different religions, one of whom is a Muslim.¹²

11 There are 13 states in the Federation of Malaysia, namely, Pahang, Malacca, Johor, Negeri Sembilan, Selangor, Perak, Penang, Perlis, Kedah, Kelantan, Terengganu, Sarawak and Sabah. The provision stated above can be found in:

- (a) Pahang Administration of Islamic Law Enactment 1991 (No 3 of 1991) s 2(1).
- (b) Majlis Islam Sarawak Ordinance 2001 (Cap 41) s 2.
- (c) Administration of the Religion of Islam (State of Malacca) Enactment 2002 (No 7 of 2002) s 2.
- (d) Administration of the Religion of Islam (State of Johor) Enactment 2003 (No 16 of 2003) s 2.
- (e) Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (No 10 of 2003) s 2.
- (f) Administration of the Religion of Islam (State of Selangor) Enactment 2003 (No 1 of 2003) s 2.
- (g) Administration of the Religion of Islam (Perak) Enactment 2004 (No 4 of 2004) s 2.
- (h) Administration of the Religion of Islam (State of Penang) Enactment 2004 (No 4 of 2004) s 2.
- (i) Majlis Ugama Islam Negeri Sabah Enactment 2004 (No 5 of 2004) s 2(1).
- (j) Perlis Administration of the Religion of Islam Enactment 2006 (No 4 of 2006) s 2.
- (k) Administration of Islamic Law (Kedah Darul Aman) Enactment 2008 (No 5 of 2008) s 2(1).

There is no definition of “Muslim” in the state enactments of Kelantan and Terengganu. In the case of the federal statute which is applicable to the Federal Territories, see s 2 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) which has a similar provision.

12 Article 8(2) of the Federal Constitution of Malaysia provides that:

Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment. [emphasis added]

However, it is interesting to note that in the recent case of *Zaina Abidin bin Hamid @ S Maniam v Government of Malaysia* (unreported), the Federal Court of Malaysia had, on 2 February 2012, dismissed a special Constitutional Reference from the Shah Alam High Court on several questions, on the grounds that there

(cont'd on the next page)

8 The issue of parental right over the religion of a child who is born before one of his or her parents converts to Islam is not free from dispute either.

9 Article 12(4) of the Federal Constitution provides that the religion of a person under the age of 18 years shall be decided by his parent or guardian. The Islamic law as embodied in the majority of the state enactments and the federal statute provides, *inter alia*, that a person who is not a Muslim may convert to the religion of Islam if he is of sound mind and if he has not attained the age of 18 years, his parent or guardian consents to his conversion.¹³ It is interesting to note that prior to the repeal of the Administration of Islamic Law Enactment 1992¹⁴ in Sabah, a person who was below 18 years of age had to obtain the consent from the *parents* or his guardian in order for him to convert to Islam.¹⁵ The difference between the word “parent” and “parents”, if

were facts in dispute. These questions included, among others, the constitutionality of the definition of “Muslim” in s 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. The matter was remitted to the Shah Alam High Court for a full hearing. See Hafiz Yatim, “Religious Status: Case Sent Back to High Court”, <<http://www.malaysiakini.com/news/188061>> (accessed 25 February 2012); Debra Chong, “Federal Court Avoids Deciding On Right To Religion of Choice”; <<http://www.themalaysianinsider.com/litee/malaysia/article/federal-court-avoids-deciding-on-right-to-religion-of-choice/>> (accessed 25 February 2012); “Is the Definition of A ‘Muslim’ Unconstitutional?” <<http://www.loyarburok.com/2012/02/02/definition-muslim-unconstitutional/>> (accessed 25 February 2012).

- 13 (a) Majlis Islam Sarawak Ordinance 2001 (Cap 41) s 69(b).
 (b) Administration of Islamic Religious Affairs (Terengganu) Enactment 1422H/2001M (No 2 of 2001) s 101(b).
 (c) Administration of the Religion of Islam (State of Malacca) Enactment 2002 (No 7 of 2002) s 105(b).
 (d) Administration of the Religion of Islam (State of Johor) Enactment 2003 (No 16 of 2003) s 117(b).
 (e) Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (No 10 of 2003) s 117(b).
 (f) Administration of the Religion of Islam (State of Selangor) Enactment 2003 (No 1 of 2003) s 117(b).
 (g) Administration of the Religion of Islam (Perak) Enactment 2004 (No 4 of 2004) s 106(b).
 (h) Administration of the Religion of Islam (State of Penang) Enactment 2004 (No 4 of 2004) s 117(b).
 (i) Majlis Ugama Islam Negeri Sabah Enactment 2004 (No 5 of 2004) s 79(b).
 (j) Perlis Administration of the Religion of Islam Enactment 2006 (No 4 of 2006) s 117(b).
 (k) Administration of Islamic Law (Kedah Darul Aman) Enactment 2008 (No 5 of 2008) s 80.

In the case of the federal statute, see s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) which has a similar provision.

- 14 Sabah No 13 of 1992. This enactment has been repealed and substituted by s 86 of the Majlis Ugama Islam Negeri Sabah Enactment 2004 (No 5 of 2004).
 15 Sabah Administration of Islamic Law Enactment 1992 s 68 (repealed).

any, used in the Federal Constitution and the state enactments will be discussed later in this article.

10 In the state of Pahang, a child of a *muallaf*¹⁶ (whether the *muallaf* is a male or female) who is below 18-years-old and who has been ordered by a court, other than the Syariah Courts, to be in the custody of the *muallaf*, and if the *muallaf* decides that the child be converted to Islam, the said child becomes converted to Islam at the time the custody was granted.¹⁷ This means that the custody of the child must be granted to the *muallaf* by the civil court, and then only the *muallaf* may decide whether to convert the child to Islam.

