Doing The Right Thing

A Practical Guide on Legal Matters for Churches in Malaysia

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2004

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Preface

Churches in Malaysia operate under a set of laws that imposes restrictions on their freedom to practise their faith. The Christian community has often experienced anxieties about matters pertaining to the law, which can appear complex and intimidating. Christians feel paralysed since they are unsure if they are doing the right thing. Arising from this, there is an obvious need for Christians to be equipped with a basic knowledge of the law so that they can exercise their Constitutional right to profess, practise and propagate the Christian faith with wisdom and courage that comes from knowing that they have done the right thing in the eyes of the law. It is with this in mind that Kairos Research Centre offers this handbook to the wider Christian public.

This handbook was put together with the help of several Christian lawyers. It represents an initial step in a long-term project to help Christians keep up with laws that change over time. Conceivably, other issues will arise in the future that will need to be addressed. Hence, the handbook will need to be updated from time to time. We welcome suggestions from our readers as to how the book may be improved so that it will become an invaluable resource for the Christian community.

Ng Kam Weng
June 2004

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CHAPTER 1

Church Organisation

- What is the legal or constitutional status of a church in Malaysia?
- Does a church need to be registered as an institution under the Societies Act 1966, Companies Act 1965 or be a member of any registered Christian organisation?

POSITION OF ISLAM AND OTHER RELIGIONS

Article 3(1) of the Federal Constitution spells out that Islam is the religion of the Federation of Malaysia, but other religions may be practised in peace and harmony in any part of the Federation. It must be emphasised, however, that Malaysia is a *secular* state. In other words, this means that although Islam is the official religion, this country is not an Islamic state.[1] In the memorandum submitted by the Alliance Party to the Reid Commission prior to the independence of the Federation, it was stated that:

"Malaysia is a secular state. In other words, this means that although Islam is the official religion, this country is not an Islamic state."

> …The religion of Malaysia shall be Islam. The observance of this principle shall not … imply that the State is not a secular State.[2]

This statement strongly suggests that the expression 'Islam' in the Federal Constitution merely means "such acts as relate to rituals and ceremonies."[3]

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 principal and significant right to the freedom of religion in Malaysia in its unequivocal declaration that *every person*[4] has the right to:

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1 See the explanation of the late Tunku Abdul Rahman Putra Al-Haj, the first Prime Minister of Malaysia, and the comment of the late Tan Sri Dr. Tan Chee Khoon in *Contemporary Issues on Malaysian Religion*, Pelanduk Publication, 1985 pp. 25 and 29.

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

3 *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55.

4 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.

(1) *Profess*;
(2) *Practise his own religion*; and
(3) *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.

In concurrence with the rights vested in Article 11(1) of the Federal Constitution, every religious group, under Article 11(3), is entitled to:

(1) manage its own religious affairs;
(2) establish and maintain institutions for religious or charitable purposes; and
(3) acquire and own property, hold and administer property in accordance with the law.

However, this right as bestowed shall be exercised without breaching any general rule relating to public order, public health or morality (Article 11(5) of the Federal Constitution).

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

CONSTITUTIONAL STATUS OF CHURCHES

"... establishing a church is both inevitable and necessary for Christians to exercise their religious rights under the Federal Constitution."

Article 11(1) of the Federal Constitution ensures the right to profess and practise our religion. Right to "profession of religion" means the right of the person who believes in a religion to state his creed in public, whilst the "practice of religion" is the practical expression of his belief in the form of private or public worship, in word or deed.[5] He may do so by carrying on worship himself or partaking in a worship carried on by others.[6] It follows naturally that a person who professes Buddhism can in no way practise his/her Buddhist religion unless a Buddhist temple is established for that purpose. Similarly, no Christian can profess and practise Christianity, in which community life forms an essential part of its practice, without having in the first place a church. In other words, establishing a church is both inevitable and necessary for Christians to exercise their religious rights under the Federal Constitution.

Furthermore, such a right is specifically elucidated and affirmed by Article 11(3)(b) of the Federal Constitution, where the right *to establish and maintain institutions for religious* (and charitable) *purposes* is impliedly granted to *all* religious groups, and not limited to Islam only. The word "institutions" must necessarily include churches, temples, mosques, monasteries and the like, while the phrase "establish and maintain" suggests that unless a religious group contravenes any law relating to public order, public health

5 *Stainislaus v State* AIR 1975 M.P. 163.
6 *Shrirur Mutt v Commissioner* [1952] Mad LJ 557 at p. 587.

or morality,[7] it cannot be abolished by the Government. Rationally, establishing and maintaining a church by Christians is constitutionally protected as it falls entirely within the ambit of Article 11(3)(b).

Hence, there is no doubt that Articles 11(1) and (3)(b) of the Federal Constitution firmly guarantees the constitutional status of churches established throughout the whole of Malaysia. Such freedom of religion promulgated in and bequeathed by the Federal Constitution to Christians in Malaysia must therefore include 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. Interpreting otherwise would either render the provisions in the Constitution meaningless and frivolous, or disparage and ridicule the authority of the "Supreme Law of the Federation"[8] in granting rights to the populace of Malaysia.

However, the more practical question is not whether a church can exist, but rather in what *form* it may exist in Malaysia. A simple illustration is that a business can be registered as a *public or private company* whilst a charitable or sports club can be registered as a *society*. One may ask the question: what is the importance of having such a status? This issue will be discussed in detail below.

REGISTRATION OF A CHURCH—WHETHER NECESSARY

It suffices, at this stage, to say that on the one hand, a church *need not be registered* through any mechanism in order to be a lawful and constitutional body, as the Federal Constitution, which overrides all laws in Malaysia, guarantees unequivocally the legitimate existence of churches in any part of the Federation. Hence, a peaceful church gathering cannot be regarded as an illegal or unlawful assembly on the ground that the church has not been registered as an organisation. Any law against a harmonious religious meeting will, presumably, be *ultra vires*[9] the Constitution or void by virtue of Article 4(1) of the Federal Constitution. Any unjustifiable

"... a church need not be registered through any mechanism in order to be a lawful and constitutional body..."

7 This is one of the two restrictions to religious freedom in Malaysia. Article 11(4) of the Federal Constitution allows the State and Federal governments (for Federal Territories only) to legislate laws controlling and restricting the propagation of non-Islamic beliefs to Muslims. This provision will be scrutinised in Chapter 4. Likewise, Article 11(5) subjects the right to freedom of religion to the law relating to public order, public health or morality so as to prevent the commission of any such crime in the name of religion. Examples of such laws are provisions under the Penal Code (Act 574), sections 295-298A, which make it an offence to engage in activities such as disturbing a religious assembly, trespassing a place of worship and burial ground, and destroying or defiling a place of worship with the intent of insulting the religion of any person.

8 Article 4(1) stipulates that any law passed after Merdeka Day that is inconsistent with the Federal Constitution, the supreme law of the Federation, shall be void to the extent of the inconsistency.

9 *Ultra vires* means beyond one's (legal) power or authority: The Concise Oxford Dictionary of Current English (7th Edition, Oxford University Press) 1987, p. 1163.

interference of a religious assembly, whether by the authorities or private persons,[10] amounts to an infringement of the constitutional rights of that particular religious group. In such context, obviously, registration of churches in Malaysia is a non-issue.

Unfortunately, a church that is not registered may encounter difficulties with matters involving land (immovable property), bank accounts (movable property), or when applying for approval from government authorities (for instance, when applying for 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 (hereinafter refer as "the NLC"), which is the *law* governing land matters in Malaysia, does not include churches as one of the many bodies which are eligible to hold and deal in land in Malaysia.[11]
(c) Church denominational groups which were established in Malaya after the year 1900[12] (for instance, Assemblies of God[13] and Full Gospel Assembly[14]) and newly-established local churches are generally not recognised by the government, what more in being granted the status of a *body corporate*[15] entitling them to own church property.

These issues will be discussed further in the chapter on "Church Buildings." For now, it suffices to say that Christians have the right to hold a gathering for religious purposes. There is no law against such gatherings in Malaysia; and even if there is, it is submitted that such a law is *ultra vires* the Constitution and, therefore, void and unenforceable. Similarly, there is no prohibition, either legally or constitutionally, against the establishment of church organisations in any part of this country. Knowing the indisputable right that we have, Christians need not be doubtful or fearful with regards to establishing churches and organising church gatherings.

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10 A private person may be charged under section 296 of the Penal Code for causing such interference and disturbance to a religious assembly. The offence carries a maximum punishment of one year's imprisonment and fine upon conviction.

11 See sections 43 and 205(2) of the NLC. For details of the provisions and for further discussion, see the chapter on "Church Buildings."

12 For the denominational history of churches in Malaysia, see *Christianity in Malaysia: A Denominational History* (Pelanduk Publication, 1992) particularly p. 357.

13 The Assembly of God was established in Malaysia in 1935: ibid.

14 The Full Gospel Assembly was established in Malaysia in 1978: ibid, n 10.

15 A body corporate is entitled to hold property under the NLC: see section 43(d) of the NLC. See further the chapter on "Church Buildings."

Having said that, it is not uncommon for the authorities to find other reasons to impede or repress Christian gatherings especially gatherings held in residential and commercial premises, which are not places or premises designated for religious purposes. The reasons for and possible solutions to this predicament will be explored in Chapter 3.

- What are the pros and cons of registering a church under the various existing Acts?

INTRODUCTION

Let us now examine the pros and cons of registration under two main legal mechanisms provided for under the 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 1965.
2. The Societies Act 1966.

POSITION UNDER THE COMPANIES ACT 1965

ADVANTAGES		DISADVANTAGES	
1. *Separate legal entity:* A company has an existence apart from the persons who form it[16] in the eyes of the law, i.e. recognised by the law as an individual person. Thus, a company may sue a party with respect to a right that it has, e.g. under a contract.	section 16(5) & *Salomon v A Salomon & Co. Ltd.*[17]	1. Since it is a separate legal entity, it can 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 *Peck Constance Emily v Calvary Charismatic Centre Ltd*[18] on the ground of failure to comply with the company's Articles of Association and contravention of the principles and rules of natural justice. This may facilitate unnecessary legal action against the church.	

16 Walter Woon, *Company Law*, 2nd ed., FT Law & Tax, Asia Pacific, 1997, p. 1.

17 [1897] AC 22.

18 [1991] 2 MLJ 455, at p. 457.

ADVANTAGES		DISADVANTAGES	
2. *Membership:* No maximum number of members, except in relation to a private company.[19] A church can only be incorporated into a public company limited by guarantee.	section 15(1) (b)	2. A company must have a minimum of 2 members. Section 36 makes it an offence for a company to carry on business for more than 6 months after the membership has fallen below two.	section 36
3. *Property:* 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,[20] chattels, shares, etc.	section 16(5)	3. A company is prohibited from making a loan to its Directors or person(s) related to the Directors. A Director who authorises the issue of such a loan commits an offence and is liable for a maximum penalty of RM10,000.	section 133 & section 133A

19 A private company may generally have no more than 50 members.

20 *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

ADVANTAGES		DISADVANTAGES	
4. *Liability of members:* Assuming that an incorporated church is indebted to someone, the 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[21]). The members of a company cannot be sued for a company's debt. Normally, churches 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. Guarantee companies 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.[22]	section 214 (1)(e)	4. *Licence of Minister of Domestic Trade and Consumer Affairs to acquire Land:* A company formed for the purpose of promoting religion or any other like object not involving acquisition of gain by the company or its members *shall not* acquire any land without licence from the Minister. The Minister may by licence empower any such company to hold lands in such quantity and subject to certain conditions, as he thinks fit. If the decision of the Minister is unsatisfactory, the company may appeal to the Yang DiPertuan Agong within one month of such decision. Hence, the advantage of holding property is not absolute, but subject to the approval of the Minister.	section 19(2) section 19(4)
5. *Duration & Dissolution:* 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.[23] A company can continue to operate even without a business, directors or members. This means that it has perpetual succession.	section 16(5)		

21 However, under section 24 of Companies Act, the minister may grant licence to a company to dispense with this requirement, provided that the limited company:
(a) is formed to provide recreation or promote *religion, charities*, etc., and other objects useful to society;
(b) will apply its income and profits to promote its objectives; and
(c) will prohibit the payment of dividends.

