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Research paper

Judicial Interpretation: the Impact on Individual and Society in Malaysia

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Abstract

Malaysia is a multiracial country that prides itself in its interracial and interreligious mix and its peaceful and tolerant co-existence among its citizens. Family units are deemed sacrosanct and the base upon which a society and a nation resides. In any breakdown of a marriage, the unit undergoes untold suffering and misery. The pain is even more excruciating when the status quo of the religion of the child of the civil marriage is then abruptly disrupted by the unilateral action of the converted spouse which impedes on the rights and lives of the unconverted spouse and child. The situation in Malaysia is that it is possible given the case of Deepa (2016) for a converted spouse to convert a child of civil marriage unilaterally and also then to file custody for the child in the syariah court to forestall any decision made by the civil courts on custody or recovery orders. The paper intends to demonstrate how judicial interpretation in the case of Deepa has changed the landscape of family law in Malaysia and impacted rights and lives of the affected sections of her people. The case of Deepa has created a change in the civil family law by reading in a jurisdiction of the civil courts over a Muslim child and the creation of a presumption that a child of seven years has the capacity to make an independent judgement on their interest (without the need for additional evidence to collaborate the fact).The presumption creation is arguably made in the case of Deepa to family civil law to accommodate the Federal Court's decision in reversing the Court of Appeal and High Court decisions on custody orders awarding the custody of both the children of the civil marriage to the non –convert mother. This is arguably it is submitted is a result of judicial interpretation driven by a need to justify a decision rather than to reach a decision. The case cited in Deepa to argue in support of the presumption will be analysed to consider the extent the creation of this presumption is supported. It is the argument that the judicial interpretation in Deepa case is one driven to support a given outcome for the change in the award of custody and the creation of the presumption is the means by which this is achieved. It does not change the fact that however it has become a legal precedent for all civil family cases. It is submitted that the civil courts are unwilling disregard or not give cognisant to unilateral conversion of the child of a civil marriage. This has shaped the direction and/or the judicial interpretation the civil courts have taken over this issue in spite of it being contrary to pronouncements in existing case precedents as will be demonstrated in this paper. The issue of unilateral conversion recognised by the civil courts is an issue that is sensitive and fragile causing tensions, divides and conflicts not only between the affected parties in a domestic civil marriage breakdown case over custody and the religion of an infant who was converted by the converted spouse into the Muslim religion but between the races and civil society. The case of Deepa caused and required the move by the Parliament to amend the law so as to forestall unilateral conversion. However the same has also been shelved at the moment. The paper's aim is that in conducting statute and case reviews primarily from a family law perspective to evidence arguments in the furtherance for the move made by the cabinet to be revived.

Keywords: *Judicial Interpretation, Parent, Unilateral Conversion and Custody*

1. Introduction

Malaysia is a multiracial and multi religious country consisting of thirteen states and three Federal Territories. The Federal Constitution is the supreme law of the land. The country administers as stated by Rosli Dahlan[1] and Tommy Thomas[2] secular laws for non-Muslims and Islamic law for Muslims as with regard to family matters in the respective civil and syariah courts systems. In case where a civil marriage is contracted, it is governed by the Law Reform (Marriage and Divorce) Act 1977 (LRA)[3] which is applicable to non- Muslim and muslim converted spouse who are subjected to be adjudicated in the secular courts. However the Muslim marital and related family matters are regulated by the individual states and federal territories through respective legislation and are applicable only to Muslims. The convergence and conflict arises when one of the non-Muslim party (and not the other) to a civil marriage converts to Islam. This has repercussions on the existing civil marriage and children borne out of the union of the civil marriage where the other civil spouse does not also convert. The point of contention and sensitivity is the ability of the converted spouse to then convert the minor child unilaterally to Islam and the jurisdiction of the Syariah courts in dissolving civil marriages and the awarding custody of the converted child. This paper is to reflect and comment on the case study of the Malaysian apex Federal Court (2016)[4] decision of Deepa Subramaniam (Deepa) which dealt with custody issues to consider the implication it has on the non-convert spouse (usually women), child and the court's jurisdiction in a scenario never envisaged under the LRA (applicable under statutory provisions only to non-Muslims only save for converted spouse) when considering custody and religious upbringing of the 'Muslim' child.

It is submitted court decision on the ability of a parent to unilater-

ally convert a non- Muslim child borne under a civil marriage to Islam mashes the jurisdiction of civil and syariah courts that was never intended to intermingle. The civil court is then given jurisdiction to decide on the custody issues over a Muslim child that was never in the contemplation of the LRA that only has jurisdiction over non-Muslim and a converted Muslim spouse who has had a marriage solemnized previously under the civil law of the LRA. Despite holding fast to the exclusive jurisdiction of the civil courts over civil marriages and the children of civil marriages, the civil court as in Deepa case still refuses to invalidate the reach of the syariah courts over the children of these civil marriages.

