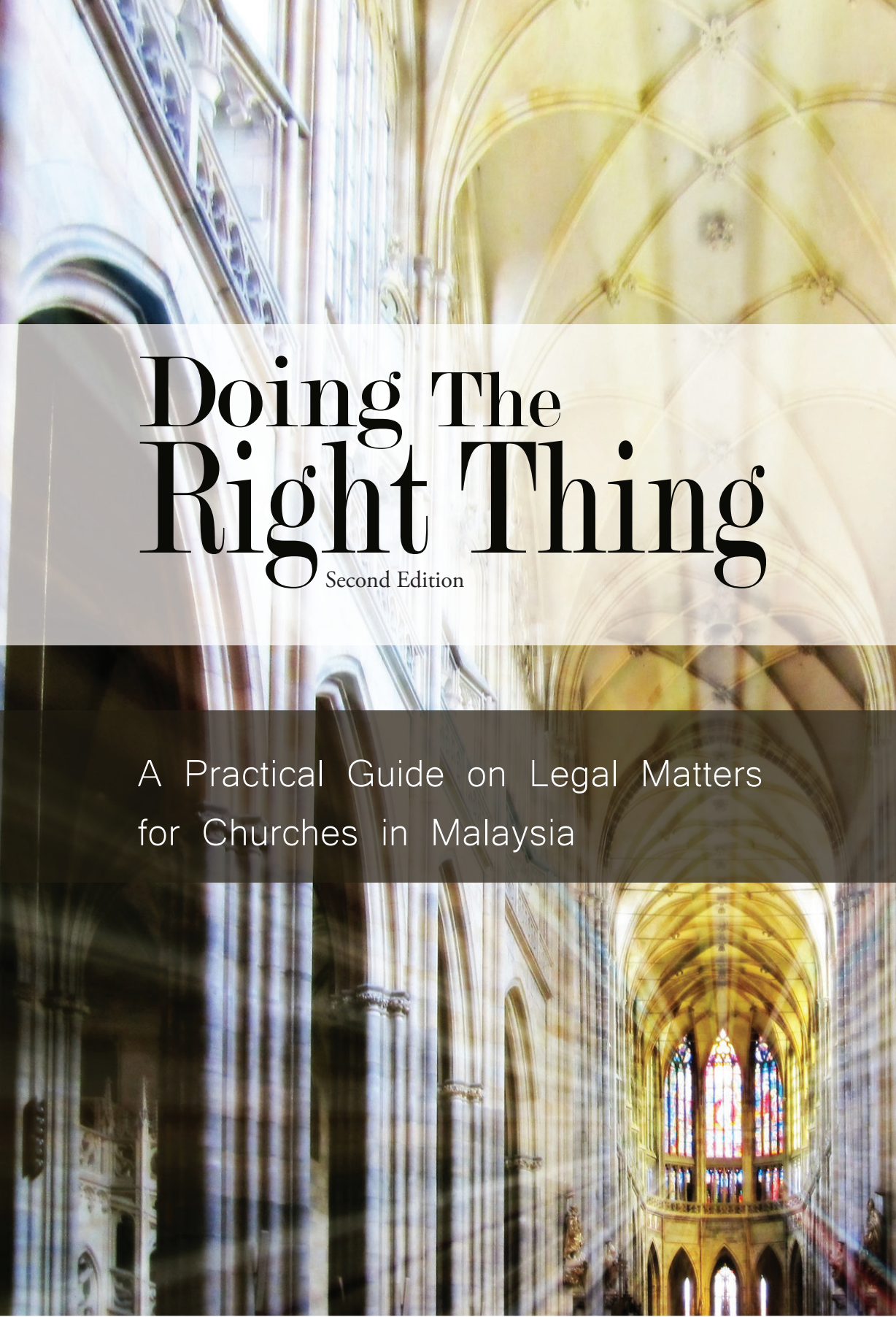




Doing The Right Thing

Second Edition

A Practical Guide on Legal Matters
for Churches in Malaysia

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PREFACE TO THE SECOND EDITION

In 2004, Kairos Research Centre published a legal handbook, “Doing the Right Thing,” to help pastors and Christian leaders understand the intricacies of the various laws of Malaysia pertaining to the rights and responsibilities of religious freedom. We have been much encouraged by the positive feedback given by our readers.

Since the publication of the first edition, there have been substantial changes in the law. To keep abreast with the latest developments and implications for the Christian community, we are pleased to commend this new edition of “Doing the Right thing.” We are confident that this will help pastors and church leaders to continue to “do the right thing” and uphold the integrity of their faith in exercising and defending their religious freedom.

I would like to thank Ms. Tan Ee Yan, who has worked diligently in identifying the latest developments in the law which need to be incorporated into this new edition. The assistance and feedback given by the other members of the Revision Committee comprising several senior lawyers have also been invaluable.

Our prayer is that God will bless this labour of love which will enable the Church in Malaysia to “do the right thing” and be a blessing to wider society in Malaysia.

Editor,
Ng Kam Weng
2019

Chapter One

CHURCH ORGANISATION

What is the legal or constitutional status of a church in Malaysia?

The Federal Constitution is the supreme law of Malaysia which takes precedence over all other laws in Malaysia. In other words, any law inconsistent with the Constitution, in so far as it is inconsistent, shall be treated as if such law never existed.¹

ISLAM AS THE OFFICIAL RELIGION OF MALAYSIA

Malaysia is a *secular* country. This means that although Islam is the official religion of the Federation of Malaysia,² it is not an Islamic state.³ The memorandum submitted by the Alliance Party to the Reid Commission⁴ prior to the

¹ Article 4(1) of the Federal Constitution states that that “any law ... which is inconsistent with this Constitution shall to the extent of the inconsistency be void”.

“In the case of a clash, the Federal Constitution will prevail over State Constitutions, Acts of Parliament, federal subsidiary legislation, State Enactments and State subsidiary legislation, common law and custom”. – Shad Saleem Faruqi, *Document of Destiny – The Constitution of the Federation of Malaysia*, Star Publications, 2008, p. 63.

² Article 3(1) of the Federal Constitution.

³ For a further elaboration on this, see comments of the late Tunku Abdul Rahman Putra Al-Haj, the first Prime Minister of Malaysia, and the late Tan Sri Dr. Tan Chee Khoo in *Contemporary Issues on Malaysian Religion*, Pelanduk Publications, 1985, pp. 25 and 29. In fact, an Islamic theocracy was not even contemplated: see Andrew Harding, “Malaysia: Religious Pluralism and the Constitution in a Contested Polity” (2012) 4 *Middle East Law and Governance* 356, at pp. 372–373.

For better understanding of the origin of Article 3(1) and the intention of framers of the Federal Constitution in inserting this provision, see Joseph M. Fernando, “The Position of Islam in the Constitution of Malaysia” (2006) 37(2) *Journal of Southeast Asian Studies* 249, and Joseph M. Fernando, *The Making of the Malayan Constitution*, MBRAS, 2002, pp. 129–131.

⁴ An independent commission formed on 21 March 1956 to review and recommend the Federal Constitution.

independence of the Federation, stated that:

The religion of Malaya shall be Islam. The observance of this principle shall not ... imply that the State is not a secular State.⁵

This statement strongly suggests that the expression “Islam” in the Federal Constitution refers to merely ritual and ceremonial acts.⁶ Whilst Islam enjoys a special position in Malaysia, it does not override any other Article of the Constitution⁷ nor does it affect “the religious freedom or the structure and operation of the state, which was, in all other respects, clearly intended to be secular”.⁸

STATUS OF CHRISTIANITY AND OTHER RELIGIONS IN MALAYSIA

The status of Islam is clear, but what about the legal and constitutional status of other religious groups, including the Christian community, in Malaysia? Article 11(1) of the Federal Constitution confers a right to the freedom of religion in Malaysia in its unequivocal declaration that *every person*⁹ has the right to:

⁵ *Report of the Federation of Malaya Constitutional Commission*, Kuala Lumpur: Government Printer, 1957, Chap. IX, para. 169, p. 73.

⁶ *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55, at p. 56. Further, Professor Andrew Harding pointed out that if the Federal Constitution is properly contextualised, Article 3 merely provided that Islam “had only a ceremonial or symbolic role to play”: see (2012) 4 *Middle East Law and Governance* 356, at p. 372.

⁷ Article 3(4) of the Federal Constitution.

⁸ Andrew Harding, n. 6 above, at p. 372.

⁹ This expression will sufficiently include citizens as well as aliens: *Ratilal v State of Bombay* (1954) ACR 1055, provided, of course, that such person must be above 18 years old: *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 301.

- (i) *profess*;
- (ii) *practise his own religion*; and
- (iii) *propagate it*, subject to any law that controls and restricts propagation of any religious doctrine or belief among Muslims legislated under Article 11(4) of the Federal Constitution.

Further, every religious group, under Article 11(3), is entitled to:

- (a) manage its own religious affairs;
- (b) establish and maintain institutions for religious or charitable purposes; and
- (c) acquire and own property, hold and administer property in accordance with the law.

However, this right can only be exercised if it does not breach any public order, public health or morality rules (Article 11(5) of the Federal Constitution).

In order to better understand the status of churches in Malaysia, Articles 11(1) and (3)(b) of the Federal Constitution need to be examined in detail.

Article 11(1) of the Federal Constitution ensures the right for each person to publicly state and practise his beliefs,¹⁰ either by himself or in a group.¹¹ This necessarily means that establishing a church as a way for Christians to exercise their religious rights under the Federal Constitution is guaranteed.

This is supported by Article 11(3)(b) of the Federal Constitution, where the right *to establish and maintain institutions for religious* (and charitable) *purposes* is impliedly

¹⁰ *Rev Stainislaus v State of Madhya Pradesh and Others* AIR 1975 MP 163.

¹¹ *Shrirur Mutt v Commissioner* [1952] Mad LJ 557, at p. 587.

granted to *all* religious groups, and not limited to Islam only. Therefore, establishing and maintaining a church is constitutionally protected.

Hence, there is no doubt that Articles 11(1) and (3)(b) of the Federal Constitution firmly guarantee the constitutional status of churches established throughout the whole of Malaysia. Such freedom of religion means Christians have the freedom to establish churches for the purpose of worship, fellowship and ministry as these activities are essential and cardinal to the practice of our faith. No other interpretation of the Constitution would be logical.

IN WHAT FORM SHOULD A CHURCH EXIST IN MALAYSIA?

The more practical question is not whether a church can exist, but rather in what *form* it may exist as a legal entity in Malaysia.

Since the Federal Constitution guarantees the existence of churches, a church's right to exist is not disputed. A church *need not be registered* through any mechanism in order to be a lawful and constitutional body. However, a church that is not registered may encounter practical difficulties with matters involving land (immovable property), bank accounts (movable property), or when applying for approval from government authorities (for instance, when applying for

Does a church need to be registered as an institution under the Societies Act 1966, Companies Act 2016 or be a member of any registered Christian organisation?



conversion of usage of land designated for residential purposes into property for religious purposes, or in applications for putting up a signboard in front of a church located in a shoplot or residential premise).

Why does such an anomaly exist since the Federal Constitution secures the establishment of churches? To the best of our knowledge, there are at least three inter-related reasons:

(a) Under Article 11(3)(c) of the Federal Constitution, a church has the right to own and hold property only when it is done *in accordance with the law*.

(b) The National Land Code 1965 (NLC), which is the law governing land matters in West Malaysia, does not include churches as one of the many bodies which are eligible to hold and deal in land in Malaysia.¹²

(c) Church denominational groups which were established in Malaya after the year 1900¹³ (for instance, Assemblies of God¹⁴ and Full Gospel Assembly¹⁵) and newly-established local churches are generally not recognised by the government, what more in being granted the status of a *body corporate*¹⁶ entitling them to own church property.

These issues will be discussed further in Chapter 3 on “Church Buildings”.

In summary, Christians have the right to hold a gathering

¹² See sections 43 and 205(2) of the NLC. For details of the provisions and for further discussion, see Chapter 3 on “Church Buildings”.

¹³ For the denominational history of churches in Malaysia, see Robert Hunt, Lee Kam Hing and John Roxborough (eds.), *Christianity in Malaysia: A Denominational History*, Pelanduk Publications, 1992, particularly p. 357.

¹⁴ The Assemblies of God was established in Malaysia in 1935: *ibid*.

¹⁵ The Full Gospel Assembly was established in Malaysia in 1978: *ibid*.

¹⁶ A body corporate is entitled to hold property under the NLC: see section 43(d) of the NLC. See further Chapter 3 on “Church Buildings”.

for religious purposes. Any law to the contrary should be unenforceable. Therefore, there is no reason to be doubtful or fearful with regards to establishing churches and organising church gatherings.

Having said that, sometimes authorities find other reasons to impede or repress Christian gatherings especially gatherings held in places or premises not designated for religious purposes (e.g. residential or commercial premises). The reasons for and possible solutions to this predicament will be explored in Chapter 3.

In the event a church chooses not to register itself as a legal entity, can it still function?



Whether or not a church is a registered legal entity, a bank account is an operational necessity for almost all churches. To facilitate the opening of bank accounts without the need to register under any legal statute, a church may register itself with the National Evangelical Christian Fellowship (NECF) as a member.¹⁷ The church will receive a certificate of membership. The NECF has standing arrangements with certain banks that will allow NECF members to open bank accounts.¹⁸

For ownership of property, please see Chapter 2.

REGISTRATION: COMPANIES ACT 2016 vs SOCIETIES ACT 1966

Let us now examine the pros and cons of registration under two main legal mechanisms provided for under the

¹⁷ The criteria for membership and the process of application can be found on NECF's website. See <http://www.necf.org.my/index.cfm?&menuid=7> (accessed on 4 October 2017).

¹⁸ <http://www.necf.org.my/newsmaster.cfm?&action=view&menuid=2&retrieveid=436> (accessed on 4 October 2017).

statutes of Malaysia. Such knowledge is important before a church attempts to incorporate or register itself under any of the following statutes:

- (1) The Companies Act 2016.
- (2) The Societies Act 1966.

1. CHURCH ORGANISATION: PROS AND CONS OF REGISTRATION UNDER THE COMPANIES ACT 2016

ADVANTAGES	
1. <i>Separate legal entity</i> : A company has a legal identity separate from its shareholders. Thus, a company enjoys all the rights and powers of a legal entity in carrying out its dealings.	Sections 20 & 21; <i>Salomon v A Salomon & Co. Ltd</i> ¹
2. <i>Membership</i> : No maximum number of members, except in relation to a private company. ² A church can only be incorporated into a public company limited by guarantee. ³	Section 42
3. <i>Property</i> : A company may own property in its own name. The members do not legally own its assets. Apart from land, properties that a company can own include goods, chattels, shares, etc.	Section 21(1)(b)

¹ [1897] AC 22.

² A private company may generally have no more than 50 members: section 42(1) of the Companies Act 2016.

³ A company which is formed with the object of promoting religion shall only be formed as a company limited by guarantee: section 45(1)(e) of the Companies Act 2016. A company limited by guarantee does not have a share capital: section 12 of the Companies Act 2016. Therefore, the sources of funds are mainly derived from donation, subscription and fees of members. In the context of a church set up as a company limited by guarantee, the source of funds is primarily derived from offerings of church members.

4. <i>Liability of members:</i> The fiscal liability of the members of a company can be limited if it is a limited company (normally such organisation contains the word “Berhad”/“Bhd” as part of its name). The members of a company cannot be sued for a company’s debt. Under the Companies Act 2016 churches are required to incorporate themselves as guarantee companies whereby members need to contribute, at most, the amount they agreed to guarantee as stated in the memorandum of association. Companies limited by guarantee are usually not trading companies. They are confined in practice to organisations that want the advantages of incorporation without necessarily wanting to engage in business.	Section 435(2)(b) Section 435(2)(c)
5. <i>Duration & dissolution:</i> once a company is incorporated, it may not be dissolved except in accordance with due process of law as set out in the Companies Act, i.e. when it is properly wound up or struck off the register. A company can continue to exist even without a business, directors or members. This means that it has perpetual succession.	Section 18

DISADVANTAGES	
1. Since it is a separate legal entity, it can, among other things, sue or be sued in its own name. E.g., expulsion of a member of a guarantee company may be challenged in court by suing the church as in <i>Peck Constance Emily v Calvary Charismatic Centre Ltd.</i> ⁴	
2. A company must maintain various registers for members, directors, managers and secretaries and shareholdings which can be inspected by the public.	See generally, Part II, Division 8
3. A company is obliged to lodge with the Registrar of Companies an annual return setting out details, inter alia, its financial records, indebtedness or “such other information as the Registrar may require”.	Section 68
4. <i>Licence of Minister of Domestic Trade and Consumer Affairs to Acquire Land</i> : A company formed for the purpose of promoting religion must be registered as a guarantee company. Such companies <i>must</i> obtain a licence from the Minister to hold lands. Hence, the right to hold property is not guaranteed, but subject to the approval of the Minister.	Section 45(1)(e) Section 45(4)

⁴ [1991] 2 MLJ 455, at p. 457. In this case, a church was sued for failure to comply with the company's Articles of Association and contravention of the principles and rules of natural justice.

2. CHURCH ORGANISATION: PROS AND CONS OF REGISTRATION UNDER THE SOCIETIES ACT 1966

ADVANTAGES	
1. <i>Separate legal entity</i> : A registered society is to be treated as a person in the eyes of the law, who is able to sue or be sued in the name of the public officer of the society. ⁵	Section 9(c)
2. Property: Immovable property may be registered in the name of the society unless it has been registered in the names of trustees. So long as all documents or instruments relating to the property are duly signed and executed by three present office-bearers ⁶ and sealed with the seal of the society, the documents shall be valid and effective as though they had been done by a private person or a registered proprietor. Movable property, if not vested in trustees, is vested in a “governing body”. ⁷ This means that the society can open a bank account through the “governing body” or trustee.	Section 9(b) Section 9(a)

⁵ The public officer must be declared to the Registrar and be registered by him. Without a public officer, a society can be sued in the name of any officer-bearer: section 9(c) of the Societies Act 1966.

⁶ The appointment of an office-bearer must be authenticated by a certificate of the Registrar.

⁷ The term “governing body” is not defined in the Act. Presumably, it refers to the main committee of the society.

DISADVANTAGES	
1. <i>Restriction to the office-bearers:</i> A person who has been: (i) convicted of any offence under the Societies Act 1966; (ii) convicted of any offence that carries a sentence of a fine of more than RM2,000 and/or imprisonment of more than one year;⁸ (iii) detained, banished, deported, etc. under any law relating to security and public order; or (iv) an undischarged bankrupt, etc.; cannot become or remain in role where he/she is responsible for the management or conduct of any activity of the society⁹, or be an adviser or employee. Such a restriction may not be a fair yardstick for a church or Christian organisation to choose its leader or adviser.	Section 9A
2. <i>Prospect of being made unlawful:</i> Authorities have wide powers and discretion over societies so that the Registrar has powers to enter, search and seize any material or evidence which in the Registrar's opinion would be "prejudicial to public peace, welfare, good order or morality". Churches can, contrary to its constitutional status, be "made" an unlawful society. This is the main reason why it is not advisable for a church to be registered under the Societies Act 1966	See for e.g., sections 5, 6A, 7, 13, 64 and 65

⁸ Such a restriction will cease after five years from the date of release from imprisonment, or from the date on which a fine was imposed: section 9A(2) of the Societies Act 1966.

⁹ See section 9A(7)(b) of the Societies Act 1966 for the full definition of "office-bearer" under this provision.

SUMMARY

A church legally exists and can practise its beliefs by virtue of the Federal Constitution, without any need for it to be registered. However there may be practical reasons for the church to be registered. If so, it is generally advisable that the church be incorporated under the Companies Act 2016.

Chapter Two

OWNERSHIP AND MANAGEMENT OF CHURCH PROPERTY

How can a church legally own or hold property in its own name?

What are the possibilities / options?

What is a trust? Can a trust be used so that a trustee can

hold property on behalf of the church?

Generally, a church can own property in its own name (i.e. it can have its name registered as proprietor on the land title).

By Article 11(3)(c) of the Federal Constitution, every religious group¹ has the constitutional right to acquire, hold and administer property² *in accordance with the law*.³

The only restriction to this right is that such property must be acquired, owned and administered *in accordance with the law*. Malaysian land law is governed mainly by the National

¹ The use of the phrase “every religious group” suggests that this right is for all religious bodies, Islamic and non-Islamic.

² “Property”, though not defined in the Federal Constitution, includes both movable and immovable property.

³ Such property rights are subject to the law relating to *public order, public health and morality*. The Malaysian courts have defined the term “public order” to mean “the tranquillity and security which every person feels under the protection of law, a breach of which is an invasion to the protection which the law affords”: *Re Tan Boon Liat* [1976] 2 MLJ 83.

Land Code 1965⁴ (NLC), and so the church must comply with the NLC for land matters.

MALAYSIAN LAND LAW

Malaysia's land law operates on the Torrens System, a land registry system whereby generally, the Land Registrar guarantees that the owner named in the register has indefeasible title to the land. The owner has all the rights to administer and deal in the land subject to restrictions under the NLC. Therefore, registration of land title is crucial to protect the owner's interest in the land.

Can a church own property in its own name?



Only four groups of persons or bodies are eligible to hold and deal in land in Malaysia,⁵ namely:

- (1) natural persons other than minors/children;⁶
- (2) corporations registered under the Companies Act 2016;
- (3) sovereigns, governments, organisations and other persons authorised to hold land under the Diplomatic and Consular Privileges Ordinance 1957; and
- (4) bodies expressly empowered to hold land under any written law.⁷

⁴ Although land matters are under the purview of individual States, Article 76(4) of the Federal Constitution explicitly allows the Federal government to regulate land matters to ensure the uniformity of law and policy. To date, all States have adopted the NLC, except Sabah and Sarawak which have their own land legislation (Sabah Land Ordinance and Sarawak Land Code). The land law discussion in this chapter focuses on the position in West Malaysia based on the provisions of the NLC. The law in Sabah and Sarawak is not very much different.

⁵ Sections 43 and 205(2) of the NLC.

⁶ A minor is a person below the age of 18 years: section 2 of the Age of Majority Act 1971.

⁷ Presumably, the section 43, subsection (d) of the National Land Code 1965 will allow the registration of land in the name of a society, by virtue of section 9(b) of the Societies Act 1966.

A number of Christian institutions have been conferred statutory privileges that allow them to “acquire, purchase, take, hold and enjoy movable and immovable property”.⁸

OPTIONS FOR CHURCHES TO HOLD LAND

However, since most of these statutes were first passed many years ago, it is unlikely that such statutes will continue to be enacted by Parliament. Thus most churches, especially the newly-established ones, have to look for alternatives in solving the issue of holding land. Below are the most typical options adopted by churches:

- (a) register as a private company limited by guarantee under the Companies Act 2016;
- (b) register as a society under the Societies Act 1966;
- (c) appoint a trustee to hold property on behalf of the congregation;
- (d) appoint a Public Trustee for that purpose; and
- (e) incorporate a trust company under the Trust Companies Act 1949 for that purpose.

⁸ Examples of statutes that provide statutory powers to Christian institutions/denominations to hold land under the NLC include:

- (i) Methodist Church in Malaysia Act 1955;
- (ii) Roman Catholic Bishops (Incorporation) Act 1957;
- (iii) Synod of the Diocese of West Malaysia (Incorporation) Act 1971;
- (iv) Titular Superior of the Brothers of the Saint Gabriel (Incorporation) Ordinance 1957;
- (v) Titular Superior of the Brothers of the Institute of the Marist Brother of the School (Incorporation) Act 1958;
- (vi) Redemptorist Fathers (Incorporation) Act 1962;
- (vii) Salvation Army (Incorporation) Ordinance 1956;
- (viii) Superior of the Institute of the Congregation of the Brothers of Mercy (Incorporation) Act 1972;
- (ix) Good Shepherd Nuns (Incorporation) Act 1973;
- (x) Missionary Societies (Sarawak) Ordinance;
- (xi) Presbyterian Church (Penang) Ordinance; and
- (xii) Presbyterian Church of England Mission Incorporation (Johore) Enactment.

For options (a) and (b), please refer to the discussion in Chapter 1 (Church Organisation). In this chapter, we will focus on the trustee options of (c), (d) and (e).

TRUSTS

Generally, in a private trust, there is a *settlor*,⁹ *trustee* and *beneficiary*.¹⁰ Simply put, a trust is created by a settlor who appoints a trustee to hold property/land for the benefit of one or more beneficiaries. The trustee has legal ownership of the trust property and has certain legal and administrative powers in dealing with the property for the benefit of the beneficiary who has only a *beneficial interest*¹¹ in it. The trustee has ownership powers over the trust property (e.g. he is able to sell or mortgage the trust property);¹² however, he is not allowed to gain any benefit from the trust property. A trustee's failure to carry out his duties will give the beneficiary a right to take legal action against him.

The trustee has legal ownership of the trust property and has certain legal and administrative powers



The advantage of having trustees to hold church property

⁹ A settlor is "a person who creates a trust": *Sinha & Dheeraj, Legal Dictionary*, ILBS, 1996, p. 189.

¹⁰ A beneficiary is "a beneficial owner of property ... for whose benefit the legal title is held by a trustee under a trust arrangement": *Australian Legal Dictionary*, Butterworths, 1997, p. 121.

¹¹ A beneficial or equitable interest is "an interest in property recognised by the court ... The owner of a beneficial interest has the right to use and enjoy the property": *ibid* at p. 120. A simple illustration is this: if Ali holds property for Balan, Balan is said to have a beneficial interest in that property. A beneficial interest is, therefore, the interest that a beneficiary has in a trust fund, or in the property subject to a trust.