22 *Supra*. n 1, p. 7.

23 Ibid., p. 52.

POSITION UNDER THE SOCIETIES ACT 1966

ADVANTAGES		DISADVANTAGES	
1. *Separate legal entity:* 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.[24]	section 9(c)	1. Being a legal entity, the natural consequence is that all claims and judgments of court would be executed against the property of the society.	section 9(e)
2. *Property:* The immovable property of a registered society may be registered in the name of the society unless it has been registered in the name of a trustee. So long as all documents or instruments relating to the property are duly signed and executed by three present office-bearers,[25] the documents shall be valid and effective as though it has been done by a private person or a registered proprietor. The movable property, if not vested in trustees, is vested in a "governing body."[26] This means that the society can open a bank account through the 'governing body' or trustee.	section 9(b) section 9(a)	2. *Restriction to the office-bearers:* A person who has been: (i) convicted of any offence under the Societies Act (hereinafter referred to as "the SA 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.[27] (iii) detained, banished, deported, etc. under any law relating to security and public order. (iv) an undischarged bankrupt, etc. cannot become or remain as an office-bearer, adviser or employee of the registered society. In this context, the term "office-bearer" extends to any person responsible for the management or conduct of any activity of the society.[28] Such a restriction may not be a fair yardstick for a church or Christian organisation to choose its leader or adviser.	section 9A

24 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 SA 1966.

25 The appointment of an office-bearer must be authenticated by a certificate of the Registrar and sealed with the seal of the Society.

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

27 Such a restriction will cease after 5 years from the date of release from imprisonment, or from the date on which a fine was imposed: section 9A(2) of the SA 1966.

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

At this juncture, it would be wise to explore the definition of the word "society." Section 2 of the SA 1966 seems to suggest that a religious body cannot fall under the category of "society." "Society" under the SA 1966 includes any club, company, partnership or association of seven or more persons whatever its nature or object. On the other hand, the Act does not expressly exclude religious bodies from the scope of its definition.[29] As such, a church organisation can be registered as a society if it chooses to. However, once it is registered, the church will be governed and controlled by the stringent and rigorous provisions of the SA 1966.

"... a church organisation can be registered as a society if it chooses to. However, once it is registered, the church will be governed and controlled by the stringent and rigorous provisions of the SA 1966."

Powers of the Minister, Registrar and Police under the SA 1966

It is clearly not advisable for a church to register under the SA 1966 considering the wide and unfettered powers of discretion conferred on the Minister, the Registrar and his subordinates and the police. This is further illustrated below:

The Power of the Minister of Home Affairs

(1) To declare a society unlawful under section 6 of the SA 1966

The Minister has the absolute discretion to declare a society unlawful if he is of the opinion that the society is being used for purposes prejudicial to the security of Malaysia, public order and morality. In the absence of a precise definition of the terms "security, public order and morality," such power may be abused for political or religious reasons.

(2) To make regulations under section 67 of the SA 1966

Apart from prescribing the procedural requirements of a society, the Minister is also empowered to make regulations "prescribing anything which may be prescribed" under the SA 1966.[30] This is again an extension of powers granted to the Minister under the SA 1966. So far the Minister of Home Affairs has made two significant regulations:

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29 Some institutions have been expressly excluded. This includes:
- (i) a registered company;
- (ii) a company or association constituted under law;
- (iii) a registered trade union;
- (iv) a company, association or partnership constituted solely for business purposes;
- (v) a registered co-operative society;
- (vi) a school organisation or club;
- (vii) a school, management committee of a school or parent-teacher association.

30 Section 67(2)(f) of the SA 1966.

(a) The Societies Regulations 1984[31]

This regulates not only the procedures of application for the registration of a society, but it also bestows powers on the Registrar to order any society to produce for his inspection:

(i) documents of title of any property held by it;
(ii) all books of accounts; and
(iii) minutes and other records of proceedings,

failing which the office-bearers and management[32] may be liable, upon conviction, to a fine not exceeding RM1,000 or/and a term of imprisonment of not more than 6 months.

(b) The Societies (Application for Vesting Order) Regulation 1993[33]

This regulation was made for the purpose of vesting in a newly registered society the property owned by a society whose registration has been cancelled.

The Power of the Registrar

(1) General powers under section 3 of the SA 1966

This provision allows the Registrar to "exercise all such powers, … as may be necessary for the purpose of giving effect to and carrying out the provisions of the [Societies] Act." It seems to suggest that the Registrar can do practically anything to ensure compliance with the Act. It is submitted that unrestricted powers such as these are hazardous and can be abused as "absolute power corrupts absolutely." Section 3A, which was inserted into the SA 1966 after 1988, can be used to curtail the activities organised by a church or Christian organisation registered as a society.

(2) To refuse registration of a society under section 7 of the SA 1966

The Act provides for a wide range of grounds on which the Registrar can refuse the registration of a society, such as:

(a) if there is a dispute among the members (section 7(2)(c)).
(b) if it *appears to the Registrar* that the purpose of the society is prejudicial to the "peace, welfare, security, public order, good order or morality" in Malaysia (section 7(3)(a)).
(c) if the registered name of the society is, *in the opinion of the Registrar, undesirable* (section 7(3)(d)(ii)).

31 PU (A) 402/1984.
32 Refer to Regulation 14, which imposes such obligation on both the office-bearer and person(s) managing and assisting the management of the society.
33 PU (A) 281/1993.

These terms are poorly defined and this opens the door for misapplication. Though a society may appeal to the Minister or further appeal to a civil court over a decision made by the Registrar, such litigation is normally lengthy and costly.

(3) To cancel registration of any society under section 13 of the SA 1966

The SA 1966 empowers the Registrar to cancel the registration of a Society for reasons such as non-compliance with an order made by the Registrar[34] or when the current object pursued by the society differs from its registered objects.

(4) To enter and inspect records under section 63 of the SA 1966[35]

If the Registrar has reason to believe that the society is acting in contravention of the SA 1966, he may enter and search any place of meeting of the society and inspect books, accounts, minutes and other documents kept by the society after giving notice to any of its office-bearers. The Registrar does not even need to have any basis or proof for so doing, as long as he "has reason to believe" that the society has not observed any one of the provisions in the SA 1966 or rules and regulations made under it.

(5) Power of entry in special cases under section 64 of the SA 1966

If the Registrar or the Assistant Registrar *has reason to believe* that a registered society is being used for purposes prejudicial to public peace, welfare, good order or morality in Malaysia, he may enter (by using force, if necessary) and search the place and persons therein for evidence of such wrongdoing. Normally, such an act would be regarded as an intrusion of privacy and trespassing on private property, but in the case of a registered society the Registrar has been expressly vested with the power to do so.

The Power of the Police

Power of entry and search

Apart from the Registrar, the police[36] also have the power to enter, by force or otherwise, and make a search in any dwelling house or building where they *have reason to believe* that:

(1) A meeting of any *unlawful society* is being held in the building;
(2) Books, accounts, writings, list of members, banners, etc. of an unlawful society are being kept within the premises.

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34 Under section 13A, the Registrar has the power to make certain orders requiring the society to do or not to do certain matters. Non-compliance will render the registration of the society cancelled.

35 Such power is also extended to the Assistant Registrar and to Registration Officers appointed by Yang Di Pertuan Agong under section 3(1) of the SA 1966.

36 This must be a police officer of or above the rank of Inspector. However, he may be assisted by his subordinates.

The police also have the authority to arrest any person and seize all things that belong to such an unlawful society.

SUMMARY

As mentioned earlier, a church need not be registered in order to be a lawful organisation. A church legally exists and stands as it is by virtue of the Federal Constitution and not by any registry mechanism under any statute. Nevertheless, if a church has been registered under the SA 1966, it can, contrary to its initial or primary constitutional status, be "made" an unlawful society as elucidated in section 41(1)(d) of the SA 1966.

Section 41(1)(d) provides that a society becomes unlawful if its registration has been cancelled under sections 2A, 13, 14 or 16 of the SA 1966. This means that a society, though registered, can be rendered unlawful, if its registration is cancelled due to one of the following reasons:

(1) Non-compliance with the stipulation of Federal or State Constitution (section 2A);

(2) If the Registrar is satisfied that:

- the registration was effected as a result of fraud, mistake or misrepresentation in any material matter;
- the society is being used for unlawful purposes prejudicial to the peace, welfare, good order or morality in Malaysia;
- the society is pursuing objects other than the registered objects;
- the society has wilfully contravened the SA 1966 or any regulations thereof or any of its members habitually contravenes section 4(1) of the Sedition Act;
- the society has ceased to exist; and
- the society fails to conform to an order made by the Registrar under section 13A (section 13).

(3) Failure to furnish information required by the Registrar such as providing a list of office bearers, audited accounts, description of moneys or property received from person(s) or organisation ordinarily residing outside Malaysia, or "other such information as the Registrar may from time to time require" (section 14).[37]

(4) Dispute among members or office-bearers that is unresolved (section 16).

The office-bearers,[38] members[39] and representatives[40] of an unlawful society face

37 See details in section 14(2)(a) to section 14(2)(e).

38 An office-bearer managing or assisting in managing an unlawful society can be imprisoned up to a maximum term of 5 years and fined up to RM 10,000 (section 42).

39 Members of an unlawful society can be liable to 3 years' imprisonment and a fine of RM 5,000 (section 43).

40 Any person acting on behalf of, representing or assisting, whether in a professional capacity or otherwise, an unlawful society may be liable, upon conviction, to 5 years' imprisonment and a fine of RM 10,000 (section 48).

numerous criminal liabilities. Taking into account the number of 'dangerous stipulations' in the Act, a church should think twice before taking upon itself such encumbrances. If a church is thinking of registering itself as a society for the sole purpose of acquiring land, there are better options, such as trusteeship. This will be addressed in the next chapter.

"If a church is thinking of registering itself as a society for the sole purpose of acquiring land, there are better options, such as trusteeship."

CHAPTER 2

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 trusteeship? How can a trustee hold property on behalf of the church?

OWNERSHIP OF CHURCH PROPERTY

When we talk about ownership or holding of property in the name of a church, what we really mean is that in the title deed (commonly known as the "grant" or "document of title") of the land, the registered proprietor or owner is the church itself. In other words, the name of the registered owner, for instance, Grace Church of Seremban, will be written on the deed. However, in the course of exploring this possibility, we must first comprehend some crucial legal background on this issue.