III. Consent of “parent” or “parents”

11 The conflict of choice of religion for a child by the parents boils down to the interpretation of Art 12(4) of the Federal Constitution and the provision on conversion to Islam of a minor child as provided in the above-mentioned state enactments. Malaysian civil courts in recent cases involving this issue seemed to move from the purposive interpretation approach¹⁸ to the literal interpretation approach,¹⁹ where a single parent who has embraced Islam was held to have the right to unilaterally convert a child to Islam without the knowledge or consent of the other non-Muslim parent.

12 In *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah*²⁰ (“*Chang Ah Mee*”), the father converted to the Islamic faith and later converted the two-year-old daughter without the consent of the mother. The mother applied for a declaration that the conversion of her daughter be declared null and void. Pursuant to s 68 of the Sabah Administration of Islamic Law Enactment 1992, a person who is below 18 years of age may convert to Islam provided that consent shall be obtained from the *parents* or his guardian. Justice Ian Chin noticed the term “parents” as mentioned in the Enactment is in the plural which literal and ordinary interpretation means the father and

16 A *muallaf* means a person who is a recent convert to Islam. See s 2 of the Pahang Administration of Islamic Law Enactment 1991 (No 3 of 1991).

17 Pahang Administration of Islamic Law Enactment 1991 (No 3 of 1991) s 103.

18 By using the purposive interpretation approach, the court will look at the overall intention of the Parliament or state legislature from reading the Constitution, statute or state enactments as a whole. See also Wu Min Aun, *The Malaysian Legal System* (Pearson Malaysia Sdn Bhd, 3rd Ed, 2005) at p 287 on “The Purpose Approach”.

19 By using the literal interpretation approach, the word or phrase in question is given its literal or ordinary grammatical meaning. See also Wu Min Aun, *The Malaysian Legal System* (Pearson Malaysia Sdn Bhd, 3rd Ed, 2005) at p 282 on “The Literal Rule”.

20 [2003] 5 MLJ 106; [2003] 1 CLJ 158; [2003] 1 AMR 581.

the mother while the singular form would mean either the father or the mother. Following the amendment to the Guardianship of Infants Ordinance²¹ in 1999, both the father and the mother have the same and equal right over the person and property of an infant.²² Such equal right is illusory unless it means that the husband and wife must exercise them jointly. In other words, it cannot be exercised by one only without the other save when the other has died. Justice Ian Chin later acknowledged that Art 12(4) of the Federal Constitution speaks of “parent” in the singular form but the learned judge refused to interpret it literally. The learned judge justified it by stating that the Federal Constitution does not discriminate against the gender. Since the father and mother have equal right over the person and property of an infant, the term “parent” in Art 12(4) must necessarily mean both the father and the mother if both are alive. To allow just the father or the mother to choose the religion of the child would invariably mean depriving the other of the constitutional right under Art 12(4). Thus, the High Court of Sabah and Sarawak (Sandakan) declared that the conversion of the minor was null and void. It seems that the court, in interpreting Art 12(4) of the Federal Constitution, was adopting a purposive approach in which the spirit of the law prevailed over the literal meaning of the law.

13 However, *Chang Ah Mee* was not followed in subsequent cases. The Kuala Lumpur High Court in *Shamala Sathiyaseelan v Dr Jeyaganesh Mogarajah*²³ took a literal approach in interpreting Art 12(4). The brief facts are that the husband had converted to Islam and he had also converted his two minor children. The wife applied to the civil High Court for a declaration that the conversion of her two children to Islam by the husband without her knowledge and consent was null and void. *Chang Ah Mee* was cited to support her case and reference was also made to s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993²⁴ as well as s 5 of the Guardianship of Infants Act 1961.²⁵

21 Sabah Cap 54.

22 Before the amendment on 1 September 1999, s 5 of the Guardianship of Infants Ordinance (Sabah Cap 54) gave the father the primary right over the person and property of an infant. See *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah* [2003] 5 MLJ 106 at 111; [2003] 1 CLJ 158 at 460; [2003] 1 AMR 581 at 583.

23 [2004] 2 MLJ 648; [2004] 2 CLJ 416.

24 Section 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) provides that: “For the purpose of this Part [Part X Religious Education], a person who is not a Muslim may convert to Islam if he is of sound mind and if he has not attained the age of eighteen years, his parent or guardian consents to his conversion.”

25 Section 5 of the Guardianship of Infants Act 1961 (Act 351) provides for equality of parental rights. Section 5(1) states that:

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

(cont'd on the next page)

14 The civil High Court found that on a construction of Art 12(4) of the Federal Constitution, read in conjunction with s 95(b) of the Administration of Islamic Law (Federal Territories) Act 1993, both of which use the singular word “parent”, the consent of a single parent was enough to validate the conversion of a minor to Islam. Furthermore, s 5 of the Guardianship of Infants Act 1961 did not apply to the husband in the present case as he had become a Muslim. The court also distinguished *Chang Ah Mee* as the Sabah Administration of Islamic Law Enactment 1992 used the term “parents”. The court went further to state that by virtue of Art 121(1A) of the Federal Constitution, the Syariah Court is the qualified forum to determine whether the conversion of the minors was valid or not and the court was of the view that the only way open for the wife was to seek the help of the Islamic Religious Council of the Federal Territories. Unfortunately, Shamala being a non-Muslim could not invoke the jurisdiction of the Syariah Court and thus she had rights but no remedies or fair recourse.

15 The literal approach in interpreting the law relating to the parents’ rights over the religion of children was also adopted in *Nedunchelian V Uthiradam v Nurshariqah Mah Singai Annal*²⁶ (“*Nedunchelian*”). In this case, the non-converting husband applied for a declaration that conversion of the four minor children by the wife who had converted to Islam was invalid, void and contrary to law. The husband contended that Art 12(4) of the Federal Constitution must be read in the plural in that both parents’ consent was needed for the conversion of the children’s religion to Islam. He relied on *Chang Ah Mee* and s 2(95) of the Eleventh Schedule (Art 160(1) of the Federal Constitution) which provides that “Construction of singular or plural – words in the singular include the plural, and words in the plural include the singular”. Syed Ahmad Helmy JC held that the word “parent” in Art 12(4) of the Federal Constitution is framed in the singular. Although under Art 160(1) the singular includes the plural, the placement of the word “parent” in the singular clearly gives rise to the question whether it was intentionally inserted as such to be read in the singular. The four minor children were merely following the religion of the mother who had converted to Islam, which was permissible and did not offend Art 12(4) of the Federal Constitution.