¹² The Trustee Act 1949 also gives trustees the power of investment, power to sell and purchase property, protection against certain liabilities, and power to appoint new or additional trustees. It also sets out the various duties and liabilities of trustees.

is that a trust can be easily created. A church does not need to be legally incorporated or registered for it to be able to appoint a trustee to hold property on behalf of its members. Subject to the church's own governance procedures, members of a church may, for instance, appoint one or more trustees¹³ by resolution of a general meeting. A memorandum of this resolution should



... members of a church may appoint one or more trustees by resolution of a general meeting.

be drawn up and signed either at the meeting by the person presiding, or afterwards, and witnessed by two people who were present at the

meeting. A trust deed can also be prepared by an experienced and competent legal practitioner at the request of the church members or a committee formed for the purpose of appointing a trustee, stating precisely the purpose of such a trust, the trust property, and the beneficiaries.¹⁴

The main risk in creating a trust is if the trustee turns out to be unscrupulous and abuses the trust for his own benefit as the settlor would have given control of the trust property to the trustee upon the creation of the trust. Further, the trustee does have wide-ranging powers under the Trustee Act 1949 as to how he can administer the trust property.¹⁵

Of course, the church can sue the trustee for breach

¹³ Under section 39(2) of the Trustee Act 1949, there are no restrictions on the number of trustees in the case of trusts created for charitable, religious or public purposes.

¹⁴ In order for a valid trust to exist, the following must be clear and certain:

- (i) the intention to create a trust;
- (ii) the purpose of the trust; and
- (iii) who the beneficiaries are.

(*Knight v Knight* (1840) 3 Beav 148, at p. 172.)

¹⁵ These include power to invest any trust funds in their hands; power of sale of property without being answerable for any loss; power to raise money by sale, conversion or charge of trust property; power to employ agents to transact any business; power to delegate the trust to any person (including a trust corporation) during his absence from Malaysia; and power to appoint new or additional trustees.

of trust in the event the trustee fails to act properly, but the litigation process to settle the matter can be lengthy and acrimonious. The church has to make sure that the appointed trustees are trustworthy as well as God-fearing. They must also be capable of managing and dealing with the property for the benefit of the church congregation.

The risk can be further mitigated by the trustee's duties and powers being clearly defined and restricted in the trust document, to minimise any abuse. For example, having more than one trustee appointed, and their exercise of power be restricted by requiring unanimous consent of the trustees.

The church has to make sure that the appointed trustees are trustworthy as well as God-fearing.



Another option for churches in Peninsular Malaysia to mitigate the risk of trustees abusing their powers is by incorporating the trustees as a corporate body with the Prime Minister's Department, Legal Affairs Division under the Trustees (Incorporation) Act 1952. The Minister can revoke the certificate of incorporation of such body corporate if it is found that it has acted in contravention of the Act or of any law; or if it has deviated from the original objectives of its establishment.¹⁶ Such exercise of the Minister's powers, however, are subject to his discretion (i.e. he is not obliged to do so), just as the initial incorporation of the trustees is also subject to his discretion. (The application form and the list of required documents for such an application can be obtained from the Legal Affairs Division. The Minister may, if he considers such incorporation expedient, grant the certificate

¹⁶ Section 17 of the Trustees (Incorporation) Act 1952.

of incorporation, and may also prescribe conditions relating to qualifications, number of trustees, their tenure, amount of property the trustees can hold, mode of appointing new trustees, etc.)

The advantages of incorporating a body of trustees as a body corporate under the Trustees (Incorporation) Act 1952 are as follows:

- (i) such a body corporate enjoys the benefit of perpetual succession (i.e. will not cease to exist even if one or all of the trustees die);
- (ii) it may sue and be sued in its corporation name; and
- (iii) it may acquire, hold, deal and enjoy movable and immovable property (subject to conditions and directions in the certificate).

The disadvantages are that:

- (i) it is up to the Minister's discretion whether to incorporate/register and revoke such incorporation/registration;
- (ii) the Minister may prescribe conditions relating to qualifications, number of trustees, their tenure, amount of property the trustees can hold, mode of appointing new trustees, etc.; and
- (iii) trustees are required to submit audited financial statements to the Minister on or before 30 June of each year, which shall be available for public inspection.¹⁷

¹⁷ Section 15 of the Trustees (Incorporation) Act 1952.

HOLDING PROPERTY VIA A TRUST COMPANY

In addition to appointing individuals as trustees, there is also the option of holding property via a trust company incorporated under the Trust Companies Act 1949 (TCA).

Only a public company¹⁸ incorporated in Malaysia may apply to the Registrar of Companies to be registered as a trust company, subject to the conditions stipulated in section 3 of the TCA. Amongst these conditions is that the authorised capital of the company must not be less than RM500,000 divided into shares of not less than RM10 each.

The scope of what a trust company can do are restricted by section 8 of the TCA, which allows a trust company to, amongst others, hold and acquire or sell and dispose as well as mortgage or lease the property it holds.

Please also refer to Chapter 1 (Church Organisation) where we have discussed the advantages and disadvantages of a company incorporated under the Companies Act 2016.

CONCLUSION

Every option has its pros and cons. Each church should carefully examine the options available to pick the option that best suits its structure.

¹⁸ A public company in one which is registered under the Companies Act 2016. Unhelpfully, a public company is defined as “a company other than a private company” (section 2 of the Act). A more useful indicator is that the company carries a legal designation “Berhad” instead of “Sendirian Berhad.”

Chapter Three

CHURCH BUILDINGS

What is a development plan or structure plan?

How does the local authority draft and decide on the use of land based on such a plan?

How can a church be involved in the planning of usage of land in its area?

How can a church voice its dissatisfaction with regards to the allocation of land for use as burial grounds and other non-Muslim religious usage?

Is it illegal for a church to use a shoplot or residential house for the purpose of worship or other church activities?

If so, can the church apply for conversion of usage of land to religious purposes for such a building?

So, a church has acquired or is holding land. Can the church use the land for any purpose that it wants? Each state has the power to make laws on land matters¹ within its jurisdiction. However, the Federal Government is responsible to ensure uniformity of law and policy in the states. For this reason, various laws have been made by Parliament which include, among others, the National Land Code 1965 (NLC), the Street, Drainage and Building Act 1974 (SDBA),

¹ Which powers include making laws pertaining to land tenure, registration of titles and deeds, land improvement, Malay Reservations, compulsory acquisition of land, and transfer of land.

and the Town and Country Planning Act 1976 (TCPA).

Generally, the NLC has specified only three categories of land use, i.e. building, industry and agriculture.² The building category is further sub-divided to include purposes such as residential, commercial, educational, recreational and other welfare facilities.³ The states may, from time to time, add to the list of purposes through subsidiary legislation under the NLC.⁴

The local planning authority or, for the Federal Territories, the Commissioner for Federal Territories⁵ ("the Commissioner"), are responsible to prepare a structure plan for local designated areas under their purview.⁶ Upon receiving the approval of the State Committee or the Minister, that plan is normally used to set out the pattern of land usage for that area. The usual types of land use⁷ include:

- (a) residential;
- (b) commercial/industrial;
- (c) institutional/educational;
- (d) religious;
- (e) burial ground;
- (f) recreational;
- (g) open space/bushes/forests/rivers/lakes; and
- (h) roads/highways.

² Section 52 of the NLC.

³ Section 116(4) of the NLC.

⁴ Sections 116(4)(f) and 14 of the NLC. A State Authority may also designate the purposes that the State thinks fit in the circumstance of any particular case.

⁵ The Commissioner is an official appointed by the Yang Di-Pertuan Agong and is declared to be a "corporation sole" under the name of *Pesuruhjaya Ibukota* or the Commissioner of the Federal Capital of Kuala Lumpur: section 4(1) of the Federal Capital Act 1960 (Act 35).

⁶ Section 8 of the TCPA and section 7 of the FTPA..

⁷ Most, if not all, structure plans indicating the zoning of land use for a district are available for inspection and reference at the respective District Offices upon request.

WHAT IS A DEVELOPMENT OR STRUCTURE PLAN?

A development plan, in relation to an area, is

- (a) a *local plan* for the area; or
- (b) if there is no local plan for that area, the *structure plan* for the area.⁸

A *development plan* determines the use and development of land, subject to modification and alteration, of an area covered by the plan, within a time frame proposed by the State Planning Committee or the Federal Territories Planning Advisory. It is important to note that, for the Federal Territories only, the Commissioner⁹ has the discretion to grant the planning permission even if it does not conform with the development plan.¹⁰ In the event a planning permission application is refused, the Commissioner must give a written explanation for the refusal.¹¹

A *structure plan* refers to reports, drawings, maps and models outlining the use of land and buildings in a specified area for any purpose. Both the TCPA and Federal Territory (Planning) Act 1982 (FTPA) stipulate that all the states and the Federal Territories must prepare a structure plan for the area located under their jurisdiction. Such a plan is, of course,

⁸ Section 2 of both the TCPA and the FTPA.

⁹ Under section 2 of the FTPA, the term "Commissioner" means "the Commissioner appointed under the Federal Capital Act 1960 [Act 190]. In the Federal Capital Act, "Commissioner" means "*Datuk Bandar Kuala Lumpur* or in English, the Commissioner of the City of Kuala Lumpur, appointed under section 4" (See: section 2).

¹⁰ However, under section 8 of the FTPA, in exercising such a discretion, the Commissioner must take into consideration:

- (i) matters that are expedient and necessary for the purpose of proper planning;
- (ii) the development plan;
- (iii) the local plan or the Comprehensive Development Plan; and
- (iv) other material consideration.

¹¹ Section 22(5) of the FTPA.

not a new conception. As early as 1931, the Federal Territory (then known as Kuala Lumpur) already had an Area Plan. A Town Plan replaced it in 1939.¹² Subsequently, various plans were made until 1976 when the TCPA came into force. The TCPA introduced the system of structure plans to the whole of Peninsula Malaysia except Federal Territories, which were not brought under this system until 1982 by the FTPA.

A *local plan* consists of a map and a written statement formulating proposals for the development, land use, environmental protection and the preservation and improvement of landscape for a certain area.¹³ Such a plan is more comprehensive than a structure plan as it also contains diagrams, illustrations and descriptive matters for the purpose of explaining or illustrating the proposals in the plan. A local plan is not compulsory. The Local Planning Authority (or LPA, which includes the City Council, the Municipal Council, the District Council, the Town Council, etc.) or the Commissioner may prepare such a plan only if they “think it desirable”.¹⁴

THE CHURCH AND DEVELOPMENT PLANS

We might wonder why such plans are relevant to churches in Malaysia. Basically, a development plan—once it is drawn up and comes into effect—governs and determines the use of land in a particular area. If the area does not

Basically, a development plan—once it is drawn up and comes into effect—governs and determines the use of land in a particular area.



¹² See Kuala Lumpur Draft Structure Plan, DBKL, 1982, p. 1.

¹³ Section 12(3) and (4) of the TCPA and section 13(3) and (4) of the FTPA. The TCPA has been amended to include various particulars that a local plan must include.

¹⁴ See section 12 of the TCPA and section 13 of the FTPA.

have land allocated for religious usage or for use as a burial ground for non-Muslims, a church, strictly speaking, will not be able to erect a church in that area, or use any building in the area for religious purposes, regardless of the population of the Christian community in that area.

As such, we should examine in greater detail both Acts, especially how the various plans are prepared and how the church can play a part in the course of such planning.

(a) Town And Country Planning Act 1976 (applies to all of Malaysia save for the Federal Territories)



Following a survey conducted by the LPA, the LPA will submit a report and a draft structure plan to the State Planning Committee. The draft structure plan is a written statement formulating the policy and general proposals with respect to the development and use of land in that area.¹⁵

How does the local authority draft and decide on the use of land based on such a plan?

While preparing the draft, the LPA must publicise the proposed draft plan and report its survey to the public for the purpose of permitting the public to make representations and voice their objections, if any, to the LPA.¹⁶ It is mandatory for the LPA to “consider every representation”.¹⁷

It is during this time that, if an area is not allocated with any land or building for religious purposes, a church

¹⁵ Section 8 of the TCPA.

¹⁶ The LPA will normally organise an exhibition to explain the draft plan to the public. Section 9(2)(a) of the TCPA also obligates the LPA to publicise such a plan in two local newspapers.

¹⁷ Section 9(1) of the TCPA.

may voice its objection by making a representation to the LPA. Such objections must be considered by the LPA and the State Planning Committee prior to their approval of the draft structure plan. The Committee may also afford the complainant an opportunity to appear before an appointed sub-committee to make a verbal submission regarding the complaint. This will also be the right avenue to convey any dissatisfaction with regards to any oversight of the authority on the religious rights of non-Muslims. It is disheartening to note that churches often do not actively exercise such rights.

Thereafter, the State Planning Committee will decide whether to approve, modify or reject the draft plan. Once approved, the plan will come into effect after the State Authority's assent is obtained.¹⁸ When the plan is finalised, alteration is no longer possible.

(b) Federal Territories (Planning) Act 1982 (applies to the Federal Territories only)

The procedure for the preparation of a development plan under the FTPA is similar in many ways to that under the TCPA. The plan is prepared by the Federal Territory Planning Advisory Board (which is also known as the *Lembaga Penasihat Perancangan Wilayah Persekutuan*) established under section 4 of the FTPA. The Board's main function is to advise the Minister of Federal Territories about the draft structure and local plan. Some of its features are similar to that of the State Planning Committee¹⁹ under the TCPA.

¹⁸ Section 10(6) of the TCPA.

¹⁹ The State Planning Committee, under section 4(4)(b) of the TCPA, advises the State



How can a church be involved in the planning of usage of land in its area?

On the other hand, the Commissioner is also given the task of preparing and implementing the development plan, which is part of the function of the LPA under the TCPA. Since the FTPA came into force in 1984, the Commissioner is responsible for preparing a draft structure plan for Kuala Lumpur. The current structure plan is known as The Kuala Lumpur Structure Plan 2020 and is designed to be applied until 2020. Once a structure plan is proposed, a public notice will be issued in the *Gazette* and local newspapers and the public will be invited to inspect the plan and raise objections in writing, if any, within a month from the date of issue of the notice. A committee is formed to hear the objections raised.

Nevertheless, it must be noted that the implementation of the plan can be quite arbitrary. This is particularly obvious, since the person planning and the person implementing the plan is actually the same person. Thus, we have to be prepared for the eventuality that the plan would not be strictly adhered to especially if the approved plan was not what was originally intended. For instance, the KL City Plan (as The Kuala Lumpur Structure Plan 2020 is popularly known) was introduced in May of 2008 and was supposed to have been gazetted in the following year to give the Plan the status of law. However, after receiving some 62,224 responses from 5,025 representatives of the public, the plan has not been gazetted. The consequence is that there is at present no certainty as to how the land is to be

Government instead of the Minister on matters relating to conservation, use and development of land in the state.

used, and is liable to change at the whims of the powers that be. There are now plans to formulate a Kuala Lumpur City Plan 2050.²⁰

Whether we are looking at a part of the country governed by the TCPA or the FTPA, the relevant local government will usually use the structure plan as a core reference and guide in processing any application regarding usage of land in that area. Therefore, the State Authority or the Commissioner as the case may be, may refuse to issue a *planning permission*, which allows for the erection of a church building in a particular place where the structure plan does not authorise one to be built in that area.

What action can the authorities take against a church if premises are used for religious purposes without the necessary permission from the authorities?



However, many churches today use shops or residential premises as church buildings without the permission of the state or local authority. We will examine the dangers faced by such churches and the necessary steps to be taken in remedying this situation.

CONSEQUENCES FOR NON-COMPLIANCE WITH PLANNING PERMISSION RULES

Generally, the local government has the authority to evict any person from premises that are not used in accordance

²⁰ Lim, Jarod, "New Draft Plan for KL City", *The Star Online*, 16 March 2017, <https://www.thestar.com.my/metro/community/2017/03/16/new-draft-plan-for-kl-city-hall-comes-up-with-proposal-after-first-plan-scrapped/> (accessed on 31 October 2017).

with their designated purpose.²¹ This covers situations where (i) a church uses land or building that has been categorised for residential or commercial purposes, and has not applied for planning permission to change the category of land or building use;²² and (ii) in relation to churches located in the Federal Territories that are established after 1982, have not applied for planning permission. Such power is given to the Kuala Lumpur City Hall (DBKL) by the FTPA and to other local governments by the TCPA, and may be exercised against occupiers of lands or buildings that are not used in conformity with the development plan or planning permission or development order granted under the Acts.²³

The procedures of enforcement under the FTPA, TCPA, and SBDA are set out below.

(a) Federal Territory (Planning) Act 1982

Failure to use land or buildings in the Federal Territories in accordance with the planning permission is an offence punishable by a fine not exceeding RM50,000 upon conviction.²⁴

If planning permission has not been obtained, the Commissioner may serve a notice, called the *enforcement notice* (or *notis penguatkuasaan*), to both the owner and occupier of the building requiring them to comply with the requirements

²¹ The designated purposes can be found in the land title document. Otherwise, a land search can be conducted with the local land authority, and the results should state the designated purpose.

²² Section 2 of the TCPA and section 29 of the FTPA.

²³ Section 18 of the TCPA and section 19 of the FTPA.

²⁴ Section 26 of the FTPA.

listed in the enforcement notice.²⁵ Failure to comply will normally lead to an *eviction notice* being issued. This is the most common type of notice received by churches in the Federal Territories that use shop houses and residential premises as places of worship and for religious activities.

If a church fails to comply with the enforcement notice:²⁶

- (ii) the Commissioner may recover from the owner of the land any expenses and costs incurred in the course of executing the notice; and
- (iii) the occupier can be fined up to RM20,000 upon conviction of such offence and RM500 for every day of non-compliance.

Even if a church has received an enforcement notice, it can still apply for planning permission from the Commissioner.²⁷ If permission is granted, the enforcement notice will not take effect.²⁸ An application for the retention of buildings on the land or continuance of any use of land can also be made to the Commissioner within the period prescribed by the enforcement notice.²⁹ Generally, however, the local authorities will not go so far as to enforce such notice on a church upon the expiry of the notice. The reason for this could be due to the desire to maintain religious harmony, which has always been jealously guarded in our country. Nevertheless, it serves as a “warning” to local churches for non-compliance with the FTPA. Having said that, it must also be noted that such delay does not preclude

²⁵ Section 27 of the FTPA.

²⁶ Section 29(1) to (4) of the FTPA.

²⁷ Section 28(1) of the FTPA.

²⁸ Section 28(2)(ii) of the FTPA. The Commissioner, however, has the sole discretion in deciding whether to grant such permission or not.

²⁹ Section 28(1) of the FTPA.

the authorities from taking action in the future.

Instead of issuing an enforcement notice, the Commissioner may issue a *requisition notice*³⁰ to the owner of a land in the event the church does not have the proper planning permission. Such requisition notice may require him to only use the land for certain purposes, upon certain conditions being met, and/or alteration or removal certain buildings. Such requirements and conditions must be carried out within one month from the date of service. As such, the powers conferred to the Commissioner are wide ranging.

The owner, nevertheless, may appeal to an Appeal Board, established under the FTPA, against the decision of the Commissioner. If such appeal fails or if no appeal is filed, the owner must comply with the notice, failing which it becomes an offence.³¹ Ironically, if the appeal is allowed, this provision allows the owner to claim for loss suffered due having to comply with the earlier notice from the Commissioner. If the compensation awarded is inadequate, the owner may even appeal to the Appeal Board to assess the amount.

(b) Town and Country Planning Act 1976

The TCPA prohibits any development without planning permission or contrary to planning permission.³²

Sections 21A, 21B and 21C require an applicant to submit a detailed *development proposal report*. Such a report must

³⁰ Section 30 of the FTPA.

³¹ Section 30(8) of the FTPA. Upon conviction, the owner may be fined up to a maximum of RM10,000 and RM500 each day in a case of continuing offence.

³² Sections 19 and 21 of the TCPA.

contain, inter alia, specific particulars about the development, geographically as well as topographically. Although such a requirement is not intended for the application of conversion of land for usage by a church, it indirectly hinders such an application.

Any unauthorised development, as in the FTPA, may incur a fine of RM100,000 with a further fine of RM1,000 per day for each additional day that the offence continues. The LPA also has the power to serve a notice to the owner and occupier of the land carrying on development without a planning permission.³³ If development has been going on without permission, the authority may, instead of the notice mentioned above, serve a notice “in prescribed form requiring them to discontinue the development”.³⁴ Failure to comply with the notice to discontinue development is an offence punishable with a maximum fine of RM500,000 and a further fine of RM1,000 for each additional day that the offence continues.

As with the FTPA, section 30 of the TCPA also allows for the service of a requisition notice to the owner of a land on the same grounds, bearing the same effects.

(c) Street, Drainage and Building Act 1974 (SBDA)

Any person who uses any building or part of a building for a purpose other than which it was originally constructed for without the prior written permission from the local authority may be fined up to RM25,000 and shall also be liable to a

³³ Section 27(2)(a) and (b) of the TCPA.

³⁴ Section 27(4) of the TCPA.

further fine of up to RM500 for every day during which the offence is continued after a notice to cease using for other purpose has been served on such person.³⁵ This is in addition to the penalties under the FTPA or TCPA.

(d) Conclusion

Any premises used for religious purposes must have the appropriate planning permission.

A congregation may be evicted from the building and be subjected to an enormous fine upon conviction for an offence.



How can a church voice its dissatisfaction with regards to the allocation of land for use as burial grounds and other non-Muslim religious usage?

Upon receiving a notice of eviction, a church may apply to the local authority for a planning permission. It is not impossible

to obtain such permission, although the duration of the process varies from state to state.

Although Malaysian courts have not specifically addressed the issue on whether Christians have the right to have a place to gather and worship in Malaysia, such right is implied based on our constitutional right to establish and maintain institutions for religious purposes.³⁶ This is because, if Malaysians are not able to have a place to gather and worship, then the right to establish and maintain institutions for religious purposes

³⁵ Section 70(12) of the SDBA.

³⁶ Article 11(3)(b) of the Federal Constitution. An “institution” for the purpose of this Article 11 must necessarily include a church building or chapel and Christian educational school (such as Sunday school) and seminary (*S.K. Patro v State of Bihar* AIR 1970 SC 259, at p. 263). A religious educational institution for purely religious instruction may be regarded as a charitable institution (*Sidhrajibhai v State of Gujarat* AIR 1963 SC 540, at p. 544). However, a graveyard or burial ground cannot be considered as an institution (*Mohd Ali Khan v Lucknow Municipality* AIR 1978 All 280 (DB), at pp. 285–287).

would have no substance.

Nevertheless, we do not know how the law will develop in the future. As it stands, churches still face constraints in getting places in which to gather. This is especially true for church planting work in new housing areas.

Are there any approvals required for church renovations? Can the church erect new structures on its property? Can a church demolish its existing building and re-construct a new building?



There are no approvals required for internal church renovations. Under section 19(2)(a) of the TCPA and section 20(2)(a) of the FTPA, no planning permission is required for works (renovations) that are necessary for the maintenance, improvement or other alteration of a building that only affect the interior of the building and do not:

- (i) involve any change in the use of the building or the land to which it is attached;
- (ii) materially affect the external appearance of the building;
- (iii) involve any increase in the height or floor area of the building;
- (iv) involve any addition to or alteration of a building that affects or is likely to affect its drainage, sanitary arrangements, or its soundness; or
- (v) contravene or involve or result in any inconsistency with any provision in the local plan.

Planning permission is required to be obtained from the local authority for (i) any renovation that will materially alter the structure of the building; and (ii) the construction of any

new building.³⁷

The application must be submitted by a “principal submitting person” (PSP)³⁸ who must be a qualified person such as an architect, registered building draftsman or an engineer, as (i) the application includes technical documents, the most important of which is the building plan, and (ii) the PSP is responsible for the proper execution of the works once it is approved. Any change in the qualified person during the building or renovation requires the approval of the local authority.³⁹ If the local authority does not respond within three calendar months from the date of submission, the PSP may apply to the State Authority for permission.⁴⁰

The Uniform Building By-Laws 1984 (“By-Laws”) spell out the documents required, which includes amongst others, the different types of plans (e.g. site plan, sketch plan, floor plan, etc.) that need to be submitted in the application, the timeline of the application process and the necessary fees.⁴¹ Further, the By-Laws provide for technical details pertaining to the structure of building, such as the measurements of height and width of different types of spaces. Any works of alteration to the structure of a building must be carried out in accordance with building and structural specifications in the By-Laws. The local authority can intervene if it appears that there is non-compliance in the course of construction. Specifically, the

³⁷ Section 70 of the Street, Drainage and Building Act 1974 (SDBA).

³⁸ Section 70(19) of the SDBA.

³⁹ Section 7 of the Uniform Building By-Laws 1984.

⁴⁰ Section 70(18) of the SDBA.

⁴¹ See Part II of the By-Laws.

local authority may issue to the PSP a directive to rectify any non-compliance, or to withhold issuance of the Certificate of Completion and Compliance (CCC).⁴² If there continues to be non-compliance, the local authority may itself execute such works to rectify the non-compliance and the costs for doing so will be borne by the owner of the building.⁴³

The PSP shall issue a CCC once he/she is satisfied that:

- (i) the building works have been executed in conformity with the approved plans and the requirements of law;
- (ii) all technical conditions imposed by the local authority has been complied with; and
- (iii) the building is safe and fit for occupation.⁴⁴

If a CCC is issued in contravention of the requirements of law, the PSP shall be liable to a maximum fine of RM250,000 and/or a maximum of 10 years' imprisonment.⁴⁵

It is therefore important for a church to engage a responsible and qualified PSP. In particular, the church must ensure that the PSP is registered under the relevant statute regulating his professional body; e.g. an architect qualified to make submissions as a PSP is an architect registered with the Board of Architects Malaysia under the Architects Act 1967. In the case of engineers, the engineer must be registered with the Board of Engineers Malaysia under the Registration of Engineers Act 1967.

⁴² Section 70(23) of the SDBA.

⁴³ Section 70(24) and (25) of the SDBA.

⁴⁴ Section 70(20) and (21) of the SDBA.

⁴⁵ Section 70(27) of the SDBA.

PENALTIES FOR UNAUTHORISED CONSTRUCTION OR BUILDINGS

(a) Demolition and Fines

Local authorities can remove or destroy any structure that has been erected in contravention of approved plans or laws and regulation.

First, the local authority may, by notice served on the owner of the property, require him to:

- (i) cease further construction;
- (ii) demolish the contravening structure; and
- (iii) take any other steps that they may specify; within a specified time.⁴⁶

If he is unable to do so, he may request the local authority to carry out the requirements of the notice, but he shall be required to deposit with the local authority the cost and expenses that will be incurred.⁴⁷

Any person who fails to comply with the notice served on him is guilty of an offence and is liable to a maximum fine of RM250 for every day the offence continues after the expiry of the notice.⁴⁸ Also, the local authority may demolish the structure and the owner must indemnify the local authority for the costs of such demolition.

