

Unity Threatened By Continuing Infringements Of Religious Freedom

NOTE OF PROTEST BY THE MALAYSIAN CONSULTATIVE
COUNCIL OF BUDDHISM, CHRISTIANITY, HINDUISM,
SIKHISM & TAOISM (MCCBCHST)

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Introduction

The constitutional guarantee that “Every person has the right to profess and practise his religion” has been substantially eroded by the majority decision of the Federal Court, Malaysia’s highest court, in *Lina Joy’s case*¹. The latter is the culmination of a series of court cases and governmental actions that indicates an increasing Islamisation of law and public policy in Malaysia.

This creeping Islamisation process has created a sense of fear amongst non Muslims² comprising Buddhists, Christians, Hindus, Sikhs, Taoists and others, who form about 45% of the population of the country. Many Malaysians from all races and religions are frightened how easily the safeguards entrenched and enshrined 50 years ago in our Federal Constitution are now being eroded through the back door.

Personal tragedies

A Christian at heart but a Muslim in name

Lina Joy, an ethnic Malay born to Muslim parents, has been told by Malaysia’s highest court that she must get permission from the Islamic courts of Malaysia before the State will recognise her as a Christian. This is in spite of the fact that she says she converted to Christianity more than 15 years ago and has since then professed and practised Christianity as her religion. As the only non Muslim on the panel of the Federal Court who

¹ Lina Joy v Islamic Council of the Federal Territory [Civil Appeal No. 01-02-2006 (W)], decided on 30th May 2007 (*per* Tun Ahmad Fairuz Sheikh Abdul Halim, CJ and Dato’ Alauddin Mohd Sheriff FCJ; Dato’ Richard Malanjum CJ(Sabah & Sarawak) dissenting)

² In this Memorandum, ‘non Muslim’ is used to refer to persons who do not profess Islam as his or her religion. Many Muslims, we believe, also do not support this increasing trend of shifting power to theocrats but they are too scared to speak out for fear of being labelled “deviants” or being the subject of threats. See for example the death threats against one of the counsels who held a watching brief for the Malaysian Bar in support of Lina Joy in her battle through the Courts.

dissented from the majority pointed out, it was unreasonable to expect Lina Joy “to apply for a certificate of apostasy when to do so would likely expose her to a range of offences under the Islamic law”. In some cases, apostasy (or “attempting” to commit apostasy) is criminalised with provisions for a prison sentence³. In other States, the person is subjected to prior detention to ‘rehabilitate’ him⁴. Lina is now forced to submit herself to the judgment of a Court applying a religious law where many of its adherents feel that people like her ought to be stoned to death (see e.g. the arguably unconstitutional Hudud enactments which have been legislated by the State Assemblies of Kelantan and Terengganu and have received Royal Assent but have not yet been carried into force⁵.)

Islamic authorities seem to take a dogmatic stance without paying any heed to reasoned comments on this issue from moderate commentators. In the words of the Director-General of the government-backed Malaysian Institute of Islamic Understanding, Dr Syed Ali Tawfik Al-Attas, as reported in the Star newspaper on 1st May 2007, “Islam is not to be made the desperate handmaiden of any political party in dire need of support and membership at all costs. Using the mechanism of the Judiciary to ‘islamise’ people, or to prevent them from leaving Islam is totally absurd.”

A family torn apart by the Islamic authorities

“Rehabilitative” detention is exactly what is happening to Revathi, an ethnic Indian born to parents who had converted to Islam before her birth, who went to the Syariah court for an order permitting her to leave Islam. Revathi says she is a Hindu. She has married her Hindu husband, Suresh, under Hindu rites. They have one daughter, now aged about 15 months.

³ Perak Crimes (Syariah) Enactment 1992, sections 12, 13

⁴ Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 119; Kelantan Islamic Council and Malay Custom Enactment 1994, s. 102

⁵ Although enacted by the Islamist PAS led State governments, the ruling Barisan Nasional coalition who returned to power in Terengganu have shown no signs of repealing this legislation.

Revathi's marriage cannot be registered, and the child's birth also remains unregistered, because the State refuses to sanction their union. Revathi does not therefore have the protections of civil marriage laws, whilst the child is subject to the social stigma and the lower degree of protections afforded to an illegitimate child.

Revathi went to the Melaka Syariah High Court in its civil jurisdiction for an order allowing her to leave Islam. Instead of getting that order, it appears that the Islamic court exercised its criminal jurisdiction over her by sending her to a detention camp in a different State for "rehabilitation" for 100 days. That detention period was then extended by another 80 days in her absence. Non Muslims are not allowed to visit her in the detention camp, and her Hindu husband is grudgingly and quietly allowed very limited access. In the meanwhile, her Muslim mother obtained a Syariah Court order granting her custody of the 15 month old baby and together with the police enforced that order on Suresh's Hindu family. The baby is now with the grandmother, the mother is in detention and the father is heartbroken.

A widow who cannot grieve

The plight of Kalammal Sinnasamy also breaks the hearts of many Malaysians. Kalammal was married to Moorthy Maniam, a national hero who had been a member of the Malaysian team that had climbed Mount Everest. Corporal Moorthy became paralysed from the waist down in 1998 as a result of an accident in his military camp. His wife bravely tended to her husband during the period of his paralysis. When he fell from his wheelchair and went into a coma, his wife was again constantly by his side. Whilst he was in a coma, for the very first time, Kalammal was brusquely told that Moorthy had converted to Islam and that his body would be given an Islamic burial. When Moorthy died, the Islamic Religious Affairs Council came to collect the body. Despite the fact that the widow was a non Muslim, the Islamic Council went to the Islamic courts and within an hour of filing its petition obtained an Islamic court order in the wife's absence decreeing that Moorthy had been a Muslim.

