

# Conversion of Minor Children to Islam in Malaysia : Whither Consent of Parents?

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## 1. INTRODUCTION

Issues relating to conversion to Islam in Malaysia have drawn the interest of many segments of Malaysian public and been given wide coverage recently, in particular pertaining to the conversion of minor children. The issue at stake here is, does it or does it not require consent of parents prior to the conversion? If the answer is positive, further explanation follows whether the law requires consent of both parents prior to the conversion or one parent's approval is sufficient to constitute a consent.

Therefore, this paper seeks to discuss the issue in its perspective and hence relevant resolution may be offered. To date, certain decisions of Malaysian courts have shown conflicting trends whereby some decisions affirmed the requirement of consent of both parents while in some other cases, the consent of one parent only is sufficient for minor children to convert to Islam. The case of *Chang Ah Mee*<sup>1</sup> is often cited to support the proposition of requirement of consent of both parents prior to the conversion of minor children to Islam. Nevertheless, new interpretations have been adopted by courts in post *Chang Ah Mee* era. With this framework as a background, this paper seeks to analyze the current situation within civil and Islamic law perspectives.

## 2. CONVERSION TO ISLAM: STATUTORY POSITION

Conversion in the Malaysian context denotes a non-Muslim who converts to Islam despite the facts that the term conversion also can be applied to conversion to other religions as well, for example conversion from Christianity to Buddhism or Hinduism to Christianity. The term "conversion to Islam" is proposed to be used throughout this paper in order to differentiate it from conversion to other religions<sup>2</sup>. In the Malaysian

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<sup>1</sup> the full citation of the case is *Chang Ah Mee vs Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* [2003] 5 MLJ 106

<sup>2</sup> Previous researches and discussions relating to conversion to Islam have shown slight differences of terminology applied to describe the issue under investigation. For instance, Hamid Jusoh has used "conversion". Refer Hamid Jusoh, *The Position of Islamic Law in The Malaysian Constitution With Special Reference To The Conversion Case in Family Law*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991. Prof. Ahmad Ibrahim has used both terminologies, "conversion" and "conversion to Islam". Refer his several articles for example, Ahmad Ibrahim, "Dissolution on Ground of Conversion to Islam, *Malaysian Law News*, Mac 1993 at 29-34; id, "Effect of Conversion on Marriage – Section 51 of The Law Reform (Marriage and Divorce) Act 1976", id, *Administration of Islamic Law in Malaysia*, Kuala Lumpur: Institute of Islamic Understanding Malaysia, 2000 at 207-225; id, "Conversion To and From Islam", id, *The Administration of Islamic Law in Malaysia*, Kuala Lumpur : Institiut Kefahaman Islam Malaysia, 2000 at 325-357 ; id, "The Need to Amend Section 51 Of The Law Reform( Marriage and Divorce) Act 1976"[1990] 2 MLJ lviii. Other scholars including R.H. Hickling and Mehrun Siraj preferred "conversion

context, conversion to Islam is governed primarily by List 11 of the Ninth Schedule of the Federal Constitution, which provides lists of matters of *Hukum Syarak* (Islamic Law), which is of state matter. The list provides as follows:

“Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic Law and personal and family law of persons professing the religion of Islam, including the Islamic Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the states: Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic Law and doctrine of Malay custom”.

It is subsequently governed by two other statutes which provide for the process and procedure of conversion, States Administration of Islamic Law Enactments<sup>3</sup> and States

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to Islam”. Refer R.H. Hickling, “Effect on Marriage Of A Conversion To Islam”, [1979] 21*Mal. L. R.* 374 – 376. Refer also R.H. Hickling, “Conversion and Kitabiya in Malaysia” [1979] *JMCL* 55 – 70 and Mehrun Siraj “The Legal Effect of Conversion to Islam, *Viswalingam S v Viswalingam U.*(1979)”, [1965] *Mal. L.R.*, Vol. 7, No. 1, 95–112.