Before it undertakes any demolition, the local authority is required to give a 30-day notice, after which it may vacate

⁴⁶ Section 72(1) of the SDBA.

⁴⁷ Section 72(2) and (3) of the SDBA.

⁴⁸ Section 72(4) of the SDBA.

the building and remove all movable property for the purposes of demolition.⁴⁹

(b) Fines

Any person who makes any unlawful alteration to a building or alteration without the prior permission of the local authority shall be liable to a fine of up to RM25,000. Further, the local authority may apply to the Magistrate's Court for a court order to alter the building or to demolish it.⁵⁰

Deviations from approved building plans without prior written permission of the local authority, erecting buildings without prior permission, continuing building works even though the local authority has given orders for it to be suspended, and any other failure to comply with any direction of the local authority are serious offences liable to a fine of up to RM50,000 or imprisonment of up to 3 years or to both; and for every day that the offence continues, a fine of RM1,000 will be imposed.

(c) Conclusion

Property owners generally comply with laws and regulations relating to erection of new buildings. However, it is not uncommon for property owners to undertake renovations without knowing that the alterations being made in fact require approvals. If in doubt about whether a church's renovations

⁴⁹ Section 72(5) of the SDBA.

⁵⁰ Section 70(11) of the SDBA.

require an approval, the church should consult an architect or an engineer.

SIGNBOARDS

Hanging a signboard on a building is a local authority matter. Each local authority has its own set of rules and so it is impossible to list all the regulations here.

Can a signboard be attached to a building to indicate the existence of a church? Would a church need to apply for such permission from the local authority? What are the procedures involved?



However, to take the Petaling Jaya City Council (*Majlis Bandaraya Petaling Jaya*

or MBPJ) as an example, a licence is needed before a signboard can be hung on a building.⁵¹ The application for a signboard must be made using prescribed forms available at MBPJ. However, there are a number of requirements which a church needs to fulfil before a license will be granted:

- (i) A copy of the business registration verification (or the *Perakuan Pendaftaran Perniagaan*) in Forms A and D or a Society registration certificate must be submitted together with the application form. An unregistered church will not be able to produce such a document.
- (ii) Apart from any other languages that may appear on the signboard, the Malay language (*Bahasa Melayu* or BM) must be given emphasis. The wording in BM must be larger than the wording in other languages. However, in the case of a registered firm, company or society, only

⁵¹ Undang-undang Kecil Iklan MBPJ 2007.

the registered name may be printed on the signboard. One way of getting around the requirement of using BM wording on the signboard is to register the name of a church in initials or alphabets. For example, KLEFC instead of Kuala Lumpur Evangelical Free Church, or JBGC instead of Jalan Bahru Grace Church.

Most churches are not registered as a body corporate either as a company or society and thus, they cannot apply for a licence to erect a signboard.

Chapter Four

PROPAGATION

Are there any restrictions on Christians evangelising in Malaysia?

What are the laws which control and restrict the propagation of non-Islamic religions? How do these laws affect us?

Is it an offence to distribute Christian literature/videos/films/cassettes/tracts in the Malay language?

Would the implication be different if they are:

(i) distributed to non-Christians outside the church compound or in public places?

(ii) disseminated to Muslims (either wilfully or unintentionally)?

Must we print the phrase "For non-Muslims only" on all Christian literature?

The relevant provisions in the Federal Constitution in relation to the propagation of religions is set out in Article 11. Article 11(1): Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it. Article 11(4): State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control and restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

Commentators have noted that Article 11(1) and (4) flow “logically and necessarily from Islam’s position as the religion of the Federation”,¹ aiming to prevent Muslims from being exposed to “heretical religious doctrines, be they of Islamic or non-Islamic origins and irrespective of whether the propagators are Muslims or non-Muslims”.² On the other hand, such a provision appears to be contrary to the spirit of freedom of religion and may have the effect of undermining and overarching the principle of religious freedom in the long term.³

OVERVIEW

A total of ten states⁴ in Malaysia, at the time of writing of this chapter, have enacted specific legislation (typically called “Enactments”) to control and restrict the propagation of non-Islamic religions among Muslims. These Enactments are named as either the Control and Restriction of the Propagation of Non-Islamic Religions Enactment,⁵ Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment,⁶ or

¹ Kevin YL Tan & Thio Li-Ann, *Tan, Yeo & Lee’s Constitutional Law in Malaysia and Singapore*, 2nd edn., Butterworths, 1997, p. 925.

² Tun Salleh Abas, *Selected Articles and Speeches on Constitution, Law and Judiciary*, Malaysia Law Publisher, 1985, p. 45.

³ AJ Harding, *Law, Government and the Constitution in Malaysia*, Malayan Law Journal, 1996, p. 202.

⁴ This number includes the Perak Enactment which has not yet come into force. However, the Perak Enactment will still be referred to in this chapter for discussion.

⁵ The states include: Terengganu (En.1/80; wef 1/4/1986), Kelantan (En.11/81; wef 1/1/1987), Kedah (En.11/88; wef 1/10/1988), Perak (En.10/88; not yet in force), Pahang (En.5/89; wef 1/3/1990) and Johor (En.12/91; wef 19/7/2007).

⁶ Selangor (En.1/88; wef 7/7/1988).

other analogous titles.⁷ The other states (i.e. Penang, Sabah and Sarawak) have no specific Enactments controlling the propagation of non-Islamic religions. However, there are relevant offences provided in the Syariah criminal legislation.

SPECIFIC LEGISLATION ON THE CONTROL AND RESTRICTION OF PROPAGATION OF THE NON-ISLAMIC RELIGIONS

There are six main restrictions common to all the various states' Enactments, with only slight variations. The Terengganu Enactment is probably the "master copy" for the others (as it was the first Enactment to be passed).

For simplicity, we will look at the Enactments as a whole, highlighting similarities and differences between the different states as they occur. Before we proceed, it will be helpful to look at some definitions.

Section 2 of the state Enactments define the words "Non-Islamic Religions" to include Christianity, Hinduism, Buddhism, Sikhism, Judaism or any variation, version, form or offshoot of the said religions.⁸ It also includes any creed, ideology, philosophy or any body of practices and observances.

The word "publication" includes any book, magazine,

⁷ The other three states have the following Enactments:

(i) Control and Restriction (the Propagation of Non-Islamic Religions Amongst Muslims) (Negeri Sembilan) Enactment 1991 (En.9/91; wef 5/4/2007);

(ii) Control and Restriction of the Propagation of Non-Islamic Religions to Muslim Enactment 1988 (Malacca) (En.1/88; wef 1/1/1990);

(iii) Control and Restriction of the Propagation of Religious Doctrine and Belief which is Contrary to the Religion of Islam Enactment 2002 (Perlis) (En.6/2002; no record is found on the effective date).

⁸ Pahang En.5/89 has included Bahai as a non-Islamic religion, whereas Kedah En.11/88 has included Qadyanism and Bahaism as non-Islamic religions.

pamphlet, leaflet, any other reading material (whether printed, typed, handwritten, or otherwise produced), and any reproduction by any means, and includes sound-recording material, any film or audio recording to be read, visualised or listened to. However, in four state Enactments, the definition of “publication” does not specify film or audio recording.⁹ The definition of the word “publication” is of great significance in the discussion on the application of both sections 7 and 8 of the state Enactments.

Section 3 of the state Enactments sets out the criteria for deciding whether a person is a Muslim. This is important because if the person propagated to is not a Muslim, then there cannot be an offence under the Enactments. The material factor

to determine if a person is a Muslim is that person’s general reputation, notwithstanding his or her faith, beliefs,

The material factor to determine if a person is a Muslim is that person’s general reputation, notwithstanding his or her faith, beliefs, conduct, behaviour, character, act or omission.



conduct, behaviour, character, act or omission. The Enactments do not define the term “general reputation”. The term seems to be very broad, covering all Muslims regardless of whether his or her faith and behaviour are in conformity with the Islamic religion. We cannot, therefore, assume that a person is a non-Muslim just because he eats non-halal food in public, or does not attend the Friday prayers. Even if a person renounces his Islamic faith in public, this may not necessarily disqualify him as a Muslim as the faith of such person is not to be questioned under this section.

⁹ These are the Terengganu, Kelantan, Malacca and Perlis Enactments.

The six main offences regarding the propagation of a non-Islamic faith are dealt with in the paragraphs that follow.

(a) Section 4: Persuading, influencing or inciting a Muslim to change his faith

A person commits an offence under section 4 if he persuades, influences, or incites¹⁰ a Muslim to:

- (i) follow and be a member of or be inclined towards a non-Islamic religion; or
- (ii) forsake or disfavour the Islamic faith.

In the states of Johor, Negeri Sembilan, Pahang, Perak and Kedah, it is also an offence to hold or organise any activity, performance, entertainment or presentation whose content or message is designed to persuade, influence or incite a Muslim to become a follower or member of, or to be inclined towards a non-Islamic religion, or forsake and disfavour the Islamic faith.

The maximum punishment for this offence varies from state to state. In most states, the maximum penalty is a fine of RM10,000 and/or four years' imprisonment. Terengganu provides for the highest maximum fine of RM50,000 and/or six years' imprisonment. For the state of Kelantan, there is mandatory whipping, apart from the maximum fine of RM10,000 and/or maximum imprisonment of five years.¹¹

Section 4(3) provides that it can be a defence if the accused has reason to believe and did believe that the other

¹⁰ Johor En.12/91 adds the word "coerces".

¹¹ Refer to Appendix 1 for each state's maximum penalty.

person was not a Muslim.¹² Nevertheless, it is not a valid defence to argue that a Muslim was not affected by anything that was said or done by the accused.

In *PP v Krishnan a/l Muthu*, the complainant, a Muslim, had known and was in love with the accused, a married man, for seven years. Subsequently, they had a series of quarrels that led to physical fights. The complainant was compelled under threat to renounce Islam and embrace Hinduism. The accused also asked the complainant to make an oath at the Hindu temple and prohibited her from praying as a Muslim. The accused was convicted for two offences under (a) section 325 of the Penal Code (voluntarily causing grievous hurt) in which he was fined RM2,000; and (b) section 4(2) of the Control and Restriction of the Propagation of Non-Islamic Religions (Pahang) Enactment 1989 in which he was fined RM1,500 and imprisoned for a period of 20 days.¹³

(b) Section 5: Subjecting a Muslim under the age of 18 years to influences of a non-Islamic religion

Under section 5, any person who subjects a Muslim who is a minor to receive instruction in a non-Islamic religion, or take part in any ceremony, act of worship, or religious activity other than that of the Islamic faith commits an offence. The word “subjects” means “requires, causes, persuades, influences, incites, encourages or allows”.

¹² This is, however, not a defence available under the Selangor Enactment.

¹³ Termerloh Magistrate’s Court Case No. MA 83-146-2002 (unreported). See Mohamed Azam Mohamed Adil, “Law of Apostacy and Freedom of Religion in Malaysia” 2 AJCL 134, at p. 153.

The Pahang Enactment omits the phrase “under the age of 18 years”, thus enlarging the scope of this section to cover not only minors but adults as well.

The maximum penalties for this offence vary from state to state. In most states, the maximum penalty is a fine of RM10,000 and/or four years’ imprisonment. Terengganu provides for the highest maximum fine of RM50,000 and/or eight years’ imprisonment. For the state of Kelantan, there is mandatory whipping, apart from the maximum fine of RM10,000 and/or maximum imprisonment of five years.¹⁴

It is a defence if, prior the alleged offence, the accused had been informed by the parent or guardian of the minor that the latter is not a Muslim.¹⁵ However it is not a valid defence if the accused was simply not aware of the minor’s religion



...the onus is on the instructor to ask the parent or guardian if the minor is a Muslim or not, a confirmation from the minor himself/herself is not sufficient.

under this provision.¹⁶ Therefore

the onus is on the instructor to ask the parent or guardian if the minor is a Muslim or not, a

confirmation from the minor himself/herself is not sufficient. Section 5 prevents propagation of non-Islamic religions in educational institutions and seems to discourage exposure to non-Islamic religions even for educational purposes.

¹⁴ Refer to Appendix 1 for each state’s maximum penalty.

¹⁵ Such defence is not provided for under the Selangor Enactment.

¹⁶ See subsections (3) and (4).

(c) Section 6: Subjecting a Muslim to any speech on or display of any matter relating to a non-Islamic religion

Under section 6, a person who calls on, arranges or contrives a meeting with or contacts by telephone¹⁷ or by any other means, a Muslim for the purpose of subjecting the Muslim to any speech on or display of any matter concerning a non-Islamic religion commits an offence. Such a person must be a stranger to the Muslim.¹⁸ A “stranger” is defined as someone:

- (i) with whom previously one has not spoken or has spoken only casually, or
- (ii) with whom one has had only business, official or formal dealings, or
- (iii) who cannot be regarded even as one’s acquaintance.¹⁹

The maximum punishment for this offence varies from state to state. In most states, the maximum penalty is a fine of RM5,000 and/or two years’ imprisonment. Terengganu provides for the highest maximum fine of RM20,000 and/or three years’ imprisonment. For the state of Kelantan, there is mandatory whipping, apart from the maximum fine of RM10,000 and/or maximum imprisonment of five years.²⁰

This provision intends to cover the scenario where the telephone is used to preach a non-Islamic religion to a Muslim. It also includes the common practice of door-to-door

¹⁷ Under the Selangor Enactment, “contact by telephone” was replaced with “any other means whatsoever, communicates with”, whilst the Perak, Pahang, Negeri Sembilan and Johor Enactments include “or by any other means” in addition to “contact by telephone”, to widen the scope of this provision.

¹⁸ This is not necessary under the Perak, Pahang, Negeri Sembilan, Johor and Selangor Enactments: the requirement for a person to be a stranger has been omitted.

¹⁹ See section 6(4). Subsection (4) is absent in the Perak, Pahang, Negeri Sembilan, Johor and Selangor Enactments since “stranger” is not a necessary element.

²⁰ Refer to Appendix 1 for each state’s maximum penalty.

evangelism or street evangelism, or other kinds of evangelism to strangers.

(d) Section 7: Sending or delivering publications concerning any non-Islamic religion to a Muslim

Section 7 makes it an offence for a person:

- (i) from within any state to send, deliver or cause to be sent or delivered to a Muslim within or outside the state;
- or (ii) from outside any state, to send or cause to be sent or delivered to a Muslim within the state,

any publication concerning a non-Islamic religion, or any advertising/publicity material for any such publication, which has not been requested for by the receiver. Even if a request has been made by the receiver, the sender will still be committing an offence if the request was prompted by him or by someone acting on his behalf.²¹

It is, however, a defence if the accused, upon due inquiry, had reason to believe and did believe that the receiver of the publication is not a Muslim.²² This will depend on the facts and circumstances of each case.

The maximum punishment for this offence varies from state to state. In most states, the maximum penalty is a fine of RM5,000 and/or two years' imprisonment. Terengganu provides for the highest maximum fine of RM15,000 and/or three years' imprisonment. For the state of Kelantan, there is mandatory whipping, apart from the maximum fine of

²¹ Section 7(5). For Selangor En. 1/88, it is subsection (4). However, Perlis En.6/2002 appears to provide a defence if the receiver had made a request for it.

²² Section 7(4). The words "upon due inquiry" are absent in the Kedah, Kelantan, Malacca and Terengganu Enactments. The Selangor Enactment does not have such a defence.

RM10,000 and/or maximum imprisonment of five years.²³

(e) Section 8: Distributing publications concerning a non-Islamic religion to a Muslim in a public place

This is a pertinent issue faced by Christians who engage in street or door-to-door evangelism. Under section 8, a person commits an offence if he or she distributes or delivers any publication of non-Islamic religion to a Muslim in a public place. The term “public place” is not defined in the Enactments. Presumably, it would include “every public highway, street, road ... public garden or open space, and every theatre ... or *other place of general resort to which admission is obtained by payment or to which the public have access*”.²⁴

Under section 8, a person commits an offence if he or she distributes or delivers any publication of non-Islamic religion to a Muslim in a public place.



Possible defences to such a charge are:²⁵

- (i) the offender had exercised reasonable care to ensure that the publication did not fall into the hands of a person who is a Muslim. As such, some Christian publications have on them the phrase “For non-Muslims only”. Though this phrase is not required legally, it is arguably an exercise of reasonable consideration for the intent of this provision; or
- (ii) the publication was given to a Muslim at his request without any prompting on the part of the accused. In other words, there is no liability if a Muslim makes the

²³ Refer to Appendix 1 for each state's maximum penalty.

²⁴ Section 2 of the Interpretation Acts 1948 and 1967.

²⁵ The Selangor Enactment does not have similar express provision on the defence, but states that it shall not be a defence if the receiver had made a request for it if the request had been prompted by the accused or any person acting for the accused.

first move in requesting for a Christian publication.

The maximum punishment for this offence varies from state to state. In most states, the maximum penalty is a fine of RM5,000 and/or two years' imprisonment. Terengganu provides for the highest maximum fine of RM15,000 and/or three years' imprisonment. For the state of Kelantan, there is mandatory whipping, apart from the maximum fine of RM10,000 and/or maximum imprisonment of five years.²⁶

(f) Section 9: Offence relating to the use of certain words and expressions of Islamic origin

Under section 9, a person commits an offence if he, in any published writing, or in public speech or statement, or in any speech or statement addressed to an organised gathering of persons, or in any speech or statement which is published or broadcast and which at that time of its making he knew or ought reasonably to have known would be published or broadcast, uses any of the words listed in Part I of the Schedule in the state Enactment, or any of its derivatives or variations, to express or describe any fact, belief, idea, concept, act, activity, matter, or thing of or pertaining to any non-Islamic religion.

A non-Muslim commits an offence if he, in the circumstances set out above, uses any of the expressions listed in Part II of the Schedule in the state Enactment, except by way of quotation or reference. For the words which are not to be associated with a non-Islamic religion (listed in Part I of the Schedule in the Enactments) and the expressions which are not

²⁶ Refer to Appendix 1 for each state's maximum penalty.

to be used by a non-Muslim (listed in Part II of the Schedule in the Enactments), please refer to Appendix 2.

It is to be noted that in the Kedah Enactment, the provision only refers to “words” listed in the Schedule.

On the other hand, in the Johor Enactment, there is no Schedule attached to list down the words or expressions of Islamic origin. Section 9 merely refers to the use of “words of Islamic origin” or “expressions of Islamic origin”, which will then depend on the interpretation by the court.

Generally, the scope of prohibited words or expressions varies from state to state.

The maximum punishment for this offence varies from state to state. In most states, the maximum penalty is a fine of RM5,000 and/or two years’ imprisonment. Terengganu provides for the highest maximum fine of RM15,000 and/or three years’ imprisonment. For the state of Kelantan, there is mandatory whipping, apart from the maximum fine of RM10,000 and/or maximum imprisonment of five years.²⁷

OFFENCES UNDER THE SYARIAH CRIMINAL LEGISLATION

Generally, Syariah criminal legislation only applies to Muslims. There are two relevant offences on this subject matter. The first offence is the propagation of non-Islamic doctrines and beliefs among Muslims. This offence is provided in the statute or enactments of the Federal Territories and eight states.

²⁷ Refer to Appendix 1 for each state’s maximum penalty.

Section 5 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides that:

Any person who propagates religious doctrines or beliefs other than the religious doctrines or beliefs of the religion of Islam among persons professing the Islamic faith shall be guilty of an offence and shall on conviction be liable to a fine not exceeding *three thousand* ringgit or to imprisonment for a term not exceeding *two years* or to both.

The above provision is worded similarly (with slight differences on the penalty) in:

- Section 10 of the Crimes (Syariah) Enactment 1992 (Perak)²⁸
- Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996²⁹
- In the Penang Enactment, it specifically highlights that the words “any person” refer to both Muslim and non-Muslim, and provides that the offender in such cases may be prosecuted in a civil court.
- Section 5 of the Syariah Criminal Offences Enactment 1997 (Johor)³⁰
- Section 5 of the Syariah Criminal Offences Ordinance 2001 (Sarawak)³¹
- Section 5 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001³²

²⁸ Perak En.3/92.

²⁹ Penang En.3/96.

³⁰ Johor En.4/1997.

³¹ Sarawak Ordinance Chapter 46.

³² Terengganu En.7/2001. A person who is guilty of an offence under section 5 shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or both.

- Section 6 of the Syariah Criminal Offences Enactment 2013 (Pahang)³³
- Section 5 of the Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014³⁴

Kelantan has a provision³⁵ which is worded differently:

Any person who helps or causes a person who professes the religion of Islam to leave his religion but such act does not amount to *riddah* (which means “apostasy”) is guilty of an offence and shall, on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to both.

The second offence involves “deviationist teaching or practice”, or “teaching or expounding any doctrine or performing any ceremony or act contrary to Islamic law or fatwa”.

The punishment for this offence can be divided into two categories:

(a) Maximum fine of RM5,000 or maximum three years’ imprisonment or six strokes of whipping or any combination thereof

- Section 4 of the Syariah Criminal Offences (Federal Territories) Act 1997
- Section 119 of the Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994.

³³ Pahang En.11/2013. A person who is guilty of an offence under section 6 shall on conviction be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to whipping not exceeding 6 strokes or to any combination thereof.

³⁴ Kedah En.18/2014.

³⁵ Section 124 of the Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994.

Maximum penalty: three years' imprisonment and whipping (Note: no fine, no prescribed maximum stroke of whipping but it should not exceed 6 strokes, which is the maximum that a Syariah Court can impose within its criminal jurisdiction)

- Section 7 of the Syariah Criminal Offences (Selangor) Enactment 1995
- Section 4 of the Syariah Criminal Offences (State of Penang) Enactment 1996
- Section 4 of the Syariah Criminal Offences Enactment 1997 (Johor)
- Section 4 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001
- Section 4 of the Syariah Criminal Offences Ordinance 2001 (Sarawak)
- Section 5 of the Syariah Criminal Offences Enactment 2013 (Pahang)
- Section 4 of the Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014

(b) Maximum fine of RM5,000 or maximum three years' imprisonment or both

- Section 60 of the *Enakmen Kesalahan Syariah (Negeri Melaka) 1991*
- Section 34 of the Criminal Offences in the Syarak Enactment 1991 (Perlis)
- Section 52 Syariah Criminal (Negeri Sembilan) Enactment 1992

- Section 9 of the Crimes (Syariah) Enactment 1992 (Perak)
- Section 52 of the Syariah Criminal Offences Enactment 1995 (Sabah)

CONSTITUTIONAL OR UNCONSTITUTIONAL?

Having said that, are these provisions unconstitutional? Article 11(4) of the Federal Constitution allows the state and federal governments to “control and restrict” the propagation of non-Islamic religion to a Muslim. In a country that guarantees the freedom of religion to *every person*, which includes a Muslim, the words “control and restrict” must not be interpreted as “totally prohibit”. Otherwise, it will defeat the purpose of granting to *every person* the right to freedom of religion and it will surely contradict the spirit of the Federal Constitution.

In a country that guarantees the freedom of religion to every person, which includes a Muslim, the words “control and restrict” must not be interpreted as “totally prohibit”.



The intended purpose of such a provision in the Federal Constitution, as said earlier, was to prevent Muslims from being exposed to heretical religious doctrine, be they of Islamic or non-Islamic origins.³⁶ Nevertheless, this should not mean that a Muslim is to be excluded from knowing or learning about the teachings of other religions, especially if it involves genuine discussion conducted in good faith. Nor can this provision be taken to mean that the Muslim does not have the right and privilege to “believe” in the religion of their

³⁶ Tun Salleh Abas, n 2 above.

choice. To say that the term “every person” does not include Muslims, who constitute the majority in this country, would be an absurdity. Furthermore, Article 18 of the Universal Declaration of Human Rights clearly spells out that “everyone has the right to freedom of thought, conscience and religion. This right includes *freedom to change his religion or belief*, and freedom, either alone or in community with others and in the public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

The Enactments give effect to a *significant if not absolute prohibition* to the propagation of other religions to the Muslim rather than merely *control and restriction*, especially since the unintentional propagation to the Muslim is an offence.³⁷ Furthermore, placing the onus on the non-Muslim to ascertain the religion of the person being spoken to in the course of propagation is also unjustifiable.³⁸ Arguably, the state legislators may have acted beyond their legitimate power in passing such provisions into law.

There are nine states that have made express provisions in the state Enactments that a Syariah High Court has jurisdiction to declare that “a person is no longer a Muslim”, namely Terengganu,³⁹ Malacca,⁴⁰ Johor,⁴¹ Negeri Sembilan,⁴²

³⁷ See section 7(3) which provides that a publication sent to the address of a person shall be deemed to have been sent to that person. This may not be fair as there can be a scenario where a religious publication is sent to the address of premises previously lived in by a non-Muslim but is later occupied by a Muslim for whom the publication was not intended.

³⁸ See sections 5(4) and 6(4) of the state Enactments.

³⁹ Syariah Court (Terengganu) Enactment 2001, section 11(3)(b)(x).

⁴⁰ Administration of the Religion of Islam (State of Malacca) Enactment 2002 (En.7/2002), section 49(3)(b)(x).

⁴¹ Administration of the Religion of Islam (State of Johor) Enactment 2003 (En.16/2003), section 61(3)(b)(x).

⁴² Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 (En.10/2003), section 61(3)(b)(x).

Selangor,⁴³ Perak,⁴⁴ Penang,⁴⁵ Perlis⁴⁶ and Kedah.⁴⁷ Although worded differently, the Kelantan Enactment also provides that a Muslim cannot declare that he is no longer a Muslim until a court has given its approval to that effect.⁴⁸

Save for the Negeri Sembilan Enactment, all these state Enactments do not contain any substantive provisions relating to the procedure of renouncement of Islam. In fact, most states make apostasy or *murtad* (or more specifically, “attempt to apostate”) an offence under the Syariah law.

(a) Federal Territories

There are no provisions or procedures, under Federal Territories’ law, which allow a Muslim to convert out of Islam. Although the act of apostasy⁴⁹ is not technically an offence,,*takfir* is an offence under section 31 of the Syariah Criminal Offences (Federal Territories) Act 1997.⁵⁰

Can a Muslim in Malaysia legally convert out of the Islamic faith? What are the legal procedures/steps for such a conversion? What are the legal implications for apostasy under the state Muslim law enactments?