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 mother and father shall be equal.

Section 5(2) states that: “The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.”

26 [2005] 2 CLJ 306 (Johor Bahru HC).

16 The authors respectfully submit that the learned Judicial Commissioner did not give sufficient weight to Art 160(1) read together with s 2(95) of the Eleventh Schedule of the Federal Constitution because the provisions clearly show that the interpretation of the Federal Constitution need not be strictly literal. While acknowledging that the said provisions allowed singular to be interpreted as plural, the reasoning given by Syed Ahmad Helmy JC, namely, the placement of the word “parent” in the singular may be intentionally inserted to be read in the singular, was obviously self-contradicting. This is because the Judicial Commissioner’s reasoning would render Art 160(1) read together with s 2(95) of the Eleventh Schedule of the Federal Constitution redundant.

17 Similarly, in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*²⁷ (“*Subashini*”), the Federal Court²⁸ held that either husband or wife had the right to convert a child of the marriage to Islam. The word “parent” in Art 12(4), which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent. Article 12(4) must not be read as entrenching the right of choice of religion in both parents. The Federal Court further stated that Art 8 was not violated as the right for the parent to convert the child to Islam applied in a situation where the converting spouse was the wife as in *Nedunchelian*. Section 5 of the Guardianship of Infants Act 1961 which provides for equality of parental rights was not applicable since this Act prohibited its application to the husband who is a Muslim.

18 It is interesting to note that the word “parent” is used in Art 12(4) of the Federal Constitution for the English text. As for the Malay text,²⁹ in the 1970s, the Attorney-General’s Chambers of Malaysia translated the Federal Constitution and the word “parent” in Art 12(4) was translated as “*ibu-bapa*”.³⁰ According to *Kamus Dewan*,³¹ the Malay word “*ibu-bapa*” means “*emak dan ayah*” (mother and father), *ie*, “parents” in the plural form. The same translation was also adopted by the Faculty of Law, University of Malaya.³² In the 1980s, the word

27 [2008] 2 MLJ 147; [2008] 2 CLJ 1 (FC).

28 The Federal Court is the highest court and the final appellate court in Malaysia.

29 The national language of Malaysia is the Malay language. See Art 152(1) of the Federal Constitution of Malaysia.

30 *Perlembagaan Persekutuan (Terjemahan)* (Kuala Lumpur: Jabatan Chetak Kerajaan, 1972) at p 28.

31 See *Kamus Dewan* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991) at p 439. *Kamus Dewan* (Malay for the Institute Dictionary) is a Malay language dictionary published by Dewan Bahasa dan Pustaka. It is the best selling Malay dictionary in Malaysia. See <http://en.wikipedia.org/wiki/Kamus_Dewan> (accessed 3 July 2011).

32 *Perlembagaan Persekutuan (Terjemahan)* (Kuala Lumpur: Fakulti Undang-Undang Universiti Malaya, 1979) at p 8.

“*ibu-bapa*” was again used in the Federal Constitution (Malay translation) published by Jabatan Percetakan Negara (now known as Percetakan Nasional Malaysia Berhad)³³ which was the only printer appointed by the Government of Malaysia to print the Laws of Malaysia, the Federal Government Gazettes and all the State Gazettes.³⁴ The same translation could also be found in the Federal Constitution (Malay translation) published by the private publishers in 1980s and 1990s such as the Penerbit Undang-undang Malaysia (Malaysian Law Publishers),³⁵ International Law Book Services³⁶ and MDC Sdn. Bhd.³⁷ However, in the 2000s, the Attorney-General’s Chambers of Malaysia has replaced the words “*ibu bapa*”, which they previously translated, with the words “*ibu atau bapa*” (meaning “mother or father” in the singular form) in Art 12(4).³⁸ Other private publishers such as International Law Book Services continued to use the words “*ibu bapa*” in Art 12(4) of the Federal Constitution in the Malay text but recently replaced them with “*ibu atau bapa*”.³⁹ Meanwhile, another private publisher, namely, MDC Publishers Sdn Bhd, have also adopted the words “*ibu atau bapa*”, as compared to its earlier translation in the 1980s.⁴⁰

19 Article 160B of the Federal Constitution provides that the national language text shall be authoritative and if there is any conflict or discrepancy between such national language text and the English language text, the national language text shall prevail over the English language text. The actual reason of the change in the words “*ibu bapa*” (mother and father) to “*ibu atau bapa*” (mother or father) is unclear. Whether this was influenced by or resulted from the recent trend of the court decisions which interpreted Article 12(4) of the Federal Constitution literally remains questionable.

33 *Perlembagaan dan Undang-undang Am* (Kuala Lumpur: Jabatan Percetakan Negara, 1983) at p 1:23.

34 See Circular No 20 of 1981 issued by the Finance Ministry of Malaysia, <http://www.treasury.gov.my/pekeliling/spp/spp201981_01.pdf> (accessed 3 July 2011).

35 See Hamid bin Ibrahim & Nasser bin Hamid, *Perlembagaan Persekutuan* (Kuala Lumpur: Penerbit Undang-undang Malaysia, 1984) at p 9.

36 See *Perlembagaan Persekutuan* (Kuala Lumpur: International Law Book Services, 1985) at pp 7–8 and also *Perlembagaan Persekutuan* (Kuala Lumpur: International Law Book Services, 1992) at p 14.