(1) Under Article 11(3)(b) of the Federal Constitution, every religious group has the right to establish and maintain an institution for religious or charitable purposes. It also has the right to acquire, hold and administer property in accordance with the law in Article 11(3)(c).[1]

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1 Both rights are subject to the law relating to *public order, public health* and *morality*. There is no precise definition of the terminology. However, the Malaysian court in one case interpreted 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. Examples cited include danger to human life and disturbance of public tranquillity, which covers public safety. Some illustrations from Indian cases may help us understand the meaning better. They may presumably be taken as persuasive authorities in the Malaysian court as the provision in the Constitutions of both countries are almost similar (see Philip Koh, *Freedom of Religion in Malaysia*—The Legal Dimension, Graduate Christian Fellowship, 1987).

(a) The use of fraud in converting a person from one faith to another is said to be a practice opposed to both public order and morality: (1957) MPLJ 1 (Naj).

(b) Also, in the interest of public order, the banning of a religious procession on the ground of apprehension of breach of peace is justifiable: *Mohd Siddiqui v State of UP* (1954) All 756 (DB). Similarly, the shedding of animal blood in public places as a form of religious sacrifice may also contravene the law relating to public health.

"... a church must first comply with the NLC before it has the right to acquire any immovable property."

The phrase "every religious group" seems to indicate that such right is given to all religious bodies and denominations, whether Islamic or non-Islamic. An "institution" for the purpose of this article must necessarily include a church building or chapel and Christian educational school (such as Sunday school) and seminary.[2] A religious educational institution for purely religious instruction may be regarded as a charitable institution.[3] However, a graveyard or burial ground cannot be considered as an institution.[4] "Property," though not specified, includes both movable and immovable property.[5]

(2) Nonetheless, the only restriction to this right is that such property must be acquired, owned and administered *in accordance with the* law. The holding of immovable property, i.e. land, in Malaysia is governed mainly by the National Land Code 1965[6] (hereinafter referred to as "the NLC"). In other words, a church must first comply with the NLC before it has the right to acquire any immovable property.

Before going any further, we need to understand Malaysia's land law system. We call it the Torrens System.[7] It simply denotes "a system of land titles where a register of land holdings maintained by the State guarantees indefeasible title."[8] The system allows for titles to be accorded by registration. The NLC regulates the procedural requirements of registration for certain transactions in land. It is a system that saves much time when there is a need to determine the legitimate or genuine owner of a piece of land. We merely need to refer to the registered name in the title deed to know who the legal owner is. The owner has all the rights to administer and deal in the land subject to restrictions under the statutes. For this reason, the registration of land title becomes an essential feature under the NLC to protect the interests of the owner of the land.

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2 *S.K. Patro v State of Bihar* (1970) SC 259, at p. 263.

3 *Sidhrajbhai v State of Gujarat* (1963) SC 540, at p. 544.

4 *Mohd. Ali Khan v Lucknow Municipality* (1978) All 280 (DB), at pp. 285-287.

5 Unlike our Constitution, Article 26(c) of the Indian Constitution specifically contains the phrase "movable and immovable property" that religious bodies are entitled to hold or acquire.

6 Although land matters are exclusively under the jurisdiction of the states, Article 76(4) explicitly allows the Federal government to regulate land matters to ensure the uniformity of law and policy. To date, all states have adopted the Code, except Sabah and Sarawak which have been exempted from this constitutional provision by virtue of Article 95D. Hence, both states have their own land codes governing the use of land in these states.

7 The system was named after the inventor who first introduced the system to Australia in 1858.

8 *Butterworths' Australian Legal Dictionary*, Butterworths, 1997, at p. 818. This system differs from the old title system (or the common law system) where a good title must be established by a chain of transactions and events reaching back to the root of the title. That is, under the old system, we have to trace the history of the land to ascertain who the legitimate owner is before we can deal in the land.

Eligibility to Hold and Deal in Land

By virtue of sections 43 and 205(2) of the NLC, only four groups of persons or bodies are eligible to hold and deal in land in Malaysia, namely:

(1) natural persons other than minors/children;[9]
(2) corporations having power under their constitution to hold land;[10]
(3) sovereigns, governments, organisations and other persons authorised to hold land under the Diplomatic & Consular Privileges Ordinance 1957; and
(4) bodies expressly empowered to hold land under any written law.[11]

We will first examine the fourth group.

Statutorily Regulated Institutions

Interestingly, there are quite a number of statutes regulating the administration of property of various religious or denominational institutions, which fall under the protection of Article 11(3)(c) of the Federal Constitution.[12] These institutions have been conferred statutory privileges and have been incorporated into corporate bodies so as to allow them to "acquire, purchase, take, hold and enjoy movable and immovable property."[13] The statutes which incorporate religious groups[14] include:

(1) Methodist Church in Malaysia Act 1955;[15]
(2) Roman Catholic Bishops (Incorporation) Act 1957;[16]
(3) Synod of the Diocese of West Malaysia (Incorporation) Act 1971;[17]
(4) Titular Superior of the Brothers of the Saint Gabriel (Incorporation) Ordinance 1957;[18]
(5) Titular Superior of the Brothers of the Institute of the Marist Brother of the School (Incorporation) Act 1958;[19]

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9 According to section 2 of the Age of Majority Act 1971 (Act 21), a minor is a person below the age of 18 years.

10 Corporations may be empowered by their constitutions, i.e. the Memorandum & Articles of Association, to hold or deal in land. Such corporations would mean corporations registered under the Companies Act 1965 (Act 125). Thus, if the constitution does not expressly so empower the corporation, there may be a reference to the provisions of sections 19-36 of the Companies Act, which may authorise the corporation to deal in land.

11 Presumably, this sub-section will sanction the registration of land in the name of a society, if not registered in the name of any trustee, by virtue of section 9(b) of the Societies Act 1966 (Act 335).

12 *Shri Govindlalji v State of Rajasthan* (1963) SC 1638, at pp. 1660 and 1661.

13 See section 2 of the Methodist Church in Malaysia Act 1955 and sections 4 and 4A of Roman Catholic Bishops (Incorporation) Act 1957, which are typical of the provisions in most of the religious-related incorporation statutes.

14 There are some non-Christian religious group that enjoy the same status, e.g.:
(i) Pure Life Society (Suddha Samajam) (Incorporation) Ordinance 1957 [Ord 15/1957]
(ii) Cheng Hoon Teng Temple (Incorporation) Act 1949 [Act 517]

15 Revised 1991, Act 457, which provides for the holding of property within the Federation by the Secretary of the Trustee of Methodist Church in Malaysia.

16 Revised 1991, Act 492, which provides for incorporating the Titular of Roman Catholic Bishops as a body corporate to hold property, movable or immovable.

17 Act 355.

18 Ordinance 21/1957.

19 Ordinance 54/1958.

(6) Redemptrist Fathers (Incorporation) Act 1962;[20]
(7) Salvation Army (Incorporation) Ordinance 1956;[21]
(8) Superior of the Institute of the Congregation of the Brothers of Mercy (Incorporation) Act 1972;[22] and
(9) Good Shepherd Nuns (Incorporation) Act 1973.[23]

Additionally, some states have laws regulating the incorporation of religious bodies passed long before the independence of Malaysia, for example:

(1) Missionary Societies (Sarawak) Ordinance;[24]
(2) Presbyterian Church (Penang) Ordinance;[25] and
(3) Presbyterian Church of England Mission Incorporation (Johore) Enactment.[26]

All the religious bodies listed above have acquired the legal status of a body corporate. As such, they are empowered to hold land under the NLC.

However, it is submitted that most of the statutes are enacted as a result of the historical establishment of the institutions in Malaysia. We cannot, hence, naively assume 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 property. Below are some options:

(1) register as a private company limited by guarantee under the Companies Act 1965;
(2) register as a society under the Societies Act 1966;
(3) appoint a trustee to hold property on behalf of the congregation; and
(4) appoint a Public Trustee for that purpose.

Options (1) and (2) have already been discussed in the previous chapter. We will focus on options (3) and (4) in this chapter.

Trusteeship

To understand the concept of trust and trusteeship, let us consider this definition:

> A trust is an arrangement under which property is given to one person, the trustee, to use or apply it, and the income from it, for other persons, the beneficiaries. As between trustee and beneficiaries the property belongs to the beneficiaries, in the sense that the trustee can derive no benefit from it. However, as regards third parties (including the government), the property belongs to the trustee. It is therefore, the trustee and not the beneficiaries who can sell or mortgage the property, and it is the trustee in whom the legal title to the property is vested.[27]

20 Act 16/1962.
21 Ordinance 35/1956.
22 Act 86.
23 Act 108.
24 Cap 106, Reprint 1967.
25 Cap 254, Strait Settlement Enactment.
26 Enactment No. 139.
27 Anthony R. Mellows, *The Trustee's Handbook*, Oyez Publishing, 1975, at p. 1.

Generally, in every private trust, there is a *settlor*[28], *trustee* and *beneficiary.*[29] At this stage, it suffices to say that 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 is vested with legal ownership of the trust property and has certain legal and administrative powers in dealing with the property. Hence, a trustee is, legally speaking, the owner of the property whilst the beneficiary has only a *beneficial interest*[30] in it. Such interest gives the beneficiary a right to take legal action against the trustee in, for instance, a case of breach of trust.

The trustees are governed by the Trustees Act 1949[31] (hereinafter referred to as "TA 1949") that regulates the power of investment, power to sell and purchase property, protection against certain liabilities, power to appoint new or additional trustees, various duties and the liabilities of the trustee.

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

29 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, at p. 121.

30 "Beneficial or equitable interests" 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.

31 Act 208, Revised 1978.

The advantages of having a trustee to hold the church property are:

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

(1) A trust can be easily created. Without going into the technicalities, members of a church can appoint one or more trustees[32] by resolution of a general meeting. A memorandum of this resolution should 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.[33] A trustee 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 subject-matter or trust property, and the beneficiaries.[34]

"... a church, neither legally incorporated nor registered under any statutory device, is able to appoint a trustee to hold property on behalf of its members."

(2) There is no law requiring the trust-creating entity to be a registered body or a legal entity so long as the basic criteria for forming a trust are fulfilled. Thus a church, neither legally incorporated nor registered under any statutory device, is able to appoint a trustee to hold property on behalf of its members.

Having said that, the following are some of the weaknesses in creating a trust:

(1) In a trust, the good faith of the trustee is one of the fundamental basis of the trust. (Indeed, the very word "trust" connotes the confidence which the previous owner has in his "trustee."[35]) The reason is that in a trust the settlor hands over complete control to the trustee, giving him all the right to hold, manage and deal in the land without obligation to consult either with the settlor or the beneficiaries. With such enormous power, the potential hazard is that an unscrupulous trustee may take advantage of this trust and abuse it for his own benefit. Thus, if a trustee does not act in good faith, we can expect a hard time for the church. Of course, the church can sue the trustee for breach of trust but the litigation process to settle the matter can be lengthy and involves undesirable complications. The church has to make sure that the appointed trustee is trustworthy as well as God-fearing. He or she must also be capable of managing and dealing with the property for the benefit of the church congregation.

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32 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.

33 *Supra.* n 27, at p. 118.

34 There are three essential requirements for a valid trust:
(i) the words must be such that on the whole they ought to be construed as imperative;
(ii) the subject matter of the trust must be certain; and
(iii) the objects or persons intended to be benefited must be certain.
These "three certainties" are laid down in an English case, *Knight v Knight* (1840) 3 Beav 148, at p. 172.