<sup>3</sup> Refer Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (Enactment No 10 of 2003), Administration of the Religion of Islam (State of Malacca) 2002 (Enactment No 7 of 2002), Administration of the Religion of Islam (Perak) Enactment 2004 (Enactment No 4 of 2004), Administration of The Religion of Islam (State of Johor) Enactment 2003 (Enactment No 16 of 2003), Administration of Islamic Religious Affairs (Terengganu) Enactment 2001 (Enactment No 2 of 2001) and Administration of the Religion of Islam (State of Selangor) Enactment 2003 (Enactment No 1 of 2003 and Majlis Islam (Sarawak) Ordinance 2001 [Cap 41] Sarawak, Administration of Muslim Law Enactment, 1963 Perlis (Enactment No 3 of 1964), Administration of Islamic Religious Affairs of the State of Penang 1993, (Enactment No 7 of 1993), Administration of Islamic Law Enactment, 1992 Sabah (Enactment No 13 of 1992), Administration of Islamic Law (Pahang) Enactment, 1991 (Enactment No 3 of 1991), Administration of Islamic Law (Federal Territories) Act 1993 (Act No 505), Administration of Muslim Law Enactment Kedah, [No 9 of 1962], Council of the Religion of Islam and Malay Custom Kelantan Enactment 1994 (Enactment No 4 of 1994) respectively

Rules and Regulations of Muslim Conversion.<sup>4</sup> Briefly, process and procedural aspect of conversion to Islam under the States Administration Enactments provides three stages, pre-conversion, conversion solemnisation and finally, post conversion and registration. A non-Muslim who intends to convert must fulfill two basic requirements, age qualification and a sound mind person<sup>5</sup>. At present, there are two categories of age requirement specified by the states Enactments, the first category is upon attaining the age of majority (*baligh*) in accordance with Islamic law and the second category is attaining the age of eighteen years, failure which the consent of parent or guardian shall be obtained. The first category is governed specifically in the state of Sabah of which the relevant provision reads as follows "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 eighteen (18) years of age consent shall be obtained from the parents or his guardian"<sup>6</sup>. It is indirectly stated in the Enactment although reaching the age of puberty is the minimum requirement for any person to conversion, consent of parents or guardian shall be obtained if the person have not attained eighteen years of age<sup>7</sup>.

The second category is upon attaining the age of eighteen years old, failure in which, the consent of parent or guardian is a necessary<sup>8</sup>. The provision reads as follows:

"For the purpose of this Part, a person who is not a Muslim may convert to the religion of Islam if he is sound mind and –

- (a) has attained the age of eighteen years; or
- (b) if he has not attained the age of eighteen years, his parent or guardian consents to his conversion".

The provision above clearly states that any person who wishes to convert himself freely, must have attained eighteen years of age<sup>9</sup>. Any person below this age can do so

<sup>4</sup> This statute is enacted under the authority of the States Administration of Islamic Law Enactments in order to further govern detail rules and regulation pertaining to conversion to Islam, such as relevant forms and documents, fees, conversion process and procedure, registration of conversion and procedure for issuance of certificate of conversion. Refer for example the Rules of Muslim Conversion (Sabah) 1997.

<sup>5</sup> Most states provides for these requirements, however, only the states of Kedah and Kelantan which are silent relating to the above conditions. Although no age qualification specified in these two states they provides for the mechanism of control of converts whereby registration of a converted person only take effect in accordance with the provisions prescribed by the Enactment and any rules in force. Refer Administration of Muslim Law Enactment Kedah, [ No 9 of 1962 ], Council of the Religion of Islam and Malay Custom Kelantan Enactment 1994, ( Enactment No 4 of 1994 )

<sup>6</sup> Section 68 of the Administration of Islamic Law Enactment, 1992 Sabah ( Enactment No 13 of 1992 ).

<sup>7</sup> Ibid.

<sup>8</sup> It is submitted that this provision is consistent with the requirement of article 12 (4) of the Federal Constitution which provides that the religion of a person under eighteen years of age shall be decided by parent or guardian and section 2 of the Age of Majority Act 1971 ( Act 21 ) which provides the age of majority for all person in Malaysia is eighteen years old. This 1971 Act has repealed the previous 1961 Act.