37 See *Perlembagaan Persekutuan* (Kuala Lumpur: MDC Sdn Bhd, 1986) at p 9.

38 See *Perlembagaan Persekutuan* (Kuala Lumpur: Percetakan Nasional Malaysia Bhd, 2002) at p 26.

39 Compare *Perlembagaan Persekutuan* (Kuala Lumpur: International Law Book Services, June 2007) which used the words “*ibu bapa*”, with *Perlembagaan Persekutuan* (Petaling Jaya: International Law Book Services, March 2010) and *Perlembagaan Persekutuan* (Petaling Jaya: International Law Book Services, November 2010) which used the words “*ibu atau bapanya*”.

40 See *Perlembagaan Persekutuan* (Kuala Lumpur: MDC Sdn Bhd, August 2007) and *Perlembagaan Persekutuan* (Kuala Lumpur: MDC Sdn Bhd, April 2010) which used the words “*ibu atau bapa*”.

20 In *Nedunchelian*, the civil High Court highlighted that Art 160B of the Federal Constitution states that the authoritative text of the Constitution is the Bahasa (or Malay) text and hence “when the equivalent term of parent which is “*ibu bapa*” in the Bahasa (or Malay) text is construed, it invariably is interpreted in the singular sense as the plural sense would be “*kedua ibu bapa*” (meaning “both mother and father”) in the Bahasa (or Malay) text. The court went further to state that “the intention of the framers of the Constitution in placing the word parent in the singular clearly intended it to be such”.

21 It is observed that the court had intended to adopt a literal interpretation approach in *Nedunchelian*. Ironically, the court had misconstrued the literal meaning of “*ibu bapa*” as in the singular sense despite the fact that it actually means “mother and father” in the plural sense according to *Kamus Dewan*, the best selling Malay dictionary in Malaysia. Assuming the court were to construe the meaning of the words “*ibu bapa*” correctly according to the dictionary, then “*ibu bapa*” in the plural sense and in the Malay text which is the authoritative text should be given effect, *ie*, the religion of a person under the age of 18 years shall be decided by his *parents* instead of one parent without the knowledge or consent of the other parent. Be that as it may, this discussion has been rendered academic since the Attorney-General’s Chambers of Malaysia has replaced the words “*ibu bapa*”, which they previously translated, with the words “*ibu atau bapa*” in Art 12(4) of the Federal Constitution in the 2000s.

22 The authors humbly submit that in interpreting the relevant provisions in the Federal Constitution, the federal statute and the state enactments on the parental right in relation to the child’s religion, the purposive interpretation approach should be preferred instead of the literal interpretation approach for three reasons.

23 Firstly, as rightly pointed out by Richard Malanjum CJ (Sabah and Sarawak) in *PP v Kok Wah Kuan*:⁴¹

[I]n interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallise what is inherent. His task is creative and not passive. This is necessary to enable the constitutional provisions to be the guardian of people’s rights and the source of their freedom.

41 [2008] 1 MLJ 1 at 23 (Federal Court). See also *Dato’ Kadar Shah Tun Sulaiman v Datin Fauziah Haron* [2008] 4 CLJ 504 at [16] where Hishamudin Yunus J held that in interpreting the provisions of the Federal Constitution of Malaysia (in that context, cl (1) and (1A) of Art 121), “common sense must prevail ... purposive approach must be adopted”.

24 Secondly, Art 12(4) needs to be read in harmony with other provisions of the Federal Constitution such as Art 8 which provides for equality.⁴² By allowing one parent to unilaterally determine the religion of a child without the knowledge and consent of the other parent amounts to denying the constitutional right of the other parent as guaranteed by the Federal Constitution, particularly the right to determine the religion of the child and equality in the sense of no discrimination on the ground only of religion. The literal interpretation of Art 12(4) clearly goes against the spirit of the Federal Constitution and at the same time leads to an unjust result.

25 Thirdly, it is rather impractical to suggest that a non-Muslim parent has an “equal right” to determine his or her child’s religion if the converting spouse has already unilaterally converted the child to Islam. In *Subashini*,⁴³ the Federal Court stated that Art 8 was not violated as the right for the parent to convert the child to Islam applied in a situation where the converting spouse was the wife as in *Nedunchelian*. However, the authors humbly submit that the issue is not whether the parent who converts a child to Islam or any religion other than Islam is a father or mother. What is more important is whether either parent has the equal right to convert a child to his or her preferred religion. While it is possible for a converting parent to convert his or her child to Islam, the same does not necessarily apply to the non-converting parent to convert the child who has already been unilaterally converted to Islam, to another religion which is not Islam. In Malaysia, apostacy or renouncing Islam in this context is a highly sensitive matter and the success rate for applications made for a declaration that a person has ceased to be a Muslim is rather low.⁴⁴ Besides, a Muslim who claims to be

42 Article 8(1) of the Federal Constitution of Malaysia provides that “all persons are equal before the law and entitled to the equal protection of the law”. Article 8(2) further provides that:

Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

43 *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2008] 2 MLJ 147 at 172; [2008] 2 CLJ 1 at 34 (FC).

44 According to Dr Mohamed Azam Mohamed Adil, the Associate Professor at the Centre for Islamic Thought and Understanding (“CITU”) of Universiti Teknologi Mara (“UiTM”), who had collected official data from the Syariah Courts, State Religious Departments and the National Registration Department (“NRD”), 750 Muslims applied to the NRD to change their names to non-Muslim names between 1999 and July 2003, and of the number only 220 were successful. Most of them were converts to Islam. The number of Muslims who actually applied to the Syariah Courts to renounce Islam was much lower – there were only 100 between 1994 and 2003. See P Selvarani, “Sunday Interview: Very Few Have Abandoned the Faith” *New Straits Times* (19 November 2006).

a non-Muslim or renounces Islam commits a punishable Syariah offence in the states of Pahang,⁴⁵ Malacca,⁴⁶ Perak,⁴⁷ Sabah⁴⁸ and Terengganu.⁴⁹ Therefore, it seems that the non-Muslim parent may not be able to exercise the right to determine the religion of the child once the child has been unilaterally converted to Islam by another converted parent.