This is primarily because of the judicial interpretation of the civil courts given to the Article 12(4) of the Federal Constitution where the word parent is read in a singular context. There is another case of stemming from Indra Gandhi Mutho v Pengarah Jabatan Agama Islam Perak (Indira Ghandi) [2013] 7 Current Law Journal (CLJ)[5] that directly challenges the validity unilateral conversion which is now pending before the Federal Court. The former Minister in the Prime Minister Department Nancy Shukri, in (February 2016)[20] reportedly held the view that children should be allowed practice the religion practiced by the parents at the time of marriage in event one of them opts to convert and to be able to choose religion at eighteen years of age. The Government of Malaysia had stepped in to propose the amendment that would negate the unilateral conversion that is permitted by judicial interpretation of the word parent under Art 12(4) under a line of cases including Deepa that has caused rippled and tensions across the racial and religiously mixed society. This stance of the government to amend the LRA to allow it to prevail over any state legislature provisions that allow for unilateral conversion in the press article captioned ' *Nation 's Interest comes first Dr Ahmad Zahid: Accept decision to amend Marriage and Divorce Act*.' However the same was put on hold as reported to be put on hold (Friday, 7th April 2017) under the caption, '*Deferment too review conversion Bill. Zahid: Need to relook proposed amendments to Marriage and Divorce Act*.' [17-19]

This is however a humane personal and social issue that runs and cut deep into the individual and family of a civil marriage. This inflicted and inflicts continuingly untold misery on the non-converted spouse and child of the civil marriage. Imagine a spouse in an abusive and unhappy marriage being threatened by the offending party with unilateral conversion of self and child to further victimise the helpless and voiceless spouse into submission and compliance. This is reported by Lainey Lau (advocacy officer, Malaysian Women Aid's Organisation)

"*whenever there is a court ruling in favour of unilateral conversion, we would immediately get calls that very week from (mostly) women who share that their husbands have threatened to convert to Islam to gain custody of their children. This is a great cause of fear in many women and is an issue that needs to be taken seriously by the authorities. "*

Or a non-Muslim mother given custody over a Muslim child and is in constant worry that she will deprived of the custody because the child is not brought up the Islamic way. How will but not this affect her enjoyment of her right to her way of life and her own fundamental guarantees of life, liberty, religion, equality, association and expression under the Federal Constitution.

The door is now open in event custody is granted to the non-covert spouse for the converted spouse to challenge on the Islamic religious upbringing of the child where again this issues will resurface.

It is an irony that the victim (non –convert spouse) is then clothed as the transgressor for failure to educate the child in the Muslim religion. In the recent case of Deepa the converted father to is reported to have said with regard to the daughter to whom the custody of daughter has been awarded to the mother,

"*If I hear talk again that she wants my kids to become murtad (apostate), or if I find out she is taking my daughter to a Hindu temple or giving her non halal food. I will snatch my daughter away from her."*

Hence awarding custody of a converted child to a non-convert spouse would raise even more trauma and provide no closure as long as the convert father or spouse is able to convert the child to Islam.

2. Materials and Methods

The method is a doctrinal legal research on statute and case study of relevant selected cases impacting on the individuals and family unit of a civil marriage where a spouse converts and unilaterally converts the child bringing to fore conflict of laws, jurisdiction applicable and inherent judicial conflicts in deciding custody issues. The paper will explore and discuss the following questions.

1. Whether civil law of LRA should protect the legitimate expectation (including the status quo in the religion of the children) of applicability of civil laws to the parties in a civil marriage even after conversion into Islam of one spouse.
2. Whether the civil law of the LRA is meant to be applicable to decide custody issues of a Muslim child.
3. Whether the judicial reading of the word parent under Article 12 (4) of the judiciary to mean single parent is justified.
4. The justification of creation of the legal presumption of a child of seven years of age capable of forming an independent judgment as to the child own interest.

In this regard cited passages will be quoted from statute and case judgments as it the norm in legal writing as a mark of legal authority to substantiate arguments made.