<sup>9</sup> In determining whether a person has or has not attain the age of eighteen years old, section 3(2) of Age of Majority Act 1971 ( Act 21 ) is applicable. It clearly stipulates that the day any person is born is considered a whole day. The section reads as follows: 'In computing the age of any person the day on

provided that the consent of parent or guardian is obtained. At present, this provision can be found in the state of Terengganu<sup>10</sup>, Malacca<sup>11</sup>, Selangor<sup>12</sup>, Perak<sup>13</sup>, Negeri Sembilan<sup>14</sup>, Johor<sup>15</sup>, Sarawak<sup>16</sup>, Penang<sup>17</sup>, Federal Territory<sup>18</sup> and Perlis<sup>19</sup>. Pahang provide for similar provision but silent relating to consent of parent or guardian<sup>20</sup>. Prior to the present position, the minimum age requirement in these states differed significantly<sup>21</sup>. This position is further affirmed by Schedule Three of The Rules of Muslim Conversion ( Sabah ) 1997 which states to the effect that consent letter from parent to be submitted along in a minor's application form to convert. Nevertheless, the states of Kelantan and Kedah are silent regarding the age requirement<sup>22</sup>.

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which he was born shall be included as a whole day, and he shall be deemed to have attained the age of eighteen years at the beginning of the eighteenth anniversary of that day".

<sup>10</sup> section 101 (a) and (b) of the Administration of Islamic Religious Affairs( Terengganu) Enactment 2001 (Enactment No 2 of 2001 ).

<sup>11</sup> Section 105(a) ,(b) of the Administration of the Religion of Islam ( State of Malacca) 2002 ( Enactment No 7 of 2002)

<sup>12</sup>Section 117(a),(b) of the Administration of the Religion of Islam( State of Selangor) Enactment 2003 ( Enactment No 1 of 2003)

<sup>13</sup>Section 106 of the Administration of the Religion of Islam ( Perak) Enactment 2004(Enactment No 4 of 2004) . This section further require that the consent must be in writing.

<sup>14</sup> section 117(a), (b) Administration of the Religion of Islam ( Negeri Sembilan) Enactment 2003( Enactment No 10 of 2003)

<sup>15</sup> section 117(a), (b) of Administration of The Religion of Islam( State of Johor ) Enactment 2003 (Enactment No 16 of 2003)

<sup>16</sup> section 69 (a), (b) of Majlis Islam ( Sarawak ) Ordinance 2001 [ Cap 41] Sarawak

<sup>17</sup> Administration of Islamic Religious Affairs of the State of Penang 1993, ( No 7 of 1993), section 77

<sup>18</sup> Administration of Islamic Law ( Federal Territories) Act 1993( Act No 505), section 95(a), (b).

<sup>19</sup> Administration of Muslim Law Enactment, 1963 Perlis ( Enactment No 3 of 1964), section 109(2),

<sup>20</sup> Section 100 of Administration of Islamic Law(Pahang) Enactment, 1991(Enactment No 3 of 1991), section . However this section is silent relating to consent of parent or guardian.

<sup>21</sup> For example previously Selangor requires the minimum age of *baligh* in accordance with Islamic Law ( section 67 of Administration of Islamic Law Enactment) 1989 and Terengganu similarly provides for the same minimum requirement but further imposed the age of fourteen years and seven months in order to be registered as newly convert. (Refer section 181 and 185 of the Administration of Islamic Religious Affairs Enactment 1986 (Terengganu ) respectively. (Enactment No 12 of 1986 ). Malacca and Negeri Sembilan requires the minimum age of eighteen years old ( section 63 of the Administration of Islamic Law Enactment ( State of Malacca) 1991) and section 82 of the Administration of Islamic Law ( Negeri Sembilan) and section 100 of the Administration of Islamic law Enactment 1991. However, no specific provision of age requirement in Perak .