35 *Supra.* n 27, p. 1.

(2) There are various powers conferred on the trustee by the Trustee Act 1949. These include power to invest any trust funds in his hand;[36] power of sale of property without being answerable for any loss;[37] power to raise money by sale, conversion or charge of trust property;[38] power to employ agents to transact any business;[39] power to delegate the trust to any person (including a trust corporation) during his absence from Malaysia;[40] and power to appoint new or additional trustees.[41] Having such enormous powers to deal with the trust property, a trustee ought to exercise them cautiously to avoid pecuniary loss to the church. A church congregation must, therefore, make sure that the appointed trustee has the capability of bearing such a responsibility and has the prudence to exercise the powers granted, justly and conscientiously.

However, one should note section 2(2) of TA 1949 which states:

> The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

Therefore, it is advisable that, in the drafting of the trust instrument, the trustee's duties and powers be clearly defined and restricted to minimise any abuse. If the powers are to be exercised, certain safeguards, for example, obtaining the unanimous decision of the trustees, may be prudent.

Having said that, under the Trustees (Incorporation) Act 1952,[42] the selected trustees of a church can apply to the Minister for a certificate of registration of the trustees as a corporate body. The Minister may, if he considers such incorporation expedient, grant the certificate, 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 are:

"... the selected trustees of a church can apply to the Minister for a certificate of registration of the trustees as a corporate body."

(1) 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),
(2) it may sue and be sued in its corporation name, and
(3) it may acquire, hold, deal and enjoy movable and immovable property (subject to conditions and directions in the certificate).

36 Sections 6 and 8 of the TA 1949. Such power shall be exercised according to the discretion of the trustee subject to the consent or direction provided by the trust deed, if any: section 9 of the TA 1949.

37 Section 16 of the TA 1949.

38 Provided the trust deed or the law has authorised the trustee to pay capital money to the trust for any purpose: section 21 of the TA 1949.

39 Including solicitor, banker, stockbroker, etc.: section 28 of the TA 1949.

40 Section 30 of the TA 1949.

41 Section 40 of the TA 1949.

42 Act 258, revised 1981.

CONCLUSION

Having considered the available options, it is indeed very difficult to recommend any particular option. Every option has its pros and cons. Each church has to choose the option that best suits its structure.

CHAPTER 3

Church Buildings

- Can shoplots or residential premises be used as church buildings? If not, what are the consequences of doing so?
- 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?

INTRODUCTION

Under the Ninth Schedule, item 2 in List II[1] of the Federal Constitution, each State Legislature has the power to make laws on land matters[2] within its jurisdiction. However, the Federal Government may, for the purpose of uniformity of law and policy in all states,[3] enact laws in respect of land matters. For this reason, various laws have been made by Parliament which include, inter alia, the National Land Code 1965[4] (hereinafter referred to as "the NLC"), the Street, Drainage & Building Act 1974[5] (hereinafter referred

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1 See Article 74(2) of the Federal Constitution.

2 Including land tenure, registration of titles and deeds, land improvement, Malay Reservations, compulsory acquisition of land and transfer of land.

3 Article 76(1)(b) and 76(4) of the Federal Constitution. However, Sabah and Sarawak have their own land codes regulating land in these states.

4 Act 56 of 1965.

5 Act 133.

to as "the SDBA") and Town and Country Planning Act 1976[6] (hereinafter referred to as "the TCPA"). These Acts are relevant to our discussion on this topic. However, these Acts will not be enforced in a state unless the State Legislature adopts them as part of its legislation.[7]

Generally, the NLC has specified only 3 categories of land, i.e. building, industry and agriculture.[8] The building category is further sub-divided to include purposes such as residential, commercial, educational, recreational and other welfare facilities.[9] The states may, from time to time, add to the list of subsidiary legislations under the NLC.[10] Such specification also applies where the land is used for industrial[11] and agricultural[12] purposes. However, the TCPA and the Federal Territories (Planning) Act 1982[13] (hereinafter referred to as "the FTPA") stipulate that the local planning authority or the Commissioner for Federal Territories[14] (hereinafter referred to as "the CFT") respectively shall prepare a draft structure plan for local designated areas under their jurisdiction. Such a draft plan, upon receiving the approval of the State Committee or the Minister, normally decides the pattern of land usage for that particular area. The usual types of land use[15] include:

(1) Residential;
(2) Commercial/industrial;
(3) Institutional/educational;
(4) Religious;
(5) Burial ground;
(6) Recreational;
(7) Open space/bushes/forests/rivers/lakes;
(8) Roads/highways;

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6 Act 172. The Federal Territories have an analogous Act named the Federal Territories (Planning) Act 1982 (Act 267).

7 Section 3 of the NLC. The TCPA has also been adopted by all states except Malacca and Pahang, whilst the SDBA applies to all states in West Malaysia.

8 Section 52 of the NLC.

9 Section 116(4) of the NLC.

10 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.

11 Section 117(1)(a) of the NLC elaborates the use of industrial land in various forms, including factories, workshops, foundries, jetties, railways, etc.

12 Section 115(4)(e) of the NLC allows buildings to be erected on agricultural land only for providing educational, medical and sanitary facilities.

13 *Supra.* n 6. This Act applies only to lands and development in the Federal Territories.

14 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).

15 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?

Section 2 of the FTPA and TCPA define a *development plan*, in relation to an area, as:

(1) a *local plan* for the area; or
(2) If there is no local plan for that area, the *structure plan* for the area.

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.

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 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, 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.[16] 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.[17] 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 (hereinafter referred to as "the LPA") or the Commissioner may prepare such a plan only if they "think it desirable."[18]

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 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.

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

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

17 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.

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

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.

Town and Country Planning Act 1976

The LPA will conduct a survey to "examine matters that may be expected to affect the development or planning of the development of [an] area."[19] The LPA refers to the relevant local authority such as the City Council, the Municipal Council, the District Council, the Town Council, etc. Matters to be examined by the LPA include the principal, physical, economic, environmental and social characteristics; population, communication and transport system.

Following the survey, 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.[20]

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.[21] It is mandatory for the LPA to "consider every representation."[22]

It is during this time that, if an area is not allocated with any land or building for religious purposes, a church may voice its objection by making a representation to the LPA. Such objections will not only be taken into consideration by the LPA, but will also be considered by the State Planning Committee prior to their approval of the draft structure plan. The Committee may also afford the complainant with 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 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.[23] When the plan is finalised, alteration is no longer possible.

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19 Section 7(1) of the TCPA.

20 Section 8 of the TCPA.

21 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.

22 Section 9(1) of the TCPA.

23 Section 10(6) of the TCPA.

Federal Territories Planning Act 1982

The FTPA is a combination of the Kuala Lumpur City (Planning) Act 1973[24] and the TCPA. The procedure for the preparation of a development plan is similar in many ways to that under the TCPA. It was 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 was 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 Committee[25] under the TCPA.

On the other hand, the Commissioner (who is also known as the *Datuk Bandar* of Kuala Lumpur) was also given the task of preparing and implementing the development plan, which was part of the function of the LPA under the TCPA. The Commissioner had to prepare a draft structure plan for Kuala Lumpur after the FTPA came into force in 1984. The plan was effective until the year 2000. A public notice issued in the *Gazette* and local newspapers invited the public to inspect the plan and raise objections in writing, if any, within a month from the date of issue of the notice. A committee was formed to hear the objections raised.

On September 1, 1982, an exhibition was held to display the Draft Structure Plan to the public, inviting public opinion and objections.[26] The exhibition received responses from various bodies, private and public, different political and religious organisations as well as charitable groups. A committee named the *Jawatankuasa Mendengar Bantahan Awam* consisting of 22 persons was set up for the purpose of hearing and considering the 178 objections received.[27] The committee conducted 28 hearing sessions between October 22, 1982 and November 12, 1982. Every agency and body was given one hour to submit its objections, whilst each individual was given 30 minutes.[28]

After taking into consideration all the complaints lodged, the committee submitted a report to the Commissioner for his perusal. Thereafter, in June 1983, the Commissioner submitted the Draft Structure Plan to the Minister. After being duly advised by the Federal Territories Planning Advisory Board, the Minister approved it with some modifications in June 1984.[29]

A comparison between the Draft Structure Plan and the Approved Structure Plan will indicate the effectiveness of the complaints and objections made by the public and other affected bodies. For instance, the draft structure plan did not specify any allocation of a non-Muslim burial ground. By comparison, the Muslim burial ground was

24 Act 107. The FTPA retains the administrative structure set up under this Act.

25 The State Planning Committee, under section 4(4)(b) of the TCPA, advises the State Government instead of the Minister, on matters relating to conservation, use and development of land in the state.

26 See the Kuala Lumpur Structure Plan, DBKL, 1984, at p. 6, paragraph 1.3.3.

27 Ibid. There were objections from 107 individuals, 7 professional bodies, 6 political organisations, 5 religious groups, 6 public agencies and 47 other organisations.

28 *Supra.* n 1.

29 The Minister of Federal Territories is empowered to make modifications before approving the draft under section 8(ii) of the FTPA.

expanded by more than 15 times within a 20-year period. The Approved Structure Plan in 1984 clearly denotes allocation of a non-Muslim burial ground although the amount of land designated for such a purpose was still far from satisfactory. Nonetheless, the allocation for a Muslim burial ground was also reduced.

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. Nonetheless, the 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 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.

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.

- What action can the authorities take against a church if the development plan or structure plan is not complied with?

EVICTION FOR NON-COMPLIANCE

"... the local government has the authority to evict any person from premises that are not used in accordance with their designated purpose."

Generally, the local government has the authority to evict any person from premises that are not used in accordance with their designated purpose. Such power is given to the Kuala Lumpur City Hall (DBKL) by the FTPA and to other local governments by the TCPA. Such power can also be used 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.[30] Let us now scrutinise the procedures of eviction provided for under both Acts, separately.

FTPA 1982

Under section 19 of the FTPA, any use of land and building in the Federal Territories must conform to the development plan or planning permission under the Act.[31] Any

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

31 An exception is given to the usage of land and buildings prior to the date of coming into effect of the Act and reserved subject to the permission of the Commissioner, which, if granted, will normally contain certain terms and conditions.

contravention of section 19 is an offence punishable by a fine not exceeding RM50,000 upon conviction.[32] Strictly speaking, if a church is built after 1982, it should apply for a *planning permission*[33] from the Commissioner. The Commissioner has the discretion to grant or not grant a planning permission regardless of whether the development is in conformity with the development plan.[34] If such application is refused, the Commissioner is obligated to give his reason in writing for such a refusal.[35]

These rules are also applicable to churches that occupy and use buildings designated for commercial and residential purposes.[36] If such a permission is not 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 listed in the enforcement notice.[37] Failure to comply will normally lead to the sending of a notice requiring the occupier to be evicted from the building and thus is usually named an *eviction notice*. This is the most common type of notice received by the churches in the Federal Territories that use shop houses and residential premises as places of worship and for religious activities.

Upon non-compliance by a church with the enforcement notice:[38]

(1) the Commissioner or any authorised officer may enter, with or without workmen, to the building or land and may take necessary steps to execute the notice. Such power may extend to the demolition and alteration of buildings or removal of goods, vehicles and things from the building. The Commissioner may request for assistance from the police in executing the notice;

(2) the Commissioner may recover any expenses and costs incurred in the course of executing the notice from the owner of the land; and

(3) the occupier can be fined up to RM20,000 upon conviction of such offence and RM500 every day if the non-compliance persists.