⁴³ Administration of the Religion of Islam (State of Selangor) Enactment 2003 (En.1/2003), section 61(3)(b)(x).

⁴⁴ Administration of the Religion of Islam (Perak) Enactment 2004 (En.4/2004), section 50(3)(b)(x).

⁴⁵ Administration of the Religion of Islam (State of Penang) Enactment 2004 (En.2/2004), section 61(3)(b)(x).

⁴⁶ Administration of the Religion of Islam Enactment 2006 (Perlis) (En.4/2006), section 61(3)(b)(x).

⁴⁷ Syariah Courts (Kedah Darul Aman) Enactment 2008 (En.8/2008), section 13(3)(b)(x).

⁴⁸ Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 (En.4/1994), section 102(1).

⁴⁹ Apostasy is the renouncing of a religion, whereas *takfir* is declaring a Muslim as having abandoned Islam.

⁵⁰ Act 559.

Here,

- (a) any person who alleges or imputes by words, either spoken or written, or by sign or visible representation, or by any act, activity or conduct, or by organising, promoting or arranging any activity or otherwise in any manner, that any person professing the religion of Islam or person belonging to any group, class or description of persons professing the religion of Islam-is or are *kafir*;⁵¹
- (b) has or have ceased to profess the religion of Islam;
- (c) should not be accepted, or cannot be accepted, as professing the Islamic religion; or
- (d) does not believe, follow, profess or belong to the Islamic religion

shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.”

Under the Syariah Criminal Offences (Federal Territories) Act 1997, only the Syariah Court or a religious authority established under written laws has the power to issue any ruling or decision on any matter relating to the religion of Islam.

(b) Johor

The Syariah Criminal Offences Enactment 1997⁵² does not provide a specific offence on apostasy.

⁵¹ “The word *kafir* refers to ‘one who does not believe in God as the One and Only. If one believes in God in the form of a Trinity, he according to Islam is *mushrik*, a person who performs *shirk*, the adding of a thing to God.” Mokhtar Stork, *A-Z Guide to the Qu’ran* (Marshall Cavendish Editions, 2008), s.v. “Kafir, Mushrick, Munafiq”.

⁵² Johor En.4/97.

(c) Kedah

The Syariah Criminal Offences (Kedah Darul Aman) Enactment 2014⁵³ does not provide a specific offence on apostacy.

However, takfir is an offence under section 29 of this Enactment punishable by imprisonment up to a maximum of three years or a fine of RM5,000 or both.

(d) Kelantan

Section 102 of the Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994⁵⁴ makes apostasy a punishable act and appears to provide for conversion out of Islam by court approval. The relevant provisions are:

- (i) no person who has confessed that he is a Muslim by religion may declare that he is no longer a Muslim until a court has given its approval to that effect;
- (ii) before the court gives its approval, the person shall be presumed to be a Muslim and any matter which is connected with the religion of Islam shall apply to him;
- (iii) if a Muslim person purposely attempts either by word or deed to abandon the religion of Islam, the court may, if so satisfied, order such person to be detained in a *Pusat Bimbingan Islam* for a period not exceeding 36 months for the purpose of educating him and such person shall be asked to repent according to *Hukum Syarak*; and

⁵³ Kedah En.18/2014.

⁵⁴ Kelantan En.4/94.

(iv) the officer in charge shall give a report of progress to the court every month.

The provision suggests that a Muslim is allowed to convert out of Islam with the approval of the Syariah Court. It is, nevertheless, unclear what criteria the Syariah Court will employ in deciding whether or not to pronounce a person as having converted out of Islam. There is no straightforward answer to this.

On the other hand, if a person is found guilty of apostasy under this provision the punishment is severe. A three-year detention period can be imposed on such a proselyte.

Besides, the Enactment also punishes any person who causes a Muslim to leave his religion.⁵⁵ *Takfir* is also a punishable offence under section 24 of the Syariah Criminal Code 1985.⁵⁶ The punishment may extend to three years' imprisonment or a maximum fine of RM5,000 or both.

In addition to the Enactments above, the State Legislative Assembly of Kelantan has also passed the Syariah Criminal Code (II) (1993) 2015 which has yet to come into force.⁵⁷ This Code provides for *hudud* punishments and other criminal offences, punishable in accordance with Islamic criminal law. Under this Code, the offence of apostasy (*irtidad* or *riddah*) carries the death penalty.

Pursuant to section 23 of the Code, apostasy (*irtidad*) is a voluntary or intentional act, without compulsion by anyone or circumstances, of uttering a word or committing an act

⁵⁵ Section 124.

⁵⁶ Kelantan En.2/85.

⁵⁷ See: http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_enactment_Ori_lib.nsf/f831ccddd195843f48256fc600141e84/edd5daa1361eaa7d482580140012da26?OpenDocument (accessed on 5 September 2018).

against or that affects the Islamic religion. Acts or words that affect the *aqidah* (belief) are those which concern or deal with the fundamental aspects of Islamic religion such as matters pertaining to *Rukun Islam*, *Rukun Iman* and matters of *halal* (the allowable or the lawful) or *haram* (the prohibited or the unlawful).

If found guilty of *irtidad*, the offender will first be sentenced to imprisonment within such period deemed suitable by the court for the purposes of repentance. The court shall consider continuance of imprisonment so long as there is hope for the offender's repentance. Note that no maximum period of imprisonment is prescribed, and the offender could potentially be detained for an indefinite period of time. It is not clear what amounts to "hope" for repentance. Further, "hope" for repentance is not measurable and no objective test is prescribed for the determination of a reasonable period. When there is no hope of repentance, the court shall pronounce the *hudud* sentence (that is, death) on the offender and order the forfeiture of his or her property irrespective whether such property was acquired before or after the commission of the offence to be held for the *Baitulmal*⁵⁸. Provided that when the offender repents, whether the repentance is done before the death sentence is pronounced or after such pronouncement but before the sentence is carried out, the offender shall be free from the *hudud* sentence and his or her property shall be returned.

Punishments for other offences prescribed in the Code

⁵⁸ Literally meaning 'the House of Property'. It is the public treasury of a Muslim state... Its source of income includes *zakat*. " Mokhtar Stork, *A-Z Guide to the Qu'ran* (Marshall Cavendish Editions, 2008), s.v. "Baitulmal (Public Treasury)".

are severe; they include death and amputation of limbs. The Code has yet to be enforced due to limitations imposed by federal laws. Presently, under the Syariah Court (Criminal Jurisdiction) Act 1965, the powers of the Syariah courts in meting punishments are limited to imprisonment not exceeding three years, fine not exceeding RM5,000 and whipping not exceeding six strokes. As such, the Syariah Criminal Code (II) (1993) 2015 remains unenforceable by the Syariah Courts in Kelantan.

(e) Malacca

Attempted apostasy is an offence under the Syariah Offences (State of Malacca) Enactment 1991⁵⁹ (or more accurately in the Malay language, *Enakmen Kesalahan Syariah (Negeri Melaka) 1991*). Section 66 of the Enactment empowers the court to detain a Muslim who, by word or deed, admits to converting out of Islam or declares that he or she is no longer a Muslim. As long as the Syariah Court is satisfied that a person has acted in a way which may be interpreted as attempting to convert out of Islam, such person may be detained in the Islamic Counselling Centre (or *Pusat Bimbingan Islam*) for a maximum period of six months for the purpose of “education” and giving the person an opportunity to repent according to *Hukum Syarak*.⁶⁰

Note that the maximum period of detention is six

⁵⁹ Malacca En.6/91.

⁶⁰ The official version of the Enactment is in the Malay language. Thus, the exact purpose is stated in the Malay language as “*dengan tujuan pendidikan dan orang itu diminta bertaubat mengikut Hukum Syarak*”.

months. Further, during the period of remand, the officer of the *Pusat Bimbingan Islam* is required to report the progress of the apostate to the Syariah Court on a weekly basis. Although there seems to be safeguards in the Malacca Enactment to ensure that the Syariah Courts and religious officers do not act beyond their powers, it is not clear what the consequences are if the apostate fails to repent within the maximum remand period of six months. It appears that the apostate's only way to freedom is to repent before the Syariah Court; or if he or she is already in remand at the *Pusat Bimbingan Islam*, the officer at the centre reports the person's repentance to the Syariah Court and the Court orders his or her release.

Also, *takfir* is an offence under section 68 of *Enakmen Kesalahan Syariah* punishable by imprisonment up to a maximum of three years or a fine of RM 5,000 or both. The description of the offence is quite similar to the Syariah Criminal Offences (Federal Territories) Act 1997, section 31.

(f) Negeri Sembilan

The Syariah Criminal (Negeri Sembilan) Enactment 1992,⁶¹ also makes apostasy an offence, but appears to restrict its application solely to the motive behind the apostasy. Section 48 of the Enactment provides that any person who declares himself to be a non-Muslim so as to evade any action that can possibly be taken against him under this or any other Enactment in force "shall be guilty of an offence". The maximum penalties are a 3-year jail term or a fine of RM5,000

⁶¹ Negeri Sembilan En.4/92.

or both. Any Muslim committing apostasy, like it or not, is bound to “avoid himself for any action being taken” under any Syariah law simply because he is no longer a Muslim and can no longer be subjected to Islamic law. Such a provision will, therefore, inevitably cover every occurrence of conversion out of the Islamic faith.

However, under the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, there are provisions relating to the procedure for leaving Islam. In fact, Negeri Sembilan is the only state with a legally prescribed procedure for renouncing Islam. Section 119(1) of the Enactment provides that a Muslim shall not renounce Islam until and unless he has obtained a declaration to that effect from the Syariah High Court. The provision then goes on to spell out the procedure for obtaining such a declaration from the Syariah High Court.

The person who intends to renounce Islam must make an *ex parte* application for a declaration to that effect to the Syariah High Court Judge in open court. The pre-requisites for making such an application are as follows:

- (a) if the applicant is born a Muslim, was born and domiciles in Negeri Sembilan; or
- (b) if the applicant is a *muallaf*⁶², he has converted to Islam in Negeri Sembilan and registered as a Muslim in accordance with section 111 of this Enactment, and domiciles in Negeri Sembilan.

The application must specify the reasons or grounds on which the applicant intends to renounce Islam and must be

⁶² a new convert; a person who has officially converted to Islam” Kamus Dwibahasa Oxford Fajar, fifth edition.

supported by an affidavit specifying all facts supporting the grounds for the application.

After hearing the application, the Syariah High Court judge will then:

- (a) advise the applicant to repent, and if the judge is satisfied that the applicant has repented in accordance with *Hukum Syarak*, the judge shall record the repentance of the applicant; or
- (b) if the applicant refuses to repent, the judge shall order an adjournment of the case for 90 days during which the applicant shall be required to undergo counselling for the purpose of advising the applicant to return to Islam.

The Majlis Agama Negeri Sembilan will appoint a counsellor, *Pegawai Perunding Cara Aqidah*, who will be responsible for counselling the applicant. If the applicant repents within the counselling period of 90 days, the counsellor shall report this to the Syariah Court so that his or her repentance can be recorded by the Court. Should the applicant fail to repent within the 90-day period, the applicant shall be brought before the Syariah High Court again. The counsellor responsible shall prepare a report on the applicant. If the Court is of the opinion that there is still hope that the applicant may repent, the Court may again adjourn the hearing and order the applicant to undergo a further counselling session for a period not exceeding a year. The Syariah Court may strike out the application if the applicant fails or refuses to attend the counselling session. If the applicant repents, the officer responsible for him or her shall report to the Syariah High Court. The applicant will be

brought to the Court and has his or her repentance recorded by the Court. On the contrary, if the applicant still refuses to repent, the Syariah Court may then decide to declare that the applicant has renounced Islam. Prior to the declaration, the Syariah Court must make orders relating to the dissolution of his or her marriage, the division of matrimonial property, the rights of *perwalian* (marriage guardianship), right to property and custody rights.

Notwithstanding a legal mechanism to make conversion out of Islam possible, it is still the intent of lawmakers to retain Muslims in Islam; hence the counselling or rehabilitation period. Further, success in obtaining a declaration under section 119 also depends on the grounds for renouncing Islam. The Syariah High Court must be satisfied that there is good reason for a person to renounce Islam.

In a case study conducted in 2014 at the Negeri Sembilan Mufti's Department,⁶³ it was found that there were 219 applications to leave Islam that were submitted to the Department from 1998 to 2013, out of which 209 were submitted by non-Malays, i.e. converts to Islam (*muallaf*) or children of converts to Islam. Of the total number of applications, 72 cases had been decided at the time of the case study, out of which 37 obtained approval for leaving Islam.

Applications to the Syariah Court have three possible outcomes: (i) success (in obtaining a declaration to leave Islam); (ii) rejection of the application; and (iii) successful

⁶³ Mohd Al Adib Samuri and Muzammil Quraishi, "Negotiating Apostasy: Application to Leave Islam in Malaysia", in *Muslim-Christian Relation Journal*, Vol. 25(4), 2014, pp. 507–523, available at https://www.researchgate.net/publication/271626600_Negotiating_Apostasy_Applying_to_Leave_Islam_in_Malaysia (accessed on 8 October 2016).

rehabilitation of the applicant. From the case study, it was observed that applicants who were successful were usually able to show with evidence and for good reason that they had never truly lived as Muslims nor practised Islam even though they had been registered as Muslims. Their registration, appears to be a mere technicality as their parents converted to Islam at their birth, or they converted to Islam merely for the purpose of marrying a Muslim (and subsequently divorced), or they were born to Muslim converts but brought up by foster parents who were non-Muslims. Should this be a precedent for future cases, freedom for a Malay-born Muslim to leave Islam remains limited or highly improbable.

(g) Pahang

Under section 8 of the Syariah Criminal Offence Enactment 2013 (Pahang),⁶⁴ a person who claims to be a non-Muslim to avoid action being taken against him under this Enactment or any written law is guilty of an offence, and shall, on conviction, be liable to a fine not exceeding RM5,000 or to imprisonment not exceeding three years or to whipping not exceeding six strokes or any combination thereof. This provision limits its application to the motive behind declaring oneself as a non-Muslim. There is no provision for legally converting out of Islam.

⁶⁴ Pahang En.11/2013.

(h) Penang

There is no provision in the Syariah Criminal Offences (State of Penang) Enactment⁶⁵ making apostasy an offence. Neither is there any provision outlining the procedure for converting out of the Islamic faith in the Administration of the Religion of Islam (State of Penang) Enactment 2004.

Takfir is an offence under section 31 of the Syariah Criminal Offences (State of Penang) Enactment.

(i) Perak

Sections 12 and 13 of the Crimes (Syariah) Enactment⁶⁶ make apostasy and word or action importing apostasy a punishable offence. Section 12 seems to limit its application to the motive behind the act of apostasy. It provides that any person who declares himself to be a non-Muslim for the purpose of avoiding any action being taken against him under this Enactment or any other law in force shall be guilty of an offence. Such person shall, on conviction, be liable to a fine not exceeding RM5,000 or to imprisonment for a term not exceeding three years or to both. Section 13 covers other cases of apostasy, whereby any Muslim who wilfully, either by act or words or in any manner, claims to denounce Islam or declares himself to be a non-Muslims is guilty of an offence of deriding the religion of Islam. The punishment for denouncing Islam is a maximum fine of RM3,000 or two years' imprisonment or both.

⁶⁵ Penang En.3/96.

⁶⁶ Perak En.3/92.

As is the case in other states, *takfir* is also an offence in Perak, as provided under section 28 of this Enactment.

(j) Perlis

Section 23 of the Criminal Offences in the Syarak Enactment 1991⁶⁷ provides that *takfir* is a criminal offence. However, the Enactment does not mention apostasy and therefore has no stipulation on the procedure of converting out of Islamic faith in the Administration of the Religion of Islam Enactment 2006.

(k) Selangor

Under section 5 of the Syariah Criminal Offences (Selangor) Enactment 1995,⁶⁸ if a person declares himself to be a non-Muslim for the purposes of avoiding any action from being taken against him under this Enactment or any other Enactment is guilty of an offence, and shall be liable to a fine not exceeding RM5,000 or to imprisonment not exceeding three years or to both. This provision limits its application to the motive behind declaring oneself as a non-Muslim. There is no provision for legally converting out of Islam.

Section 6 of the Enactment makes *takfir* an offence. The punishment for apostasy is not mentioned, however. There is also no stipulation regarding the procedures for conversion out of the Islamic faith in the Administration of the Religion of

⁶⁷ Perlis En.4/93.

⁶⁸ Selangor En.9/95.

Islam (State of Selangor) Enactment 2003.

(l) Sabah

Attempted *murtad* (apostasy) is an offence under section 63 of the Syariah Criminal Offences (Sabah) Enactment 1995.⁶⁹ When a Muslim person, by word or conduct, intentionally claims to cease to profess the religion of Islam or declares himself to be non-Muslim, and if the Syariah Court is satisfied that such person is attempting to change his belief in Islam, the Court shall order his detention. He shall be liable to detention at the Islamic Rehabilitation Centre for a term not exceeding 36 months for the purposes of rehabilitating him in order to secure his repentance in accordance with *Hukum Syarak*. Once the offender repents, the Court shall order his release after confirmation of his repentance. When in detention, the officer-in-charge of the offender must furnish the Court with a weekly report. There are no other punishments prescribed for attempted apostasy. However, it is not stipulated how the offender's case will be dealt with if he refuses to repent within the duration of rehabilitation. Sabah law also does not provide a legal mechanism to renounce Islam nor convert out of it.

Section 64 of the Syariah Criminal Offences (Sabah) Enactment 1995 provides that *takfir* is a punishable offence.

(m) Sarawak

Section 28 of the Syariah Criminal Offences Ordinance 2001 provides that *takfir* is a punishable offence. There is no

⁶⁹ Sabah En.3/95.

mention of apostasy or converting out of the Islamic faith.

(n) Terengganu

Under section 7 of the Syariah Criminal Offences (Takzir) (Terengganu) Enactment 2001,⁷⁰ any Muslim who declares himself to be a non-Muslim so as to avoid any action from being taken against him under this Enactment or any other law in force, shall be guilty of an offence, and shall on conviction, be liable to a fine not exceeding RM5,000 or to imprisonment not exceeding three years or both. This provision limits its application to the motive behind declaring oneself as a non-Muslim.

Interestingly, there is another Enactment called the Syariah Criminal Offence (Hudud and Qisas) Terengganu Enactment 1423H/2002M⁷¹ (“the Terengganu Hudud Enactment”) which carries the death penalty for *irtidad* (apostasy) in Terengganu. Pursuant to section 25 of the Terengganu Hudud Enactment, *irtidad* is any act done or any word uttered by a Muslim being an act or word which according to *Hukum Syarak* affects or which is against the belief (*aqidah*) in Islamic religion, provided that such act or word is done or uttered intentionally, voluntarily and knowingly without compulsion by anyone or by circumstances. Acts or words that affect the belief (*aqidah*) are those which concern or deal with the fundamental aspects of Islamic religion such as matters pertaining to *Rukun Islam*, *Rukun Iman* and other matters generally known to a Muslim.

⁷⁰ Terengganu En.7/2001.

⁷¹ Terengganu En.4/2002.

Section 26 of the Terengganu Hudud Enactment provides for the punishment for *irtidad*. Unlike Kelantan, in this Terengganu Hudud Enactment, the period of repentance is three days. Upon failure to repent within three days of committing *irtidad*, the Syariah Court shall pronounce the death sentence on the offender and order the forfeiture of his or her property, irrespective of whether such property was acquired before or after the commission of the offence and to be held by the *Baitulmal*. Similar to Kelantan, there is a proviso for offenders who repent whether before or after the death sentence is passed. If the offender repents before the death sentence is carried out even though the sentence has been passed, the offender shall be free from the death sentence and his or her property shall be returned. Nonetheless, the offender shall still be sentenced to imprisonment for a term not exceeding five years (while in Kelantan, there is no further penalty imposed on an offender who has repented).

It is to be noted that section 59(2) of the Terengganu Hudud Enactment provides that this Enactment does not preclude a non-Muslim from electing it to apply to him or her in respect of any offence committed by him within the state of Terengganu. If such non-Muslim does so, the provisions of the Terengganu Hudud Enactment shall apply to him or her. This provision is obviously unconstitutional as it seeks to extend the application of the Terengganu Hudud Enactment to non-Muslims. This clearly contradicts List II (State List) of the Ninth Schedule to the Federal Constitution which expressly limits the jurisdiction of the state legislature on, among other things,

“creation and punishment of offences by persons professing the religion of Islam against precepts of that religion” and that the Syariah Courts “shall have jurisdiction only over persons professing the religion of Islam”.

Although the Terengganu Hudud Enactment was said to come into operation on 27 October 2003, it is unenforceable due to the limitations under the Syariah Courts (Criminal Jurisdiction) Act 1965 (discussed above under Section (d) Kelantan).

Summary

In summary, eight states in Malaysia have laws that penalise apostasy or attempted apostasy. They are Kelantan, Malacca, Negeri Sembilan, Pahang, Perak, Selangor, Sabah and Terengganu. Here is a comparison of the penalties in each state.

State	Penalty
Kelantan	• Detention at Rehabilitation Centre for up to 36 months • In the case of failure to repent, death sentence and forfeiture of property. No penalty in the case of repentance (this law has not yet come into force)
Malacca	• Detention at Rehabilitation Centre for up to six months
Negeri Sembilan	• Maximum fine of RM5,000 or maximum three years' imprisonment or both

Pahang	• Maximum fine of RM5,000 or maximum three years' imprisonment or both; and maximum whipping of six strokes or any combination thereof
Perak	• Declaring to be non-Muslim: maximum fine of RM5,000 or maximum three years' imprisonment or both • Words or action importing apostasy: maximum fine of RM3,000 or two years' imprisonment or both
Selangor	• Maximum fine of RM5,000 or maximum three years' imprisonment or both
Sabah	• Detention at Rehabilitation Centre for up to 36 months
Terengganu	• Maximum fine of RM5,000 or maximum three years' imprisonment or both • Repentance in three days, or death sentence and forfeiture of property. Notwithstanding repentance, imprisonment up to five years (the Terengganu Hudud Enactment has come into effect but it can be challenged as the sentences provided clearly exceed the jurisdiction of the Syariah Court)

CASES OF CONVERSION FROM 2000s

When a Muslim seeks to convert out of Islam and wishes to be legally recognised and registered as an adherent of another religion, it is often contentious. This largely stems from an Islamic understanding that apostasy (the renunciation of Islam) is a grave sin against Allah that befits the death sentence. To convert out of Islam, one must obtain a declaration to be

released from Islam from the Syariah Court before the National Registration Department is willing to record a change in the religious status of the individual. The Syariah Court, however, is highly reluctant in issuing declarations that a Muslim has renounced Islam and may leave the religion. Further, it can be seen from the apostasy laws above that anyone who attempts to leave Islam will be subject to detention for the purpose of “rehabilitation”. Applicants are thus faced with undue hardship, potential dangers of criminal punishments, and a very slim chance of success. In the past, those who failed in their applications concerning conversion in the Syariah legal system had attempted to seek remedy from the civil courts. The civil court, however, had ruled that it has no jurisdiction over those who wish to leave Islam, and that the determination of conversion out of Islam falls within the exclusive jurisdiction of the Syariah Court.⁷² This places many converts in a deadlock, without further remedy.

A recent decision of the Federal Court has provided some leeway in the area of jurisdiction of the civil court. In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*⁷³, Indira Gandhi, the wife was married to her husband under the civil law and they had three children from the marriage. Her husband subsequently converted to Islam and obtained a custody order for the children from the

⁷² This has been the stance of the civil courts in Malaysia pursuant to Articles 74(2) and 121(1A) of the Federal Constitution. See cases such as *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (Federal Court); *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2007] 4 MLJ 585 (Federal Court); *Kamariah Ali & Anor v Majlis Agama Islam dan Adat Melayu Terengganu & Ors* [2012] 2 CLJ 56 (Court of Appeal); *Hj. Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah & Another Appeal* [2014] 3 MLJ 757 (Federal Court); and *Syarifah Noorafiyza Wan Hosen v Director of Jabatan Agama Islam Sarawak & Ors* [2015] 3 CLJ 399 (Kuching High Court).

⁷³ [2018] 1 MLJ 545.

Syariah High Court. The wife later received certificates of conversion showing that the Registrar of Muallaf had registered the children as Muslims. The wife then filed an application for judicial review challenging the decision of the registrar on the grounds that the registrar had acted in breach of the procedure set out in ss 96 and 106 of the Administration of the Religion of Islam (Perak) Enactment 2004 ('the Perak Enactment') and that the certificates issues were void.

After prolonged litigation stretching up to nine years, the Federal Court came to the following decision:

(1) the High Court (i.e. the civil court) has an inherent jurisdiction to exercise judicial review and this power is vested exclusively in the civil courts. As such, Article 121(1A) of the Federal Constitution does not oust the jurisdiction of the civil court and it may thus question the legality and constitutionality of the administrative powers of the Syariah courts. Indeed, the court held:

"A good starting point would be to take the position that art 121(1A) must not be interpreted in isolation, but read together with other provisions such as art 121(1) and against the backdrop of the principles underpinning the Constitution. As has been illustrated, civil and syariah courts are distinct in nature and status: the former are established under the Federal Constitution and vested with inherent judicial powers; whereas the latter are creatures of state legislation under the State List, and akin to inferior tribunals."

(2) the issuance of a certificate of conversion by the state body could be questioned on administrative grounds; and

(3) both parents must consent to the conversion of an child from a civil marriage.

Nevertheless, the reality is that the civil courts will not exercise their right of judicial review readily, as we shall see.

Even so, there are different categories or types of conversion and in some cases, the Syariah Court will allow an application to convert. Applications for conversions broadly fall into a few categories.

The first and perhaps largest category are persons erroneously registered as Muslims in their MyKad due to naming conventions. This mostly applies to *bumiputeras* of Sabah and Sarawak who are given Malay-sounding names.⁷⁴ If it can be proven that the applicant is not in fact a Muslim, the change in religious status from Muslim to another religion is possible.

