

## Putik Lada: In a Catch 22 bind

Contributed by Richard Wee Thiam Seng  
Friday, 07 November 2008 07:54AM

©The  
Star (Used by permission)

by Richard Wee  
Parliament has to intervene when there is an issue of  
jurisdictional conflict between Syariah and civil laws.

LAST year, the Federal Court in the case of Subashini Raja-singam v Saravanan Thanga-thoray, by a majority of 2-1, dismissed the wife's application for a court order to stop her husband, who had converted to Islam, from going to the Syariah court for a divorce and from unilaterally converting their infant children to Islam.

It was dismissed on a technical ground. Under Section 51, Law Reform (Marriage and Divorce) Act 1976, if one spouse converts to Islam, the other spouse can only apply for divorce three months after that conversion.

Subashini filed her divorce application just before that three-month deadline.

She had done so because her husband had filed a similar application in the Syariah court and that court was apparently prepared to grant a divorce order as well as an order for custody of her child despite her absence (she cannot appear in that court as she is not a Muslim).

However, the Federal Court made some interesting observations. One major issue in that case was the conversion of one of the children in the marriage to Islam by the converted husband.

Subashini had contended that the conversion was irregular and therefore void, as the law requires the consent of both parents when the child is converted to another religion.

But the majority of the Federal Court, in a Judgment delivered by Datuk Nik Hashim Nik Ab. Rahman FCJ said: "The wife complained that the husband had no right to convert either child of the marriage to Islam without the consent of the wife. She said the choice of religion is a right vested in both parents by virtues of Articles 12(4) and 8 of the Federal Constitution, and Section 5 of the Guardianship of Infants Act 1961.

[Articles 12 (4) of the Federal Constitution provides that the religion of a person under the age of eighteen years shall be decided by his parent or guardian. Article 8 prohibits discrimination on the basis, among other things, of gender; and Section 5 of the Guardianship of Infants Act 1961 provides that both parents have equal rights in matters related to the child.]

"After a careful study of the authorities, I am of the opinion that the

complaint is misconceived. Either husband or wife has the right to convert a child of the marriage to Islam.

The word 'parent' in art 12(4) of the FC, which states that the religion of a person under the age of 18 years shall be decided by his parent or guardian, means a single parent."

With respect, I disagree with this part of the decision. The 11th Schedule, Section 2 (95) of the Federal Constitution specifically states that singular words in the Constitution shall include the plural. So the use of the word "parent" in the Federal Constitution does not mean only one parent but both parents.

In the light of the majority decision of the Federal Court, it appears that the law as it stands now is as follows:

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

It is my view that Parliament has to intervene to legislate this matter and correct the position of Subashini and those like her. The amendments should include the requirement that both parents must give their consent if a child below 18 years of age is to be converted to another religion.

As it stands now, it is almost impossible to give advice to a client in a similar position to Subashini's.

If a non-Muslim client told me that his or her spouse has converted their child to Islam and asks me what to do, I am in a quandary:

If I say "I don't know", it won't look good for me as a lawyer.

If I say "go to the Syariah court to get a remedy", I am asking a non-Muslim to go a Syariah court, which in any event is incorrect.

If I say, "We'll settle this in a civil court", I may be bound by the majority decision of the Federal Court in the Subashini case. Unless the client is willing to take the case all the way to the Federal Court so that the issue can be revisited, he or she may not have any remedy.

So, I urge Parliament to step in and amend the law accordingly.

Section 5 of the Guardianship of Infants Act would need clarification by perhaps substituting the word “parents” for “parent”.

This would ensure that the consent of both parents would be required before the religion of the child is changed. I would, however, venture to state that Parliament should consider allowing the child to choose whatever religion the child wants to subscribe to when he or she attains the age of 18. Till that age, the law may consider allowing the child to continue adhering to the religion that he or she was born into.

As for the Federal Constitution, Article 12 (4) ought to be clarified to mean that both parents are empowered in matters related to the child.

I am however reluctant to advocate amending the Federal Constitution.

It is unhealthy to frequently amend the Federal Constitution, and in this matter, the provisions of the Constitution have already clearly defined singular words like “parent” to include plural meaning of both father and mother.

But for the sake of clarity and avoidance of doubt, perhaps Article 12 (4) should be specifically amended accordingly.

In addition, when there is an issue of jurisdictional conflict between Syariah and Civil laws, Parliament must make laws not to compel non-Muslims to go to the Syariah court. Religion being a personal matter, Parliament must be sensitive to the people, by not making a person who subscribes to one religion to be adjudged by the laws of another religion.

The writer is a member of the Bar Council’s National Young Lawyers Committee (NYLC). Putik Lada, or pepper buds in Malay, captures the spirit and intention of this column – a platform for young lawyers to articulate their views and aspirations about the law, justice and a civil society. For more information about the young lawyers, please visit [www.malaysianbar.org.my/nylc](http://www.malaysianbar.org.my/nylc).