3. Federal Court Viran a/l Nagapan v Deepa a/p Subramaniam (Deepa) [2016] Malayan Law Journal (MLJ) Unreported 05

This case facts concerned a husband and wife who contracted a civil law marriage under the Law Reform (Marriage and Divorce) Act 1976 (LRA) on 19 March 2003. The marriage bore them two children Shamila and Mithran. The husband on 26 November 2012 converted into Islam and thereafter on 4th January 2013 registered the conversion of his two children into Islam. He took the name Izwan bin Abdullah and gave the names Nur Nabila and Muhammad Nabil to his children. His application for dissolution of his civil marriage was granted by the Syariah High Court. His application for permanent custody of the children was granted on 19 September 2013 with visitation rights granted to the ex-wife. The wife, a non-Muslim, could not be a party to the proceedings and remain unaware at the material time of the orders obtained by her ex-husband. She sought to have a divorce and the marriage dissolved under the LRA and an order for the custody of her children by filing a petition in the civil High Court on 12 December 2013. Her applications that were served on her ex-husband were granted and the court awarded custody of the two children to the ex-wife with weekly access to the ex-husband. Her ex-husband took Mithran from his ex-wife home on 9 th April 2014. On the 11th April 2014 the ex-husband filed a notice of appeal against the decision of the civil High Court. The ex-wife retaliated by obtained a recovery order from the civil High Court pursuant to section 53 of the Child Act 2001 wherein the Inspector – General Police (IGP) or his officers were directed to recover the child and return him to the mother notwithstanding the order of the Syariah Court. This order also was appealed by the ex-husband. Pending the hearing of the appeal by the civil Court of Appeal, the Attorney General (AG) and IGP sought to intervene as parties under public interest. The questions posed were whether a recovery order can be made under the Child Act when there exist a custody order given under a Syariah court, where there is a conflict of custody orders does civil court prevail over Syariah court and whether the Civil court can exercise supervisory jurisdiction over the Syariah court. The civil Court of Appeal affirmed the judgment of the High Court on both the custody order and the recovery

order. The Federal Court affirmed the long standing law that the civil courts have exclusive jurisdiction over the care, custody and dissolution of marriage and ancillary matters of a civil marriage contracted under the LRA but yet it held the order of the syariah court on the custody order as valid. The rationale being the judicial interpretation of the Article 12 (4) of the Federal Constitution allows a single parent (converted spouse) to convert a child. The Federal Court also disturbed the order of custody of the lower courts awarding the custody of both the children to the mother. It awarded the son who was forcibly taken from the mother in contravention of the civil custody order (though not under the syariah court order which paradoxically still stood notwithstanding it was in contravention to Section 51 LRA) to the father.

3.1. Whether Civil Law of LRA Should Protect the Legitimate Expectation of the Parties (Including the Preservation of Religious Status Quo of the Children).

In Deepa case the Federal Court decision, we have the paradoxical and conflicted stance affirming a long standing law that care and custody issues of a civil marriage remain within the exclusive jurisdiction of the civil courts. But yet in the same breathe the civil Federal Court in Deepa case allows a Syariah court order on care and custody that violates this law to stand and be recognised as a valid order. Extracts from the judgements is reproduced.

"The issue is not new. The Civil Courts had consistently held that the converted spouse cannot use his conversion to Islam to escape responsibilities under the LRA. (Also see Tey Siew Choo v. Teo Eng Hua [1999]6 CLJ 308, Kung Lim Siew Wan v. Choong Chee Kuan [2003] 6 MLJ 260 and Shamala a/p Sathiyaseelan v. Dr Jeyaganesh a/l Mogarajah [2004] 2 MLJ 241). 22. We have no reason to depart from the earlier decisions. We are of the same view that a non-Muslim marriage does not automatically dissolve upon one of the parties converting to Islam. ***The Civil Courts continue to have jurisdiction in respect of divorce as well as custody of the children despite the conversion of one party to Islam. In the present case, the ex-husband and the ex-wife were Hindus at the time of their marriage. By contracting the civil marriage under the LRA they are bound by its provisions in respect of divorce as well as custody of the children of the marriage.*** *Matters under the LRA are within the jurisdiction of the Civil Courts and the Civil Courts continue to have jurisdiction over them, notwithstanding the ex-husband's conversion to Islam. Thus, the matter of dispute between the ex-husband and the ex-wife in this case is not a matter within the jurisdiction of the Syariah High Court. It follows that Article 121(1A) which removes the jurisdiction of the Civil Courts in respect of any matter within the jurisdiction of the Syariah Courts does not operate to deny the Civil Courts jurisdiction in respect of the matters set out in section 51 of the LRA…..The Syariah Courts have no jurisdiction over the ex-husband's application to dissolve his civil marriage with the ex-wife. Neither have the Syariah Courts jurisdiction over custody of the children born from the civil marriage under the LRA.* ***The Syariah Courts have jurisdiction only over matter relating to divorce and custody when it involves a Muslim marriage, solemnized according to Muslim Law****. When one of the parties is a non-Muslim the Syariah Courts do not have the jurisdiction over the case even if the subject matter falls within their jurisdiction….The Civil Courts have the exclusive jurisdiction to grant decrees of divorce of a civil marriage under the LRA and to make all other ancillary orders including custody care and access of the children born out of that marriage and all other matters ancillary thereto.* ***It is an abuse of process for the spouse who has converted to Islam to file for dissolution of the marriage and for custody of the children in the Syariah Courts.*** *This is because the dispute between parties is not a matter within the exclusive jurisdiction of the Syariah Courts. Therefore, Article 121(1A) of the Federal Constitution which deprives the Civil Courts jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts is not applicable in this case."*