A second common category of applicants is persons who were once non-Muslims but who converted to Islam in the course of their lives, and now wish to revert to being non-Muslim. This include persons who converted to Islam for marriage but subsequently divorced. As an example, the case of Siti Fatimah Tan Abdullah (originally Tan Ean Huang), who had converted to Islam in 1998 to marry a Muslim. The marriage subsequently failed. Tan was able to show that she had

⁷⁴ For further reading, see Pg Ismail Pg Musa and Siti Zubaidah Ismail, "Permohonan Keluar Islam: Kajian Kes di Mahkamah Tinggi Syariah Negeri Sabah" (2015) *Jurnal Syariah* Jil 23 Bil 1 53–78, available at https://umexpert.um.edu.my/file/publication/00002828_113351.pdf (accessed on 27 May 2017).

never practised Islam, she continued to live as a non-Muslim after her marriage and that she had adopted Islam only to have her marriage legally registered. In 2009, the Syariah Court of Appeal in Penang allowed Tan to leave Islam.⁷⁵ This was a rare judgment, but an important one as it set the precedent of freeing a non-practising Muslim from the religion of Islam.

Another category concerns those who are registered as Muslims but who are non-practising Muslims. Applicants in this category may be children whose initially-non-Muslim parents converted to Islam while they were minors, and who unilaterally converted them. The children of such Muslim converts may continue to practise their non-Muslim way of life, especially if they were being brought up by their non-Muslim extended family. An example is Revathi Masoosai. She was born Siti Fatimah to Muslim convert parents but was brought up by her Hindu grandmother. She lived all her life as a Hindu and married an Indian man who professes Hinduism. Their marriage was solemnised according to the Hindu rites and subsequently they had a daughter. As she was still registered as a Muslim, their marriage which was in accordance with Hindu rites could not be registered as a civil marriage. She sought the conversion of her religious status in order to legally register their marriage. The Syariah High Court denied her application in 2007.⁷⁶ Revathi was later detained at an Islamic rehabilitation centre for six months. Subsequently, the Islamic authorities had taken away Revathi's 15-month old daughter

⁷⁵ *Majlis Agama Islam Pulau Pinang v Siti Fatimah Tan binti Abdullah* (2009) JH 27 Bhg II 185 (Syariah Court of Appeal, Penang).

⁷⁶ *Siti Fatimah bte Abd Karim v Majlis Agama Islam Melaka* [2007] 2 ShLR 136 (Malacca Syariah High Court).

and handed her to the child's Muslim grandparents.

However, in 2016 Roneey anak Rebit of Sarawak was successful in his conversion from Islam to Christianity. Roneey is a Bidayuh born to Christian parents who converted to Islam when he was a child. He was unilaterally converted by his parents, but when he attained the age of majority, Roneey reverted to his original faith and lived as a Christian. At age 41, upon his application, the High Court of Sarawak granted an order to remove the word "Islam" from his identity card.⁷⁷ In another publicised case only five months after Roneey's case, however, three Muslims who were originally non-Muslims, namely Jenny Peter @ Nur Muzdhalifah Abdullah, Tiong Choo Ting @ Mohd Syafiq Abdullah and Salina Jau Abdullah lost their applications to convert out of Islam to return to their original faiths. In February of 2018, the Federal Court held that the civil courts had no jurisdiction to hear apostasy cases. It can be seen from these cases that applications for conversion may have an unpredictable outcome at this time.

Finally, the most contentious category of conversion is by persons who were practising Muslims but now wish to renounce Islam. Malay Muslims who wish to convert out of Islam would fall in this ⁷⁸category. Applications in the categories mentioned above may be allowed on the grounds that the applicant was not a true Muslim in the first place, i.e. on grounds of technicality. In this category, however, the applicant is originally a Muslim but now wishes to renounce the faith. In the Syariah Courts'

⁷⁷ Azmi bin Mohamad Azam @ Roneey v Director of Jabatan Agama Islam Sarawak & Ors, [2017] 9 MLJ 541

⁷⁸ <https://www.nst.com.my/news/crime-courts/2018/02/339414/updated-federal-court-rejects-appeal-sarawakian-apostates>

mind, this is clearly apostasy.

In *Daud bin Mamat*,⁷⁹ it was held that freedom to “profess” a religion under Article 11(1) does not include the right to leave Islam as leaving Islam is exiting from a religion and it cannot be equated with the right to “profess” a religion. The most publicised and well-known case of this category is that of Lina Joy. Lina Joy, a Malay by ethnicity, was born Azlina bte Jailani. She was raised a Malay but later embraced Christianity and was baptised. Lina made applications to the National Registration Department (NRD) for her name to be changed and for the word “Islam” to be removed from her identity card. The NRD rejected her application to remove the word “Islam”. In 2000, Lina Joy sought remedies from the High Court but the High Court dismissed her application on the grounds that even though Article 11(1) guarantees freedom to profess and practice a religion, it must be read together with other sub-clauses that pertained to religion. Further to Article 11(1), Article 11(3) provides that every religious group had the right to manage its own affairs. By virtue of Article 11(3), the practice of Islam as well as the renunciation of Islam is within the jurisdiction of the relevant Islamic authorities. The Court ruled that a convert from Islam may not hide behind Article 11(1) without first settling his renunciation of Islam with the relevant religious authority. Furthermore, the Federal Constitution in Article 160(2) defines a “Malay” as one who “*professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom ...*”. The implication was that Lina, being Malay, is by definition a Muslim and may

⁷⁹ [2001] 2 MLJ 390 (Kota Bharu High Court).

not change her religious status. A Malay remains in the Islamic faith until his/her death and cannot renounce the Islamic religion. On final appeal at the apex court, the Federal Court confirmed that the Syariah Court (not the civil courts) would be the proper forum to determine the religious status of Lina Joy.⁸⁰

In many other cases before and after *Lina Joy*, the civil courts have ruled that the determination of whether a person is Muslim or not falls within the exclusive jurisdiction of the Syariah Court.⁸¹ Article 121(1A) of the Federal Constitution provides that civil courts shall have no jurisdiction in matters that are under the Syariah courts' jurisdiction. The civil courts hold on to the principle that, to convert to Islam one has to follow the practice determined by Islamic law, and likewise, to convert out of Islam one must do so in accordance with practice governed by Islamic law. In Malaysia, the administration of and adjudication under Islamic law have been entrusted to religious authorities and the Syariah courts, respectively. It is for these reasons that civil courts have excluded themselves from determining the religious status of Muslim converts. The trend of the case law is Muslims who wish to leave Islam will need to bring their applications before the Syariah Court. At

⁸⁰ For the court judgments, see *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119 (Kuala Lumpur High Court), *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193 (Court of Appeal), *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan Lain-lain* [2007] 4 MLJ 585 (Federal Court).

⁸¹ For example, see *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 (Kuala Lumpur High Court); *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (Federal Court); *Priyathaseney & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 MLJ 302 (Ipoh High Court); *Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors* [2004] 5 MLJ 40 (Muar High Court); *James v Government of Malaysia* [2012] 1 MLJ 721 (Kuala Lumpur High Court); *Hj. Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah & Another Appeal* [2014] 3 MLJ 757 (Federal Court); and *Syarifah Nooraffyyza Wan Hosen v Director of Jabatan Agama Islam Sarawak & Ors* [2015] 3 CLJ 399 (Kuching High Court).

the Syariah Court, the act of leaving Islam amounts to apostasy or *irtidad* and such an act will be adjudicated in accordance with Islamic principles and laws.

What is the ambit of Freedom of Religion as entrenched under the Federal Constitution?

Article 11(1) of the Federal Constitution provides that “every person has the right to profess and practise his religion, and subject to clause (4), to propagate it”. In the earlier part of this chapter, we examined the restrictions on propagation. In this section, we will concentrate on the subject of religious freedom as entrenched in the Federal Constitution.

Freedom of religion is basic to the nature of man and is deeply rooted in our daily lives. In fact, “the movement for ‘freedom of belief’ precedes every other in the history of the struggle for human rights and fundamental freedom”.⁸²

Our country has been known for tolerance, respect, cohesion and mutual understanding among its people. However, this does not automatically translate into religious pluralism. Much of the debate hinges upon the interpretation of Article 3 of the Federal Constitution, which provides as follows:

Article 3(1): *Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.*

What does the Federal Constitution mean in saying that “Islam is the religion of the Federation”? To understand what

⁸² Paul Seighart, *International Human Rights Law*, Clarendon Press 1983, p. 324.

it means, we need to look into the legislative history behind the provision.

Initially, the Reid Commission which drafted the Malayan Federal Constitution did not provide the confessional provision that Islam is the official religion of the Federation as the inclusion of such clause was objected to by the Malay Rulers. Furthermore, it would contradict with the secular nature intended for the state.⁸³

However, Article 3 of the Federal Constitution was subsequently enacted in response to a memorandum submitted by the Alliance Party to the Reid Commission. The relevant extract of the memorandum reads as follows:

... the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising the other religions and shall not imply that the state is not a secular state.

The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising the other religions and shall not imply that the state is not a secular state.



In its Report, the Reid Commission responded to the question of state religion as follows:

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

⁸³ Joseph M. Fernando, "The Position of Islam in the Constitution of Malaysia" (2006) 37(2) *Journal of Southeast Asian Studies* 249, at pp. 252–253.

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 practising their own religions and shall not imply that 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 and that is a matter of specific instruction in which I myself have played very little part.” Mr Justice Abdul Hamid is of the opinion that a declaration should be inserted in the Constitution as suggested by the Alliance and his views are set out in his note appended to this Report. (Paragraph 169 of page 73 of the Report)

The above extract will not be complete without seeing Mr Justice Abdul Hamid’s note on Islam as a state religion in paragraphs 11 and 12 at page 100 of the Reid Commission

Report:⁸⁴

It has been recommended by the Alliance that the Constitution should contain a provision declaring Islam to be the religion of the State. It was also recommended that it should be made clear in that provision that a declaration to the above effect will not impose any disability on non-Muslim citizens in professing, propagating and practising their religions, and will not prevent the State from being a secular State. As on this matter the recommendation of the Alliance was unanimous their recommendation should be accepted and a provision to the following effect should be inserted in the Constitution either after Article 2 in Part I or at the beginning of Part XIII.

Islam shall be the religion of the State of Malaya, but nothing in this Article shall prevent any citizen professing any religion other than Islam to profess, practise and propagate that religion, nor shall any citizen be under any disability by reason of his being not a Muslim.

A provision like one suggested above is innocuous. Not less than fifteen countries of the world have a provision of this type entrenched in their Constitutions. Among the Christian countries, which have such a provision in their Constitutions are, Ireland (Article 6), Norway (Article 1), Denmark (Article 3), Spain (Article 6), Argentina

⁸⁴ This dissenting note was written after Justice Abdul Hamid changed his mind on whether a confessional provision should be included in the draft constitution.

(Article 2), Bolivia (Article 3), Panama (Article 36) and Paraguay (Article 3). Among the Muslim countries are Afghanistan (Article 1), Iran (Article 1), Iraq (Article 13), Jordan (Article 2), Saudi Arabia (Article 7) and Syria (Article 3). Thailand is an instance in which Buddhism has been enjoined to be the religion of the King who 17

It would mean that while Article 3 of the Federal Constitution provides that Islam is the religion of the Federation, the provision is only meant for the official purpose of rituals and ceremonies. This view was taken by the court in the case of *Che Omar bin Che Soh v Public Prosecutor*,⁸⁵ where the then Supreme Court, having taken cognizance that Islam is a complete way of life covering all fields of human activity, held that Article 3 of the Federal Constitution was never intended to extend the application of Shariah to the sphere of public law.

The case of *Teoh Eng Huat v Kadhi, Pasir Mas & Anor*⁸⁶ highlighted the issue of conversion and the problem in maintaining religious harmony in our multi-racial society. Although the Supreme Court had to some extent affirmed the individual's right of religious freedom, that right is accorded only to adults. A minor's religious path will continue to be determined by his or her parents or guardian. While one may applaud the actual decision of *Teoh Eng Huat*, questions remain as to whether the issue of conversion has been resolved entirely, and whether this case has shed any light on the role of Islam in Malaysian public law.

The subsequent case law, however, has given the debate

⁸⁵ [1988] 2 MLJ 55 (Supreme Court).

⁸⁶ [1990] 2 MLJ 300 (Supreme Court).

on the role of Islam in Malaysia a whole new breadth. In the case of *Meor Atiquilahman bin Ishak v Fatimah binti Sihi*,⁸⁷ the High Court declared that Islam is the primary religion which takes precedence over other religions in this country and the rules which prohibited the wearing of *serban* (a kind of turban) in schools were contrary to Articles 3 and 11 of the Federal Constitution. Again, in the case of *Lina Joy v Majlis Agama Islam WP & Kerajaan Malaysia*,⁸⁸ the High Court judge was of the view that “it is the general tenor of the Constitution that Islam is given a special position and status ... Article 3(1) has a far wider and meaningful purpose than a mere fixation of the official religion”.⁸⁹ Reading Article 3 together with Article 11(4), he found that there was intention in the Constitution to protect the religion of Islam from being exposed to other religious influences. Likewise, in *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur*⁹⁰ the Court of Appeal held that the element of “other religions may be practised in peace and harmony” in Article 3(1) should be construed as subjecting “the welfare of an individual or group ... to that of the community”. This is worrying as the non-Muslims were said to bear the responsibility of ensuring their practice of religion does not affect the peace and harmony of the country, rather than the government and the majority

⁸⁷ [2000] 5 MLJ 375 (Seremban High Court). Nevertheless, this decision had been reversed by the Court of Appeal which held that wearing of a *serban* did not form an integral part of the religion and Article 11(1) was not infringed: *Fatimah bte Sihi & Ors v Meor Atiquilahman bin Ishak & Ors* [2005] 2 MLJ 25 (Court of Appeal). The Court of Appeal's decision was later affirmed by the Federal Court which found that wearing a turban (*serban*) is of little significance in Islam. The school regulations on school uniform were not unconstitutional: *Meor Atiquilahman bin Ishak v Fatimah bte Sihi & Ors* [2006] 4 MLJ 605 (Federal Court).

⁸⁸ [2004] 2 MLJ 119.

⁸⁹ *Ibid*, at paras [12] and [18].

⁹⁰ [2013] 6 MLJ 468 (Court of Appeal).

Muslims ensuring that the religious minorities may practise their religion in peace and harmony.⁹¹

These recent judicial decisions appear to be contrary to earlier precedents and the intention of the original framers of the Federal Constitution. They seem to have failed to take into account founding documents as aids to the interpretation of the scope of Article 3. They also undermine the secular order that undergirds the Federal

The priority of secular (non-Islamic) norms has been reversed over Islamic ones. Islam has been elevated to a position above all other religions and it has been accorded protection and privileges at the expense of Malaysian citizens' fundamental right to religious freedom.



Constitution. The founding fathers' consensus for a secular democratic state has been downplayed. The priority of secular (non-Islamic) norms has been reversed over Islamic ones.⁹² Islam has been elevated to a position above all other religions and it has been accorded protection and privileges at the expense of Malaysian citizens' fundamental right to religious freedom.

⁹¹ Jaclyn L. Neo, "Competing Imperatives: Conflicts and Convergences in State and Islam in Pluralist Malaysia" (2015) 4(1) *Oxford Journal of Law and Religion* 1, at p. 24.

⁹² Jaclyn L. Neo, *ibid*, at p. 19.

Chapter Five

LANGUAGE

Are there any legal restrictions on the use of Bahasa Melayu in churches or in Christian publications?

What is or should be our legal contention/principle?

As the Federal Constitution provides that the Malay language (or *Bahasa Melayu*) is our national language,¹ there is no prohibition against its usage in any part of this land. This is reinforced in the National Language Act 1963/67.

Nevertheless, since 1980, nine states in Peninsular Malaysia² have passed laws restricting the use of various Malay terms and expressions which are supposed to be reserved solely for the use of Muslims and cannot be associated with non-Islamic religions. Except for Kedah and Johor, the laws containing this prohibition have similar wording across the states as they are based on the Terengganu Control and Restriction of Non-Islamic Religions Enactment.

Section 9(1) of the state Enactments provide that “a person commits an offence if he:

(i) in any published writing; or

¹ Article 152 of the Federal Constitution.

² Although the Perak Enactment has not yet come into force, it will still be referred to in this chapter for discussion.

- (ii) in any public speech or statement; or
- (iii) in any speech or statement addressed to any gathering³ of persons; or
- (iv) in any speech or statement which is published or broadcast;

and which at the time of its making he knew or ought reasonably to have known would be published or broadcast, uses any of the words listed in Part I of the Schedule or any of its derivatives or variations, to express or describe any fact, belief, idea, concept, act, activity, matter or thing pertaining to any non-Islamic religion.”⁴

Section 9(2) of the state Enactments stipulates that “a person who is not a Muslim commits an offence if he, in the circumstances laid down in subsection (1), uses any of the expressions listed in Part II of the Schedule,⁵ except by way of quotation or reference.”⁶

Section 9(4) of the state Enactments allows either the Ruler in Council⁷ or the State Authority⁸ to amend the

³ The Terengganu, Kelantan, Malacca, Perlis and Kedah Enactments use the term “organised gathering” instead of just “gathering”, thus seemingly sanctioning the use of the terms in an informal gathering.

⁴ Section 9(1) of each state’s respective Control and Restriction of Non-Islamic Religion Enactment.

⁵ Kedah does not have a Part II of the Schedule and thus section 9(2) does not exist in its Enactment. Johor has no Schedule at all. Instead, it prohibits the use of any “words of Islamic origin”. In the absence of a definition of the term in the Enactment, this phrase clearly intends to cover all possible terms that may be associated with the Islamic faith.

There is no Schedule attached to the Johor Enactment (Johor En.12/91) which lists down the words or expressions of Islamic origin. Section 9 of the Johor Enactment merely refers to the use of “words of Islamic origin” or “expressions of Islamic origin”, which will then depend on the interpretation by the court. As for the Kedah Enactment (Kedah En.11/88), there is no similar provision because its Schedule merely lists down “words which are not to be associated with non-Islamic religion”. Unlike other State Enactments, its provisions does not make any reference to the “expression which are not to be associated with non-Islamic religion”.

⁶ Section 9(2) of each state’s respective Control and Restriction of Non-Islamic Religion Enactment.

⁷ The states include Terengganu, Kelantan, Selangor, Perlis and Perak. Pahang gives such power to the Ruler instead of the Ruler in Council.

⁸ The states are Malacca and Negeri Sembilan.

Schedule by an order published in the Gazette.⁹

The terms and expressions stipulated in the Schedule of the state Enactments are wide ranging. In fact, most of the words are commonly and widely used by non-Muslims, including Christians. Words like *Allah*, *firman*, *iman*, *Injil*, *nabi*, *rasul*, *wahyu*, etc. are all included in the Schedule. A table listing the prohibited words contained in the Schedule of each state Enactment can be found at Appendix 2 of this book.

The penalty, if convicted of the offence in section 9 of relevant Enactment is a fine and/or imprisonment or both. The amount of fine and duration of imprisonment varies in each state. Please refer to Appendix 1 for each state's penalty.

THE ALLAH CONTROVERSY

Malay speaking Christians in Malaysia and Indonesia have long used the word "Allah" for God. In the Malay Bible, "Allah" is the word used to translate *Elohim* or *El* in the Hebrew Bible. This translation is not peculiar to Malaysia and Indonesia. Arabic-speaking Christians and Christians in the Middle East and some parts of Africa refer to God (*Elohim*) as Allah. This is because Allah is the Arabic word for God.

However, as mentioned above, from the 1980s, state Enactments in Malaysia have legally restricted the use by non-Muslims of certain Arabic words including "Allah", reserving it exclusively for Islam.

The tussle over the right to use the word "Allah" came to the fore in late 2009 and 2010. Popularly known as the *Herald*

⁹ Kedah does not have this provision. Johor does not have a Schedule as such.

case,¹⁰ this case concerns the conditions imposed by the Minister of Home Affairs on the publication of a weekly newsletter of the Roman Catholic Church known as the *Herald*. The permit issued for its publication under the Printing Presses and Publications Act 1984 included certain conditions. Amongst other conditions, the permit prohibited the *Herald* from using the word “Allah” in its Malay editions. Initially, the High Court quashed the Minister’s decision and made various declarations regarding the publisher’s constitutional right to profess and practise its religion. When the case was heard before the Court of Appeal, the Court in 2013 concluded that the Minister’s decision to impose the condition was reasonable. The Court opined that the prohibition was in the interest of public order as the use of the word by non-Muslims had the potential to cause public disorder, confusion or misunderstanding amongst the Muslims. Further, it was held that the word “Allah” was not an integral part of the Christian faith. By a majority decision, application for leave to appeal at the Federal Court was rejected.¹¹ Nevertheless, the Federal Court held that the Court of Appeal’s view on the theological issues were merely obiter dictum.

The decision of the Court of Appeal was a blow to Christians in Malaysia. However, it is not the end of the road for us. At this point in writing, SIB Sabah and its President, Jerry Dusing, are seeking a declaration pertaining to their

¹⁰ *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ 78 (High Court) and *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468 (Court of Appeal).

¹¹ *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 (Federal Court).

constitutional right to use the word “Allah” in all publications.¹² This transpired when SIB Sabah had, in 2007, imported Indonesian Christian publications that used the word “Allah”. They were confiscated by the customs officer because the Minister of Internal Security had stipulated that certain words, including “Allah” were exclusive to Islam and cannot be used in publications of other religions. The publications were returned to SIB Sabah in due time, but SIB Sabah is still pursuing several declarations including the right of the church and its Bahasa Malaysia-speaking congregation to possess, use and import materials notwithstanding the use of the term “Allah” in those publications and materials.

Similarly, in the case of Jill Ireland, a Melanau native of Sarawak whose audio CDs containing the word “Allah” were confiscated by a customs officer at the airport is seeking her constitutional rights with respect of the use of the word “Allah”. The hearing for the declaration of her rights has yet to be heard.¹³

In Sabah and Sarawak, native Christians have used the word “Allah” for generations to profess their faith. Historically, the word “Allah” has been used in the Malay Archipelago by Christians to refer to our God. The word “Allah” is indeed

¹² *Jerry WA Dusing @ Jerry W Patel & Anor v Menteri Keselamatan Dalam Negeri Malaysia & Anor* [2015] 1 MLJ 675 (Court of Appeal). The Court of Appeal has granted leave for judicial review of the directive of the Minister of Internal Security prohibiting non-Muslim publications containing the word “Allah”. The case has been remitted to the High Court for hearing.

¹³ *Jill Ireland Lawrence Bill v Menteri Bagi Kementerian Dalam Negeri Malaysia dan Kerajaan Malaysia* [2015] 3 MLJ 743 (High Court) and *Menteri Bagi Kementerian Dalam Negeri Malaysia v Jill Ireland Lawrence Bill* [2015] MLJU 949 (Court of Appeal). Jill Ireland sought a number of reliefs. The High Court ordered the audio CDs to be returned to her as the officer concerned did not have powers to confiscate them. However, it did not grant declarations concerning her constitutional rights pertaining to the use of the word “Allah”. The Court of Appeal has granted leave to appeal and the case has been remitted to the High Court for consideration of the constitutional issues.

an integral part of the Christian faith of Malay-speaking Christians.

The commonly argued ground for prohibiting Christians from the use of the word “Allah” is one of public interest – for the sake of peace and harmony of the nation. It is contended that if the usage was allowed, it would be a threat to Islam because of the confusion and misunderstanding it would engender, and this in turn would create public disorder. In the *Herald* case, the High Court held that there was no material evidence tendered by the Minister of Home Affairs to prove that the use of the word “Allah” would cause confusion or threaten and endanger public order.¹⁴ However, the Court of Appeal accepted that post-judgment incidents such as “attacks on churches and mosques” and “street protest and inflammatory discussions and accusations on the subject in the media and in the blogs” were factors that could influence the judicial reasoning.¹⁵

Article 3(1) provides that Islam is the religion of the Federation; *but other religions may be practised in peace and harmony*. In the *Herald* case, the High Court interpreted the second limb as a right protecting non-Muslims so that they may practise their religion in peace and harmony. However, the Court of Appeal understood the second limb to mean that other religions are to be practised in peace and harmony subject to Islamic supremacy,¹⁶ “making the religious majority

¹⁴ *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 MLJ 78, at para. [63] (High Court)

¹⁵ *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468, at para. [96] (Court of Appeal).

¹⁶ *Ibid*, at para. [48]. See also Jaclyn L. Neo, “What’s in a Name? Malaysia’s ‘Allah’ Controversy and the Judicial Intertwining of Islam with Ethnic Identity” (2014) 12(3) *ICON* 751, at p. 758.

the beneficiaries of this provision”.¹⁷

CONCLUSION

Despite the *Herald* judgment, the law on the constitutional right of non-Muslims to use the word “Allah” is not yet settled. However, there are currently cases being pursued by the Christian community to seek the courts’ protection to uphold our constitutional rights of freedom to profess and practise our religion in a meaningful manner.

¹⁷ Jaclyn L. Neo, *ibid*, at p. 762.

Chapter Six

POLICE INVESTIGATION

Can a person be detained or summoned to the police station to assist the police with their inquiries/investigations?

If summoned, is a person legally obliged to furnish/submit any information to the police?

Is the failure to furnish the required information illegal?

The police, in general, are conferred with several powers under the Police Act 1967 (hereinafter referred to as “the PA”) and Criminal Procedure Code (hereinafter referred to as “the CPC”), which include, inter alia:

- (i) power to arrest;¹
- (ii) power to conduct a search;²
- (iii) power to inspect licences and vehicles;³
- (iv) power to regulate assemblies, meetings and processions in public places;⁴
- (v) power to regulate the playing of musical instruments in public places;⁵ and
- (vi) power to make rules and orders for the control of traffic.⁶

The general rule is that a police officer in making an investigation may examine orally *any person* acquainted with

¹ Section 23 of the CPC.

² Sections 20, 22, 54, 56, 62, 63 and 116 of the CPC.

³ Section 24 of the PA.

⁴ Section 8 of the Peaceful Assembly Act 2012 provides that a police officer has the responsibility to take such measures as is necessary to ensure the orderly conduct of public assemblies.

⁵ Section 28 of the PA.