<sup>22</sup> Section 99 of Council of the Religion of Islam and Malay Custom Kelantan Enactment 1994 only provides to the effect that "A person shall not be registered as a person who has embraced the religion of Islam except in accordance with the provisions of this Enactment". Reference also can be made to section 140 of the Administration of Muslim Law Enactment 1962 of Kedah ( Enactment No 9 of 1962) which provides "No person shall be converted to the Muslim Religion otherwise than in accordance with Muslim Law and the provision of this Enactment or any rules made thereunder".

### 3. CONVERSION OF MINOR CHILDREN TO ISLAM : ISLAMIC AND CIVIL LAW POSITION

Generally speaking, the development in this area of law is rather “uninteresting” initially as not many cases been reported, however this situation has changed judging from the recent cases decided by court which has sparked considerable interest by Malaysian public to discuss and debate them openly<sup>23</sup>.

Looking from historical perspective, it can be broadly categorized into 2 period, firstly, pre- independence of Malaysia and post independence particularly after amendment to the article 121(1A) of the Malaysian Constitution. Notably, during the pre independence period, among the earliest cases of minor children conversion to Islam reported in Malaysia( Malaya as she was then) including the famous case of *In Re Maria Huberdina Hertogh*<sup>24</sup>. It was decided in this case that a minor had no capacity to decide her own religion as she was subjected to the consent of her parents. She was barely fourteen years old, therefore the religion of the minor followed the religion of parent (the father).

While post independence period is marked through many exciting development in this area whereby many cases been reported. Among others, steady streams of discussion subsequent to these cases had taken place in relevant conferences, seminars and articles<sup>25</sup>. Some of landmark cases are *In Re Susie Teoh; Teoh Eng Huat vs Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam*<sup>26</sup>, *Genga Devi Chelliah vs Santanam Damodaram*<sup>27</sup>, *Chang Ah Mee vs Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors.*<sup>28</sup>, *Shamala Sathiyaseelan vs Dr Jeyaganesh C Mogarajah & Anor*<sup>29</sup>, *Nedunchelian Uthiradam vs Nurshafiqah Binti Mah Singai Annal and 9 others*<sup>30</sup> and recent case of *Subashini a/p Rajasingam vs Saravanan a/l Thangathoray*<sup>31</sup>

Two categories of minor children conversion are of considerable importance, firstly, the conversion occurs out of minor’s own initiative and secondly, minor’s conversion as a result of their parents’ conversion. For the purpose of this discussion, a minor is a person below the age of majority. The age of majority as defined and interpreted by the Age of Majority Act 1971<sup>32</sup>, is eighteen years old.

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<sup>23</sup> See for example new interpretation adopted by the High court in *Nedunchelian Uthiradam vs Nurshafiqah Binti Mah Singai Annal and 9 others* [2005] 2 CLJ 306

<sup>24</sup> (1951) MLJ 164. Noted that court followed the religion of the father and not the religion of the mother.

<sup>25</sup> Refer for example

<sup>26</sup> [1990] 2 MLJ 228

<sup>27</sup> [2001] 2 CLJ 359

<sup>28</sup> [2003] 5 MLJ 106

<sup>29</sup> [2004] MLJ 648

<sup>30</sup> [2005] 2 CLJ 306

<sup>31</sup> [2007] 2 MLJ 798; [2008] 2 MLJ 147

<sup>32</sup> Act no 21. Relevant provision is section 2 which states as follows:

As discussed above, the position of minor conversion to Islam is governed by the provisions under States Administration of Islamic Law Enactment<sup>33</sup>. Prior to the present position it is relevant to note that certain states comprised of Selangor, Perak and Penang provided special provision relating to the position of minor children of newly converts. The provision granted simultaneous conversion of minor children with the conversion of the parent or guardian. This is provided in section 70 of the Administration Enactment Selangor states:

“If at the moment of conversion to Islam, a *muallaf* whether male or female, has any natural child, who has not attained the age of majority according to Hukum Syara’ ( *baligh* ), the child becomes converted to Islam at the same moment”<sup>34</sup>.