"…*However, Syariah Court order remained a valid order until it is set aside. Thus, with respect, the High Court Judge, cannot direct the IGP or his officers to execute the High Court Judgment, irrespective of the Syariah High Court Order. Thus, on the facts of this case, both the Syariah High Court the High Court Judge, cannot direct the IGP or his officers to execute the High Court Judgment, irrespective of the Syariah High Court Order."*

The Federal Court in Deepa case did not directly address the Court of Appeal judgment below that backed the civil High Court order. It did not propose a resolve the conflicting orders which the Federal Court allowed for or delve into the sensitive area of the supervisory jurisdiction of the civil courts. It in fact facilitated (paradoxically) a stalemate situation between the civil and syariah courts where in fact there should not be one as the Federal court said

"*As rightly pointed by Abdul Hamid Mohamad FCJ (as he then was) in Latifah bte Mat Zain (supra) that if laws made by Parliament and the Legislature of the State are in strict compliance with the Federal List and State List, then there should not be any situation where both courts have jurisdiction over the same subject matter."*

The Court of Appeal judgment in Deepa case of the learned Court of Appeal judge Tengku Maimun Mat also considered that it is not possible for a valid order of Syariah court to exist on custody matter where the Syariah court have no jurisdiction in the first instance.

"*The High Court judge did not err in deciding that the respondent was the person having custody of the children pursuant to ss. 52(2) and 53(2) of the Act* ***by reason that the Syariah Court had no jurisdiction to grant custody of the children of a civil marriage****. Although s. 52(2) of the Act provides that a person has lawful custody of a child if he has been conferred custody of the child by a Syariah Court, in the light of the decision in the case of Subashini, that provision must be read in the proper context, namely that the* ***Syariah Court order must necessarily relate to the custody order granted over children of a Muslim marriage.*** *None of the defences provided under s. 52(3)(b) of the Act were applicable to the current case. The existence of the Syariah Court order did not provide any defence to the appellant."*

Despite as cited above, in the Deepa Federal Court judgement acknowledging that if the boundaries as set up in the Federal Constitution and Ninth Schedule was adhered to there would be no conflict between the jurisdictions and despite clear statements of the jurisdictional authority of civil courts, the judicial interpretation and decision in Deepa case paradoxically did not resolve the possibility and existence of conflicting orders from syariah and civil courts. It is submitted that this stems from the judicial interpretation of the word parent by the civil courts and the refusal to invalidate or not give cognizance to an unilateral conversion and/or lack of jurisdiction of the syariah courts on custody matters where parties are also non-Muslim.

3.1.1. Legitimate Expectation of Parties in a Civil Marriage.

The rationale and prior Supreme Court (now Federal Court) case of Tang Sung Mooi v Too Miew Kim [1994] 3 Malayan Law Journal (MLJ)[6] of the provision of Section 51 LRA at page 167 where Mohammed Dzaiddin Supreme Court Judge (SCJ) (as he then was) stated that the provision intended to give protection to the non- converted spouse and also the children of the marriage against a Muslim convert.

"*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."***

On the jurisdiction of the civil court to provide ancillary relief and have jurisdiction of the convert even after the conversion, Mohammed Dzaiddin SCJ said (at pg 124)

"*From the wording of s 51(2) of the Act**, the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam.** In our opinion … the High Court … has jurisdiction to hear and determine the ancillary issues…. It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since Syariah Courts do not have jurisdiction over non-Muslims. In the context of the legislative intent of s 3 and the overall purpose of the Act, the respondent's legal obligation under a non-Muslim marriage cannot surely be extinguished or avoided by his conversion to Islam."*

Nik Hashim, the Federal Court Judge (FCJ) in the case of Subashini a/p Rajasingam v Saravanan a/l Thangatoray [2008] 2 MLJ 147[7] in the case of went further and stated at page 168 that:-

"*The husband could not shield himself behind the freedom of religion clause under art 11(1) of the FC to avoid his antecedent obligations under 1976 Act on the ground that the civil court has no jurisdiction over him. **It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore, the status of the husband and wife at the time of registering their marriage was of material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children**. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam.*

Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect of divorce and custody of the children of the marriage and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam."

In the words of Abdul Aziz Mohamed FCJ, in the same case of Subashini the civil legal regime (civil matrimonial laws) and legitimate expectation of the spouse and child of the civil marriage is also highlighted.