⁶ Section 29 of the PA.

the facts and circumstances of the case and shall reduce in writing any statement made by the person so examined.⁷ Such a person is bound to answer all questions relating to the case put to him by the officer-in-charge. However, that person is not required to answer any question that will expose him to criminal charge/penalty/forfeiture.⁸

Must a person follow a police officer to the police station to assist the police with their enquiries? Even though there are no Malaysian cases or statutes that touch on the issue, English cases⁹ may shed some light on the matter. The landmark case of *Rice v Connolly*¹⁰ decided that while every citizen has a *moral or social duty* to assist the police, there is no such *legal duty*.¹¹ An act of refusal to answer a question posed by a police constable (as opposed to telling a lie) or to accompany him to the police box/station cannot constitute an offence of “wilfully obstructing a police constable in executing his duty”.¹² It is also an established English legal principle that a police/custom officer has no right “to detain somebody for the purposes of getting them to help in their enquiries. A police officer either arrests the person for an offence or they do not arrest at all”.¹³ According to the English judges, there is no such offence as not

⁷ Section 112(1) of the CPC.

⁸ Section 112(2) of the CPC.

⁹ Section 5 of the CPC allows the application of the “law relating to criminal procedure for the time being in force in England ... so far as the same shall not conflict or be inconsistent with the [Criminal Procedure] Code”.

¹⁰ [1966] 2 QBD 414.

¹¹ However, section 10 of the Kidnapping Act 1961 makes it a legal duty for any person who is aware of the commission of such offence/intention of a person to commit such offence to supply information to the police failing which he may, in the absence of a reasonable excuse, be liable to a maximum penalty of three years’ imprisonment if convicted.

¹² [1966] 2 QBD 414, at p. 417. An analogous provision found in section 186 of the Penal Code phrases the offence as “voluntarily obstructs any public servant in the discharge of his public functions”.

¹³ Per Lord Justice Lawton in *R v Lemsatuf* [1977] 2 All ER 835, at p. 839.

“helping the police with their enquiries”.¹⁴

However, we must be mindful of two contingencies:

(a) All the English authorities mentioned above have not, to our knowledge, been applied or adopted by any Malaysian court. In other words, these principles, though relevant, have not been tested in the Malaysian courts. Thus, it is not clear whether the Malaysian courts would adopt the same principles.

(b) Under the Penal Code (hereinafter referred to as “the PC”), it is an offence when a person who is:

- (i) *legally bound* to produce or to deliver any document to any public servant;¹⁵ or
- (ii) *legally bound* to furnish information on any subject to any public servant;¹⁶ or
- (iii) *bound by law* to render/furnish assistance to any public servant¹⁷

intentionally omits to perform such legal duty.

Nonetheless, it is arguable as to what constitutes such legal duty.¹⁸ Furthermore, there is neither provision under any statute nor case law that clearly or ostensibly places a legal duty

¹⁴ *Ibid.*

¹⁵ Section 175 of the PC.

¹⁶ Section 176 of the PC.

¹⁷ Section 187 of the PC.

¹⁸ Section 13 of the PC may provide some examples. Section 13 of the PC obligates every person aware of the commission of/intention of any person to commit certain offences under the PC to give information to the police regarding such offence/intention. Such offences include:

- (i) offences against the government/state: sections 121–126, and 130 of the PC
- (ii) offences against public tranquillity: sections 143–145, 147 and 148 of the PC
- (iii) offences against human life: sections 302, 304, 307 and 308 of the PC
- (iv) offences of kidnapping/abducting: sections 363–369 of the PC
- (v) offences of extortion: sections 382, 384–389 of the PC
- (vi) offences of robbery and gang-robbery: sections 392–397, 399, 402 of the PC
- (vii) offences of mischief by fire or explosive substances: sections 435 and 436 of the PC
- (viii) offences of criminal house-trespass or house-breaking: sections 449, 450, 456–460 of the PC

on members of the public “to assist police in their enquiries”. Apparently, no power has been conferred on the police to detain any person or insist on his attendance at the police station for the purpose of assisting with enquiries, except such “persons supposed to be acquainted with the facts and circumstances of the case”.¹⁹ In other words, the exercise of such power to examine is limited to the suspect or witness of an offence.

The power to make a search is conferred on the police in various statutes.²⁰ However, the general power to make a search can be found in the CPC, whereby, a search of premises can be made with or without a search warrant depending on the circumstances. Under the CPC, a search without warrant is granted only for the purpose of locating (a) stolen property based on well-founded information;²¹ or (b) counterfeit coins or currency or machinery used to forge the same.²²

Under what circumstances can the police make a search in a church building/office, with or without a warrant? Are there restrictions to such powers?



A much wider power of search is granted under section 116 of the CPC to an *investigating police officer*²³ to search or order a search to be made on any place. The provision covers search for almost everything, including “any document or other thing”, which is considered necessary for the conduct of

¹⁹ Section 112(1) of the CPC.

²⁰ For example:

- sections 44–49 of the Copyright Act 198
- sections 16–19 of the Dangerous Drugs (Forfeiture of Property) Act 1988
- sections 8–10 of the Kidnapping Act 1961.

²¹ Section 62 of the CPC.

²² Sections 62A and 62B of the CPC.

²³ I.e. an officer who has been authorised to conduct an investigation into any offence. For example, under section 109 of the CPC, only officers of the rank of sergeant or above, or an officer in charge of the police station (OCS) have the power to investigate seizable offences. They are, therefore, the investigating police officers in such cases.

an investigation. Additionally, under section 116A of the CPC, should a police officer (not below the rank of an Inspector) have reasonable cause to suspect that there is evidence of the commission of a security offence or organised crime, he may search and seize without a warrant. The power of search includes searching any person who is on the premises at the time of search, and for the purposes of the search such persons may be detained. In practice, the police often do not apply for a search warrant²⁴ or a summons or even issue an order²⁵ before conducting a search in reliance on section 116 or 116A of the CPC.²⁶ However, there are certain criteria that must be fulfilled before the police may conduct such a search:

- (i) There must be an on-going police investigation. In a non-seizable offence,²⁷ the police will not carry out an investigation unless they have received an order to investigate (normally referred to as an “OTI”) from the Public Prosecutor.²⁸ However, for a seizable offence,²⁹ the police may begin investigation upon receiving information³⁰ or when the police have reason to suspect the commission of a seizable offence has taken place; and
- (ii) The police must have reason to believe that the person concerned will not produce the document or thing even

²⁴ Under section 54(i)(a) of the CPC.

²⁵ Under section 51 of the CPC, a search can be made upon the issuance of a summons by the court or of a written order by a competent police officer.

²⁶ See Mimi Kamariah, *Criminal Procedure in Malaysia*, 2nd edn., University of Malaya Press, 1995, p. 63.

²⁷ Non-seizable offences usually refer to offences which are punishable by imprisonment of not more than three years or a fine. They are normally less serious than seizable offences.

²⁸ Section 108(ii) of the CPC.

²⁹ Offences that are punishable by death or by imprisonment for three years and above are usually classified as seizable offences. The penalty indicates the gravity of such offences.

³⁰ Such information may be supplied orally by an informant or by way of a *first information report* (commonly known as police report) by a complainant under section 107 of the CPC.

if ordered to do so or that the document or thing is not known to be in the possession of any person.

A common perception is that such restrictions are ineffective, as the powers given to the police in making such a search are simply too wide-ranging.

If a summons is issued by the court or a written order is issued by the police officer under section 51 of the CPC, the person receiving the summons or order must submit the document or thing required at the time and place specified in the summons or order. Such power can be easily abused, since there are merely two inconsequential conditions for issuing such summons or order:

- (i) the production of the document or property must be considered “necessary or desirable”³¹ for the purpose of any investigation, enquiry, trial or other proceedings under the CPC; and
- (ii) the order has to identify the specific document or property it is looking for, and adequate time must be given to the party subjected to the summons or order to produce it.³²

Section 54 of the CPC also authorises the issue of a search warrant in three cases:

- (i) where the court has reason to believe that the person summoned to produce a document or thing under section 51 will not produce it; or

³¹ However, this term is so ambiguous that its interpretation can be very wide and dangerous. It may also be very subjective as to what makes a document “necessary and desirable”.

³² See Mimi Kamariah, n. 29 above, p. 64. Also, “it is not the intention of the Legislature to empower police officers to make harassing domiciliary visits to enquire minutely into the private concerns of individuals, and to seize any part of their papers under bare chance that something there might be found tending to the conviction of any accused parties”: per Justice Seton Karr in *Queen v Syed Hassan Ali Chowdhry* 8 WR 74, at p. 75.

- (ii) where the document or thing is not known to be in the possession of any person; or
- (iii) where a general inspection or search is necessary for the purpose of justice or of any trial, enquiry and other proceeding.

However, there are restrictions in relation to any search warrants granted:

- (i) the court may order that the police only search or inspect the place or part thereof as may be specified;³³
- (ii) every warrant issued by the court must be in writing, signed and shall bear the *seal of the court*;³⁴
- (iii) the warrant must be in force for a specified and reasonable number of days;³⁵ and
- (iv) the warrant must contain:
 - (a) the authority under which it is issued,
 - (b) name of the person to whom it is addressed, and
 - (c) address of the premises to be entered.³⁶

However, it seems that the Malaysian courts, by virtue of section 435 of the CPC,³⁷ is often very lenient in interpreting the power of the police in making a search especially in criminal cases³⁸ for the purposes of crime prevention and protection of

³³ Section 55 of the CPC.

³⁴ Section 57(1) of the CPC.

³⁵ Section 57(2) of the CPC.

³⁶ See *R v IRC, ex parte Rossminster Ltd* [1981] AC 952, at p. 1000.

³⁷ Section 435 of the CPC reads as follows:

"Any member of the police force may seize any property which is alleged or may be suspected to have been stolen, or which is found under circumstances which create suspicion that an offence has been committed, and such member, if subordinate to the officer in charge of the nearest police station, shall forthwith report such seizure to such officer.

³⁸ In *Re Kah Wai Video (Ipoh) Sdn Bhd* [1987] 2 MLJ 459, the judge held that the police have an implied extension of power to search and seize any article though not mentioned in the

public interest. It is submitted that these factors must also be balanced with the right of individuals to enjoy their property without sanctioned interference from the authorities.

Hence, in the context of church buildings, which are private properties, the police generally have no right to enter and search the building unless they comply with the provisions mentioned above. Any illegal or unlawful entry or search of private land will constitute a trespass to the premises and property, in which case the person conducting the search is liable to pay monetary compensation to the victim.³⁹

The Administration of Islamic Law (Federal Territories) Act 1993 provides for the administration of Islamic religion and law, the organisation of the Syariah courts, the power of religious enforcement officers in criminal procedure such as search, seizure and arrest, and such related matters in the Federal Territories of Malaysia. Each state has an equivalent of the Administration of Islamic Law legislation. As an example, Selangor has enacted the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

Under the Administration of Islamic Law (Federal Territories) Act 1993, a Majlis Agama Islam is established, the role of which is to be a policy maker in religious matters. It has authority to aid and advise the Yang di-Pertuan Agong in all matters related to the religion of Islam within the Federal Territories.⁴⁰ It is the chief authority on such matters in the Federal Territories, after the Yang-di-Pertuan Agong.⁴¹

warrant.

³⁹ See *Ghani & Ors v Jones* [1969] 3 WLR 1158 and *Wong Liang Nyuk v PP* [1958] MLJ 246. See also the general comment in the Malaysian context by Mimi Kamariah, n. 29 above, pp. 75–77.

⁴⁰ Section 2 of the Administration of Islamic Laws (Federal Territories) Act 1993.

⁴¹ Section 31 of the Administration of Islamic Law (Federal Territories) Act 1993.

The Majlis Agama Islam has the power to appoint religious enforcement officers to investigate any offences under any written law concerning offences against the precepts of Islamic law.⁴² Thus the religious enforcement officers are likened to be the “Islamic police”.

The Syariah Criminal Procedure (Federal Territories) Act 1997 and equivalent state Enactments⁴³ apply only to offences against the precepts of the religion of Islam and over which



What powers do state religious authorities have in criminal procedure (i.e. arrest, search, seizure, etc.)? Under what circumstances are they authorised to enter a church, conduct a search or investigation and/or seize church property?

the Syariah Court has jurisdiction.⁴⁴ This means that religious enforcement authorities and officers, and the Syariah Court have powers and jurisdiction

only over offences prescribed in Syariah law.

Where religious enforcement officers are investigating a case or have reason to believe that an Islamic offence may have been committed, the relevant Syariah Criminal Procedure legislation confers investigating powers to religious enforcement officers and police officers investigating the matter.

(1) Arrest

Any religious enforcement officer or *Pegawai Masjid*⁴⁵ has the power to arrest without a warrant or order from a judge. The situations in which he may do so are wide-ranging. He may arrest without warrant:

⁴² Section 58 of the Administration of Islamic Law (Federal Territories) Act 1993.

⁴³ For instance, Enactment No. 4 of 1992 Syariah Criminal (Negeri Sembilan) Enactment 1992; Enactment No.9, of 1995, Syariah Criminal Offences (Selangor) Enactment 1995.

⁴⁴ Section 2 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

⁴⁵ Section 76 of the Administration of Islamic Law (Federal Territories) Act 1993 provides for the appointment of the *Pegawai Masjid* which shall include a *Naqib Masjid*, an *Imam*, and *Imam Ratib*, a *Bilal* and a *Pembantu Bilal*.

- (a) a person who is involved in any seizable offence⁴⁶ or if reasonable suspicion exists that the person is so involved or if a reasonable complaint has been made or credible information has been provided, that the person is involved in a seizable offence; or
- (b) any person who has committed or attempted to commit any offence involving a breach of peace.

Note that less serious offences (i.e. non-seizable offences)⁴⁷ will require a warrant for arrest from a judge.

(2) Search

The Syariah Criminal Procedure (Federal Territories) Act 1997 empowers religious enforcement authorities with wide powers of search.

Religious enforcement officers have power to search with or without warrant. Usually, searches are conducted with a warrant, but in recent years religious enforcement authorities have exercised their powers to enter and search without a warrant.

A search warrant may be issued when an officer making an investigation considers that the production of a document or thing is necessary to the investigation at hand, and there is reason to believe that:

- (a) the person in possession of it would not produce it

⁴⁶ A "seizable offence" is an offence punishable with imprisonment for one year or more, for which a religious enforcement officer or police officer may ordinarily arrest without a warrant. See section 2 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

⁴⁷ A "non-seizable offence" is an offence punishable with imprisonment for less than one year or with a fine only, for which a religious enforcement officer or police officer may not arrest without warrant. See section 2 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

even if summoned under section 42⁴⁸ to do so; or

(b) the document or thing is not known to the court to be in possession of any person;

then the investigating officer can cause a search to be conducted in any place.

A religious enforcement officer or police officer may, however, search the following persons without warrant:

(a) a person who has already been arrested;⁴⁹ or

(b) any person found on the premises of a place being searched under warrant; in this case, note that such person can also be lawfully detained until the search is completed.⁵⁰

Further, a warrant may be issued for general searches and inspection for the purposes of justice or any inquiry,⁵¹ a threshold which can be easily met.

(3) Power to Examine Witnesses and to Require Attendance of Witnesses

A religious enforcement officer making an investigation may order (in writing) a person “who appears to be acquainted with the circumstances of the case” based on information given or otherwise to appear before the officer. If such person fails to do so, the officer may report this to a judge who may then issue a warrant requiring the attendance of the person before

⁴⁸ Section 42 concerns the power of the Syariah Court to order a person who is in possession of any documents, property or any other items deemed to be necessary for the carrying out of an investigation or inquiry, to produce it.

⁴⁹ Section 15 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

⁵⁰ Section 12 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

⁵¹ Section 44 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

the officer.⁵²

Therefore, even if a person concerned with a case at hand is not detained or arrested, he or she can easily be ordered to appear before the investigating religious enforcement officer for questioning, or to provide information.

Although it is generally thought that Syariah law does not concern nor affect non-Muslim Malaysians, Syariah law has far-reaching implications in our nation, affecting Muslims and non-Muslims alike.

In recent years, religious enforcement officers have used their powers extensively to enter and search Christian organisations and even churches. For example, in August 2011, the Selangor Department of the Religion of Islam (JAIS) entered and searched, without a warrant, the premises of a church in Selangor where a dinner organised by a non-profit organisation was being hosted. Though JAIS was heavily criticised for it, the state government of Selangor issued a public statement declaring that JAIS had acted in line with powers and jurisdiction provided under the law.⁵³ The religious enforcement officers cited “control of propagation of a non-Islam religion amongst Muslims” as grounds for their investigation. It was feared that Muslims were being evangelised to in the premises of the church.

In another high-profile raid involving Christians, this time on the premises of the Bible Society of Malaysia in Selangor in 2014, JAIS again cited Selangor Non-Islamic Religions

⁵² Section 58 of the Syariah Criminal Procedure (Federal Territories) Act 1997.

⁵³ Namely, the Syariah Criminal Procedure (State of Selangor) Enactment 2003, Syariah Criminal (State of Selangor) Enactment 1995 and Selangor Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988.

(Control of Propagation Among Muslims) Enactment 1988 to justify its raid, search, seizure and arrest. JAIS seized over 300 copies of the Alkitab, the Malay Bible and ten copies of the Iban Bible. Two BSM officials were also arrested and released. The government decided no charges would be made against the Society after considering the Selangor Non-Islamic Religions (Control of Propagation Among Muslims) Enactment 1988 that prohibits non-Muslims in Selangor from using 35 Arabic words and phrases, including the word for God, “Allah”.

Theoretically, Syariah offences do not apply to non-Muslims,⁵⁴ the Syariah Courts have jurisdiction over Muslims only,⁵⁵ and religious enforcement officers generally do not have authority over non-Muslims. However, in the matter of propagating a religion other than Islam amongst Muslims, *any person* who carries out such propagation is guilty of an offence (discussed in further detail in Chapter 4: Propagation). This has implications on the church as the provision can easily be abused to suspect the church of having committed an offence under Syariah legislation. This is also the legislative provision that religious enforcement officers will most frequently rely on as grounds for entering and searching the premises of a church. Note also that propagation is a seizable offence, thus giving enforcement officers wider powers of arrest.

Be familiar with the legislation in your jurisdiction concerning the powers of religious enforcement authorities in criminal procedure. Know what powers they may exercise in

⁵⁴ See section 1 of the Syariah Criminal Offences (Federal Territories) Act 1997 and the equivalent state Enactments.

⁵⁵ See sections 46 and 47 of the Administration of Islamic Law (Federal Territories) Act 1993 on the jurisdiction of Syariah courts. Equivalent state Enactments will have similar provisions on the jurisdiction of Syariah courts in their respective states.

what circumstances. In every jurisdiction the legislation is cited as Syariah Criminal Procedure [name of state] Enactment. In the case of Sarawak, it is Syariah Criminal Procedure Ordinance. In the Federal Territories, as cited above, it is the Syariah Criminal Procedure (Federal Territories) Act 1997.

Should officers from state religious department (e.g. JAIS) wish to enter your premises, request that they produce a warrant in which the terms of the search will be specified. In the absence of a warrant, the officers should give an explanation and the grounds for making an entry and a search.

As an occupant of the premises, you have the right to be present at the search. Should any item be seized, the officers are obliged to furnish you with a list of items seized upon your request.⁵⁶

56 Sections 52 and 53 of the Syariah Criminal Procedure (Federal Territories) Act 1997, and equivalent state Enactments.

Chapter Seven

PUBLIC MEETINGS

What are the legal procedures that must be observed when applying for approval to hold evangelistic meetings in “public places”?

Which are the relevant government bodies involved in processing such applications?

For some reason, there are people who are reluctant to attend religious meetings conducted in a church building. They may perhaps feel more comfortable in less intimidating premises. For that reason, some churches prefer to hold evangelistic meetings in public places, such as civic halls, multi-purpose auditoriums, schools and hotel ballrooms. Let us now consider the law and the proper procedures involved in holding meetings in such places.

Apart from conferring the right to profess and practise one’s religion, the Federal Constitution also bestows the right to assemble peaceably and without harm to all citizens in Malaysia¹ subject, of course, to restrictions that are deemed to be “necessary and expedient in the interest of the security of the Federation ... or public order”.²

¹ Article 10(1)(b) of the Federal Constitution.

² Article 10(2)(b) of the Federal Constitution.

ASSEMBLIES IN PUBLIC PLACES

Further to this, the Peaceful Assembly Act 2012 (PAA 2012) was passed to ensure and uphold all citizens' right to organise or participate in assemblies peaceably as far as it is appropriate to do so, and to regulate the exercise of such right. Should the church plan a meeting or event (for consistency with the PAA 2012, we shall refer to this as "assembly") in a public place, the church must be aware of the requirements of the PAA 2012.

Under the PAA 2012, a "public place" means a road, or a place open to or used by the public as of right.³

Section 9(1) of the PAA 2012 provides that anyone who plans to organise an assembly (referred to as the "organizer" in the PAA 2012)⁴ in a public place must, ten days before the date of assembly, notify the Officer-in-Charge of the Police District (OCPD) in which the assembly is to be held. The form of notification is provided in the Fourth Schedule of the PAA 2012. Failure to notify will result in a fine of up to RM10,000.⁵ In the case of a religious assembly (or a funeral procession), under section 9(2) of the PAA 2012, the organiser may request for assistance from the police to maintain traffic and crowd control.

Within five days of receiving the organiser's notification, the OCPD is required to respond and inform the organiser of

³ Section 2 of the PAA 2012.

⁴ Under section 2 of the PAA 2012, an "organizer" is "a *person* who is responsible for the organization of the assembly". This means that a *person* needs to be responsible for submitting the notification even though the assembly is usually organised by the church. The Fourth Schedule, the form of notification of an assembly, also requires the details of a person.

⁵ Section 9(5) of the PAA 2012.

any restrictions of the assembly, if there are any. Restrictions may relate to:

- (a) the date, time and duration of assembly;
- (b) the place of assembly;
- (c) the manner of assembly;
- (d) the conduct of participants during the assembly;
- (e) the payment of clean-up costs after the assembly;
- (f) any environmental factor, cultural or religious sensitivity and historical significance of the place of assembly;
- (g) concerns of objections of any person who is residing, working or carrying on business, or owns property in the vicinity of the assembly; or
- (h) any other matters that the OCPD deems necessary.⁶

If the organiser does not comply with the restrictions imposed, he or she can be liable to a maximum fine of RM10,000.

The organiser may appeal to the Minister of Home Affairs if aggrieved by any restrictions imposed by the OCPD, and the Minister shall respond within 48 hours.⁷

With the passing of this Act, our assemblies do not now require a license from the police,⁸ but as mentioned above, the OCPD needs to be notified and restrictions on assemblies may be imposed on the organisers. As this legislation is relatively new, the reasonableness of the extent of any restrictions imposed has not been tested in a court of law. However, in 2015 the

⁶ Section 15 of the PAA 2012.

⁷ Section 16 of the PAA 2012.

⁸ Section 27 of the Police Act 1967 has been repealed.

Court of Appeal⁹ has considered whether section 9(1) and (5) of the PAA 2012 are restrictions (to the right to assemble) that are constitutional, and the Court has concluded that they are. The Court held that requirement to give notice of an assembly under section 9(1) does not infringe one's right to assemble peaceably. Rather it facilitates the exercise of one's right to assemble and enables the police to make necessary plans and preparation for the assembly. The obligation to give notice of an assembly was also in line with international norms. As to whether the imposition of a criminal sanction in section 9(5) for failure to notify was constitutional, the Court also decided that it was constitutional, it was not *ultra vires* and that the Federal Constitution does not preclude the imposition of such sanction for the regulation of the right to assemble peaceably.

Although the Police Act 1967 under which public meetings and assemblies were governed previously has by and large been abrogated by the PAA 2012, some prohibitions under the Police Act 1967 are still applicable. As most church assemblies involve music, loud speakers and such, note that sections 28 and 30 of the Police Act 1967 confer power on the police to regulate the extent to which musical instruments can be played, and to control the use of loud speakers or amplifiers in public places.

As most church assemblies involve music, loud speakers and such, note that sections 28 and 30 of the Police Act 1967 confer power on the police to regulate the extent to which musical instruments can be played, and to control the use of loud speakers or amplifiers in public places.



⁹ *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] MLJU 521.

Notwithstanding our right to assemble peaceably, should church meetings in public places be deemed to propagate Christianity amongst Muslims, state religious authorities may intervene. As discussed in Chapter 4 on Propagation, most states have enactments restricting the propagation of non-Islamic religions amongst Muslims. Should Muslims be in attendance at church meetings held in public places, the church may be deemed to subject the Muslim to “speech or display of any matter concerning a non-Islamic religion” which would be an offence under the relevant state Enactment which controls and restricts the propagation of non-Islamic religions. The state Enactments give powers to authorised officials (religious officials) to seize, investigate, and arrest without warrant, in the event of an offence thereunder.

Note that state Enactments on restriction on propagation of non-Islamic religions equally apply to church meetings in private places.

PRIVATE CHURCH MEETINGS

In the case of civic or community halls, multi-purpose auditoriums, a space in the mall or other similar places where the public frequently and usually has access to, it is possible to “make” the venue a private place.

Arguably, if a meeting is open only to “invited guests”, such a meeting cannot be deemed to be held in a public place. The general public, strictly speaking, will not have access to such a meeting, by payment or otherwise, unless invited. If this

is the case, a church may wisely extend invitations to “guests” using cards or tickets. Intrinsically, only those with invitation cards or tickets will be permitted to attend such a meeting. Such a meeting will be regarded as an assembly in a private place.

Having said so, it is advisable for the church to submit a notification to the OCPD as required by section 9(1) of the PAA 2012, for assemblies held in any place that the public usually has access to, especially if the place is an open space where the assembly can be witnessed or heard by the public.

As long as the Federal Constitution guarantees the right to practise our religion and the right to assemble, Christians may continue to organise their meetings in such places as may be desired or suitable, whether in or out of the church building.

Chapter Eight

SOCIAL WORK

What are the procedures that a church must observe when setting up a community/charitable centre (e.g. child care centre, kindergarten, drug rehabilitation centre, etc.)?

What are the regulations governing such church activities?

Social concern is one of the most effective and fruitful ways to illustrate the love of God in our local communities. Echoing the efforts of the government to create a more caring society (*masyarakat penyayang*), the church ought to initiate more social welfare activities to exemplify the way of Christ.