Upon receiving such a notice, one must immediately apply for a planning permission from the Commissioner.[39] If such a permission is granted, the enforcement notice will

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32 Section 26 of the FTPA.

33 "Planning permission" refers to permission granted, with or without conditions, for the purpose of carrying out a development in a land: section 2 of the FTPA.

34 However, 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) development plan;
(iii) the local plan or the Comprehensive Development Plan; and
(iv) other material consideration.

35 Section 22(5) of the FTPA.

36 Definition of 'Development' includes "… any change on use of land or building or any part thereof…" in which a planning permission ought to be obtained before the development is carried out.

37 Section 27 of the FTPA.

38 Section 29(1) to (4) of the FTPA.

39 Section 28(1) of the FTPA.

not take effect.[40] 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.[41] Practically, 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 of the FTPA. Having said that, it must also be noted that such delay does not preclude the authorities from taking action in the future.

Apart from the enforcement notice, the Commissioner also has the power to issue a *requisition notice*[42] to the owner of a land under three circumstances, that is to say, if the commissioner is satisfied that:

(1) any use of the land should be discontinued; or
(2) conditions should be imposed on the continued use thereof; or
(3) any building or work on any land should be altered or removed.

Such notice may require the owner of the land to cease using the land for certain purposes, impose conditions on the use of the land and require alteration or removal of the buildings. The requirements and conditions must be carried out within one month from the date of service. In other words, the Commissioner can serve a requisition notice on the owner of the residential house or shoplot which has been converted into a church without a planning permission. 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 under section 30(8) of the FTPA.[43] Ironically, this provision allows the owner to claim for loss suffered due to compliance with such a notice from the Commissioner. If the compensation awarded is inadequate, the owner may even appeal to the Appeal Board to assess the amount.

TCPA 1976

The TCPA applies to states[44] other than the Federal Territories. Similarly, all use of land and buildings must conform to the local plan of that area.[45] The TCPA also prohibits any development without planning permission.[46] Planning permission may be applied from

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

41 Section 28(1) of the FTPA.

42 Section 30 of the FTPA.

43 Upon conviction, the owner may be fined up to a maximum of RM10,000 and RM500 each day in a case of continuing offence.

44 *Supra.* n 7.

45 This, however, does not affect the lawful continued use of any land or building prior to the date when the local plan first came into effect in the area concerned.

46 Section 19 of the TCPA.

the Local Planning Authority (or the "LPA") under section 21 of the TCPA. However, the process of applying for planning permission is very tedious, and has been complicated by recent amendments and the insertion of sections 21A, 21B and 21C which also require the applicant to submit a very detailed *development proposal report*.[47] Such a report must 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. Under section 27 of the TCPA, the LPA also has the power to serve "notice in prescribed form" to the owner and occupier of the land carrying on development without a planning permission.[48] Besides, the authority may also issue a notice "informing (owner and occupier) of the contravention and calling on him to apply for [a] planning permission."[49] If the development has not been completed, the authority may, instead of the notice mentioned above, serve a notice "in prescribed form requiring them to discontinue the development."[50] Failure to comply with the notice 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.

CONCLUSION

From the discussion above, it is clear that a church cannot legally use a shoplot or residential premises for religious purposes unless a planning permission has been obtained. Furthermore, a congregation may be evicted from the building and be subjected to an enormous fine upon conviction of such an offence. 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 a permission though the process may be tedious and lengthy.

Having said that, we can also argue that since the Federal Constitution explicitly grants the right to establish and maintain institutions for religious purposes,[51] having a place to gather and worship should be an auxiliary right. Otherwise, the right to establish and maintain a religious institution would be negated. In other words, since the right to establish an institution cannot be exercised in a vacuum, the government should facilitate

"... since the Federal Constitution explicitly grants the right to establish and maintain institutions for religious purposes, having a place to gather and worship should be an auxiliary right."

47 See the Town and Country Planning (Amendment) Act 1995 (Act A933).

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

49 Section 27(3) of the TCPA.

50 Section 27(4) of the TCPA.

51 Article 11(3)(b) of the Federal Constitution.

such legally conferred rights by allowing existing buildings to be used for religious purposes.

Nevertheless, it must be emphasised that such arguments are theoretical and have yet to be tested in court. We do not know how the law will develop in the future. As it stands, the law is such that churches still face constraints in getting places in which to gather. This is especially true for church planting work in new housing areas.

- 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?

Hanging a signboard on a building comes exclusively under the jurisdiction of the local government. Thus, the local government may prescribe regulations or subsidiary legislation to govern such matters which normally fall under the ambit of advertising and trading. Since every local government has its own subsidiary legislation on this aspect, it is impossible to have a blanket rule and procedure enveloping all areas. The rules and procedures differ in various details but presumably the framework and restrictions will be quite similar. We shall take the Petaling Jaya Town Council (*Majlis Perbandaran Petaling Jaya* or "MPPJ") as an example.

The subsidiary legislation governing advertising is called *Undang-undang Kecil MPPJ 1991*. The Advertisement Licensing Unit under the Health Department (or the *Unit Perlesenan Iklan, Jabatan Kesihatan*), carries out the implementation of this law.

Under the legislation, a licence is needed before a signboard can be hung on a building. The application for a signboard must be made using prescribed forms available at the department. However, there are a number of requirements which a church needs to fulfil before a license will be granted:

(1) the legislation requires a copy of the business registration verification (or the *Perakuan Pendaftaran Perniagaan*) in Forms A and D or a Society registration certificate to be submitted together with the application form. An unregistered church will not be able to produce such a document.

(2) 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 those of the other languages. However, in the case of a registered firm, company or society, only the registered name may be printed on the

signboard. Thus, 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 such as 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. However, it is suggested that unless a signboard plays a significant role in identifying a church building, it is really quite unnecessary to apply for one.

"... unless a signboard plays a significant role in identifying a church building, it is really quite unnecessary to apply for [a licence]."

CHAPTER 4

Propagation

- Are there any restrictions on Christians with regard to propagating or evangelising the Christian faith 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:

  (a) distributed to non-Christians outside the church compound or in public places?
  (b) disseminated to Muslims (either wilfully or unintentionally)?

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

INTRODUCTION

Restrictions on the propagation of religions other than the Islamic faith can be derived from Article 11(1) and (4) of the Federal Constitution.

Article 11(1): Every person has the right to profess and practice 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 and Labuan, federal law may control and restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

It has been stated 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

1 Kevin Y.L. Tan & Thio Li-Ann, *Tan, Yeo & Lee's Constitutional Law in Malaysia and Singapore*, 2nd ed., Butterworths, 1997, at p. 925.

irrespective of whether the propagators are Muslims or non-Muslims."[2] On the other hand, it has also been noted that such a provision is "contrary to the spirit of freedom of religion… Thus, in the long term, the maintenance of this restriction may have the effect of undermining and overarching the principle of religious freedom."[3]

OVERVIEW

A total of nine states in Malaysia, at the time of writing of this chapter, have enactments cited as either Control and Restriction of the Propagation of Non-Muslim Religions Enactment,[4] Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment[5] or other analogous titles.[6] The other states have no specific enactments controlling the propagation of non-Islamic religions except for some general provisions stipulated in the Syariah Criminal Offences Enactment. For example, section 5 of the Syariah Criminal Offences (Federal Territories) Act 1997[7] provides that:

> Any person who propagates religious doctrines or beliefs other than the religious doctrines or beliefs of the religion of Islam among people 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.

Section 5 of the Syariah Criminal Offences (State of Penang) Enactment 1996 is worded similarly to the above provision with the exception that it specifically defines "Any person" to include both Muslim and non-Muslim, and provides that the offender in such cases may be prosecuted in a civil court.

Although Perak and Kelantan have specific enactments that deal with the propagation of non-Islamic faiths, these enactments also carry a general provision similar to the one in the Federal Territories in terms of the description of the crime and the maximum penalty for such an offence.

Control and Restriction of Non-Islamic Religions

Now let us take a closer look at the provisions set out by these enactments. There are five main restrictions common to all the enactments. In fact, all five restrictions are analogous in all the nine state enactments, presumably due to imitation of the earliest version, with slight variations. The Terengganu Enactment is probably the "master copy" for the others. Instead of analysing the provisions of each state enactment

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

3 AJ Harding, *Law, Government and the Constitution in Malaysia*, Kluwer Law International, 1996, at p. 202.

4 The states include: Terengganu (En.1/80), Kelantan (En.11/81), Kedah (En.1/88), Perak (En.10/88), Pahang (En.1/89) and Johor (En. 12/91).

5 Selangor (En. 1/88).

6 The other 2 states have the following Enactments:
 (i) Control and Restriction (Propagation of Non-Islamic Religions Amongst Muslims) (Negri Sembilan): En. 9/91
 (ii) Control and Restriction of Propagation of Non-Islamic Religions to Muslim Enactment: En. 1/88

7 Act 559.

separately, it will be more practical to look at them as a whole, highlighting similarities and discrepancies 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, Judaism, etc., or any of their variations, versions, forms or offshoots. It also includes any creed, ideology, philosophy or any body of practices and worship. The word "publication" includes a book, magazine, pamphlet, leaflet, any reading material or sound recording material. This definition seems to omit films or video cassettes as part of "publication."[8] The definition of this word is of great significance in the discussion on the application of both sections 7 and 8 of the state Enactments. However, after 1988, all states (except Terengganu, Kelantan and Malacca) included cinematography films, video cassettes and other material for viewing purposes as part of "publication."

Section 3 of the state Enactments sets out the criteria for deciding whether a person is a Muslim. This is a principal issue when a person is prosecuted under the individual state enactments because if the person propagated to is not a Muslim, the basis of the prosecution will collapse. The material factor here is a person's general reputation, without calling into question his or her faith, beliefs, conduct, behaviour, character, act or omission. The Enactments do not interpret the words "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 will not necessarily disqualify him as a Muslim as the faith of such person is not to be questioned under this section. The onus of proving that the propagated person is a non-Muslim is on the propagator.

Let us now examine the five main offences regarding the propagation of a non-Islamic faith:

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

Such a persuasion or influence[9] may cause a Muslim to:

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

The maximum punishment for this offence is a fine of RM10,000 and/or one year's imprisonment.[10] Subsection (3) provides that it can be a defence if the accused has reason to believe and did believe that the other person was not a Muslim.[11]

8 These statutes include the Terengganu, Kelantan and Malacca enactments.

9 After 1988, all states, except Malacca and Selangor, have made the holding or organising of "any activity, performance… whose content or message is designed to persuade, influence or incite" a Muslim to follow another religion as part of this offence.

10 The maximum punishment for each state differs. Refer to diagram in Appendix 1.

11 This is, however, not a defence available under the Selangor Enactment 1988.

Nevertheless, it is not a valid defence to argue that a Muslim was not affected by the act of the accused.

(2) Section 5: Subjecting a Muslim under the age of 18 years[12] to the influence of a non-Islamic religion:

Any person who subjects a Muslim who is a minor to participate in any religious activity other than that of the Islamic faith commits an offence and is liable to a maximum fine of RM10,000 and one year's imprisonment. The word "subjects" means "requires, causes, persuades, influences, incites, encourages or allows."