This decree was made despite the fact that Moorthy professed himself a Hindu, practised Hinduism, had participated in the Hindu ritual of carrying a milk pot up the hill of the Batu Caves temple as a form of worship during the *Thaipusam* celebrations and 11 days before falling into a coma had told his audience on national television how he would be celebrating the Hindu festival of *Deepavali*. The civil High Court blindly followed the ruling of the Islamic court instead of determining on the evidence what religion Moorthy had professed at the material time. The courts felt that whether Moorthy was a Muslim or not was a matter to be determined in accordance with Islamic law by the Islamic authorities. This totally contradicts the constitutional guarantee that only “persons professing the religion of Islam” could be subjected to the jurisdiction of the Islamic courts and Islamic law. Kaliammal’s appeal to the Court of Appeal is due for hearing in December.

A parent torn from her child

Subashini Rajasingam was married to her husband Saravanan under the civil law and under Hindu rites. They have two sons. After the birth of the second son, Subashini says her husband became estranged from her and left the marital home. She says that on 11th May 2006, on the elder child’s 3rd birthday, her husband came back and told her he had converted to Islam and that she could have nothing more to do with her elder child. Subashini was so shocked she attempted suicide. Four days later, she was discharged from hospital and returned to her marital home. She could not find her elder child. She therefore took her younger child, aged about 11 months, with her and left. She did not hear from her husband again, until she suddenly received a notification from the Islamic courts that they would be hearing a custody application in respect of her elder son, who had been given a Muslim name.

She went to the civil courts to ask for an injunction order stopping Saravanan from getting an Islamic court order in respect of her marriage and in respect of either of her children. In court documents filed by the husband, he finally disclosed that he had officially converted to Islam and unilaterally converted his elder child without the permission of the child’s mother on

18th May 2006. On the very next day, the husband applied for a dissolution of his Hindu civil marriage from the Islamic courts and for custody orders in respect of his elder child.

The High Court refused Subashini's substantive application for an injunction but granted her a temporary injunction pending an appeal. The Court of Appeal by a majority also refused her the substantive injunction but again gave her a temporary injunction pending an appeal to the Federal Court.

The majority of the Court of Appeal seemed to indicate that Subashini, despite being a Hindu, was obliged to go to the Syariah court for relief as the husband had already begun proceedings there. This is in spite of the fact that the law is clear that Syariah courts cannot exercise powers over non Muslims. The majority judges in the Court of Appeal seem to have ignored the binding decision of a five-member panel of the Supreme Court in *Tan Sung Mooi v Teo Mew Kim*⁶ which conclusively decided that the Syariah courts had no jurisdiction in cases where a non Muslim marriage had broken up despite the conversion to Islam of one spouse in that marriage. As in Lina Joy's case, the dissenting Judge was the sole non Muslim on the panel. The case is now awaiting hearing in the Federal Court.

We cannot understand why the common sense approach of YB Datuk Zaid Ibrahim, MP for Kota Bharu, in his column in the Sun newspaper, 27th March 2007 is not shared by Judges and other Muslims in dealing with these matters: "How would the Muslims feel if they have to submit to a Hindu court or to any other religious court? We should not do unto others what we do not want others to do unto us. That is the ultimate test of reasonableness. That is the test of a just legal system."

There are numerous other cases such as these involving Chinese, Indians, Eurasians and other minorities in Malaysia. The entire non Muslim community have been put in a position of fear and uncertainty as to the sanctity of their family lives and their protections under the law given the numerous abuses of the Syariah system that the authorities have allowed.

⁶ Tan Sung Mooi (f) v Too Miew Kim [1994] 2 AMR (35) 1799, SC

Islamisation of government

We would respectfully point out that there is a growing perception that Muslim judges, ministers, parliamentarians and civil servants are forgetting their oath of office to preserve and protect the Constitution. We feel duty bound to point out that this perception - that personal religious sentiments are influencing administrative and judicial decision making - is causing much disunity.

Governmental pronouncements are made which infringe the secular nature of the Malaysian Constitution and infringe on the freedoms of religion and the guarantees of equal treatment under the law enshrined in the Federal Constitution.

As lawyer Haris Mohamed Ibrahim says in his interview published in the Sun newspaper, January, 2006, “One begins to wonder whether it’s just plain abdication of duty due to lack of courage, or whether we have a situation of real concern that the judiciary may be taking us to a position where the way of life guaranteed to us under the Federal Constitution is no longer open to us. In short, are they taking us to an Islamic State?”

One example of this is former Prime Minister Tun Mahathir Mohamed’s unilateral declaration of Malaysia as an “Islamic State”. Our current Prime Minister Dato’ Seri Abdullah Ahmad Badawi’s concept of Islam Hadhari also ostracises non Muslims by asserting a belief in “Allah” when previously our national credo affirmed a belief in “God” as our shared aspiration⁷.

Non Muslim women officers in the police force are now forced to wear a veil in the form of a Muslim head-dress during ceremonial functions. The

⁷ In Malaysia, “Allah” can only be used by Muslims to describe God. In some States, it is a criminal offence for non Muslims to use the word “Allah” in relation to their worship. See for example Selangor Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988, section 9 and the Schedule.

Ministry of Health feels it is unable to distribute free syringes and condoms for HIV users because it would be against Islam. The Malaysian Attorney-General has a Syariah Advisory section which vets all laws and international treaties to ensure that it is “Syariah” compliant.