*"The husband's fourth head of submission was one that relied on the fact that Islam is the religion of the Federation by virtue of art. 3(1)of the FC for giving victory to the Syariah Court side in a conflict of jurisdiction between the Syariah Courts and the secular courts. The thinking behind this argument is akin to one that inclines towards making Islamic law, by virtue of Islam being the religion of the Federation, something like the supreme or prevailing law of this country. That kind of thinking was rejected by the Supreme Court in Che Omar Che Soh v. PP. Furthermore, husband's counsel explained that this head would be relevant only if this court should find that both the Syariah High Court and the secular High Court had jurisdiction in this case and, has been said, this court found that only the secular High Court had jurisdiction. The art. 3(1) argument was also used to contend that Parliament had no power to enact s. 51 of the 1976 Act because it compels the application by the civil courts to a Muslim of the civil law in matrimonial cases. This court was unable to see how the fact that Islam is the religion of the Federation prohibits Parliament from passing a law to ensure that where a spouse in a non-Muslim marriage converts to Islam and the marriage is consequently dissolved, he or she remains bound to the obligations under the legal regime governing a non-Muslim marriage, that he or she undertook to the other spouse, as regards himself or herself and the children of the marriage, when he or she entered into the non-Muslim marriage. **It could not be seen how the fact that Islam is the religion of the Federation can operate to prevent a measure to ensure that the non-converting spouse is not frustrated in his or her expectations flowing from those obligations."***

It is also the argument that in Subashini case that the civil laws applicable to the converted spouse includes any written law relating to divorce and matrimonial causes.

"*It is must be noted that the High Court had exercised it civil jurisdiction in this matter under S 24 (a) of the Courts of Judicature Act 1964 which states that the jurisdiction of the High court shall include the jurisdiction under any written law relating to divorce and matrimonial causes. The phrase "any written law relating to divorce and matrimonial cause must include the 1976 Act."* This would bring in laws such as Guardianship of Infants Act and the like.

Following the line of argument of Yong May Inn v Sia Kuan Seng [1971] MLJ 280[8], welfare of a child (or spouse) is not to be measured by money or physical comforts only. The word welfare must be taken in its widest sense to include moral and religious welfare of the child. Hence the spiritual welfare of the unconverted spouse and child of civil marriage deserves protection.

As summed up the points are as follows. Firstly, the protection cloak is extended over the non-convert spouse and child of the civil marriage. An unilateral conversion of the child deprives not only the other spouse of the spouse say in the religious upbringing of the child but also the child belief in the child current religion and the right to choose her religion when she is eighteen. This is a child's right as in Malaysia it is recognised more so after the case of Lina Joy v Majlis Amanah Islam Wilayah Persekutuan [2007] 4 MLJ 585 that freedom of religion for Muslim is limited. It is pertinent to remember that Malaysia has ratified and acceded to Article 14 Convention on Rights of the Child *wherein it is provided that States Parties shall respect the right of the child to freedom of thought, conscience and religion*. This is aside from impeding on the rights of the non- converted spouse in living her constitutional guarantees of right to life, equality, freedom of religion and freedom of expression under the Federal Constitution. This argument was highlighted in the High Court judgement of the Honourable High Judge Lee Swee Seng in Indra Gandhi Mutho v Pengarah Jabatan Agama Islam Perak [2013] 7 CLJ 82. Secondly the LRA was intended to protect the unconverted spouse and child interest and expectations. Thirdly arguably there are legitimate expectations that the status quo at the time of marriage (namely here religion of the parties) would be protected and maintained. Hence, right to petition for divorce by the non-convert spouse on the ground of conversion into Islam of the now Muslim spouse. The inherent extension of this intent and interpretation would be to ensure that the spouse and child are not unilaterally affected by the conversion of the converted spouse. This would have been resolved by the judicial interpretation of the word parent to include father and mother. Finally, that position of Islam under Article 3 does not triumph over the right of the parties under the Federal Constitution and enacted laws is also supported by the Supreme court case of Che Omar bin Che Soh v Public Prosecutor [1988] 2 MLJ 55[9].

It is humbly submitted that it should follow that the idea that the legitimate expectation and the preservation of the status quo of the spouse and child of the civil marriage should prevent any acts of the converted spouse that would interfere with the legitimate expectation of the civil marriage which arguably includes the prevailing religion of the child in civil marriage and the regulation of care and custody issues in accordance with civil laws. The child is then secured her right to choose her religion upon attaining the age of majority in accordance with her rights. This approach also does not impede into the constitutional rights of the non-converted spouse.

3.2. Whether the Civil Law of the LRA is meant to be Applicable to Decide Custody Issues of a Muslim Child.

In Deepa case, the argument advanced by the ex-husband is that he and his children were Muslim prior to the filing of the divorce petition in the civil High Court. Hence the matter was within the jurisdiction of the Syariah Court under Article 121 (1A). The Federal Court directed to the LRA S 3(3) and Section 51 of the LRA which reads –

*"3.(3) **This Act shall not apply to a Muslim or** to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or*

registered under this Act; ***but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from*** *granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam."*

"51.(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversions.