In such a case, the accused may argue that he/she had been informed by the parent or guardian of the minor that the latter is not a Muslim.[13] But the contention that the accused was not aware of the minor's religion cannot be valid defence under this provision.[14] Section 5 seems to discourage propagation of non-Islamic religions even in educational institutions.

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

A person who "calls on, arranges … a meeting with or contacts by telephone[15] 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.[16] A "stranger" is defined as someone:

(a) with whom previously one has not spoken or has spoken only casually, or
(b) with whom previously one has had only business, official or formal dealings, or
(c) who cannot be regarded even as one's acquaintance.[17]

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 evangelism or other kinds of evangelism to strangers.

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

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12 The Pahang Enactment 1989 omits the phrase "under the age of 18 years," enlarging the scope of this section to cover not only minors but adults as well.

13 Such defence is again not provided for under the Selangor Enactment 1988.

14 See subsections (3) and (4).

15 Under the Selangor Enactment, "contact by telephone" was replaced with "any other means whatsoever, communicates with" whilst the Perak, Pahang, Negri Sembilan and Johor Enactment includes "or by any other means" to widen the scope of this provision.

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

17 See subsection 6(4).

Section 7 makes it an offence for a person:

(a) from within any State to send, deliver or cause to be sent or delivered to a Muslim within or outside the State; or
(b) from outside any State, to send or cause to be sent or delivered to a Muslim within the State,

any publication or advertising material concerning a non-Islamic religion, which has not been requested for by the receiver. Even if a request has been made by the receiver, a person will still be committing an offence if the request was prompted by him or by someone acting on his behalf.[18]

It is, however, a defence if the accused had reason to believe and did believe that the receiver of the publication is not a Muslim.[19] This will depend on the facts and circumstances of each case.

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

This is a pertinent issue faced by Christians who engage in street or door-to-door evangelism. Under this provision, a person commits an offence if he or she distributes publications of other religions to a Muslim in a public place. The term "public place" is not defined in the Enactment. 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.*"[20]

"Under this provision, a person commits an offence if he or she distributes publications of other religions to a Muslim in a public place."

Possible defences to such an accusation are:

(a) 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.

(b) the publication was given to a Muslim at his request without any prompting on the part of the accused. He or she is, hence, not liable if a Muslim makes the first move in requesting for a Christian publication.

18 Subsection (5).
19 Subsection (4). The Selangor Enactment does not have such defence.
20 Section 2 of the Interpretation Acts 1948 and 1967.

Having said that, what should our response be to such enactments? How should we view the existence of such laws? Are these provisions justifiable under the Federal Constitution (FC)?

"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'."

To answer these queries, we must again refer to Article 11(4) of the Federal Constitution that 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.

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.[21] Nevertheless, this does not mean that a Muslim is to be excluded from knowing or learning about the teachings of other religions. 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 choice. To say that the term "every person" does not include Muslims who constitute the majority in this country would render the provisions in the Federal Constitution an absurdity. Furthermore, Article 19 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 state governments are not empowered to prohibit in toto the propagation of non-Islamic religions to a Muslim."

Therefore, the most we can say about such controls and restrictions is that an "unwelcomed and uninvited" act of propagation to the Muslim may be resisted and penalised if the act is unjustifiable. The State and Federal governments are entitled to control and restrict by law such actions, presumably, to the extent set out above and not beyond. Any further restriction or prohibition should be regarded as *ultra vires* the Federal Constitution therefore void and unenforceable. Thus, it is submitted that the state governments are not empowered to *prohibit in toto* the propagation of non-Islamic religions to a Muslim.

Having said that and in view of the provisions in the state enactments, it can be concluded that the state legislators might have acted beyond their legitimate power in enacting these laws. The enactments give effect to a *significant if not absolute prohibition* to the propagation of other religions to the Muslim rather than *control and restriction*. This is quite evident since the enactments include offences of unintentional propagation to the

21 *Supra.* n 2.

Muslim.[22] 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.[23]

Assuming that the above submission is not erroneous, the enactments are therefore null and void vis-à-vis the Federal Constitution. The Federal Court of Malaysia has the power to decide and pronounce on the validity of any written law, whether made by the States or the Federal legislators. However, since none of the provisions have been tested in court, there is no precedence to substantiate the above arguments.

What should our stand be then? It is submitted that Christians should bravely obey the call of the Great Commission but, at the same time, bear in mind the prohibitions enunciated under the untested provisions of the Enactments, and wisely avoid any direct breach of these provisions. We should not be racially or religiously discriminative in evangelism simply because man-made laws are unfavourable to us. After all, who should we obey: God or man?

- How can a Muslim in Malaysia legally convert out of the Islamic faith?
- Are there any legal provisions stipulating the procedures/steps for such a conversion?
- What are the legal implications for apostasy under the State Muslim law enactments?

INTRODUCTION

To date, most states do not have any provisions allowing Muslims to convert out of the Islamic religion. In fact, most states make apostasy or *murtad* (or more specifically, “attempt to apostate”) an offence under the Syariah law. Since the laws vary from state to state, we will look at them separately.

Federal Territories (hereinafter referred to as “FT”)

After 1984, Parliament enacted various Acts regarding Muslim law. In 1993, the Administration of Islamic Law (FT) Act[24] was enacted and in 1997, the Syariah Criminal

22 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.

23 See sections 5(4) and 6(4) of the state enactments.

24 Act 505.

Offences (FT) Act.[25] There are no provisions or procedures, which allow a Muslim to convert out of Islam. Nevertheless, the act of apostasy is not made an offence.

Section 31 of the Syariah Criminal Offences (FT) Act 1997 makes *takfir* an offence, that is, making an accusation, verbally or in written form, that any person or group of persons professing Islam:

(1) is non-Muslim;
(2) has ceased to profess that religion;
(3) should not be accepted, or cannot be accepted, as professing the Islamic religion; or
(4) does not believe, follow, profess or belong to the Islamic religion.

According to the provision, only a religious authority established under written laws has the right to pronounce or declare a person as being a non-Muslim through the issuance of a *fatwa* or decision.

Johor

Section 14(2) of Administration of Islamic Law Enactment 1978[26] may be the most unique provision found in any Islamic enactment. It stipulates briefly the procedure of legally converting out of the Islamic faith. Section 14(2) spells out that:

> Whoever is aware of a Muslim person who has converted out of the Islamic religion shall forthwith report the matter to the *Kadi* by giving all necessary particulars and the *Kadi shall announce* that such person has been converted out of the Islamic religion and *shall register* accordingly.

Nevertheless, it seems that such a procedure is only applicable upon the report of a third party rather than that of the convert himself or herself. It is also not clear whether the informant must be a Muslim. Likewise, it is ambiguous as to whether the words "*shall announce*" and "*shall register*" denote mandatory acts by the *Kadi* or otherwise. Assuming that it is not mandatory, the question will be: what can the proselyte do if the *Kadi* refuses to announce and register such conversion in spite of a report having been made by a third party? Even if the convert makes an application to the court to compel the *Kadi* to effect the registration, it is not clear whether he or she should apply to the Civil Court or the Syariah Court. If the application is made to the Civil Court, the judge may refuse the application on the ground that Islamic religious matters fall under the jurisdiction of the Syariah Court. On the other hand, it is also doubtful that the Syariah Court will entertain such an application.

Kedah

Under the Administration of Muslim Law Enactment 1962,[27] there is neither a provision allowing for conversion out of Islam nor a penalty imposed for apostasy.

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25 Act 559.

26 Enactment No. 14/78.

27 Enactment No. 9/62.

Kelantan

Section 102 of the Council of the Religion of Islam and Malay Custom Enactment[28] makes apostasy a punishable act and appears to provide for conversion out of Islam by court approval. The relevant provisions are:

(1) 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;
(2) 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;
(3) 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
(4) 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.[29] *Takfir* is also a punishable offence under section 24 of the Syariah Criminal Code.[30] The punishment may extend to 3-year's imprisonment and a maximum fine of RM5,000.

Malacca

Apostasy is an offence under the Syariah Offences Enactment[31] (or more accurately in the Malay language, *Enakmen Kesalahan Syariah*). Section 66 of the Enactment empowers the court to remand 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 remanded 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*.[32] The apostate's

28 Enactment No. 4/94.

29 Section 124 of the Council of the Religion of Islam and Malay Custom Enactment.

30 Enactment No. 2/85.

31 Enactment No. 6/91.

32 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.*"

only way to freedom is to report immediately to the Syariah Court.

Also, *takfir* is an offence under section 68 of *Enakmen Kesalahan Syariah* punishable by imprisonment up to a maximum of 3 years and a fine of RM5,000. The description of the offence is quite similar to the FT's Syariah Criminal Offences (Federal Territories) Act 1997, section 31.

Negeri Sembilan

The Syariah Criminal (Negeri Sembilan) Enactment,[33] also makes apostasy an offence, but apparently restricts 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 three-year jail term and a fine of RM5,000. 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.

Pahang

Apart from section 166 of the Administration of Religion of Islam and the Malay Custom of Pahang Enactment[34] that makes propagation of other religions to a Muslim an offence, section 185 stipulates that apostasy is an offence punishable by imprisonment, caning and a fine. Caning was introduced as a penalty for this offence in an amendment at a later stage. However, to date the amendment has yet to be enforced. Presumably, the state government is hesitant about imposing such punishment on a proselyte although the Syariah Court has the jurisdiction to impose punishment of whipping of up to six strokes under the Syariah Court (Criminal Jurisdiction) Act 1965. Presently, the Syariah Court in Pahang may only punish an apostate with imprisonment and a fine.

Penang

There is no provision in both the Administration of Islamic Religious Affairs of the State of Penang Enactment[35] and the Syariah Criminal Offences (State of Penang) Enactment[36] making apostasy an offence. Neither is there any provision outlining the procedure for converting out of the Islamic faith.

33 Enactment No. 4/92.

34 Enactment No. 8/82.

35 Enactment No. 5/91.

36 Enactment No. 3/96.

Perak

Sections 12 and 13 of the Crimes (Syariah) Enactment[37] make apostasy and word or action importing apostasy a punishable offence. Section 28 provides that *takfir* is also a punishable offence.

Ironically, section 146(2) of the old Administration of Islamic Law Enactment[38] stipulates that "if any Muslim converts himself to another religion, he shall inform the (Syariah) Court of his decision and the court shall publicise such conversion." Unfortunately, the provision was deleted in 1975. Nonetheless, even before the deletion came into force the enactment was repealed by the new Administration of Islamic Law Enactment.[39] Presumably, before the year 1992, a Muslim in Perak, relying on section 146 of the old Enactment, may convert out of Islam. The act of publicising the apostasy by the court appears to be merely an administrative formality.

Perlis

Section 23 of the Criminal Offences in Syarak Enactment 1991[40] provides that *takfir* is a criminal offence. However, there is no clear stipulation for converting out of the Islamic faith nor is there any mention of apostasy.

Selangor

Most parts of the Administration of Muslim Law Enactment[41] have been repealed by more recent enactments. Section 6 of the Syariah Criminal Offences Enactment[42] makes *takfir* an offence. The punishment for apostasy is not mentioned however. Neither is there any stipulation regarding the procedures for conversion out of the Islamic faith.

Sabah

Section 64 of the Syariah Criminal Offences Enactment 1995[43] provides that *takfir* is a punishable offence. Nevertheless, there is no provision allowing or prohibiting apostasy, nor any stipulation of procedures for converting out of Islam.