The building of non Muslim places of worship is a source of great difficulty, and unusual conditions are imposed, e.g. height restrictions on temples, church steeples and Sikh gurdwaras; gurdwaras are not allowed to have their traditional domes by bureaucrats worried this would cause confusion with mosques; churches have been relocated numerous times even after approvals are given.

The inhumane manner in which the authorities destroy non Muslim places of worship is also a source of great anguish, where the right to worship is given scant regard with demolitions carried out by local authorities at the instigation of private developers displacing places of worship which in some cases are 100 years old. There is no due process in these measures, and demolitions are carried out without any regard for the religious sensitivities of the devotees of the places of worship concerned.

Perversion of Malaysia’s history and social contract

The Lina Joy decision is not “a rejection of an attempt by a certain individual and segments to deconstruct and radically revamp the current formula” as a Muslim NGO, PEMBELA, would have us believe. It is instead a victory to those who are upsetting the constitutional balance by turning around what was promised to be a secular nation by our founders into a theocratic State.

In a democracy such as ours, the wishes of the majority prevails unless it interferes with the fundamental liberties of an individual. The Judiciary is meant to be the bastion to protect the fundamental liberties of minorities from being trampled upon by the majority. That the Judiciary has allowed

the sentimental and prejudiced wishes of the majority to prevail over the right of personal conscience of Lina Joy is naturally worrying to all those who are minorities within this country.

MCCBCHST's previous memoranda

In a memorandum entitled 'RESPECT THE RIGHT TO PROFESS AND PRACTICE ONE'S RELIGION' dated October 2005, we had set out all these problems and urged the Government to make urgent legislative reforms to alleviate these concerns. Until today, no such reforms have been made and more and more Malaysians are suffering.

After much deliberation, it is therefore our considered decision to make public that Memorandum and the reforms we had proposed together with our rationale for the same and to disseminate it both locally and internationally in order to encourage debate so we can all jointly seek solutions to these problems.


We urge the Government to urgently alleviate these concerns, so that our nation and people can concentrate on the more pressing tasks that face us in achieving our shared national vision and aspirations.

In closing, we reiterate the stand of MCCBCHST since its inception in 1983 that Malaysians of all ethnic, religious and cultural backgrounds can best resolve whatever differences of opinion which may arise through peaceful engagement in mutual respect and genuine dialogue. As we prepare to observe our 50th anniversary as an independent nation, let us be in prayer for a peaceful and just society which will find UNITY IN DIVERSITY.

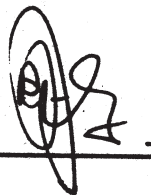
Dated this 15th day of June 2007



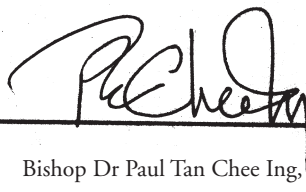
Dato' Chee Peck Kiat, *President*



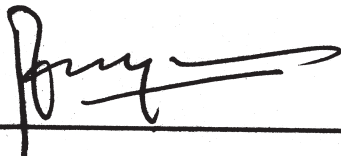
Mr R. Thiagaraja, *Hon. Secretary General*



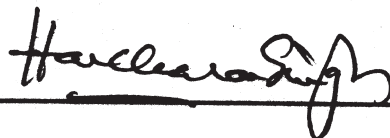
Ven. Ming Ji
Buddhist Representative



Bishop Dr Paul Tan Chee Ing, S.J.
Christian Representative



Datuk A. Vaithilingam
Hindu Representative



Sardar V. Harcharan Singh
Sikh Representative



Mr Tan Bon Sin
Taoist Representative

Respect The Right to Profess and Practise One's Religion

*A memorandum by the Malaysian Consultative Council of
Buddhism, Christianity, Hinduism and Sikhism*

RATIONALE & DESIRED OUTCOMES

Non-Muslims¹ have been deprived of their parental rights guaranteed by the Federal Constitution when one spouse converts to Islam, particularly in respect of the guardianship, custody, upbringing and religious education of their children. This is a consequence of State enactments, and decisions of both the syariah and civil courts, that have ignored the provisions of the Constitution and Federal statutes.

It is the objective of this memorandum to highlight the predicament faced by non-Muslim parents, the problems emanating from conversion and matters incidental thereto and to suggest some possible solutions that seek to do justice to all parties concerned whilst preserving the fundamental liberty to freely profess and practise one's religion for both Muslims and non Muslims.

It is the intention of this Memorandum to highlight the real societal problems faced by a significant minority of persons professing religions other than Islam in Malaysia.

Urgent attention is required by Parliament in order to ensure that the principles of the Rukunegara and the social contract on which Malaysia was formed is not subverted or compromised. Every citizen must be free to profess and practise his/her individual religion so long as this does not intrude into the rights and freedoms of others.

The sanctity of the family unit must be preserved so far as is reasonably possible.

We must be selfless, objective and compassionate in designing solutions within our Constitutional framework in order to ensure that spiritual upliftment is not denied to anyone living in Malaysia.

This Memorandum is an instrument to expose the salient issues affecting non-Muslims, explore much needed law reforms and initiate creative solutions and address the serious deprivation of a citizen's basic human right to profess and practice his/her religion of choice.

SECTION A

1. SALIENT ISSUES AFFECTING NON-MUSLIMS

1.1 **The civil courts are reluctant to adjudicate cases where the Islamic ingredient is present notwithstanding the fact the person seeking judicial relief or remedy is a non-Muslim.**

This judicial attitude stems from an interpretation of Article 121(1A) of the Federal Constitution and the various State Islamic law enactments which have the tendency to encroach into the rights of non-Muslims depriving them of any relief or remedy at all.