As social work is wide ranging, we will concentrate only on those areas and activities which are regulated by laws. Such areas include the establishment of child care centres, kindergartens, care centres and drug rehabilitation centres.

1. Child Care Centres

A child care centre (or *taska*) provides child care services for children under the age of four.

Centres which provide child care services for four or more children and receive payment¹ must be registered with the

¹ Section 2 of the Child Care Centre Act 1984 defines "child care centre" to mean "any premises at which four or more children under the age of four years from more than one household are received to be looked after for reward".

Department of Social Welfare under the Ministry of Women, Family and Community Development.²

However, if the child care centre is registered as a kindergarten or nursery school under the Education Act 1996 there is no need to register with the Department of Social Welfare.³

There are four categories of child care centres which may be registered under the Child Care Centre Act 1984:⁴

- (a) *home-based child care centre*: less than 10 children;
- (b) *work-place-based child care centre*: 10 or more children at work place;
- (c) *community-based child care centre*: 10 or more children and receives aid from the Federal Government or a State Government; and
- (d) *institution-based child care centre*: a centre other than (a), (b) and (c) above that has more than 10 children.

Churches or faith-based organisations may seek registration under category (d) above.

The *Child Care Centre Regulations 2012* sets out the requirements that child care centres need to abide by, relating to a range of issues such as:

- (a) qualifications and duties of a manager, supervisor, child care provider and other employees employed to work at such centres;
- (b) the operations such as activities, records, food and nutrition, and health of the children under care; and
- (c) the structure of the premises, prevention of fire,

² Section 4 of the Child Care Centre Act 1984.

³ Section 3(1)(c) of the Child Care Centre Act 1984.

⁴ Section 5 of the Child Care Centre Act 1984.

health, sanitation and safety of a child.

Approvals of the local council, Fire and Rescue Department and Health Department are required when applying to be registered as a child care centre. In Sarawak, the Land and Survey Department's approval is also required.⁵

The punishment for a person running an unregistered child care centre is a maximum fine of RM10,000 or imprisonment for a term up to two years, or both; and in the case of a second or subsequent offence, a maximum fine of RM20,000 or imprisonment for a term up to five years, or both.⁶

2. Kindergartens

Kindergartens (or *tadika*) offer pre-school education for children aged between four to six years old. Pre-school is the first step in the National Education System developed by the Ministry of Education.

All kindergartens must be registered with the Ministry of Education under the Education Act 1996.⁷

Kindergartens are expected to use the National Pre-school Curriculum⁸ although they may add their own curriculum to it.⁹ While it is permitted to use languages other than the national language as medium of instruction, the national language must be taught as a compulsory subject.¹⁰

⁵ Sarawak Land and Survey Department: <http://www.landsurvey.sarawak.gov.my/modules/web/pages.php?mod=webpage&sub=page&id=351> (accessed on 12 September 2018).

⁶ Section 6 of the Child Care Centre Act 1984.

⁷ Section 20 of the Education Act 1996.

⁸ Section 22 of the Education Act 1996.

⁹ Regulation 6 of the Education (National Pre-School Curriculum) Regulations 2002 requires prior notification to the Registrar General.

¹⁰ Section 23 of the Education Act 1996.

Kindergarten operators should be aware of the *Education (National Pre-school Curriculum) Regulations 2002*, as it contains regulations on important matters relating to curriculum materials, minimum period allocation and records, among others.

3. Home schooling

The Education Act of 1996 makes primary education compulsory and parents who fail to enrol their children in school can be fined up to RM5,000, jailed up to six months, or both.¹¹

The Ministry of Education, however, may grant exemption for a child to be home schooled. Its policy statement entitled *Exemption from Compulsory Education (Home Schooling)* states:

Home schooling is a method of schooling available to parents whose children have such problems as a chronic health condition which requires close attention by the guardian. However, this is a privilege and not a right. Normal schooling is preferred for children as it allows them to interact and communicate with other children.

Applications for home schooling can be made through the state education departments. The Ministry of Education has developed stringent regulations on home schooling and has only granted approval for those with chronic health problems requiring close attention by the guardian.

¹¹ Section 29A Education Act 1996.

4. Care Centres

In Malaysia, care centres are categorised by the type of care or services they provide. The Care Centres Act 1993 (CCA 1993) covers the following:

- (i) *day care centre*: premises used for four or more persons receiving care exceeding three hours per day¹² for at least three days a week; and
- (ii) *residential centre*: premises where four or more persons are receiving care as residents.

In general, centres providing care for persons other than one's family members will need to be registered with the Director General of Social Welfare before commencing operations.¹³

The Director General may impose terms and conditions which include limits on the number of persons that may be accepted by the centre, requirement for any staff employed to be fit and proper persons, and the provision of proper equipment and services for medical, health and recreational purposes.¹⁴

Non-compliance may result in the registration being cancelled.¹⁵ The possible penalties for failure to register are a maximum jail term of two years and/or a fine of RM10,000; and in the case of a continuing offence, a daily fine of RM1,000 during which the offence continues.¹⁶ It is important to note that the penalties would encompass not only the person who operates the centre but also extend to those who "take part in

¹² "Day" here means between the hours from sunrise to sunset.

¹³ Section 6(1) of the CCA 1993.

¹⁴ Section 7 of the CCA 1993.

¹⁵ Section 11(a) of the CCA 1993.

¹⁶ Section 5(2) of the CCA 1993.

the management” of the centre.¹⁷

Specific requirements concerning the operations of care centres can be found in the *Care Centres Regulations 1994*, which include structural requirements for the care centres’ premises.

5. Healthcare Facilities

Centres established to provide healthcare services are regulated under the Private Healthcare Facilities and Services Act 199) (PHFSA 1998) by the Ministry of Health. Such centres include private nursing homes, private haemodialysis centres, private maternity homes, private hospices, private community healthcare centres and any private establishment that will provide any health-related services.¹⁸

Application can be made to the Ministry of Health for the establishment¹⁹ and registration²⁰ of the centre, and thereafter for a license to operate such a centre. The application for a license to operate must be made within three years from the date of approval to establish the centre.²¹

The *Private Healthcare Facilities and Service (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006* contains the prescribed application forms and stipulates in further detail the operational requirements of each type of centre.

¹⁷ Section 5(1) of the CCA 1993.

¹⁸ Section 3 of the PHFSA 1998.

¹⁹ See sections 3, 6, 8–13 of the PHFSA 1998 for detailed information concerning approval to establish or maintain a centre.

²⁰ See sections 25–30 of the PHFSA 1998 for detailed information concerning registration of a centre.

²¹ Section 14 of the PHFSA 1998.

6. Drug Rehabilitation and After Care Centres

The establishment of drug rehabilitation centres by the government and private sector are governed under the Drug Dependants (Treatment and Rehabilitation) Act 283)²² (DDTRA 1983) by the Minister of Home Affairs.

Section 16 of the DDTRA 1983 allows a private individual, organisation, body or group of persons to apply for approval to establish and operate a private centre for the treatment and rehabilitation of drug dependants or for the after care of persons who were drug dependants. The Minister may, upon application made to him, approve the application subject to certain terms and conditions. He is also entitled to vary the terms and conditions or revoke the approval at any time without giving notice or reason for such alteration.

It is an offence to operate or assist in the operation of a place for the treatment, rehabilitation or after care supervision of drug dependants without the approval of the Minister. Upon conviction of such offence, an offender can be punished with imprisonment up to a maximum of five years, together with a fine.²³

²² Refer also to the Drug Rehabilitation Centre Rules 1983.

²³ Section 16(4) of the DDTRA 1983.

Chapter Nine

ORANG ASLI: THE ABORIGINAL PEOPLES OF PENINSULAR MALAYSIA

How do the provisions in the Aboriginal Peoples Act 1954 affect the natives/Orang Asli with respect to land occupation, education, religious freedom, etc.?

The Orang Asli in West Malaysia belong to three major tribes, namely, the Negrito, the Senoi (or Sakai) and the Proto-Malay.¹ Most of them live on land known as “aboriginal areas” or “aboriginal reserves”.² Although they are among the first ethnic groups to settle in Peninsular Malaysia, i.e., the *Orang Asal* of West Malaysia, like aboriginal peoples elsewhere in the world, they share the plight of marginalisation in virtually every aspect of national life. They are categorised as the most impoverished and underprivileged ethnic group in terms of income and standard of living in Malaysia. In 2010, the Jabatan Kemajuan Orang Asli (JAKOA) (the Department of Orang Asli Development) estimated the population of Orang Asli in Peninsular Malaysia to be 178,197 people.³

Who are the Orang Asli and what is their position under the Constitution and the law?



¹ See Amran Kasimin, *Religion and Social Change among the Indigenous People of the Malay Peninsula*, Dewan Bahasa & Pustaka, 1991, p. 4.

² These are areas and reserves declared as such under section 2 of the Aboriginal Peoples Act 1954. This will be elaborated on in the later part of this chapter.

³ *Report on the National Inquiry into the Land Rights of Indigenous Peoples*, Human Rights Commission of Malaysia, 2013, p.16, available at <http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf> (accessed on 13 September 2018).

The Federal Constitution and the general laws of the land apply to Orang Asli as they do to their fellow Malaysians. While they are entitled to the full measure and enjoyment of their constitutional rights and fundamental liberties guaranteed under the Constitution and the law, the Constitution recognises their special position as the first peoples of Peninsular Malaysia and their relative disadvantage by expressly allowing affirmative action to be taken towards redressing the same.⁴ Article 8(5)(c) allows legislation favouring the Orang Asli for their protection, well-being and advancement (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

Such legislation include:

- (a) the Aboriginal Peoples Act 1954, which provides a modicum of recognition of the right of Orang Asli to occupy state land as mere tenant at will; and
- (b) the Wildlife Conservation Act 2010 , which recognises the right of Orang Asli to shoot, kill or take certain wildlife for the purpose of food.

Little else has been done by way of legislation to protect and advance the rights of Orang Asli. Indeed, there are various legislation on land and land resources which negatively impact upon Orang Asli with regard to their land rights and their livelihood, paying scant regard to their rights.

⁴ For instance, Article 8(5)(c), legitimizes discriminatory legislation in favour of Orang Asli by way of provisions in the law of their protection, well-being and advancement (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service whilst Article 45(2), provides for the appointment of Senators "capable of representing the interest of the aborigines". Article 160(2) rather unhelpfully defines an aborigine as "an aborigine of the Malay Peninsula" and Ninth Schedule, list 1 that vests upon the Federal Government legislative authority for the "welfare of the aborigines".

Benevolent social legislation has often been held to confer not a discretion but a duty to act on behalf of the disadvantaged people which the legislation was designed to protect. Thus, the word “may” in such legislation has often been held by the courts to mean “shall” and to impose a positive obligation rather than a mere discretion on the authority to act in the furtherance of the social purpose of a particular legislation. A Court of Appeal decision⁵ held that Article 8(5) of the Federal Constitution and the 1961 Statement of Policy Regarding the Long Term Administration of the Aborigine People in the Federation of Malaya impose fiduciary duties upon the State and the Federal Governments to protect the welfare of the Orang Asli.

The official Statement of Policy Regarding the Long Term Administration of the Aborigine People in the Federation of Malaya issued by the then Ministry of the Interior on 20 November 1961 (“Policy Statement”) identifies several broad principles to be adopted for the protection and advancement of the Orang Asli.

The Policy Statement touches on several matters fundamental to the special position of the Orang Asli which are remarkably progressive in terms of the underlying principles. Some of these principles may be traced to Convention No. 107 of 1957⁶. Unfortunately, as will be evident from the discussion below, these foundational principles have not been translated into law and do not appear to have been pursued with any real sense of commitment since then.

⁵ *Kerajaan Negeri Selangor & Ors. v. Sagong Bin Tasi & Ors.* [2005] 6 MLJ 289

⁶ The Indigenous and Tribal Populations Convention, 1957 under the auspices of the International Labour Organization.

The Policy Statement:

- (a) recognises the right of the Orang Asli to benefit equally with the rest of the community, as well as the need to promote their social, economic and cultural development;
- (b) identifies the necessity to adopt special measures for protecting their institutions, customs, way of life, person, property and labour;
- (c) promotes integration, as opposed to assimilation, as the objective of social, economic and cultural development among the Orang Asli;
- (d) emphasises collaboration with Orang Asli in all matters concerning their welfare and development;
- (e) recognises the special position of Orang Asli in respect of land usage and land rights;
- (f) commits not to move Orang Asli away from their traditional areas without their full consent; and
- (g) recognises the need to relax forestry policies and objectives in favour of Orang Asli due to some Orang Asli groups practicing nomadic living, hunting and gathering traditions as well as their practice of swidden agriculture.

ARE THERE ANY INTERNATIONAL STANDARDS AND NORMS REGARDING TREATMENT OF INDIGENOUS PEOPLES?

The issue of indigenous rights is not solely a Malaysian

issue, but is an issue in nations across the globe. Special attention on the rights of indigenous peoples is reflected in the setting of international standards and norms on the treatment of indigenous and tribal people, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the United Nations General Assembly in September 2007, of which Malaysia is a signatory. The UNDRIP is an international standard that should inform Malaysia's legal and administrative mechanisms for protecting the rights of indigenous peoples.

UNDRIP affirms, and declares that each State should take specified measures to uphold the rights of indigenous people to:

- (a) equality and citizenship;
- (b) improvement of their social and economic conditions;
- (c) protection of their culture, traditional practices and lands; and
- (d) free, prior and informed consent to be obtained in all decisions, developments or measures to be taken, that may affect their community, through mandatory consultations in good faith between them and the State (or other interested parties). This is known as the Free, Prior and Informed Consent (FPIC) principle. The FPIC principle applies to all measures that may affect indigenous peoples,⁷ although the UNDRIP specifically applies the FPIC principle in indigenous lands and territories matters.⁸

⁷ Article 19 of the UNDRIP.

⁸ Articles 10, 28, 29 and 32 of the UNDRIP.

Unfortunately, Malaysia has not adopted the UNDRIP into Malaysian law. For example, it is clear from court cases that consultations between the State and indigenous communities are hardly held before the delineation of indigenous customary land for development. However, as a signatory, Malaysia has a moral obligation to abide by the principles set out in the UNDRIP.

WHAT IS THE ABORIGINAL PEOPLES ACT 1954 AND WHAT ARE ITS MAIN FEATURES?

The Aboriginal Peoples Act 1954 (APA) is a pre-Merdeka federal statute for the protection, well-being and advancement of the aboriginal peoples of West Malaysia administered by the Federal Government. The Act was enacted to protect the interests of the Orang Asli. Let us examine relevant sections of the Act to see how it affects the Orang Asli.

Ministerial responsibility and administration of the Act

Under section 19, the Minister has the power to (a) make regulations for carrying into effect the purposes of the Act; and (b) confirm the appointment of non-hereditary Orang Asli headmen. The Act does not define who the Minister is. However, pursuant to an order made under the Ministerial Functions Act 1969, the Minister charged with responsibility for Orang Asli affairs is the Minister for Rural and Regional Development.

The Director General of Orang Asli Affairs

Section 5 of the Act provides for the appointment of the Director General of Aboriginal Affairs⁹ who shall be responsible for the “administration, welfare and advancement of the aborigines”, which includes implementing the law and the executive policies of the Government on Orang Asli affairs. He has the authority to do all acts reasonably necessary and incidental to or connected with the performance of his functions under the Act.

The Director General of Orang Asli Affairs answers to the Minister of Rural and Regional Development. Other government agencies, e.g. the Department of Education and the Ministry of Health, also play a supportive role in the provision and delivery of services to the Orang Asli.

The Jabatan Kemajuan Orang Asli (previously Jabatan Hal Ehwal Orang Asli)

The Jabatan Kemajuan Orang Asli (JAKOA) (the Department of Orang Asli Development), a federal department under the charge of the Director General, operates as a single multi-functional body to undertake programmes in line with the objectives and policies of the Government.

This is in contrast with the administration for

⁹ Originally in the APA, he is known as the Direct General of Orang Asli Affairs; however, by virtue of the Titles of Office Act 1949 (Revised 1989), he is now referred to as the Director General for Aboriginal Affairs.

bumiputeras,¹⁰ which is the Cabinet's responsibility and is undertaken inter-ministerially and by a host of departments and agencies, as well as statutory bodies.

Traditional leadership

The powers vested upon the Director General for the general administration, welfare and advancement of aborigines does not preclude an aboriginal headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community.¹¹

For Orang Asli communities with a hereditary headman, the headman shall be appointed in accordance with that community's rules on succession. Where the office of headman is not hereditary, the community may, subject to confirmation by the Minister, select their headman. The Minister may, however, remove any headman from his office.¹²

Protection of Orang Asli children

Under section 18, the adoption or the assumption of care, control and custody of Orang Asli children by non-Orang Asli, except with the consent of the Director General, is prohibited.

¹⁰ Bumiputeras consists of Malays and the natives of Sabah and Sarawak, who enjoy special privileges under Article 153 of the Federal Constitution.

¹¹ Section 4 of the APA.

¹² Section 16 of the APA.

Right to Education

There are no obligations imposed on the Orang Asli community in relation to education. However, pursuant to section 17(1) of the APA, schools cannot deny Orang Asli children from attending due to their ethnicity.

No compulsion regarding religious education

The APA also prohibits compelling any Orang Asli child from attending any religious instruction unless prior consent in writing is given by his parent or guardian to the Director General.¹³ In effect, this prohibition reinforces the constitutional right to freedom of religion even for children of the Orang Asli, thus liberating them from being intimidated or compelled into converting to another religion without parental consent.

Definition of Orang Asli

Section 3 of the Act classifies three kinds of persons as an Orang Asli:

- (a) any person whose father is or was a member of an aboriginal ethnic group;
- (b) any person of any race adopted when an infant by the Orang Asli and brought up as an aborigine and is a member of an aboriginal community; or

¹³ Section 17(2) of the APA. The consent of the mother is only required if the father is dead. The consent of the guardian is only applicable if both parents are dead.

- (c) the child of any union between an aboriginal female and a male of another race that remains a member of the aboriginal community, and
- (d) speaks an aboriginal language and habitually follows an aboriginal way of life and observes aboriginal customs and beliefs.

Conversion to another religion will not terminate an Orang Asli's aboriginal status so long as he:

- (i) continues to follow an aboriginal way of life and customs; or
- (ii) speaks an aboriginal language.

This provision exists to ensure that the Orang Asli will not lose their privileges under the Act because they exercise their right to freedom of religion under the Federal Constitution.

Surprisingly, it is also stipulated that the question of whether a person is an Orang Asli is to be decided by the Minister.¹⁴

Aboriginal lands

A big part of the APA deals with lands inhabited by Orang Asli and matters connected therewith. A fuller treatment is set out below in Section 4 "Aboriginal lands under the Aboriginal Peoples Act 1954".

¹⁴ Section 3(3) of the APA. .

Exclusion of persons from aboriginal area or reserve: section 14

The Minister, by order, may prohibit any person or class of persons from entering and remaining in lands inhabited by Orang Asli. He has the sole discretion to make such an order taking into consideration the welfare of the Orang Asli in that area. Such order may be made so long as “he is satisfied that ... it is desirable” to not allow such person(s) to enter the said areas.

Unfortunately, the Act does not specify the exact grounds for allowing such exclusions. Thus, it appears that the Minister has unfettered discretion in this area. Once the order is issued and served upon such person, the Act makes it an offence for such person to enter the specified area.¹⁵ The police or the Director General may arrest the offender without a warrant if he fails to comply with the order.¹⁶

Removal of undesirable persons: section 15

The Director General and the police also have the power to detain any person found in an aboriginal area, reserve or inhabited place “whose activities, he has reason to believe, are detrimental to the welfare of the Orang Asli or any aboriginal community”, and remove the person within seven days from the date of detention.

¹⁵ Section 14(5) of the APA.

¹⁶ The maximum penalty is a RM1,000 fine.

Again, what amounts to being “detrimental to the welfare of the Orang Asli” is not explained in the APA. Such ambiguity can lead to the abuse of unencumbered powers by the authorities.

ABORIGINAL LANDS UNDER THE ABORIGINAL PEOPLES ACT 1954

A distinctive feature of indigenous minorities worldwide is their almost total dependence on and close affinity with the land and the resources yielded by the land. Equally true is the relentless way in which they have been dispossessed of the lands which they have been occupying or cultivating for generations.

In Malaysia, land is a state matter whilst the advancement, protection and well-being of the Orang Asli is a federal matter.¹⁷ Given that land and Orang Asli rights are deeply intertwined, this split in responsibility is the often-cited reason as to why the protection of Orang Asli lands and the recognition of their land rights has proven to be such an insurmountable problem.

The official policy of the Government in regard to land is contained in the Statement of Policy Regarding the Long Term Administration of the Aborigine People in the Federation of Malaya (“Policy Statement”). The broad principle adopted by the Government is set out as follows:

The special position of the aborigines in respect of land usage and land rights shall be recognised. Thus, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring

¹⁷ Ninth Schedule: State List, item 2, and Federal List, item 16, respectively.

them economically into line with other communities in their country. Aborigines will not be moved from their traditional areas without their full consent.

The paragraphs that follow examines some of features the Aboriginal Peoples Act 1954 (APA) in relation to Orang Asli land rights.

Classification of Orang Asli lands under the Act

The Act gives three categories of Orang Asli lands, namely, aboriginal inhabited places, aboriginal areas and aboriginal reserves.¹⁸

The term “aboriginal inhabited place” is defined as any place inhabited by an aboriginal community.

An aboriginal inhabited place may be declared by the relevant state authority, by giving notification in the Gazette, to be:

- (a) an “aboriginal area”, that is, any area predominantly or exclusively inhabited by aborigines and where it appears unlikely that the aborigines will remain permanently in that place;¹⁹ or
- (b) an “aboriginal reserve”, that is any area exclusively inhabited by aborigines and where the aborigines are likely to remain permanently.²⁰

Where there is no such declaration, or if the State Authority decides to revoke such declaration, the Act confers no express protection over such lands.

¹⁸ Section 2 of the APA.

¹⁹ Section 6(1) of the APA.

²⁰ Section 7(1) of the APA.

The APA envisages that Orang Asli settlements which are of a more permanent nature are to be treated as aboriginal reserves while other areas inhabited by Orang Asli which are less permanent, e.g. lands in which swidden agriculture is practised would be more appropriately declared as aboriginal areas. For that reason, the APA quite logically provides that an aboriginal reserve may exist within an aboriginal area.

Rights and interests

The APA grants a certain degree of protection to Orang Asli rights and their livelihood in respect of inhabited lands declared to be aboriginal areas or reserves.

Within aboriginal areas and reserves, no lands shall be declared as a Malay reservation or a wild animals or birds sanctuary reserve (sections 6(2) and 7(2)). Within an aboriginal reserve, no land shall be declared as a reserved forest and no land may be alienated or disposed of in any manner other than to Orang Asli and no temporary occupation of land may be permitted thereon (section 7(2)). Within an aboriginal area, land may be alienated or disposed of to non-Orang Asli after consultation with the Director General (section 6(1)).

Licences for the collection of forest produce may also be issued to non-Orang Asli or non-resident Orang Asli after consultation with the Director General (section 6(2)(iv)).

Tenure

As to tenure of land in Orang Asli areas or reserves, the Act, by virtue of section 8, only confers the right of occupancy to the Orang Asli community. In essence the Orang Asli are tenants-at-will and that only upon the grant of the State Authority. Orang Asli are, however, not precluded from being alienated or granted or leased any land under the relevant land laws, i.e. the National Land Code.

The meagre protection and rights granted under the Act over lands inhabited by Orang Asli is conferred only upon due declaration as aboriginal reserves or areas by the State Authority. There is no duty imposed on a State Authority to declare Orang Asli inhabited areas as aboriginal reserves or aboriginal areas, nor is the State Authority obliged to give reasons for why areas or reserves have been so gazetted. Conversely, the State Authority has the power to revoke the declaration of Orang Asli reserves or areas.

Degazetting reservations of Orang Asli reserves and areas

The State Authority may by notification in the Gazette revoke wholly or in part or vary any declaration of an aboriginal area or aboriginal reserve.²¹ Once revoked, aboriginal inhabited places which had been previously declared to be aboriginal areas or reserves lose the limited protection granted by the Act. No obligation is imposed upon the State Authority to declare other lands as aboriginal areas or reserves to replace those lands degazetted as such.

²¹ Sections 6(3) and 7(3) of the APA.

Compensation for loss of rights, etc.

Where land in an aboriginal area or reserve is excised, alienated, granted, leased or otherwise disposed of, the State Authority may grant compensation to any aborigine or aboriginal community. The same applies to the revocation wholly or in part of any right or privilege granted to an aborigine or his community. Compensation is paid either to the persons entitled or to the Director General to be held as a common fund for any aborigine or aboriginal community. The fund is to be administered in the manner prescribed by the Minister in charge of Orang Asli Affairs (section 12).

Malay reservations, reserved forests, game reserves: An Orang Asli community, residing in any land declared to be Malay reservation, reserved forests or game reserves under any written law has the right to continue to reside in such lands. However, section 10 provides that the State Authority may by order require the community to leave and remain out of such areas and may make an order for the payment of compensation in accordance with section 12.

State lands alienated or disposed of in other ways

The State Authority may alienate, lease, grant temporary occupation licence or otherwise dispose of state land—including non-gazetted or degazetted aboriginal inhabited places—to individuals or other entities allowed by law to hold land. Where an aboriginal community establishes a claim to

fruits or other trees on such land, the State Authority is required to pay compensation which the State Authority considers fair. The payment shall be made in accordance with section 12.

MALAYSIAN CASE LAW ON ORANG ASLI RIGHTS

Despite the limitations of the APA, the Malaysian courts have taken a liberal reading of the APA and have drawn on the Federal Constitution, the Policy Statement and common law principles to protect Orang Asli rights.

In *Koperasi Kijang Mas and 3 others v Kerajaan Negeri Perak & 2 Others*,²² the High Court held that the State Government of Perak had breached the APA when it accepted Syarikat Samudera Budi's tender to log certain areas in Kuala Kangsar which included lands in R.P.S. Sg. Banun and R.P.S. Pos Legap which had been approved by the State Government as aboriginal reserves.

The High Court went on further to hold that Syarikat Samudera Budi had no right to carry on logging activities. Only Orang Asli as defined in the APA had the right to the forest produce in these reserves.