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

Section 3 excludes the application of LRA to Muslims but reserves the jurisdiction over a married person (spouse) under LRA that converts thereafter. Whereas Section 51 (1) preserves the jurisdiction to allows the non-converting party to petition for divorce after three months and the civil court to award order of care support and custody of the children of the marriage.

It is submitted that the issue is not so much as whether the unilateral conversion issue was challenged by the non-converted spouse applying for custody but whether it is possible to unilaterally convert a child in the first place.

The Federal Court judicially construed the word parent in Article 12 (4) in the Federal Constitution to mean any one parent hence holding the unilateral conversion into Islam as valid. This was and is unfortunate because it allowed or rather invited the Syariah courts jurisdiction as seen by subsequent cases like Deepa and Indira Gandhi for Syariah court or agencies to convert the child and make then custody orders as regards the same.

The judicial attitude is reflected in the case of Subashini wherein it was held that " *But in the present case , the husband had converted to Islam and had filed the proceedings in the Syariah High Court for the dissolution of marriage and the custody of the converted son. By embracing Islam, the husband and the son became subject to Muslim personal and religious laws and it is not an abuse of process , if he , being a Muslim, seeks remedies in the Syariah High Court as it is his right to do so."*

This approach by the court it is humbly submitted conflicts with the intent of the Section 51 of the LRA that it is submitted was to sealed off the use of Islamic religion by the convert in order to protect the remnants of the civil marriage (rights of spouse and child and preservation of status quo being arguably legitimate expectations) and maintaining the secular legal obligation of the converted spouse. It also promoted the intermingling of jurisdictions of the civil and syariah courts that was meant to be separate and distinct under the Ninth Schedule of the Federal Constitution and contrary to the Federal Constitution.

It is submitted this is the predicament that is faced in the case of Deepa when now a civil court is to decide the care and custody issue of a Muslim converted child. It is submitted that under the LRA under Section 3 (3) cited previously save for the converted spouse the civil court would have no jurisdiction over the Muslim child as the Act does not apply to a Muslim. This is the jurisdiction of the Syariah courts who deal with the issue applying Islamic precepts rather than secular laws over Muslims. However we find the Federal Civil court here applying ostensibly civil principles to decide on the matter of custody over a Muslim child. However as will be seen later the confidence on the impartiality of the civil courts in so deciding may be called into question.

The Section 89 of the LRA provides that the person given the custody of the child to decide on the religious upbringing of the child rest on the premise that the child is non-Muslim. According to the case of Chang Ah Mee v Jabatan Hal Ehwal Agama Islam [2003] 5 MLJ 106, a Sabah case, Judge Ian Chin read the said provision as conferring on the non-converted spouse a right to be consulted on the religious upbringing of the child and also read the word parent to mean both parents.

A civil court order to a non- Muslim spouse to comply with the upbringing of a Muslim child in the Muslim religion would crave inroads into more divisive areas and raise constitutional issues. It may be argued that the Muslim parent would arguably find more favour presumably before the civil court to facilitate Muslim religious upbringing of the Muslim child.

The validity of unilateral conversion also may be argued to provide an undue advantage to the converted spouse (not the protected party under Section 51 LRA) in custody issue by affecting unilaterally the religion of the child. It also results arguably in a conflicted judiciary when hearing custody issues that involves converted children. The decision is a sensitive one and despite affecting a small hapless minority (mostly women), it cuts incisively deep into the statutorily protected remaining family unit and is a reflection as to the state of judicial attitudes, religious inclinations and religious tolerance in a multireligious and multiracial Malaysia.

Furthermore as the order of custody may be challenged at any future time, the civil court court would likely be asked to decide if the non-Muslim mother is bringing up the Muslim child in according to Islamic principles. Again we would have a civil court in a conflicted position not envisaged by the framers of the Constitution and overstepping the boundaries set out in the Federal Constitution namely the civil court in a family matter to adjudicate over non- Muslims and Muslims. It applies civil secular laws over in family and personal matter that include beyond the statutory exception of a Muslim converted spouse under the LRA to now as judicially construe to include jurisdiction over the Muslim child. Hence it may be argued that the judicial interpretation has extended the subjection of a Muslim child and Muslim family and personal affairs to the civil jurisdiction even though it arguably contravenes the Ninth Schedule of the Federal Constitution and the LRA itself.