1.2 **While the civil courts are disinclined to protect non-Muslims the Syariah Courts are assuming jurisdiction and power to deal with the affairs of non-Muslims related to matrimony and children's custody. In doing so, Islamic law is applied to the detriment of non Muslim affairs.**

As the law stands, a non-Muslim spouse whose matrimonial life is severed by reason of the other spouse secretly converting to Islam may be totally deprived of his or her parental rights thereby suffering infinite emotional turmoil with no meaningful redress in the courts.

1.3 **There is often inexplicable delay in disposing of cases involving those newly converted to Islam and their non-Muslim spouses, thus resulting in gross injustice.**

In a civilized society such as ours this is not a trend that should be countenanced or encouraged. Matters affecting family life, particularly the guardianship and custody of children, are serious. If they are not addressed rationally and compassionately, these disputes could lead to unpleasant repercussions. Though not insurmountable there must be political will to overcome these problems to ensure that that members of all the races who live in Malaysia are secure in their

family life and are not subjected to unbearable pain.

- 1.4 In at least three cases², a non Muslim (Hindu) parent has lost guardianship and custody of her/his children by a Syariah Court order given secretly in his/her absence with no notice to her/him. The Syariah Courts in those same orders secretly obtained by the converting spouse, also declared those children as Muslim without the Non Muslim parent's consent. This was even though those children were still under 18, were born to parents who both professed Hinduism and had been raised as Non Muslim children. Ms Genga Devi, Ms Shamala and Mr Nedunchelian all lost a significant part of their parental rights over their children.**

These conversions were in total disregard of the remaining parent's parental and guardianship rights under law and in total disregard of the best interests of the children concerned. The same Syariah courts also purported to dissolve marriages contracted under the Law Reform (Marriage and Divorce) Act 1976. In at least one case, injunctive orders were granted against the Non Muslim parent, Mr Nedunchelian, restraining him from "harassing" his own children! There are many more cases awaiting decision by the civil courts. They all highlight the agony parents and children undergo unnecessarily because of the current injustice in the law.

- 1.5 There are numerous cases where exhumations have been carried out indiscriminately pursuant to orders granted by the Syariah Courts in respect of graves in non-Muslim burial grounds.**

For example, the Port Dickson lower Syariah court has made an ex parte order declaring a deceased person as a Muslim, requiring the said deceased to be buried in accordance with Islamic law and authorising the Pendaftar Saudara Baru (Registrar of Converts) to exhume the corpse of the deceased from the Hindu burial ground at Bukit Pelanduk, Negeri Sembilan to be dealt with in accordance with Islamic law³. Another similar order was given in Sabah recently⁴. It is not known how many other such incidents go unreported.

1.6 In so called ‘apostasy’ cases, the civil courts seem to be concerned only with the recanting of Islam but not by the adoption of a non Muslim religion by the individual concerned.

In *Priyathaseny’s case*⁵ an ethnic Malay lady who had converted to Hinduism and her Hindu husband were subjected to coercive orders by the Syariah authorities. Her Hindu husband was given an order directing him to appear before the Syariah authorities on pain of arrest. It could be seen that the State Islamic authorities assumed jurisdiction and power to deal with a non-Muslim. The civil courts would not act to prevent this blatant injustice.

This trend is now reconfirmed with the refusal by the Court of Appeal on 19th September 2005⁶ to assist Lina Joy, an ethnic Malay who had converted to Christianity, to remove the word ‘Islam’ from her identity card without a Syariah court order permitting this.

2.0 THE CONSTITUTIONAL PROVISIONS : CONFLICTS

2.1 Non Muslims cannot, and do not want to, go to the Syariah court as the Syariah courts apply Islamic law and not secular laws, including rules of evidence not subscribed to by non Muslims.

(Non Muslims themselves are not competent to give evidence, the evidence that women are competent to give is limited, etc.) Although the civil courts recognise this problem, the **civil courts seem powerless to do anything to avert injustice.**

2.2 Article 121 (1A) of the Federal Constitution provides that the civil courts shall have no jurisdiction in matters within the jurisdiction of the Syariah courts. The civil courts are expanding Article 121 (1A) to an extent not originally intended, whilst Syariah courts are usurping functions which are not theirs. There is consequently nowhere for non Muslims to obtain relief when the Syariah court makes an order that interferes with their fundamental rights

guaranteed by the Federal Constitution.

2.3 **There is no remedy for non Muslims aggrieved by a Syariah court order given without jurisdiction.** The Federal Court appears to have held that a lack of an effective remedy from the Syariah court is not a legitimate concern of the civil courts. The apex court in *Shaik Zolkaffily's case*⁷ and *Dalip Kaur's case*⁸ has intimated that it is up to the legislature to formulate remedies for these problems. The civil courts concede that there is a conflict of laws. The question is how to resolve it. The civil courts are not prepared to look beyond Article 121 (1A) despite the fact that injustice may occur to innocent children. We urgently need legislative redress for these very severe social problems.

3.0 PROBLEMS ARISING FROM STATE LEGISLATION ON ISLAMIC LAW

3.1 **A minor child can now be converted to Islam at the request of only one parent without notice to the other non Muslim parent.** Provisions in certain newly enacted State legislation on Islamic law allow “ibu atau bapa atau penjaga” (“the mother or father or guardian”) to consent to the conversion to Islam of a minor⁹ thus denying the parental rights of the non Muslim parent.