Sarawak

The provisions in the Syariah Criminal Offences Ordinance or *Ordinan Kesalahan Jenayah Syariah* in the Malay Language are rather "loose" and disorganised. There is also no mention of apostasy or converting out of the Islamic faith.

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37 Enactment No. 3/92.
38 Enactment No. 11/65.
39 Enactment No. 2/92.
40 Enactment No. 4 /93.
41 Enactment No. 3/52.
42 Enactment No. 9/95.
43 Enactment No. 3/95.

◆ 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 the fundamental freedom."[44] The truth in this statement lies in the fact that more often than not religion has been put forward as the primary reason and excuse for waging wars, committing genocide, massacre of human beings, destruction of property, human degradation, brutalities and the commission of other inhumane acts.

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 it means, we need to look into the legislative history behind the provision. Article 3 of the Federal Constitution was 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.

44 Paul Seighart, *International Human Rights Law* (1983) at p. 324.

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 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:

> 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 15 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 (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 is required by the Constitution to uphold that religion (Article 7). If in these countries a religion has been declared to be the religion of the State and that declaration has not been found to have caused hardships in anybody, no harm will ensue if such a declaration is included in the Constitution of Malaysia. In fact in all the Constitutions of Malayan States a provision of this type already exists. All that is required to be done is to transplant it from the State Constitution and to embed it in the Federal.

The then Prime Minister, Tunku Abdul Rahman, also reasserted the constitutional position of Islam in the following words:

> I would like to make it clear that this country is not an Islamic state as it is generally understood, we merely provided that Islam shall be the official religion of the State.[45]

"It would mean that 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."

It would mean that 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*,[46] 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.

"... 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 of Pasir Mas, Kelantan & Anor*[47] 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.

Recent case authorities, however, have thrown the debate on the role of Islam in Malaysia to a whole new breadth. In the case of *Meor Atiqulrahman bin Ishak v Fatimah binti Sihi,*[48] the High Court declared that Islam is the primary religion which takes precedence over other religions in this country.

More importantly, in the unreported case of *Lina Joy v Majlis Agama Islam WP & Kerajaan Malaysia* (Saman Pemula No R2-24-30-2000), it was decided that a Malay remains in the Islamic faith until his/her death and cannot renounce the Islamic religion. Similar decisions were made in the case of *Soon Singh Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah* [1999] 2 CLJ 5; and *Daud bin Mamat v Majlis Agama Islam Kerajaan Negeri Kelantan* (Saman Pemula No 24-319, 320, 321 & 322-2000).

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45 Hansard, 1st May 1958.

46 [1988] 2 MLJ 55.

47 [1990] 2 MLJ 300.

48 [2000] 5 MLJ 375.

These recent judicial decisions appear to be contrary to earlier precedents, and 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 liberal secular order that undergirds the Federal Constitution. As a result, the present situation is far from clear.

CHAPTER 5

Language

- Are there any restrictions under the state enactments on using Bahasa Melayu in churches?
- What is or should be our legal contention/principle?

As the Malay Language (or *Bahasa Melayu*) is our national language,[1] there is no basis for prohibiting its usage in any part of this land. In addition, the National Language Act 1963/67[2] also reiterates the status of the Malay Language as the national language, to be used for official purposes.

"… nine states in Peninsular Malaysia have legislated enactments restricting the use of various terms and expressions. These words are said to be reserved solely for the use of Muslims and cannot be associated with a non-Islamic religion."

Nevertheless, since 1980, nine states in Peninsular Malaysia have legislated enactments restricting the use of various terms and expressions. These words are said to be reserved solely for the use of Muslims and cannot be associated with a non-Islamic religion. Such provisions are enunciated under section 9 of all the Enactments of Control and Restriction of Non-Islamic Religions.[3] As all the enactments are based on the provisions taken from the Terengganu Enactment, the wording of these provisions is more or less similar, except for the states of Kedah and Johor.

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

(1) in any published writing; or
(2) in any public speech or statement; or
(3) in any speech or statement addressed to any gathering[4] of persons; or
(4) in any speech or statement which is published or broadcast;

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1 Article 152 of the Federal Constitution.

2 Act 32, Revised 1971.

3 See the discussion on *Conversion* in chapter 4 for other provisions.

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

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."[5]

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,[6] except by way of quotation or reference."

Section 9(4) of the state Enactments allows either the Ruler in Council[7] or the State Authority[8] to amend the 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*, *nabi*, *rasul*, *wahyu*, etc. are all included in the Schedule. The following is a table listing the prohibited words contained in the Schedule of each state Enactment.

PART I: WORDS WHICH NON-MUSLIMS ARE PROHIBITED FROM USING:

State E'nctmt / **Word**	T'gnu 1980	K'tan 1981	K'dah 1988	M'ca 1988	S'gor 1988	Perak 1988	Phg 1989	Johor 1991*	N.S. 1991
Akhirat				✓					✓
Allah	✓	✓	✓	✓	✓	✓	✓		✓
Al-Quran/Quran			✓	✓					✓
Al-Sunnah				✓					✓
Azan				✓					✓
Baitullah				✓					✓
Dakwah	✓	✓	✓	✓	✓	✓	✓		✓
Fatwa	✓	✓	✓	✓	✓	✓	✓		✓
Firman Allah	✓	✓	✓	✓	✓	✓	✓		✓
Fitrah			✓						
Hadith/Hadis	✓	✓	✓	✓	✓	✓	✓		✓
Haj/Haji	✓	✓	✓	✓	✓	✓	✓		✓
Hajjah			✓						

5 Non-Islamic religions include all major religions in Malaysia, such as Christianity, Buddhism, Sikhism, Hinduism, etc.

6 Kedah does not have a Part II of the Schedule and thus subsection (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.

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

8 The states are Malacca and Negeri Sembilan.

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

State E'nctmt / Word	Tgnu 1980	K'tan 1981	K'dah 1988	M'ca 1988	S'gor 1988	Perak 1988	Phg 1989	Johor 1991*	N.S. 1991
Hauliak				✓					✓
Ibadah/Ibadat	✓	✓	✓	✓	✓	✓	✓		✓
Ilahi	✓	✓		✓	✓	✓	✓		✓
Imam		✓	✓	✓	✓				✓
Iman	✓	✓		✓	✓	✓	✓		✓
Injil	✓				✓	✓	✓		✓
Kaabah	✓	✓	✓	✓	✓	✓	✓		✓
Kadi	✓	✓	✓	✓	✓	✓	✓		✓
Karamah/Qaramah				✓					✓
Khalifah	✓	✓	✓	✓	✓	✓	✓		✓
Khutbah			✓			✓	✓		✓
Masjid			✓						
Mubaligh	✓	✓		✓	✓	✓	✓		✓
Mufti	✓	✓	✓	✓	✓	✓	✓		✓
Mussabaqah			✓						
Mussala			✓						
Nabi		✓		✓	✓	✓	✓		✓
Qiblat	✓	✓	✓	✓	✓	✓	✓		✓
Rasul	✓	✓	✓	✓	✓	✓	✓		✓
Salat/Solat	✓	✓		✓	✓	✓	✓		✓
Shahadah/Syahadah				✓					✓
Sheikh		✓		✓	✓				✓
Surau			✓						
Syariah	✓	✓		✓	✓	✓	✓		✓
Tabligh						✓	✓		✓
Ulama	✓	✓		✓	✓	✓	✓		✓
Wahyu	✓	✓		✓	✓	✓	✓		✓
Wali	✓	✓		✓	✓	✓	✓		✓
Zakat			✓						

* Johor Enactment does not contain any Schedule specifying prohibited terms and expressions. Instead, it prohibits the use of "any of the words (and expressions) of Islamic origin," presumably with the intention of facilitating the coverage of other terms not already included in the existing schedules. It deliberately leaves the phrase "words (and expressions) of Islamic origin" undefined so that the court will have wide-ranging powers to include any word it deems should fall within the ambit of this prohibition.

PART II : EXPRESSIONS WHICH NON-MUSLIMS ARE PROHIBITED FROM USING:

State E'nctmt / Expression	T'gnu 1980	K'tan 1981	K'dah 1988†	M'ca 1988	S'gor 1988	Perak 1988	Phg 1989	Johor 1991*	N.S 1991
Subhanallah	✓	✓		✓	✓	✓	✓		✓
Alhamdulillah	✓	✓		✓	✓	✓	✓		✓
Lailahaillallah	✓	✓		✓	✓	✓	✓		✓
Walillahilhamd	✓	✓		✓	✓	✓	✓		✓

State E'nctmt / **Expression**	T'gnu 1980	K'tan 1981	K'dah 1988	M'ca 1988	S'gor 1988	Perak 1988	Phg 1989	Johor 1991*	N.S. 1991
Alahu Akbar	✓	✓		✓	✓	✓	✓		✓
Insyaallah	✓	✓		✓	✓	✓	✓		✓
Astaghfirullahal Azim	✓	✓		✓	✓	✓	✓		✓
Tabaraka Allah	✓	✓		✓	✓	✓	✓		✓
Masyaallah	✓	✓		✓	✓	✓	✓		✓
Lahaula Walaquata Illabillahilaliyil Azim	✓	✓		✓	✓	✓	✓		✓
Assalamualaikum				✓					✓
Wallahi				✓					✓
Wabillahi				✓					✓
Watallahi				✓					✓
Auzubillah				✓					✓

† Kedah Enactment does not have Part II.

* Johor Enactment does not contain any Schedule specifying prohibited terms and expressions. Instead, it prohibits the use of "any of the words (and expressions) of Islamic origin," presumably with the intention of facilitating the coverage of other terms not already included in the existing schedules. It deliberately leaves the phrase "words (and expressions) of Islamic origin" undefined so that the court will have wide-ranging powers to include any word it deems should fall within the ambit of this prohibition.

Notes:

(1) Penang has only one provision under the *Syariah Criminal Offences (State of Penang) Enactment 1996*, i.e. section 5, controlling and restricting the propagation of other religions to Muslims which reads as follows:

> Any person, whether or not he professes the Muslim religion, who propagates religious doctrines or beliefs other than the religious doctrines or beliefs of the religion of Islam among people professing the Islamic faith shall be guilty of an offence which shall proceed in the Civil Court 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.

With the term "propagates" not properly defined, the court may adopt a wide and liberal interpretation of the word. It is probable that other state enactments may be referred to and be deemed to be highly persuasive in such construction.

(2) Federal Territories: *Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559). Section 5* contains an analogous provision with a similar punishment proscribed.

(3) Pahang: *Administration of Religion of Islam & Malay Custom Enactment 1982.* Its 1989 amendment (No. 4/89) has even suggested whipping (not more than six strokes) in addition to a fine and imprisonment for such offence and apostasy. The amendment is not in force yet.

(4) Kelantan: *Council of the Religion of Islam and Malay Custom Enactment 1994, section 124* states that:

> 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 *five thousand* ringgit or to imprisonment for a term not exceeding *three years* or to both.

(5) According to all existing Enactments, it seems that all states in Malaysia have *prohibited in toto* all possible means and methods of propagation of non-Islamic religions to the Muslim (instead of *controlling and restricting it* as specified in the Federal Constitution) except for the states of Perlis, Sabah and Sarawak.