The Deepa Federal Court requested the views of the children Mithran (Muhammed Nabil) aged 8 (then living with father) and Sharmala aged 11 (living with mother) of their preferences. In disturbing and overriding, the finding of the Court of Appeal and High Court, the court then awarded the custody of Mithran (Muhammed Nabil) to the father. The court said that "*he told us in clear terms that he is very happy to live with his father. He also told us that he does not wish to live with his mother."*

The judgement also relied on the change of circumstances (referring to where the child resided) which in fact resulted from the act of the father disobeying the civil court custody judgement in taking the child away from the mother.

It is to be noted that in taking this route the Federal Court departed from another long standing Federal Court decision in Manickam v Intheranee [1985] 1 MLJ 56[10] where there were 2 children aged 4 years and 9 years respectively. The Federal Court in Deepa also crafted a judicial presumption to validate its decision in departing from both the custody orders of the High Court and Court of Appeal below.

At the time of application of custody in Manickam case hearing the younger boy was with the mother and the elder was with the father. The father had remarried and had another infant and the older boy was close to by his paternal grandmother. The court was asked to consider as defective the order of custody granted by the High Court judge to the mother who did not interview the children to have as under S 88 (2) (b) of the LRA which requires a court to have regard to the wishes of the child, where he or she is of an age to express an independent opinion. The Federal Court responded that a child aged about 8 years of age and in the custody of the appellant father and his family could not reasonably be expected to express any independent opinion on his preferences. On possible negative effects of removing the child from surroundings he has grown accustomed to, the court did not attach much weight to this argument as both sides can advance similar arguments and considered the ability of the child to adapt. The fact that a child is better cared by the natural mother than a stepmother factored in

the court decision. The Deepa case also cited and recognised how a child opinion may be biased and not independent by reason of influence of a party.

"*38. In evaluating the independent opinion express by the child, the court would normally follow the opinions given if those opinions are consistent with the interests of the child. In the case of Re KO (an infant) [1990] 1 MLJ 494 Edgar Joseph Jr. had this to say:*

"... I reminded myself that how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court."

39. Whilst considering the wishes of the child, the court must always take into consideration on the possibility that the child might have been influenced by the people surrounding the child. This matter was addressed in the case of B Ravandran s/o Balan v. Maliga d/o Mani Pillai [1996] 2 MLJ 150, where the court did not follow the views of the child as the court commented that in all probability the child was influenced by material gains promised to be given or already given by the father "

The Deepa case yet however relied instead on the High Court case of Mahabir Prasad v Puspha Mahabir Prasad [1981] CLJ 182[11] wherein it stated the court gave the opportunity to the children aged seven and half and eight and half years to express their opinion to justify its creation of the rebuttable presumption that a child aged seven can give an independent opinion.

The case of Mahabir the court did not just rely on the child views but required evidence of the welfare officer and equal opportunity presented to both parents before ultimately awarding custody of the children to the mother. However the Deepa Federal Court in justifying it departure of the decision of both the courts below on custody issue by judicially crafting a rebuttable presumption extended in all civil cases that children above the age of seven (why this age is another question to be posed) can be presumed, subject to being rebutted and other extrinsic factors closely related to the case, to be capable of giving independent opinion. The same opinion of the child (notwithstanding whether independent or not) was not collaborated but was to cause the Federal Court to be satisfied as to a change of circumstance citing the residence of the child with the father (caused by the disobedience of civil custody order) to reach a different finding and disturb the award custody of both children to Deepa. Especially in cases like this, where there is a departure from findings of two courts below and the creation of a civil family law presumption to justify the finding of the court, it will undesirably be subjected to speculation.

3.3. Whether the Judicial Reading of the Word Parent under Article 12 (4) of the Judiciary to Mean Single Parent is Justified and the Impact of the same

The crux of the care and custody issues faced by spouse whose other half have converted to Islam and then converted the children of the civil marriage to Islam rest in the ability of the converted spouse to do so. This is independent from the question from the question whether the unilateral conversion is challenged or not as in the case of Deepa. The fact that the court have read Art 12 (4) to allow for unilateral conversion by a single parent is humbly submitted has triggered the intermingling of the civil and syariah courts and the paradoxically stance in judicial reasoning. The Federal Court in Deepa was guided by the obiter dictas (remarks made in passing, since the case was deemed premature) by the Federal Court in Subashini Rajasingam v Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1[7] on two main points. Firstly that the word parent means a singular parent and that S 5 Guardianship of Infants Infant on equality of parental rights was inapplicable to the converted spouse. It will be attempted to be demonstrated here that Subashini case relied heavily on the case of Teoh Eng Huat v Kadhi , Pasir Mas & Anor [1990] 2 MLJ 300[12] where the Supreme Court faced the question whether a minor child can convert to Islam without the consent of the parent or guardian given the provision of Art 12 (4) which reads " *For the purpose of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian*."

At this time in 1990 the father was the guardian under the provision of the Guardianship Act (GIA). The Guardianship of Infants Act (Amendment Act) 1999 came into effect on 1st October 1999.[P.U. (B) 376/1999] where equality of parental guardianship right were given to father and mother.