3.2 **A convert's non Muslim marriage can be dissolved by Syariah courts, again according to certain State Islamic law enactments recently made. These new State laws state that a non Muslim marriage is not dissolved until the Court (defined in the Syariah Enactments as the Syariah Courts) declares it so¹⁰.**

This is a stark contradiction to the provision legislated by Parliament in **Section 8 of the Law Reforms (Marriage and Divorce) Act 1976** which specifically states:

“Every marriage solemnized in Malaysia after the appointed date, other than a marriage which is void under this Act, shall continue until dissolved –

- (a) by the death of one of the parties;
- (b) by order of a court of competent jurisdiction;
or
- (c) by a decree made by a court of competent jurisdiction that the marriage is null and void.”

In this context “court” means the High Court (see section 2 of the Act of 1976).

Only the (Civil) High Court has the jurisdiction and power to dissolve a marriage solemnized under the Act of 1976 or to marriages to which **Section 4 of the Act of 1976** applies¹¹. Further, **Section 24 of the Courts of Judicature Act 1964** is explicit. The civil jurisdiction in matrimonial causes vests in the High Court while **Section 3 of the Act of 1976** categorically says that the Act does not apply to Muslims.

Therefore, it is obvious that anything touching the divorce and matrimonial affairs of a non Muslim can only be dealt with by the civil High Court. It is clear therefore that the Syariah court does not have the jurisdiction or power to interfere in matters governing the personal affairs of non Muslims. The obligations of the converting spouse to Islam are not vitiated in any way and this is fortified by the provision of **Section 51(2) of the Act of 1976**¹².

Hence, urgent reform is needed to ensure that the jurisdiction and powers of the High Court cannot be interfered with or disturbed, and that the Syariah Courts ought not to interfere in matters involving non Muslim persons or non Muslim matters.

3.3 Many Islamic enactments now state that upon conversion the new

Muslim (*muallaf*) shall be treated as a Muslim “for all time”¹³.

A reversion to the *muallaf*'s former religion is generally not permitted at all. In some cases, it is criminalised¹⁴ or the person is subjected to prior detention to ‘rehabilitate’ him¹⁵. **This is a clear violation of Article 11 of the Federal Constitution which guarantees that there is freedom for any one to profess and practise his own religion.**

3.4 Currently, Syariah legislation defines “Muslims” (and therefore applies Islamic law) too widely contrary to the Federal Constitution.

The Federal Constitution, Legislative List II (States), paragraph 1 provides that Islamic law can only be administered over “persons professing the religion of Islam”. Standard definitions of “a Muslim” in the Administration of Islamic law enactments go far beyond that including a person either of whose parents was a Muslim, a person who was brought up a Muslim and a person who is commonly reputed to be a Muslim. Furthermore, in some Syariah family law enactments, it is provided that no inquiry shall be entered as to the behaviour of a person in determining if he is a Muslim and the only criterion is his general reputation¹⁶.

CAUTIONARY NOTE:

A person who is by law defined as a Muslim may not profess Islam as his religion¹⁷. He may also not want to be considered as a Muslim by the State. Such a person is adversely affected. He cannot marry a non Muslim unless she converts to Islam, or they are married customarily, without registration (and hence illegally). He is subject to prosecution for Syariah offences for doing things which are not criminal for non Muslims (e.g. eating in public during Ramadhan etc.) The children by such a union may be illegitimate. The family will be forced to live a double life which will cause mental torture and may affect the children’s

education and development. Those children will eventually also be unable to marry freely.

- 3.5 The spouse, children and other non Muslim beneficiaries under the Distribution Act cannot inherit property when that person dies nor can they benefit fully through a will¹⁸. Similar provisions do not apply to Muslim family members of a non Muslim.**

The Baitul-Mal is thereby unjustly enriched. Some quietly convert for some purpose. Thereafter they revert to their former religion.

- 3.6 Much distress is caused when Syariah officials come and take bodies away from grieving relatives and force burials rather than cremations, and conduct the burial in accordance with Islamic rites.**

These State enactments encroach into, and erode, the safeguards provided by the Federal Constitution.

Only Parliament can remedy this situation.

4.0 FEDERAL LEGISLATION IN NEED OF REFORM

- 4.1 Section 51 of the Law Reform (Marriage and Divorce) Act 1976** only permits the spouse who does not convert to Islam to petition for divorce when his or her spouse converts to Islam. No specific provision requires the converting spouse to fulfill all his obligations under the civil law before converting to Islam. This is against all accepted norms of matrimonial responsibilities.

- 4.2 The absence of any provision permitting inter-religious marriage is indeed a violation of human rights**

Persons of different faiths should be free to marry and live in harmony without the dictates of religious dogmas. Our concern should be to

see the creation of a Malaysian society that is vibrant, peaceful and happy without hurting or violating any religious norms. If people of different faiths want to unite in matrimony, religion should not be an obstacle¹⁹.

4.3 The National Registration Regulations unfairly make it difficult and onerous for persons who are unlawfully defined as ‘Muslims’ to remove that classification even if they have professed a religion other than Islam all their lives.

5.0 HISTORICAL BACKGROUND

5.1 Whilst there is no doubt that Islam enjoys a special position in our country, the framers of the Constitution were careful to ensure that religious zealots would not interpret this so as to remove the religious freedom of the minority religions in Malaysia. It is obvious that the fundamental liberty to profess and practise one’s religion enshrined in Article 11 of the Federal Constitution cannot be restricted or abrogated if the Federal Constitution is read purposively and as a whole.