IV. The jurisdictional conundrum

26 The knotty situation will be further compounded if the converting spouse immediately files an application for dissolution of marriage and seeks custody of the child at the Syariah Court after unilaterally converting the child to Islam without the knowledge or consent of the non-converting spouse. As s 51 of the LRA only gives the right to the non-converting spouse to petition for divorce on the ground of conversion and not to the converting spouse, there are growing cases where a converting spouse files an application for dissolution of marriage and custody of a child *ex parte* in the Syariah Court.⁵⁰

27 Section 51(1) of the LRA provides that a petition for divorce on the ground of conversion to Islam by one party shall only be presented upon the expiration of three months from the date of conversion.

28 However, there is no legal requirement that the converting spouse must inform the non-converting spouse of his or her own conversion and the conversion of the child. Besides that, it is not mandatory for a person who has converted to Islam to register his

45 Administration of the Religion of Islam and the Malay Custom of Pahang Enactment 1982 (No 8 of 1982) s 185.

46 Syariah Criminal Offences (Malacca) Enactment 1991 (No 6 of 1991) s 63(2).

47 Crimes (Syariah) (Perak) Enactment 1992 (No 3 of 1992) s 13.

48 Syariah Criminal Offences (Sabah) Enactment 1995 (No 3 of 1995) s 55(2).

49 Syariah Criminal Offences (Hudud and Qisas) Terengganu Enactment 1423H/2002M (No 4 of 2002) s 26. However, this provision is controversial and would be *ultra vires* and unconstitutional since it imposes the death sentence on the offence of *irtidat* or *riddah* (the Arabic equivalent term for apostacy), though the Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised 1988) (Act 355) confines the jurisdiction of the Syariah Courts to such offences punishable with imprisonment up to three years or a fine not exceeding RM5,000 or whipping not exceeding six strokes or any combination thereof. The Federal Constitution of Malaysia in the Ninth Schedule, List II, Item 1 provides that Syariah Courts “shall not have jurisdiction in respect of offences except in so far as conferred by federal law”.

50 For instance, see *Haslinda binti Alias lwn Johdi Matthew Byrne @ Yahya bin Abdullah* [1999] 13 JH 47; *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505; *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2008] 2 MLJ 147; [2008] 2 CLJ 1; *Permohonan Interim Hadhanah Siti Zubaidah Chew binti Abdullah @ Chew Yin Yin* (2009) 29 JH (1) 65; and Indira Gandhi & Muhammad Ridzuan Abdullah, “Forced Conversion to Islam of Three Young Children in Ipoh” at <http://www.engagemedia.org/Members/yuthra65/videos/Conversion_issue.mp4/view> (accessed 4 July 2011).

conversion. This has made it very difficult, if not impossible, for the non-converting spouse to know the actual date of the conversion if both parties are already in a deadlock situation or the converting party refuses to disclose the actual date or does not disclose the correct date. This will lead to two possible consequences.

29 Firstly, it is possible that the non-converting spouse comes to know about the conversion but without knowing the exact date of conversion and may commit a technical error by filing his or her petition for divorce under s 51 of the LRA prematurely. This is best illustrated in the case of *Subashini*. In this controversial case, the parties were originally Hindus and they were married pursuant to a civil ceremony of marriage registered under the LRA. Two sons were born of the marriage. Subsequently, the husband converted to Islam and he also converted his eldest son. Later, the wife received a notice from the Registrar of the Syariah High Court informing her that her husband had commenced proceedings in the Syariah High Court for the dissolution of the marriage and the custody of the elder son. An *ex parte* interim custody order in respect of the converted eldest son was issued to the husband. In response, the wife filed a petition for divorce at the civil High Court, seeking dissolution of marriage, custody of both children and ancillary reliefs in the civil High Court. Meanwhile, she applied for and obtained an *ex parte* injunction against the husband, restraining the husband from converting the children to Islam without her permission. The civil High Court, in an *inter partes* hearing, dismissed her application and allowed the husband's application to set aside the injunction. The Court of Appeal upheld the decision of the civil High Court. The non-converting wife appealed against these decisions. The Federal Court's three-member panel in a 2–1 decision ruled against the non-converting wife's appeal on a legal technicality. This is because her petition for divorce was filed two months and 18 days after the husband's conversion to Islam instead of three months after the husband's conversion to Islam, as required by s 51 of the LRA.

30 Secondly, it is highly possible that by the time the non-converting spouse knows about the conversion of the spouse and the child, the converting spouse has obtained an *ex parte* custody order from the Syariah Court. The civil court, on the other hand, will not overrule or review an order made by the Syariah Court. For instance, in *Nor Kursiah Bte Baharuddin v Shahril Bin Lamin*,⁵¹ it was held that the civil High Court has no jurisdiction to question the validity of the order which was made in respect of a matter which is obviously within the jurisdiction of the Syariah High Court. Similarly, in *Kaliammal a/p Sinnasamy lwn*

51 [1997] 1 MLJ 537; [1997] 1 CLJ Supp 599. See another instance in *Kaliammal Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan* [2006] 1 MLJ 685; [2006] 1 CLJ 753; [2006] 1 AMR 498.

Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI),⁵² the deceased's wife filed an application for, *inter alia*, a declaration that the deceased was a Hindu and a non-Muslim at the time of death. There was already an order issued by the Kuala Lumpur Syariah High Court which determined that the deceased was a Muslim. Dismissing the application, the Kuala Lumpur civil High Court held that the Syariah Court was the court having jurisdiction and competency to determine the validity of the deceased's conversion to Islam and the civil court does not have the jurisdiction to review the Syariah Court's decision.