Similar provision available in Perak with additional provision for adopted children.<sup>35</sup> While state of Penang requires the evidence of custody of children granted by the Civil Court to either parent prior to the children conversion. It states as follows:

“If at the time of conversion, a person whether a male or female, has a child who has not attained the age of eighteen, and the child has been ordered by a court, other than the Syariah Court, to be in his or her custody, and he or she decides that the child be converted to Islam, the said child becomes converted to Islam at the time the custody was granted or at the time of his or her conversion which ever later”<sup>36</sup>.

Looking from civil law perspective two statutory provisions govern this matter. Firstly, article 12(4) of the Malaysian Federal Constitution which provides for parent or guardian to determine the religion of a person below the age of eighteen years. The relevant provision provides as follows:

“For the purposes of Clause(3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian”

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“subject to the provisions of section 4, the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority”.

<sup>33</sup> *Supra* note 11 to 21.

<sup>34</sup> section 70 of the Administration of Islamic Law Enactment 1989 ( Selangor )

<sup>35</sup> Section 98 of the Administration of Islamic Law Enactment 1992 ( Perak ) ( Enactment No 2 of 1992 )

<sup>36</sup> Section 80 of the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 ( No 7 of 1993 )

Secondly , provision under section 5 of the Guardianship of Infants Act 1961 which provides *inter-alia* the consent of parent in the upbringing of the minor children.

#### 4. CONSENT OF PARENTS IN A CONVERSION OF MINOR CHILDREN

Suffice to say that consent of parent is a must in any case of minor conversion . Further relevant issue of discussion is who constitutes parent or guardian as specified under the Enactments and the Federal Constitution above? Is the word “parent” or “guardian” is interpreted singular or plural?. As such whether the conversion of minor children require the consent of either parent or both parents ?. Upon scrutinising the construction of the wording “consent of parent or guardian” in the above provisions indicates “singular” and not “plural” meaning .<sup>37</sup>This position has been further affirmed by the interview conducted by the writer in selected states which states consent of one parent is sufficient to constitute consent as required by the these states Administration Enactment<sup>38</sup>.

The issue was deliberated in *In Re Susie Teoh; Teoh Eng Huat vs Kadhi of Pasir Mas Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* <sup>39</sup>, whereby her plaintiff-father was suing the Majlis Ugama Islam Kelantan for converting her minor-daughter, without his permission . He applied to the High Court in Kota Bharu *inter alia* to the declaration that he as the lawful father and guardian of the infant has the right to decide her religion, education and upbringing. He also applied for the declaration that the infant’s conversion in 1985 by the first defendant , without his consent as null and void. The High Court in Kota Bahru held that the conversion was valid, as the girl had the right to choose her own religion, provided that she did it according to her own free will, as such it was not contrary to the provision of Article 11 and 12 of the Federal Constitution. The court interpreted clause 4 of article 12 as subjected to clause 3 of the same article.

The learned judge stated that:

“In view of the above considerations, I was of the opinion that Clauses (3) and (4) of Article 12 did not apply in this case as there was no evidence to support the fact that the infant had been “required” to receive instruction in or to take part in any ceremony or act of worship of a religion other than her own. “Require” in the Concise Oxford Dictionary is defined as “ order, demand, lay down as imperative” and this illustrates an element of force or compulsion which is notably absent in this case in view of the facts stated in the plaintiff’s affidavit.”

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<sup>37</sup> Refer the provision “his parent or guardian consent to his conversion”

<sup>38</sup> Interview conducted by the writer with the personnel in the Department of Islamic Religious Affairs in Kuala Lumpur, Shah Alam, Kuching and Kota Kinabalu.

<sup>39</sup> [1986] 2 MLJ 228

The court further held that it was consonant with the provision under section 75 of Kelantan Council of Religion and Malay Custom Enactment 1966<sup>40</sup>, which states that if the Kadhi was satisfied that a person was a major according to *Hukum Syarak* he may register the person as a convert. The section reads as follows:

“No person who is a minor according to *Hukum Shara’* shall be registered as a convert to the Islamic religion”.