5.2 **Article 3 of the Federal Constitution** states that “Islam is the religion of the Federation, but **other religions may be practised in peace and harmony** in any part of the Federation.” Similarly, Article 153(1) also directs the Yang Di-Pertuan Agong to “safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak **and the legitimate interests of other communities**”. (Emphases supplied) These caveats are of utmost importance and ought never to be overlooked. It is also noteworthy that similar provisions are found in most State Constitutions²⁰.

5.3 **In *Susie Teoh’s case***²¹, the Supreme Court ascertained “what purpose the founding fathers of our Constitution had in mind when our constitutional laws were drafted”. This is what they said:

“The Malaysian Constitution was not the product of overnight thought but the brainchild of constitutional and administrative experts from UK, Australia, India and West Pakistan, known commonly as the Reid Commission following the name of the Rt-Hon Lord Reid, LL.D., FRSE, a Lord of Appeal in Ordinary. Prior to the finding of the Commission, there were negotiations, discussions and consensus between the British Government, the Malay Rulers and the Alliance Party representing various racial and religious groups. On religion, the Commission submitted:

‘169. We have considered the question of whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. **In the memorandum submitted by the Alliance it was stated: ‘The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practicing their own religions and shall not imply the State is not a secular State.**’ There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to the recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis looking to the fact that counsel for the Rulers said to us ‘it is Their Highnesses’ considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim faith or Islamic faith be the

established religion of the Federation. Their Highnesses are not in favour of such a declaration being inserted .’

“It was on the above basis that our Constitution was drafted and promulgated.” [Emphasis supplied]

5.4 It should be noted that Mr Justice Abdul Hamid (a Judge of the Supreme Court of Pakistan and a member of the Reid Commission) dissented to the proposal by the majority²². He advised that a provision as to Islam’s position in Malaysia be included, noting that such a provision would be “innocuous”. His note of dissent on this point shows that this was principally because he felt it only right to accede to the recommendations by the Alliance to the Reid Commission set out in the quote above. (The Alliance was the name for the coalition of the United Malays National Organisation, the Malayan Chinese Association and the Malayan Indian Congress who were at that time the undisputed voice of the Malayan people in their fight for independence, having won 51 out of 52 seats in the 1955 elections.)

5.5 **The Supreme Court in *Che Omar’s case***²³ has explained the sense in which the phrase ‘Islam’ as the religion of the Federation in Article 3 of the Federal Constitution is meant to be understood:

“There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. **The question here is this: Was this the meaning intended by the framers of the Constitution?** it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. ... **In our view, it is in this sense**

of dichotomy that the framers of the Constitution understood the meaning of the word “Islam” in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.”
[Emphasis supplied]

5.6 **The Law Reform (Marriage and Divorce) Bill 1972** was a result of a Royal Commission established to reform divorce laws in the country²⁴. That Bill contained 2 very important safeguards for non Muslims.

(a) The first was in the important proviso to clause 3(2) of the 1972 Bill which reads as follows:-

“(2) This Act shall not apply to any person who is married under Muslim law:

“Provided that any person, being originally a non-Muslim, to whom the provisions of sections 5, 6, 7 and 8 of this Act apply, shall continue notwithstanding the conversion of such person to Islam, to be subject to all the provisions of this Act.”

(b) The second was clause 101 of the 1972 Bill, worded as follows:-

“101. Notwithstanding the provisions of subsection (2) of section 3 of this Act any person whose religion or personal law permits polygamy may, by a statutory declaration in the prescribed

form to be made by him when giving notice of his intended marriage under section 13 of this Act, irrevocably renounce his right to take more than one wife and thereupon all the provisions of this Act shall apply to him as to any other person not exempted by his religion or personal law from compliance with the provisions of this Act.”

- 5.7 **The Schedule to the Explanatory Statement of the 1972 Draft Bill** extensively set out the reasoning behind the inclusion of these provisions, which were designed mainly to protect the rights of non Muslims.

The first provision was a specific provision to ensure that converts to Islam could not escape their obligations to their families merely by their conversion. The second was because the Royal Commission had found that other Muslim countries permitted marriages between Muslims and non Muslims, or for Muslims to renounce their right to polygamy.

- 5.8 However, when the Bill was eventually tabled in Parliament (after a Joint Select Committee of Parliament was appointed) these two important provisions were omitted. The Malaysian Indian Congress presciently objected at that time. In paragraph 4.1 of its Memorandum on Law Reform (Marriage and Divorce) Bill 1972 (with particular reference to the provisions in the said Bill affecting Non Muslims) dated 30th October 1973 and submitted to the Joint Select Committee by the MIC's Selangor State Branch, the following warning was given which has now proved true.

“4.1 It is observed that the proviso to Section 2(2) recommended in the Draft Bill of the Royal Commission to the effect that any person who was originally a non-Muslim, and subject to the provisions of the Act shall continue to be subject to the provisions of the Act

even after conversion to Islam has been omitted from the Bill as tabled in Parliament. This proviso should be reinstated; otherwise Non Muslim husbands will evade their legal and moral obligations. The rights of inheritance and succession may also be affected. It must be borne in mind that a Non Muslim even after conversion must maintain his wife, children and aged parents.”

- 5.9 The courts have now specifically stated that their hands are tied in dealing with all these problems. The non Muslim community desperately requires legislative intervention if our family life is to be preserved and protected.

SECTION B

FOCUSSED SOLUTIONS AND NECESSARY REFORMS

A. CONSTITUTIONAL AMENDMENTS

1.1 **There must be a forum for non Muslims who are affected by Syariah court judgments to obtain relief and remedies.**

In this respect, the civil courts should be given the jurisdiction and power to effectively deal with all matters involving non-Muslims where Syariah Courts have wrongfully exercised jurisdiction over non-Muslims. The civil courts should have jurisdiction and power to prohibit such a course of action, or to stay or nullify Syariah court orders which affect the rights of non-Muslims.