31 While the Syariah court order, including the custody order, is not binding on the non-converting spouse as he or she is a non-Muslim,⁵³ an issue arises as to what extent the religion of a converted parent and the converted child, especially a child who has been unilaterally converted without the knowledge or consent of the non-converting parent, may influence the chance of the non-converting parent in obtaining the custody of the child when the marriage fails.

V. Islam and custody of child

32 According to *Lisan Al-Arab*,⁵⁴ the word "*hadanah*" (custody) comes from the root verb "*hadana*" which means "to clasp in one's arm, to embrace, or to hug someone". It is also used to imply "to nurse, to bring up, or to raise a child". Terminologically, "*hadanah*" means the caring or protection of children or insane persons who are still dependent by undertaking whatever is beneficial to them.⁵⁵

33 There is a split of opinion among Muslim jurists as to whether the party who is given actual custody of a Muslim child must profess the

52 [2006] 1 MLJ 685; [2006] 1 CLJ 753; [2006] 1 AMR 498.

53 In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505, the husband converted himself and the two children to the Islamic faith and the children's conversion was done without the wife's consent. He obtained the *ex parte hadanah* (custody) order of the children from the Syariah Court. The civil High Court held that the *ex parte hadanah* order granted by the Syariah Court to the converted husband was not binding on the non-Muslim wife. In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2008] 2 MLJ 147; [2008] 2 CLJ 1, Nik Hashim FCJ held that the dissolution order of the civil marriage granted by the Syariah High Court by virtue of the conversion of the husband would have no legal effect in the civil High Court other than as evidence of the fact of the dissolution of marriage under the Islamic law in accordance with *Hukum Syarak*.

54 The *Lisan al-Arab* ("The Arab Tongue") is among the most well-known and comprehensive dictionaries of the Arabic language. See http://en.wikipedia.org/wiki/Ibn_Manzur (accessed 4 July 2011).

55 Mahdi Zahraa & Normi A Malek, "The Concept of Custody in Islamic Law" (1998) 13 Arab LQ 155 at 155–156. See also Zulkifly Muda, "Hak Hadanah dalam Konversi Agama; Kajian Perbandingan Antara Islam dengan Perundangan Malaysia" (2004) 16(4) *Kanun* 14.

religion of Islam or whether consideration can also be given to a non-Muslim.

34 According to the Shafi'is and Hanbalis, the custodian must be a Muslim⁵⁶ as they are concerned that a non-Muslim custodian may lead the child to denounce Islam by his or her teaching and this is a great detriment in Islam. However, the non-converting spouse would not be deprived of the visitation right.⁵⁷ On the other hand, the Hanafis and the Malikis are of the view that a non-Muslim is allowed to have actual custody of a Muslim child provided that the child will not be exposed to any harm both religiously or physically.⁵⁸ The Hanafis restrict the right to female relatives only⁵⁹ and the child may stay with a non-Muslim

56 See Najibah Mohd Zin, "Resolving the Conflicts in Family Disputes Involving Conversion of a Spouse to Islam under the Malaysian Law" (2007) 1 *The Law Review* 61 at 66. See also Noor Aziah Haji Mohd Awal, "Pertukaran Agama: Hak Penjagaan Anak – Isu dan Masalah" [2004] 3 MLJ xxiv at xlv; Zulkifly Muda, "Hak Hadanah dalam Konversi Agama; Kajian Perbandingan Antara Islam dengan Perundangan Malaysia" (2004) 16(4) *Kanun* 14 at 16. In Nawawi's *Minaj et-Talibin* translated by E C Howard (Lahore, Pakistan: Law Publishing Company, 1977), a manual of Islamic law according to the school of Shafi'i, the custody of children was discussed where it was stated that "[t]he education of a child can never be entrusted to ... (2) an infidel, if the child is a Moslem" at p 392. This is based on the verse which says, "and never will Allah grant to the disbelievers a way (to triumph) over the believers" (*The Qur'an*, Surah Al-Nisa: 141). Islam lays emphasis on the proper upbringing of children. Prophet Muhammad (peace be upon him) was reported to have said: "A child is born as a Muslim; it is the parents who afterwards make him a Christian, a Jew or an Infidel." (*Bukhari*). See Muhammad Iqbal Siddiqi, *The Family Laws of Islam* (India: International Islam Publishers, 1988) at p 252.

57 Nuraisyah Chua Abdullah, *Conversion to Islam – Effect on Status of Marriages and Ancillary Reliefs* (Petaling Jaya: ILBS, 2004) at p 42.

58 The view that allows a non-Muslim to have actual custody of a child is based on the *hadith* (tradition) of the Prophet that reads:

Abd al-Hamid bin Jaafar narrated from his father on the authority of his grandfather Rafi' bin Sinan that he (Rafi') embraced Islam and his wife refused to embrace Islam. She came to the Prophet (peace be upon him) and said: My daughter, and she is weaned or about to wean. Rafi' said: My daughter. The Prophet said to him: Be seated on a side. And he said to her: Be seated on a side. He then seated the girl between them, and said to them: Call her. The girl inclined to her mother. The Prophet (peace be upon him) said: O Allah, guide her. The daughter inclined to her father and he took her.

See Najibah Mohd Zin, "Resolving the Conflicts in Family Disputes Involving Conversion of a Spouse to Islam under the Malaysian Law" (2007) 1 *The Law Review* 61 at 66. See also Mahdi Zahraa & Normi A Malek, "The Concept of Custody in Islamic Law" (1998) 13 *Arab LQ* 155 at 170; Normi Abdul Malek, "Hadanah Menurut Undang-undang Islam dan Pelaksanaannya di Malaysia" (2004) 8(2) *IKIM Law Journal* 33 at 51; Noor Aziah Haji Mohd Awal, "Pertukaran Agama: Hak Penjagaan Anak – Isu dan Masalah" [2004] 3 MLJ xxxiv at xlv; and Zulkifly Muda, "Hak Hadanah dalam Konversi Agama; Kajian Perbandingan Antara Islam dengan Perundangan Malaysia" (2004) 16(4) *Kanun* 14 at 16.