The court further held “a major” according to *Hukum Syara’* is a person who has attained puberty which under Islamic law is at latest 15 years of age. The infant in this case was well past that age when conversion took place. The first defendant had also averred in his affidavit that he had converted the infant in accordance with the law.”

This decision was later reversed by the Supreme Court<sup>41</sup>, the highest court in the country. Abdul Hamid LP, delivering the judgment of the Supreme Court stated that the learned judge was wrong in his interpretation of article 12(4) which led to the cumulative practical effect that any non-Muslim infant under the age of 18 can decide his own religion, notwithstanding the wishes of the guardian or parent.

The Lordship further held as follows:

“it is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights, liabilities of infants and regulate the relationship between infants and parents. We do not find favour with the learned judge's view that the rights relating to religion is not covered by the Act on the ground that the word 'religion' is not clearly spelt out in the law..... In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian”.

However, the Lordship finally held that although the appellant is entitled to the declaration prayed for, the court declined to make the declaration as the daughter was no longer a minor at that time.

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<sup>40</sup> Enactment No 2 of 1966

<sup>41</sup> *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300 ( Civil Appeal No 220 of 1989)

decides on the religion to be 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 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 – daughter and the issuance of the certificate by the second defendant is null and void.

The issue was decided differently in the similar case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor*<sup>47</sup>. The case involved an application by the plaintiff - wife for a declaration that the conversions of her two minor children to Islam by the defendant -husband without her consent to be declared null and void. The wife and husband were married according to Hindu rites and registered under the Law Reform ( Marriage and Divorce) Act 1976 ( Act 1976). The two children of the marriage, ie the minors were Hindus at the time of birth.

The husband had converted to Islam and later converted the minors to Islam without the consent and knowledge of the wife. The wife contended by virtue of an interim order that she had an equal right to decide the religion of the minors. The husband had raised two preliminary objections. The second being the relevance . The issues for determination were *inter alia* whether the High Court being a civil court had jurisdiction to hear the plaintiff's application and whether consent of a single parent enough to validate the conversion of a minor to Islam

The plaintiff –wife supported her application by relying on art 12(4) of the Federal Constitution and section 5 of the Guardianship of Infants Act 1961 ('Act 351') whereby s 5 of Act 351<sup>48</sup> gives equality of parental rights and also section s 95 (b) of the

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<sup>47</sup> [2004] 2 MLJ 648

<sup>48</sup> "infant" is interpreted as a person who has not attained his majority – section 2(1) of Guardianship of Infants Act 1961 (Act 351). Section 2(2) further differentiates between the age of majority of Muslims and non-muslims. The age of majority for the purpose of application of this Act is Muslims 18 years old, while non-Muslims is 21 years old. The section states as follows: "for the purpose of this Act- every person professing the religion of Islam shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before; and  
(ii) every other person shall be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before. Question , what is meant by guardianship?, for what purpose of guardianship, does guardianship also included religion and religious education of infants. It is noted that GIA 1961 only applies to West Malaysia only ( section 1(2). The application of GIA 1961 is subjected to a law made by legislature of that state – section 1(3) – "Nothing in this Act shall apply in any state to

Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505'). The wife further contended based on the decision of *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* where it is held; 'The Federal Constitution does not discriminate against the sexes and since the father and the mother have equal rights over the person and property of an infant, the term 'parent' in art 12(4) must necessarily mean both the father and mother if both are living. To allow just the father or mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4). Thus the term 'parents' in s 68 of the Enactment (ie the Sabah Administration of Islamic Law Enactment 1992) does not conflict with art 12(4) as art. 12(4) confers the right on both the father and the mother'