An important point canvassed by the State Government was that the lands, although approved for declaration as aboriginal reserves had not been gazetted as such. Justice Abdul Malek held that gazetting was not a mandatory requirement and that the approval of the State Government for the lands to be declared as aboriginal reserves had, without the necessity of gazetting, created the reserves. Thereafter, only Orang Asli have

²² [1991] 1 CLJ 486.

exclusive rights to the forest produce in the reserves.

The decision has important implications for Orang Asli land rights as official sources indicate that some 29,878.63 hectares of aboriginal lands have been approved but have not yet been gazetted. Orang Asli residing in such approved lands have the same statutory rights as they have in respect of residents in gazetted aboriginal reserves including the exclusive right to forest produce. The decision also highlights the pressing demands of Orang Asli that other Orang Asli inhabited lands should be approved for declaration as reserves and gazetted speedily.

Common law rights to live on their ancestral lands

In the case of *Adong bin Kuwau & Ors, v Kerajaan Negeri Johor & Anor*,²³ the High Court made declarations that the aboriginal people of Sg. Linggiu had common law rights besides their statutory rights under the APA over their ancestral lands and their rights under the Federal Constitution.

The High Court held that the 52 plaintiffs who were heads of families of the aboriginal community living in the Sg. Linggiu catchment area had common law rights over 53,273 acres of land which had been alienated to the State Corporation by the Johor State Authority. Relying on the Australian decision of *Mabo (No. 2)* and a host of other authorities from other common law jurisdictions such as the United States, New Zealand and Nigeria, the High Court held that under the common law, the aboriginal people had common law rights to

²³ [1997] 1 MLJ 418.

live on their ancestral lands as their forefathers had done. Such common law rights include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the sense of conveying, leasing out, renting out the land or any produce therein.

The High Court, adopting a wide interpretation of the term “property”, held that such rights were proprietary rights which were guaranteed by Article 13 of the Federal Constitution. The State Authority had failed to show that it had any right to cause the plaintiffs to be deprived of their rights and the plaintiffs had not been compensated for such deprivation. Accordingly, the deprivation was unlawful.

The High Court awarded compensation to the plaintiffs because they had been deprived of the following:

- (i) heritage land;
- (ii) freedom of inhabitation and movement under Article 9(2) of the Federal Constitution;
- (iii) produce of the forests;
- (iv) future living for themselves and their immediate family; and
- (v) future living for their dependants.

The High Court assessed compensation in the sum of RM25.6 million to be paid to the 424 aboriginal people in the area. This case was significant as it was the first time the aboriginal people’s common law rights were ever recognised by the court. The High Court judgement was subsequently

upheld by both the Court of Appeal²⁴ and the Federal Court.²⁵

In *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,²⁶ the High Court dealt with a case of lands occupied by Temuans from which they were evicted. They were paid compensation only for their crops and fruit trees and the loss of their homes under the APA. The State Government contended that the land was state land. The High Court held that the land was customary and ancestral lands of the Temuans. They had a proprietary interest in, and to, the land forming their settlement. The Temuans' rights under the common law and the APA must be looked at conjunctively for both were complementary as the APA did not extinguish their rights under the common law. The land that was continuously occupied and maintained by the plaintiffs in accordance with their customs was land occupied under customary right. Referring to *Adong*, the court held that aboriginal peoples' land rights are proprietary rights which are protected by Article 13 of the Federal Constitution. The deprivation of their land for which inadequate compensation was paid was therefore unlawful.

The State and Federal Governments owe fiduciary duties to Orang Asli

In *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,²⁷ the court also held that the State Government of Selangor and the Federal Government owed fiduciary duties towards the

²⁴ *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [1998] 2 MLJ 158 (Court of Appeal).

²⁵ Decided in 2000 but unreported.

²⁶ [2002] 2 MLJ 591.

²⁷ *Ibid.*

Orang Asli plaintiffs. This duty is founded on Article 8(5)(c) of the Federal Constitution, item 16 in List 1 of the Ninth Schedule of the Federal Constitution, the APA, the 1961 Statement of Policy Regarding the Long Term Administration of the Aborigine People in the Federation of Malaya and a 1955 colonial document declaring responsibility for the welfare of the Orang Asli in the Bukit Tampoi area. In essence, this consists of the duty to protect the welfare of the Orang Asli including their land rights and not to act in a manner inconsistent with those rights. This duty had been breached by the unlawful deprivation of their proprietary rights and the unlawful eviction of the plaintiffs from their lands.

The Adong and Sagong decisions: Impact and implications

(a) Recognition of common law rights

The recognition of Orang Asli rights over their customary lands is founded upon the concept of native title rights at common law. Native title rights arise from pre-existing customary occupation and use of the land by aboriginal peoples. They existed before the enactment of statutes regulating land tenure and aboriginal peoples; and they continue to exist notwithstanding such legislation. The courts have ruled that such native title rights can only be overridden and extinguished by nothing less than plain, obvious and unambiguous legislation.²⁸

The existence of native title rights is a question of fact.

²⁸ *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1998] 2 MLJ 158 and followed in subsequent cases.

The courts will employ the following tests:

- (i) whether the claimants to such title is an aboriginal group of people;
- (ii) whether there is continuous occupation and use of the land from generation to generation – the test of “occupation” (as formulated in the case of *Madeli Salleh*)²⁹ is the existence of sufficient measure of control over the land to prevent strangers from interfering; it does not require actual physical presence on the land; and
- (iii) whether there exists a connection with the land through the observance of distinctive customs and practices.

Native title rights are not necessarily confined to the traditional use of ancestral land for hunting, fishing and gathering, but might well include rights to exploit resources which are consistent with ownership of the land over which the State may only exercise limited administrative control. In *Koperasi Kijang Mas*, the High Court held that under the statutory provision of the APA, the timber in aboriginal lands approved for gazetting, being the forest produce of such lands, can only be exploited by Orang Asli. There was no logical reason why the common law rights of Orang Asli to the produce of their ancestral lands are not protected as well.

(b) Extent of customary lands

However, the courts have on occasion been unwilling to

²⁹ *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677.

extend native customary rights to vast unsettled land or jungle where Orang Asli roam and forage, when it cannot be shown that there is an element of control over such lands by the indigenous claimants. According to the courts, this is logical, otherwise large areas of land would be under customary rights through assertions that aboriginal groups roam and forage in the area.³⁰ The determinant factor, the courts have held, is the test of occupation – whether the claimant has a measure of control over the land such that they could prevent strangers from interfering in those lands.³¹ It is a question of fact and is dependent on evidence presented to the courts.

In the recent case of *Ketua Pengarah Jabatan Hal Ehwal Orang Asli & Anor v Mohamad bin Nohing & Ors*,³² the Court of Appeal found on the facts, that the Semelai tribe in Pahang did not have control over the roaming lands such that they could prevent strangers from interfering in those lands. Further, the claimant could not identify the extent of the tribe's roaming lands. It was thus held that they did not have native customary rights over an indefinite area of land where they may roam and forage.

Conversely, in *Sangka Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor & Ors*³³ the High Court held that “lands used for roaming, hunting and foraging could not be automatically excluded from being deemed to constitute a part of the ancestral and customary land of the Orang Asli”.³⁴

³⁰ *Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256, at p. 539.

³¹ *Ketua Pengarah Jabatan Hal Ehwal Orang Asli & Anor v Mohamad bin Nohing & Ors* [2015] 6 MLJ 527, at p. 540.

³² *Ibid.*

³³ [2016] 4 CLJ 585.

³⁴ *Ibid.*, at p. 611.

Applying the test of “occupation”, the court found that the Jakun tribe was heavily dependent on hunting and foraging from the lands apart from the settled areas. They were dependent on the fruits of the forest for wood and traditional medicine. The Jakun tribe was able to show continual occupation of roaming lands by proving their heavy reliance and connection to the land by means of their continued traditional means of livelihood.

In December 2016, the Federal Court delivered its judgment on the East Malaysian (Sarawak) case of *Tuai Rumah Sandah*,³⁵ ruling that the Iban customs of *pemakai menua* (communal land or territorial domain) and *pulau galau* (forest reserves for hunting and foraging from which the Iban derive food, medicine and other produce) did not have the force of law. The apex court only recognised *temuda* (i.e. cultivated and settled land) as native customary land. It did not recognise the Iban’s native customary rights to forest reserve land that was used for hunting, foraging and roaming.

If this judgement were to be followed in future cases, it would have an adverse impact on native customary rights in Malaysia.

However, it can be argued that the Federal Court decision above was, in terms of practicality, not a majority decision, but rather, a 2:2 split decision. Of the five-person bench, four judges delivered their judgement while one had retired. Of the four judges, three ruled against Tuai Rumah Sandah while one

³⁵ *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 (Federal Court).

dissented. Of the three “majority” judgement, one judge ruled *on the facts* that the native Ibans had not proven on a balance of probabilities that they had native customary rights in the disputed land, and not on the principle that native customary rights did not exist in roaming and hunting areas.

In February 2017, the lawyers for Tuai Rumah Sandah filed a judicial review of the Federal Court’s decision, citing 15 grounds to support the application, one of which included the fact that the December 2016 judgement was effectively a minority decision.

(c) Compensation and due process

State Authorities which alienate Orang Asli traditional lands or grant licence to exploit resources in or on such lands have to consider compensation they will have to pay to Orang Asli for the loss of their rights under their native title. This applies to any dispossession of Orang Asli from their ancestral lands for government and private sector projects pursuant to which relocation plans or resettlement schemes are necessitated. Hitherto, the enormous social and economic cost to Orang Asli have never been quantified and are more often than not ignored. A pecuniary value must now be attached to these costs and this might well make it uneconomical for some projects to be implemented.

State Authorities are also obliged to accord Orang Asli affected by any administrative decision affecting their traditional lands the right to be heard, which is a component of the rule of natural justice. Alienation of lands or the granting

of interests in lands in which native title exists can be held to be null and void if such procedural matters are not complied with. Similarly, gazetted land in which native title is found to exist can be degazetted. In the case of *Mohamad bin Nohing*,³⁶ the Court of Appeal found that native title exists in an area gazetted as Malay reserve land. It was held by the Court that the gazette did not extinguish native customary rights in the land; instead the Malay reservation encroached upon the customary land of the Orang Asli. Consequently, the Malay reservation had to be degazetted. Orang Asli would also have the right to be heard before a decision to degazette Orang Asli areas and reserves is made by the State Authority.

To the extent that resource rights in and over Orang Asli traditional lands are recognised as part of native title rights, Orang Asli will have the right to exploit the resources on their lands. The right to be heard and the right to compensation for deprivation of Orang Asli traditional lands, and the rights attached thereto, effectively vest in Orang Asli the right to insist on being consulted and to negotiate upon the terms under which their rights are to be diminished or extinguished and surrendered to other interests.

It must also be noted here that the decision to alienate land, to grant licences to exploit resources on State land or to declare reserves under any written law is an administrative one. Such decisions are not only subject to judicial review by the courts as to whether all the procedures have been correctly followed, but also whether such decisions respect the Orang Asli's constitutional rights and other substantial merits of each

³⁶ [2015] 6 MLJ 527, at pp. 543–544.

decision. The jurisdiction to examine an executive decision on its merits may be expressed as the court's power to strike down an administrative action which is so flawed by reason of irrationality and/or for lack of proportionality that it amounts to an abuse of the law and therefore an unlawful decision. Where the land and other related rights of an Orang Asli or Orang Asli community are adversely affected by an administrative decision, an application for judicial review may be made on any of the grounds available for judicial intervention.

Even while the courts uphold and enforce native title rights in favour of Malaysia's indigenous people, our Orang Asli continue to face violations of their common law rights in customary land due to increasing development and commercial cultivation of land in Peninsular Malaysia. There is continual failure to gazette Orang Asli customary land as aboriginal reserves in accordance with the APA. As a result, Orang Asli tribes are involved in long, costly and protracted legal battles to preserve their lands.

In July 2013, the Human Rights Commission of Malaysia (Suhakam) published its Report of the National Inquiry on Land Rights of Indigenous Peoples.³⁷ It highlighted land rights violations of the indigenous peoples of Peninsular Malaysia, Sabah and Sarawak, and concluded with 18 recommendations. The recommendations included the need to address legal frameworks and policies to secure recognition of customary land and secure land tenure of such lands, and the need to adopt international standards in managing developments that

³⁷ The Report can be obtained here: <http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf> (accessed on 13 September 2018).

will affect indigenous lands.

In June 2015, the Cabinet formed a Cabinet Committee for the Land Rights of Indigenous Peoples to address the findings and recommendations of Suhakam. The success of this Committee in improving the dire customary land plights of the indigenous peoples of Malaysia remains to be seen.

At this point in writing, Parliament has yet to amend the outdated Aboriginal Peoples Act 1954 such that our laws on native rights reflect court decisions. Pending legislative action, state governments are expected to protect the rights of Orang Asli. However, many states do very little to protect the boundaries of Orang Asli customary lands, and there is very little effort in gazetting native customary land. Instead, state governments and local authorities have a tendency of displacing native communities and using such native customary land for commercial development.

Chapter Ten

MISCELLANEOUS

Can a church allow illegal immigrants to worship and/or take part in any activity organised by the church?

Are there any legal consequences for doing so?

An illegal immigrant¹ is prohibited from entering or remaining in Malaysia by virtue of section 8 of the Immigration Act 1959/1963 (IA 1959/63). Such an immigrant includes anyone who enters into Malaysia with a valid pass or permit, which subsequently expires or is terminated.² Such a person is guilty of an offence punishable under section 57 of the IA 1959/63 and is liable to imprisonment not exceeding five years and a fine not exceeding RM10,000 upon conviction.

The issue faced by churches in recent years is whether a church, by allowing an illegal immigrant to attend church activities, has committed an offence under the IA 1959/63. What if a church goes on to help or to provide for the daily needs of the immigrant, such as supplying food, clothing, etc.? What is the extent of assistance which a church can render under the law?

¹ The IA 1959/63 uses the term "prohibited" instead of illegal immigrant which seemingly intends to cover a wider range of persons under this category. See definition of "prohibited immigrant" under section 2 of IA 1959/63.

² Section 8(3)(o) of the IA 1959/63.

Unfortunately, section 55E of the IA 1959/63 makes it an offence for an occupier to permit an illegal immigrant to enter or remain at any premises. The onus lies on the “occupier” of the premises. An “occupier” means a person who has charge, management or control of any premises; and “premises” includes land, building and vehicles. The penalty for such an offence is a fine of an amount between RM5,000 and RM30,000, or imprisonment of up to one year, or to both, for each illegal immigrant discovered on the premises. In the case of a subsequent offence, the penalty is a fine between RM10,000 and RM60,000, or imprisonment for a term up to two years, or to both, for each illegal immigrant found on the premises.

The law (section 55E(3)) presumes that the occupier had knowledge that such persons on his premises are illegal immigrants. It is for the occupier to prove that he had taken all reasonable measures to prevent any illegal immigrants from entering or remaining on the premises.

This means that if a church, knowingly or unknowingly without taking reasonable measures to ascertain the status of a foreigner, welcomes an illegal immigrant to its premises, it will be in contravention of section 55E. Where a church commits the offence, the office bearers of the church may be found liable.³

Further, under section 56(1)(d), if a person “knowingly harbours⁴ any person” whom he knows or has reasonable grounds to believe has contravened the Act. The penalty may

³ Section 55E(6) of the IA 1959/63.

⁴ “Harbouring” means sheltering or providing refuge: *Butterworth’s Australian Legal Dictionary*, Butterworth, 1997, p. 543.

extend to a RM10,000 fine and five years' imprisonment.⁵ In other words, the person who harbours or "conceals an offender (in this case, an illegal immigrant) with the intention of shielding him"⁶ will be prosecuted under this provision.

The law on illegal immigrants is harsh. However, the IA 1959/63 should not negate the principles of human rights. An illegal immigrant should equally be accorded dignity and we should render assistance to meet their basic needs such as food and shelter should the need arises.

So what can the church do?

There is no legal prohibition to helping an illegal immigrant so long as such assistance does not constitute providing shelter or refuge to such person. As such, the church may consider obtaining legal aid or assistance on behalf of the illegal immigrant.

Also, there is no apparent legal duty placed on the public to report the presence of illegal immigrants.⁷

The main issue here is whether a non-

Can a non-Muslim female carrying a baby fathered by a Muslim partner be prosecuted in court (whether civil or Syariah)? Is it an offence if she refuses to convert to Islam after marrying a Muslim?



Muslim can be prosecuted for any offence under Islamic law in a Syariah Court. Let us examine this by first looking at a few basic legal and constitutional settings in Malaysia.

(a) As discussed in Chapter 1, Malaysia is a *secular*

⁵ Section 56(1)(bb) of the IA 1959/63.

⁶ K.J. Aiyar's *Judicial Dictionary*, The Law Book Co Pte Ltd, 11th edn, 1993, p. 553.

⁷ Section 45(1) of the IA 1959/63: Except for the master of a vessel and the captain of an aircraft who have the legal duty to report to the immigration or police officer, any person, passenger or crew on board who fails to continue his journey.

state. Even though Article 3 of the Federal Constitution provides that Islam is the religion of the Federation, the effect of such provision is that Islam is accorded special status as the official religion of the Federation. As the official religion, its rituals and rites can be applied in official ceremonies of the Federation. It does not dilute in any way the fact that Malaysia is not an Islamic state. As far as the legal system is concerned, Malaysia has a unique dual judicial system, i.e. a civil court system that has jurisdiction over all Malaysian residents and citizens, and a Syariah Court system, which applies only to Muslims.

(b) The Federal Constitution also provides that the civil courts will have no jurisdiction with respect to matters within the jurisdiction of the Syariah Court.⁸ The jurisdiction of the Syariah Court is spelled out in the Syariah Court (Criminal Jurisdiction) Act 1965 to include:

- (i) jurisdiction over *persons professing the religion of Islam*;
- (ii) jurisdiction in respect of any matters enumerated in List II (State List) of the Ninth Schedule to the Federal Constitution;
- (iii) jurisdiction in respect of any offences against precepts of the religion of Islam *by any person professing that religion*.

However, such jurisdictions are confined to offences punishable

⁸ Article 121(1A) of the Federal Constitution, a clause which was added and came into force on 10 June 1988 by virtue of Amendment Act A704.

with imprisonment not exceeding three years or fine *not* above RM5,000 or whipping *not* more than six strokes or any combination thereof.

Thus, it would seem that a non-Muslim cannot be prosecuted in a Syariah Court no matter what kind of offence he/she is deemed to have committed against the precepts of Islam.⁹ Unless and until a person has converted into the Islamic faith, the Islamic laws in Malaysia are not applicable to him or her, and he or she is not subject to the Syariah Court system.

Consequently, even if a non-Muslim woman carries a baby conceived with a Muslim before marrying him, she cannot be prosecuted in a civil court nor in a Syariah Court although being pregnant out of wedlock is an offence under Islamic law. Since it is also not an offence under the civil law, the civil court will have no jurisdiction to try such an “offence”.

In Malaysia, it is against Islamic family law for a Muslim to marry a non-Muslim spouse.¹⁰ It is therefore not possible for a non-Muslim person to legally marry a Muslim partner without converting to Islam. Generally, it is also not possible for the Muslim person to convert out of Islam to legally marry a non-Muslim partner. Conversion out of Islam is an offence under Syariah criminal law (see the discussion in Chapter 4 on apostasy).

⁹ However, please see Chapter 4 (Propagation) for a discussion on how Islamic law can affect non-Muslims in Malaysia.

¹⁰ Section 10 of the Islamic Family Law (Federal Territories) Act 1984. Similar provision can be found in equivalent state Enactments on Islamic family law.

WHAT ARE THE IMPLICATIONS IF A SPOUSE CONVERTS TO ISLAM?

When one spouse in a marriage converts to Islam, there are three main familial implications: (i) divorce; (ii) child custody (if the couple have children); and (iii) inheritance.

Divorce

The conversion of one spouse to Islam does not automatically operate to dissolve the marriage. Under the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976), if one party to a civil marriage converts to Islam, the non-converting spouse may petition for divorce after a period of three months from the date of conversion.¹¹ In short, the converted spouse has no right to petition for divorce on grounds of his or her conversion (though he or she may do so on other grounds in accordance with the LRA 1976). The right to petition for divorce on grounds of conversion to Islam is accorded only to the non-Muslim spouse.

The LRA 1976 continues to apply to even if one party to the marriage subsequently converts to Islam.¹ The converted spouse may not escape his or her responsibilities under the LRA 1976 on grounds of conversion to Islam. Further, the Syariah Court has no jurisdiction to dissolve a civil marriage under the LRA 1976, even though one party to the said marriage has converted to Islam. The Syariah Court has jurisdiction only over divorce and custody when it involves a Muslim marriage

¹¹ Section 51(1) of LRA 1976.

which is solemnised according to Islamic law.¹² Therefore, should a converted spouse wish to petition for divorce after conversion to Islam, he or she would need to rely on the relevant provisions on divorce and dissolution of marriage under LRA 1976 and not Syariah law. For instance, the converted spouse may petition for divorce under section 53 of the LRA 1976, on the ground that the marriage has irretrievably broken down, or both parties may mutually agree to dissolve their marriage under section 52 of the LRA 1976.

Nevertheless, this situation will change because on 9 August 2017 and 21 August 2017, the Law Reform (Marriage and Divorce) (Amendment) Bill 2017 was passed by the *Dewan Rakyat* (House of Representatives) and the *Dewan Negara* (Senate) respectively. At the time of writing, however, the law has not yet come into operation. Under the new law, a Muslim convert whose civil marriage has not been dissolved will have the same right as his or her non-Muslim spouse to file a divorce in a civil court on the ground of conversion to Islam.

Child custody

In recent years, conflict and legal battles have ensued over the custody of children where one parent converts to Islam. In the high profile cases of Subashini a/p Rajasingam, Deepa a/p Subramaniam and Indira Gandhi, their husbands converted to Islam and proceeded to the Syariah Court for custody orders in respect of their children. The common alleged ground for

¹² This was held by the Federal Court in the landmark case of *Viran a/l Nagapan v Deepa a/p Subramaniam and Other Appeals* [2016] 1 MLJ 585.

doing so is that the newly converted Muslim parent now has recourse under Syariah law as a Muslim.

The Federal Court held in *Deepa's* case¹³ in 2016 that child custody and maintenance of children born in a civil marriage will be determined by the civil courts in accordance with the LRA 1976. The converted parent may not shirk his or her obligations under the LRA 1976. Neither may the converted spouse rely on Syariah law to his gain or interest. Notwithstanding the conversion of one spouse to Islam, the civil courts continue to have jurisdiction regarding the dissolution of the marriage and determination of ancillary issues, including custody of children.¹⁴

In the *Indra Gandhi* case,¹⁵ Indira was married under a civil marriage. There were three children from the marriage. When the husband converted to Islam in 2009, the Syariah Court granted the husband custody of the children. When the order was made, the elder two children were with Indira while the youngest was with the husband. Sometime later, Indira received certificates of conversion of the children into Islam, which were issued by the Registrar of Muallaff. Indira filed an application to the civil High Court challenging the decision of the Registrar on the grounds that the conversions did not comply with the requirements of sections 96 and 106 of the Perak Enactment. The High Court allowed the application and quashed the certificates issued by the Registrar. In addition, custody of the children was returned to Indira.

¹³ *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585.

¹⁴ *Ibid.*, at pp. 598–599.

¹⁵ *Indra Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & others and other Appeals* [2018] 1 MLJ 545.

On appeal, the Court of Appeal held that the High Court had no power to question the decision of the Registrar of Mualaff. Indira appealed that decision and submitted that Article 121(1A) of the Federal Constitution did not oust the jurisdiction of the civil courts. The Federal Court agreed with the submission and further stated that Article 121(1A) did not confer judicial power on the Syariah Courts. The jurisdiction to review the actions of public authorities still remained with the civil courts. In addition, as the wife was a non-Muslim, she could not appear before the Syariah Court nor was that court empowered to hear her case.

The Federal Court relied on the Guardianship of Infants Act 1961 which provides that both parents had equal rights in relation to the custody and upbringing of the infant children and the wishes of both parents must be taken into account. The conversion of the husband to Islam did not alter the antecedent legal position, nor did it bring the children out of the ambit of the Guardianship of Infants Act 1961. Under the circumstances, the Federal Court held that since the certificates of conversion were issued without Indira's consent, the certificates were void.

Inheritance

Inheritance and probate laws, namely the Wills Act 1959 and the Distribution Act 1958, only apply to non-Muslims.

Wills made by Muslims must be drawn up in accordance with Syariah principles. The Syariah Court will have jurisdiction in determining any issues or disputes relating to the will of a

Muslim convert. If a Muslim convert dies intestate (i.e. without a will), his estate will be distributed in accordance with the *faraid* principles. In general, non-Muslim family members are not qualified to inherit the estate of a Muslim person under the *faraid* system. If a Muslim convert wishes for any non-Muslim to inherit, he/she must draw up a will (that should be in compliance with Syariah principles or the Wills Enactments in the states of Selangor, Negeri Sembilan and Melaka) in order to provide for his or her non-Muslim beneficiaries to the extent permissible by Syariah principles.

In order to ensure that the next-of-kin of a Muslim convert who subsequently dies intestate before the civil marriage is dissolved shall be entitled to the matrimonial assets, the Law Reform (Marriage and Divorce) (Amendment) Act 2017 has introduced a new provision into the Law Reform (Marriage and Divorce) Act 1976, namely section 51A. Under this new provision, if a Muslim convert dies before the dissolution of his or her civil marriage, his or her matrimonial assets shall be distributed by the court among the interested parties (namely the surviving spouse and surviving children of a marriage, if any, and the parents of the deceased converted spouse) upon application by any interested party. In exercising its power of distribution, the court shall have regard to several factors, which are:

- (a) the extent of the contributions made by the interested parties in money, property or works towards the acquisition of the matrimonial asset or payment of expenses for the benefit of the family;

- (b) any debts owing by the deceased and the interested party which were contracted for their benefit;
- (c) the extent of the contributions to the welfare of the family by looking after the house or caring for the family;
- (d) the duration of the marriage;
- (e) the needs of the children, if any, of the marriage; and
- (f) the rights of the interested party under the Distributions Act 1958 if the deceased had not converted.

The End