59 See: Zulkifly Muda, "Hak Hadanah dalam Konversi Agama; Kajian Perbandingan Antara Islam dengan Perundangan Malaysia" (2004) 16(4) *Kanun* 14 at 20.

provided that he or she is still under the age of forming any judgment with respect to religion and there is no indication that the child will incline to infidelity.⁶⁰ However, if it is feared that the child has started to embrace a way of life which is not Islamic, he or she should be removed from such environment even before the child starts to understand religion.⁶¹ Likewise, if there is evidence that the non-Muslim mother⁶² has taken the opportunity to deviate the child from the teaching of Islam or give the child food or drinks that are prohibited by Islam such as pork and alcohol, the non-Muslim mother will lose custody.⁶³

35 In *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah*⁶⁴ (“*Shamala*”), the non-Muslim wife applied to the civil High Court for custody, care and control of her two infant children (age below seven years) who had been converted to Islam by her Muslim husband without her knowledge and consent. She did not petition for divorce. The Muslim husband’s *ex parte* custody application at the Syariah Court was held to be not binding on the plaintiff as she was a Hindu and not a Muslim. The civil High Court held that the *overriding principle in a custody dispute is that the two infant children’s welfare shall be the court’s paramount consideration*. The question of religion is merely one factor to be balanced against others when determining which parent should be given custody, care and control. Under s 88(3) of the LRA, there shall be a rebuttable presumption that it is for the good of the two infant children below the age of seven years to be with their mother, but in deciding whether that presumption applies to the facts of this case, the court shall have regard to the undesirability of disturbing their life by changes of custody. In this case, the two infant children had been in the physical custody of their Hindu mother since birth (except a brief period of about three months when the Muslim father took the children away from the Hindu mother relying on the Syariah Court custody order). Therefore, the court was of the view that it is usually in the two infant children’s interest to preserve the *status quo* because there is likely to be an emotional trauma of a significant kind if their relationship with their mother and their environment were changed on the transfer of the two infant children from the mother to the father.

60 Mahdi Zahraa & Normi A Malek, “The Concept of Custody in Islamic Law” (1998) 13 Arab LQ 155 at 170–171.

61 Mahdi Zahraa & Normi A Malek, “The Concept of Custody in Islamic Law” (1998) 13 Arab LQ 155 at 171.

62 Muslim jurists unanimously agreed that so long as she is qualified, a mother will have the first claim to the *hadanah* (custody) of her child: Mahdi Zahraa & Normi A Malek, “The Concept of Custody in Islamic Law” (1998) 13 Arab LQ 155 at 159.

63 Zulkifly Muda, “Hak Hadanah dalam Konversi Agama; Kajian Perbandingan Antara Islam dengan Perundangan Malaysia” (2004) 16(4) *Kanun* 14 at 27.

64 [2004] 3 CLJ 516; [2004] 5 AMR 75.

36 The court acknowledged that according to the Shafi'is, a non-Muslim woman is disqualified from obtaining the custody of a Muslim child born to a Muslim father. However, the court distinguished this from the present facts as the two infant children were not born to a Muslim father. The father was a Hindu when they were born. The court was of the view that other Sunni jurists do not insist on the identity of religion between the mother and her infant children, provided they shall be brought up in the faith of their father. Thus, if there are reasonable grounds to think that the non-Muslim mother would influence the two infant children's religious belief, for example by teaching them her articles of faith or by making them eat pork, then the two infant children shall be taken away from her. This means that the non-Muslim mother shall not lose her right to the custody of her two infant Muslim children so long as there is no fear of her bringing them up according to a religion different from the father's. Therefore, the court ordered legal custody jointly to both the non-Muslim mother and the Muslim father which meant that both parents had to discuss and agree on issues or long-term decisions affecting the two infant children, for instance choosing the method of education, choice of religion and administering the children's property. Care and control which covered the day-to-day care of the two infant children and the responsibility for looking after them daily would be given to the mother while the father was allowed to visit them. This actual custody, *ie*, the right to have the two infant children live with the mother was given with the condition that the non-Muslim mother would lose the right to actual custody if there are reasonable grounds to believe that she would influence the children's present religious beliefs (Islam). When the children reach the age of discernment (*mumaiyiz*), they shall have the choice of living with either of the parents unless the court otherwise orders.

37 One commentator has found that the judgment in *Shamala* reflects the view of the Maliki school.⁶⁵ While the paramount importance of the interest of the children was taken into consideration in the sense that the actual custody, care and control of the children were given to the non-Muslim mother, practical difficulties were expected to arise out of the manner in which the custody order was given.⁶⁶

38 It is observed that while the religion of the party as well as the religion of the child may not be the sole determining factor for the civil High Court to grant a custody order, it may, to a certain extent, affect

65 Noor Aziah Haji Mohd Awal, "Pertukaran Agama: Hak Penjagaan Anak – Isu dan Masalah" [2004] 3 MLJ xxiv at xlv.

66 This view was expressed by the Malaysian Bar Council in their press statement dated 22 July 2004. See "Shamala's Case" *Infoline* July/August/September 2004 at p 34.

the court's decision when one of the parents and the child are Muslims, particularly if the court chooses to follow the view of the Islamic legal jurists despite the fact that the other parent may not be a Muslim. *Shamala* as explained above is an obvious instance.