1.2 **Parliament should reconsider Article 121 of the Federal Constitution.** Recent amendments to this important and basic article of the Constitution have divided the nation. In this context it would be a prudent exercise to receive representations from all quarters and study them and taking into consideration the post-amendment repercussions **restore the judicial power in the High Courts, Court of Appeal and the Federal Court.**

1.3 **Parliament should also consider the conflict that has arisen as a result of introducing Article 121(1A).** It should find ways and means not to subject non-Muslims to hardship. In this regard it is suggested that Parliament consider **inserting a proviso to Article 121 (1A)** in suitable terms to ensure that the Syariah courts shall have no jurisdiction where there is a dispute:

- (a) as to whether or not a person professes Islam as his religion or
- (b) as to whether or not a person professed Islam as his religion

during his lifetime or

- (c) in which a necessary party to the litigation is a person who does not profess Islam as his religion or
- (d) where the relief sought by the litigants involve matters affecting the privilege or statutory rights under administrative powers of the government or the interests of persons who do not profess Islam as their religion.

Civil courts should be empowered with jurisdiction to adjudicate on these issues.

1.6 Provisions deeming converts to Islam as Muslims “for all time” should be deleted.

B. MARRIAGE AND FAMILY ISSUES

1.1 All legislation purporting to give only one parent the right to convert a child to Islam or only one parent the right to determine a child’s religion should be repealed. It should be made explicit that fathers and mothers should share parental rights, and both parents consent should be obtained before a child is converted to another religion, including Islam.

1.2 Provisions must be inserted in civil legislation permitting a party converting to Islam to apply for divorce with suitable safeguards to ensure that his non-converting spouse’s usual rights to ancillary relief on a divorce is not prejudiced in any manner.

1.3 The religion of a child should not be made an issue until he or she have attained the age of 18 in cases where one spouse embraces Islam and the other remains a Non Muslim.

1.4 A person’s religion should not affect his capacity to marry. It is

suggested that serious thought be given to give the option to Malaysians to enter into civil marriages where one party is a Muslim and the other party is a non Muslim. Children of such marriage can be brought up in the religion their parents decide on mutually. That child itself should be allowed to determine for himself his own religion upon reaching the age of 18.

- 1.5 Family members of a convert to Islam should not lose their statutory inheritance rights under the civil law merely because of the conversion.
- 1.6 All State Syariah legislation should be amended so that a similar provision to the suggested proviso to Article 121(1A) of the Federal Constitution referred to in paragraph 1.3 of Section B is inserted.

C. RIGHTS OF CHILDREN

- 1.1 It should be entrenched that the child of a person who converts to Islam shall be free to receive instruction in the religion of both his parents and shall not be converted to Islam until he attains the age of 18 and himself chooses to profess Islam.
- 1.2 In cases where a child under the age of 18 has been converted to Islam or any other religion because of the conversion of one of his or her parents, that child should have the right at any time after he has attained the age of 18 years to re-affirm or renounce the faith he had been converted to when he was still under the age of 18 and unable to fully exercise his own free will.

D. REAPPRAISE AMBIT OF ISLAMIC LAW

- 1.1 Islamic law should only be applied to persons who profess Islam

as their religion i.e. persons who freely acknowledge themselves as Muslims.

- 1.2 The only permissible definition of a Muslim in State Syariah enactments should therefore be the words used in **paragraph 1 of the State List of the Federal Constitution**, namely that “ ‘a Muslim’ is a person who professes Islam as his religion”.
- 1.3 Federal Legislation should be enacted to regulate how to determine if a person professes Islam or not.
 - (a) The procedure for a person who professes a religion other than Islam to stop being subjected to Islamic law must be simple and straightforward with no sanctions attached to this procedure at all (including not being subjected to “rehabilitation”, “detention” or “counseling”) and no fee payable. The system should provide for a simple registration to identify the religion professed which should be *prima facie* conclusive. Any “counselling” prior to conversion out of Islam must be on a voluntary basis, must allow the intending convert to be accompanied by friends, relatives or legal counsel, and must not include any element of either force or detention at all.
 - (b) Appropriate provisions should be made so that the person concerned would honour all liabilities accrued against him and enjoy all benefits accrued to him under Malaysian Syariah law up to the date of his ceasing to profess Islam. After that the civil law should prevail.
 - (c) Any adjudication on whether or not one “professes” Islam or “professed” Islam during one’s lifetime should be with the civil High Courts and not syariah courts. There ought to be no consideration given at all as to whether this amounts to apostasy under Islamic law.
- 1.4 The general criminal law should be more explicit (perhaps by an

amendment to the Penal Code) to make it a serious offence for anyone to detain in any manner whatsoever a person who wishes to leave Islam for any reason whatsoever.

This Memorandum is submitted by the Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism with our hopes and prayers that it will receive the serious and urgent consideration of the Government to ensure that the strong bonds of harmony and national unity we enjoy will continue to be preserved and enhanced.