The Supreme Court in Teoh case decided that the High court judge decision to hold a minor can decide her own religion voluntarily was " *rooted on wrong premises , are not in accordance with the spirit and intention behind the respective legislation…*"

The Supreme court strove to drive home the point that legislative and constitutional intent need to be considered especially when it concerns inter race relations. The need not to construe laws in any particular bend which is out of scheme of the entire framework is of paramount importance. This approach is as important today as it was then also, in course of the judgement it was said, "*we have considered the question whether there should be any statement that if any provisions were inserted it must be clear that it would not in any way affect the civil right of non-Muslims*."

Lord President Abdul Hamid decided in Teoh case, the "*parent or guardian **normally** has the choice of the minor religion."* It is to be noted that the case of Teoh referred to a normal context of a parent right over child to decide their child religion when the child is under 18 years of age. But it is not really on fours in case where it involves unilateral conversion and dispute by parents on custody and religious upbringing of the child of a civil marriage and where the Guardianship of Infants Act has been since amended to include equality of parental rights.

Furthermore it humbly submitted that the in the case of Subashini Nik Hashim Federal Court Judge (FCJ) has made an oversight in relying on Section 1 (3) of the Guardianship of Infants Act to argue that it excludes the application to a Muslim. It is humbly submitted that the exclusion applies in relation to a marriage contracted under Syariah or Muslim laws. Furthermore, the case of Sharmala Sathiyaseelan v Jeyaganesh Mogarajah [2004] 2 MLJ 241[13] was cited as authority in saying that the case of Shamala did not apply Section 5 of the Guardianship of Infants Act. Wherein in the case of Shamala Faisa J did accept the application of the said Act by his comment,

"I pause here to remind the parties about the equality of parental rights under S 5 of the Guardianship of Infants Act 1961 (Act 1961) which provides 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 the father and in relation to the custody and upbringing of an infant, the mother shall have the same rights and authority…." [14]

Furthermore the in case of Subashini (where the father unilaterally converted the children) the FCJ Nik Hashim has a different perspective on the application of Article 8 on the right of either spouse to choose equally to convert the child into Islam. *" That being so, art 8, is not violated as the right for the parent to convert the child to Islam applies in a situation where the converting spouse is the wife as in Nedunchelian, supra and as such the argument that both parents are vested with the equal right to choose is misplaced."*

However the right is seemingly only exercisable by a parent (father or mother) who converts the child into Islam does not address the deprivation of equal right of the non convert spouse to do likewise.

It is humbly submitted as the term guardian includes father and mother for marriage contracted under the civil laws. The word parent has been decided and interpreted to mean both parents albeit by the Sabah High Court Judge Ian Chin J in Chang Ah Mee that " *the constitution does not discriminate against the sexes and hence the term 'parent' in article 12 (4) must necessarily mean both the father and mother and 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 mother if both are living.

The possible interpretation of the word parent has been argued to mean both parents also by reference to Article 160 (1) and Eleventh Schedule of the Federal Constitution wherein it is provided that:[21]

2 (94) – construction of masculine gender words importing the masculine gender include the females

2 (95) – construction of singular or plural words in the singular includes the plural and words in the plural includes the singular.

Hence parent should mean both parents as even as a singular term it has to include both parents.

However the uncompromising stance of the Federal Court in the judicial interpretation of the word parent to mean a single parent (despite sound reasons to find otherwise) has as seen above caused a crossing of boundaries and intermingling of civil and syariah jurisdictions and raises issue on conflicts that are yet unresolved. It is a hope that the apex court will have an opportunity in hearing the appeal in the Indira Ghandi case to revisit this position in an objective manner in the spirit of Teoh case *in accordance with the spirit and intention behind the respective legislation* and not out of bend. It is arguable that there is a judicial leaning in the current times that affect judicial interpretation, Professor Emeritus Dato Dr Shad Faruqi[15] has this to say " *A silent rewriting of the Constitution is taking place. In personal disputes disputes between Muslims and non-Muslims , many judges are interpreting their powers narrowly. Syariah authorities are interpreting their powers expansively.*" The late former President of the Supreme Court Sultan Raja Azlan Shah words is brought to mind that *"Judicial independence is a cornerstone in any democratic country, as every lawyer and politician knows. The judges are independent of all – executive, Parliament and from within themselves – and are free to act in an independent and unbiased manner."* [16]

4. Conclusion

Hence there is a need for the intervention of legislature if there no change in current judicial reading of the word parent to press ahead with the amendments proposed. It is necessary and humane reaction to stem the tide of unnecessary, divisive and disruptive issues (constitutional, jurisdictional and otherwise) that has potentially untoward consequences for the nation.

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