39 It follows that the parallel legal and court systems can be used strategically by certain parties in increasing the chance of obtaining the custody of the child when the marriage fails.⁶⁷

VI. Conclusion

40 The legal quagmire arising from the unilateral conversion of a child by one parent and its impact on the custodial right of a parent has over the years caused social tension and ethnic dissension. The judgments in *Shamala*, *Nedunchelian* and *Subashini*, which adopted a literal interpretation of the word "parent" in Art 12(4) of the Federal Constitution, have had a far-reaching impact on the cohesiveness of family units and the sustainability of the social and religious harmony of the nation. It has gone beyond a question of the parents' choice of the religion of their child and has undermined national unity since family units are the basic units that form society.

41 The latest case involving Indira Gandhi and Muhammad Ridzuan Abdullah (formerly known as K Patmanathan)⁶⁸ has again raised the concern of all Malaysians. Such conflicts, if left unattended, will tear the plural society apart.

42 Following Indira Ghandhi's case, on 22 April 2009, the Malaysian Cabinet decided that civil courts are the right forum to dissolve a marriage in the event that a spouse converts to Islam. It also decided that if either spouse were to convert to Islam, the children

67 Shanmuga K, one of the counsel who represented the non-Muslim wife in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2008] 2 MLJ 147; [2008] 2 CLJ 1 pointed out that under the current situation in Malaysia, a husband (or wife, but usually husband) is able to escape his marital obligations quite easily by converting himself to Islam followed by converting his children to Islam if he wants the custody of the children. The presence of the children is not required and the husband needs only to produce their birth certificates when he converts the children to Islam. See Shanmuga K, "Law Reforms When One Spouse Converts to Islam: the Problem" 18 June 2009 at <<http://www.loyarburok.com/human-rights/pray-for-me/law-reforms-needed-convert-to-islam-problem>> (accessed 4 July 2011).

68 See "Forced Conversion to Islam of Three Young Children in Ipoh" <http://www.engagemedia.org/Members/yuthra65/videos/Conversion_issue.mp4/view> (accessed 4 July 2011). Three children, Tevi Darsiny (12 years old), Karan Dinish (11 years old) and baby Prasana Diksa (1 year old) were unilaterally converted to Islam by their converted father, Muhammad Ridzuan Abdullah, on 2 April 2009, without the knowledge or consent of his Hindu wife, Indira Gandhi. The children were converted in their absence, using only their birth certificates.

should follow the faith that the parents had agreed on at the time of marriage, or implied by their common religion.⁶⁹ For this purpose, the Attorney-General was instructed to look at all the relevant laws so as to amend the same to be in line with the decision. Three laws were identified, namely, the LRA, the Islamic Family Law (Federal Territories) Act 1984⁷⁰ and the Administration of Islam Law (Federal Territories) Act 1993.⁷¹

43 There were mixed reactions to the Cabinet's decision. While some non-Islamic religious bodies, non-governmental bodies and certain political parties welcomed the Cabinet's directive, it was opposed mainly by the Islamic non-governmental bodies.⁷² However, the proposed amendments to the three laws were then held back, following the decision of the 217th (special) meeting of the Conference of Rulers on 29 June 2009 that any amendments to the laws pertaining to matters of conversion and religion must be referred to the state religious authorities first.⁷³

44 Indeed, it is time to break the legal impasse by amending the relevant federal statutes and the state Islamic enactments, particularly those statutes which have already been identified by the Attorney-General. For instance, s 51 of the LRA should be amended so that either party should be allowed to petition to a civil court for divorce on the ground that one has converted to Islam.⁷⁴ This is to avoid further

69 "A Civil Solution on Conversions" *New Straits Times* (24 April 2009); "Common religion for Children" *The Star* (24 April 2009).

70 Act 303.

71 Act 505. See V Vasudevan & Joseph Sipalan, "Dewan Rakyat: Amendment Bills on Conversion will have to wait" *New Straits Times* (30 June 2009).

72 "Religious Council Lauds Decision" *New Straits Times* (24 April 2009); "MCA Hails Cabinet Decision" *The Star* (24 April 2009); "Decision Shocks Syariah Lawyers" *The Star* (24 April 2009); "Get Views from Muftis First, Government Urged" *The Sun* (24 April 2009); "Groups Welcome 'Common Religion' Ruling for Children" *The Star* (25 April 2009); and Shanon Shah, "Cabinet's Conversion Decision Opposed" *The Nut Graph* (30 April 2009) <<http://www.thenutgraph.com/cabinets-conversion-decision-opposed>> (accessed 4 July 2011). See also Bar Council's press release entitled "Bar Council Urges Government to Move Swiftly" issued on 28 April 2009 <http://www.malaysianbar.org.my/press_statements/press_release_bar_council_urges_government_to_moveswiftly.html> (accessed 4 July 2011) and "Muslim Groups Upset with Religious Conversion Ruling" *The Malaysian Insider* (30 April 2009) <<http://www.themalaysianinsider.com/malaysia/article/muslim-groups-upset-with-religious-conversion-ruling>> (accessed 4 July 2011).

73 See S Pathmawathy, "Conversion Laws: Rulers Put the Brakes" *Malaysiakini* (29 June 2009) <<http://www.malaysiakini.com/news/107451>> (accessed 4 July 2011) and "Rulers Defer Decision on Conversion of Minors" *The Star* (30 June 2009) <<http://thestar.com.my/news/story.asp?file=/2009/6/30/nation/4223941&sec=nation>> (accessed 4 July 2011).

74 For the proposed amendments to s 51 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164), see Ahmad Ibrahim, "Dissolution on Ground of Conversion to Islam" *Malaysian Law News* (March 1993) at pp 29–34 and Ahmad Ibrahim, "The
(cont'd on the next page)

complication of the family dispute when both parties separately petition for divorce or file the application for dissolution of marriage as well as the custody of children at the civil court and Syariah Court respectively. Article 12(4) of the Federal Constitution should be construed purposively so that both parents should decide the religion of the child and the rights of parents to choose the religion of their child will not be rendered illusory or ineffective.

Need to Amend Section 51 of the Law Reform (Marriage and Divorce) Act 1976” [1990] 1 MLJ lviii.