The High Court of Kuala Lumpur held that the plaintiff-wife's application was dismissed upon the construction of Art 12(4) of the Federal Constitution which provides for singular word "parent" and s 95 (b) of the Administration of Islamic Law (Federal Territories) Act 1993 ('Act 505') whereby the phrase used is 'his parent or guardian consents'.<sup>49</sup> Thus, the use of the singular word 'parent' in both art 12(4) of the Federal Constitution and s 95(b) of Act 505 were clear. The consent of a single parent was enough to validate the conversion of a minor to Islam. Further, s 5 of Guardianship of Infant Act 1961( Act 351) did not apply to the husband in the present case as he was now a Muslim by virtue of s 1(3) of Act 351

The court distanced herself from the interpretation of the word parent in the earlier case of *Chang Ah Mee*. 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 s 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 is spelt 'p-a-r-e-n-t' without the alphabet 's'. It is used in the singular sense"

Nevertheless, the declaration sought for by the plaintiff -wife did not materialised in this case as the court held that it has no jurisdiction to hear the mother's application for such declaration. The syariah court is the qualified forum to determine the status of the two minors and as such the court did not make any ruling relating to the legality of the minors' conversion.

The position above takes new direction when the Johor Bahru High Court adopted different interpretation of the extent of application of article 12 (4) in the recent case of

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persons professing the religion of Islam until this Act has been adopted by a law made by the legislature of that state

<sup>49</sup> section 95(b)

*Nedunchelian Uthiradam vs Nurshafiqah Binti Mah Singai Annal @ Valarmathy A/P Mah Singai Annal and 9 ors.*<sup>50</sup> This was an application by the plaintiff father seeking primarily to invalidate a Syariah Court order obtained by the 1st defendant mother converting their minor children from the Hindu faith to the Islamic faith. The 1st defendant converted 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.

The plaintiff herein who is the husband of the first defendant filed an application seeking for the following relief:

1. A declaration that the four minor children, cited as the second, third, fourth and fifth defendants is and was at all material times of the Hindu faith.
2. A declaration that the Orders made by the 9<sup>th</sup> Defendant that the second, third, fourth and fifth defendants have been converted to the religion of Islam is invalid void and contrary to law
3. A declaration that the Orders made by the 7<sup>th</sup> Defendant dated 22.4.2003 to the extents of its applicability to the Plaintiff, the second, third, fourth and fifth defendants is invalid and void and does not bind the second, third, fourth and fifth defendants.
4. Injunction restraining the 7<sup>th</sup> defendant and /or the first defendant from continuing with the proceeding in Mahkamah Tinggi Syariah Kota Bahru. Kes Mal no 01.100.099.41 tahun 2003 and execution of the earlier orders made in the proceedings against the second, third, fourth and fifth defendants

The court interpreted that Article 12 (4) Constitution as 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-as affirmed by Teoh Eng Huat's case-it does not state or cover the situation where the 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. In short Article 12(4) does not prohibit the minor from following the religion of his parent-the word parent herein being framed in the singular. Though under Article 160(1) the singular includes the plural nevertheless the placement of the word parent in the singular clearly gives rise as to whether it was intentionally inserted as such to be read in singular.....hence based on the reasoning aforesaid I have to respectfully differ from the views expressed in *Chang Ah Mee's case* ”.

The court further held that:

“The intention as such is reinforced in the context of children below 18 years of age being prohibited from electing the religion of their choice must surely be subordinated to

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<sup>50</sup> [ 2005] 2 CLJ 306

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 4 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 the Article 12(4) of the Federal Constitution. This fact of the 4 children following the religion of the mother and not exercising an election as to their religious choice is reflected in the finding of the Syariah's Court Ground of Judgment on the custody issue:

Therefore merely following the religion of parent does not constitutes violation of article 12(4) of the Constitution as the children did not exercise their choice relating to religion.

The recent decided case is *Subashini a/p Rajasingam vs Saravanan a/l Thangathoray*<sup>51</sup> has shown that consent of either parent is sufficient to constitute consent as required by law

## 5. CONCLUSION

Based on the discussion above , it clearly demonstrated that court decisions differed significantly in certain cases. The issue is, which precedent will be a good law depends very much to the legal justification and reasoning by court . Other mechanisms must be explored to resolve such disputes in the future.

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<sup>51</sup> [2007] 2 MLJ 798