Dated this 20th day of October 2005

Sgd.
**Most Ven Dr. K. Sri
Dhammananda Nayake Maha
Thera**
(Buddhists)

Sgd.
**Rt. Rev. Bishop (Dr.) Paul Tan
Chee Ing, SJ**
(Christians)

Sgd.
Datuk A. Vaithilingam
(Hindus)

Sgd.
Sardar V. Harcharan Singh
(Sikhs)

NOTES:

- ¹ In this Memorandum, ‘non Muslim’ is used to refer to persons who do not profess Islam as his or her religion
- ² See *Genga Devi a/p Chelliah lwn Santanam all Damodaram* [2001] 1 MLJ 526, HC; *Shamala a/p Sathyaseelan v Dr Jeyaganesh all C Mogarajah*: [2004] 2 MLJ 241, 1 CLJ 505, HC and also [2004] 2 MLJ 648, 2 CLJ 416, HC; *Nedunchelian all V Uthiradam v Nurshafiqah binti Mah Singai Annal @ Valarmathy a/p Mah Singai Annal & 9 Ors* [2005] 2 AMR 711, HC
- ³ See the Order dated 13th March 2003 of the *Port Dickson Subordinate Syariah Court Kes Mal (Sibil) Bil. 05001-099-1 of 2003* on the *ex-parte* application of Abdul Manas bin Md Isa as the Pendaftar Saudara Baru (Registrar of Converts) on behalf of the Majlis Agama Islam Negeri Sembilan and/or the Jabatan Hal Ehwal Agama Islam Negeri Sembilan Darul Khusus.
- ⁴ Reported in the Sabah Daily Express on 27th May 2005: “Burial dispute: Family regrets not being told.”
- ⁵ *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 MLJ 302, HC
- ⁶ New Straits Times, 20th September 2005: “Religious body’s approval required.”; The decision of the High Court is reported in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119
- ⁷ *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & 2 Ors* [2003] 3 CLJ 289, FC
- ⁸ *Dalip Kaur v Pegawai Polis Daerah Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1, SC

- ⁹ Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 117 (especially Bahasa Melayu version)
- ¹⁰ Islamic Family Law (Negeri Sembilan) Enactment 2003, s. 46, s. 2 (definition of ‘Court’)
- ¹¹ See sections 50, 51, 52 and 53 of the Act of 1976
- ¹² As confirmed in *Tan Sung Mooi (f) v Too Miew Kim* [1994] 2 AMR (35) 1799, SC
- ¹³ Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 113
- ¹⁴ Perak Crimes (Syariah) Enactment 1992, sections 12, 13
- ¹⁵ Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 119; Kelantan Islamic Council and Malay Custom Enactment 1994, s. 102
- ¹⁶ See for example the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 2 (definition of a ‘Muslim’) and the Islamic Family Law (Negeri Sembilan) Enactment 2003, s. 5.
- ¹⁷ A common example of such cases are children born to a parent who goes through the form of converting to Islam merely to get married, but then raises his children in his original religion or the case of a parent who deserts his children causing the spouse to revert to her former religion and to raise her children alone with her family members, who will ordinarily raise the child in their own religion.
- ¹⁸ *Majlis Agama Islam Wilayah Persekutuan lwn Lim Ee Seng & Yg Lain* [2000] 2 AMR (20) 2062, HC
- ¹⁹ It is noteworthy that in some countries with significant Muslim populations, Muslims and non Muslims are allowed to marry each other without giving up their own respective religions; see for example

the Special Marriage Act 1954 of India. See also the Schedule to the draft Law Reform (Marriage and Divorce) Bill 1972 by the Royal Commission on Non Muslim Marriage and Divorce Laws explaining clause 101 of the Bill (paragraph 0 herein).

- ²⁰ See for example Articles 5 and 27B (1) of the Laws of the Constitution of Kelantan
- ²¹ *Teoh Eng Huat v Kadhi Pasir Mas* [1990] 2 MLJ 301, SC
- ²² *Ibid*, para. 12-13 of the Note of Dissent by Mr Justice Abdul Hamid
- ²³ *Che Omar bin Che Soh v Public Prosecutor & Anor Case* [1988] 2 MLJ 55, at p.56
- ²⁴ Report of the Royal Commission on Non Muslim Marriage and Divorce Laws dated 15th November 1971

THE MALAYSIAN CONSULTATIVE COUNCIL OF BUDDHISM, CHRISTIANITY, HINDUISM, SIKHISM AND TAOISM

The Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (Majlis Perundingan Malaysia Agama Buddha, Kristian, Hindu, Sikh dan Tao) or MCCBCHST is a registered society dedicated to the promotion of goodwill, harmony and unity. The Council was founded in 1982 with four religions represented and officially registered on August 6 1983, with the Taoists joining the Council in 2006.

The members of the Council are national organisations for their respective religions. The Council has long been recognised by as the de facto representative body for the major religions in Malaysia other than Islam.

The members of the Council are:

Buddhists – *Malaysian Buddhist Association, Buddhist Missionary Society of Malaysia, and Sasana Abhiwurdhi Wardhana Society*

Christians – *The Christian Federation of Malaysia comprising the Catholic Bishops' Conference, Council of Churches Malaysia & National Evangelical Christian Fellowship*

Sikhs – *Malaysian Gurdwara Council, Sikh Naujawan Sabha Malaysia & Khalsa Diwan Malaysia*

Hindus – *Malaysia Hindu Sangam*

Taoists – *Federation of Taoist Associations Malaysia*

The Aims of the Council are

- To promote understanding, mutual respect and co-operation between people of different religions
- To study and resolve problems affecting all inter-religious relationships
- To make representations regarding religious matters when necessary.

The Objectives of the Council are

- To uphold and promote the ideas as enunciated in the Rukun Negara
- To promote unity, harmony and understanding amongst people of different religions through conferences, seminars and other channels
- To print, publish and distribute journals, periodicals, leaflets or books that the Executive Committee may consider desirable for the promotion of its objects, with the proviso that prior approval must be obtained from the competent authority.