After knowing all the restrictions, what should our response be? Should we stop using the terms and expressions even though the church has been using them all this while? Or should we continue to use them despite the clear prohibitions in the state Enactments?

It is proposed that instead of submitting blindly to the laws, we should first question the validity of such laws. As discussed in the chapter on conversion, it is suggested that the law prohibiting the use of terms in the Malay language may contravene the provisions of the Federal Constitution. Besides, proscription on the use of the Malay language as a medium of instruction in church would conflict with the National Education policy which makes the Malay language a compulsory subject in all primary and secondary schools. A timetable was set up to effect the use of the Malay language as the medium of instruction throughout all national schools.[10] It would, therefore, be quite senseless to make the study of the Malay language compulsory in schools, and at the same time prohibit its use in church. Nevertheless, this issue can be a sensitive matter and the government is not keen to discuss it openly.

10 Except for classes in the mother tongue of the students and English language: Richard Mead, *Malaysia's National Language Policy and the Legal System*, Yale University Southeast Asia Studies, 1988, at p. 24.

CHAPTER 6

Police Investigation

- Can a person be detained or summoned to the police station for the purpose of 'assisting the police with their enquiries/investigations'?
- If summoned, is a person under legal obligation to furnish/submit any information to the police?
- Does failure to furnish the required information amount to 'obstructing the police officer in the discharge of his public function', contrary to section 186 of the Penal Code?

The police, in general, are conferred with several powers under the Police Act 1967[1] (hereinafter referred to as "PA") and Criminal Procedure Code[2] (hereinafter referred to as "the CPC"), which include, inter alia:

(1) power to arrest;[3]
(2) power to conduct a search;[4]
(3) power to inspect licences and vehicles;[5]
(4) power to regulate assemblies, meetings and processions;[6]
(5) power to stop certain activities which take place other than in a public place;[7]
(6) power to regulate the playing of musical instruments in public places;[8] and
(7) power to make rules and orders for the control of traffic.[9]

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1 Act 344, Revised 1988.

2 Act 593

3 Sections 11 and 23 of the CPC. However, a magistrate may authorise an arrest, verbally or by warrant, under sections 16, 47 and 50 of the CPC, while a High Court judge has the same power by virtue of section 315 of the CPC.

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

5 Section 24 of the PA.

6 Section 27 of the PA.

7 Section 27A of the PA, provides that:
(a) the activity is directed to, or is intended to be witnessed or heard or participated in by persons outside the land or premises, or is capable from all the circumstances of being understood as being so directed or intended; or
(b) the activity attracts the presence of twenty persons or more outside the land or premises; or
(c) the activity is likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace.

8 Section 28 of the PA.

9 Section 29 of the PA.

The general rule enunciated under section 112 of the CPC is that a police officer in making an investigation may examine orally *any person* acquainted with the facts and circumstances of the case and shall reduce in writing any statement made by the person so examined.[10] Such a person is bound to answer all questions relating to the case put to him by the officer-in-charge. However, that person shall not be bound to answer any question that will expose him to criminal charge/penalty/ forfeiture.[11]

"... while every citizen has a moral or social duty to assist the police, there is no such legal duty."

Is a person duty bound to follow a police officer to the police station for the purpose of "assisting the police with their enquiries"? Even though there are no Malaysian cases or statutes that touch on the issue, English cases[12] may shed some light on the matter. The landmark case of *Rice v Connolly*[13] decided that while every citizen has a *moral or social duty* to assist the police, there is no such *legal duty.*[14] 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."[15] 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."[16] According to the English judges, there is no such offence as not "helping the police with their enquiries."[17]

However, we must be mindful of two contingencies:

(1) 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 pertinent, have not been verified in the Malaysian context. Thus, their applicability is still contingently questionable.

(2) Under the Penal Code[18] (hereinafter referred to as "the PC"), it is an offence when a person who is:

   (a) *legally bound* to produce or to deliver any document to any public servant;[19] or

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10 Section 112(1) of the CPC.

11 Section 112(2) of the CPC.

12 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..."

13 [1966] 2 QBD 414.

14 However, section 10 of the Kidnapping Act (Act 365) 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 3 years' imprisonment if convicted.

15 Ibid., 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..."

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

17 Ibid.

18 Act 574

19 Section 175 of the PC.

(b) *legally bound* to furnish information on any subject to any public servant;[20] or
(c) *bound by law* to render/furnish assistance to any public servant.[21]

intentionally omits to perform such legal duty.

Nonetheless, it is arguable as to what constitutes such legal duty.[22] Furthermore, there is neither provision under any statute nor case law that clearly or ostensibly places a legal duty 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."[23] In other words, the exercise of such power is limited to the suspect or witness of an offence.

- 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?

The power to make a search is conferred on the police in various statutes.[24] However, the general provision is enunciated in the Criminal Procedure Code (Act 593) (hereinafter refered to as "the CPC").

Generally, 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 stolen property based on well-founded information[25] and searching

20 Section 176 of the PC.

21 Section 187of the PC.

22 Section 13 of the PC and section 112 of the CPC 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.

23 Section 112(i) of the CPC.

24 For example:
(a) sections 44-49 of the Copyright Act 1987 (Act 332)
(b) sections 16-19 of the Dangerous Drugs (Forfeiture of Property) Act 1988 (Act 340)
(c) sections 8-10 of the Kidnapping Act 1961 (Act 365).

25 Section 62 of the CPC.

"... a search without warrant is granted only for the purpose of locating stolen property based on well-founded information[25] and searching for counterfeit coins or currency or machinery used to forge the same."

for counterfeit coins or currency or machinery used to forge the same.[26]

A much wider power of search is granted under section 116 of the CPC to an *investigating police officer*[27] 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 an investigation. Consequently, in practice, the police often do not apply for a search warrant[28] or a summons or even issue an order[29] before conducting a search in reliance on section 116 of the CPC.[30] Though such power is likely to be abused, there are certain criteria that must be fulfilled before the police may conduct such a search:

"... in practice, the police often do not apply for a search warrant[28] or a summons or even issue an order[29] before conducting a search in reliance on section 116 of the CPC."

(1) there must be a police investigation in the first place. In a non-seizable offence,[31] 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.[32] However, for a seizable offence,[33] the police may begin investigation upon receiving information[34] or when the police have reason to suspect the commission of a seizable offence has taken place.

(2) The police must have reason to believe that the person will not produce the document or thing even if ordered to do so or that the document is not known to be in the possession of any person.

It is submitted 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.

26 Sections 62A and 62B of the CPC.

27 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.

28 Under section 54(i)(a) of the CPC.

29 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.

30 See Mimi Kamariah, *Criminal Procedure in Malaysia*, 2nd. ed., University of Malaya Press, 1995, at p. 63.

31 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.

32 Section 108(ii) of the CPC.

33 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.

34 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.

Such power can be easily abused, since there are merely two inconsequential conditions for making such an order:

(1) the production of the document or property must be considered 'necessary or desirable'[35] for the purpose of any investigation, enquiry, trial or other proceedings under the CPC; and
(2) 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 order to produce it.[36]

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

(1) 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
(2) where the document or thing is not known to be in the possession of any person; or
(3) 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 for the granting of such summons or order:

(1) section 55 of the CPC: the police can only search or inspect the place or part thereof as specified in the warrant.
(2) section 57(1) of the CPC: the warrant must be in writing, signed and shall bear the *seal of the court.*
(3) the warrant shall 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.[37]

However, it seems that the Malaysian court, by virtue of section 435 of the CPC,[38] is often very lenient in interpreting the power of the police in making a search especially in criminal cases[39] for the purposes of crime prevention and protection of 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.

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35 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."

36 See Mimi Kamariah, *Criminal Procedure in Malaysia*, 2nd. ed., University of Malaya Press, 1995, at 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, 75.

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

38 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.

39 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 warrant.

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.[40]

40 See case law: *Ghani & Ors v Jones* [1969] 3 WLR 1158 and *Wong Liang Nyuk v PP* [1958] MLJ 246. See also general comment for the Malaysian context by Mimi Kamariah, *Criminal Procedure in Malaysia*, 2nd. ed., University of Malaya Press, 1995, at pp. 75-77.

CHAPTER 7

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?

INTRODUCTION

For some reasons, there are people who are reluctant to attend religious meetings conducted in a church building. Perhaps, psychologically, they feel threatened by the sheer number of Christians in the church. 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 Malaysia[1] 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] We will now deal with these restrictions.

PUBLIC MEETINGS—NEED FOR POLICE LICENCE

As is commonly known, the police have been given the power to enforce the law regarding public meetings and assemblies. Under section 27 of the Police Act 1967[3] (hereinafter referred to as "PA 1967"), an Officer in charge of a Police District (frequently referred to as the "OCPD" or the *Ketua Polis Daerah*) has the power to direct the conduct of persons, vehicles and routes of assemblies or meetings in public places. A church that plans to hold a meeting, whether religious or social, in public places must therefore

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

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

3 Act 344.

"A church that plans to hold a meeting, whether religious or social, in public places must therefore submit an application to the OCPD for a licence."

submit an application to the OCPD for a licence.[4]

The application can be made on prescribed forms available in any district police station or simply by writing a letter requesting for such licence or permission. The letter stating the date, time, venue of the meeting and the number of persons attending should be directed to the *Ketua Polis Daerah* by the committee of the church.[5] The approval for such a licence is subject to two conditions, that is, the meeting or assembly is not likely to:

(1) be prejudicial to the interest of the security of Malaysia or any part thereof; or
(2) incite a disturbance of peace.

Nonetheless, the OCPD has the discretion to refuse or cancel a licence *on any grounds at any time*.[6] It appears that the OCPD has immense powers to grant or refuse a licence, and to cancel a licence for any public meeting for whatever reason even after permission has been granted. In addition to this, the police may stop the meeting and disperse the congregation[7] on the grounds that:

(1) the licence has not been issued or has subsequently been cancelled; or
(2) one of the conditions in the licence has not been complied with.[8]

Any contravention of the above provision or refusal to obey the order of police is an offence punishable by imprisonment for one year and a fine of between RM2,000 to RM10,000.[9] Furthermore, the police have the authority to arrest without warrant any person suspected of having committed such an offence.[10]

4 Section 27(2) of the PA 1967.

5 According to section 27(2A), an application for a licence must be made by an organisation or jointly by three persons. Nevertheless, an application by individuals may be refused on the grounds that the meeting is in fact intended to be held by the organisation. As such, a church should, by right, apply under the heading of an organisation by the church committee. Having said that, it is also interesting that section 27(2D) of the Act explicitly disallows an application by "an organisation which is not registered or otherwise recognised under any law in force in Malaysia." As submitted earlier, a church is unequivocally recognised by the highest law in the land, i.e. the Federal Constitution. It thus follows that a church must necessarily and unquestionably be regarded as an "organisation" for the purpose of this section.

6 Refer to the proviso of section 27(2) of the PA 1967.

7 See section 27(3) of the PA 1967.

8 Such a meeting is deemed to be an unlawful assembly and any person(s) attending such a meeting has committed an offence under section 27(5) unless that person can prove that he/she came to the meeting through innocent circumstances and had no intention of associating with the assembly.

9 See section 27(8) of the PA 1967. The Act purposely *excludes* the exercise of discretion of the court under section 173A and section 294 of the Criminal Procedure Code, in sentencing such an offender to a lighter punishment, i.e. a *bond of good behaviour* whereby the offender need not serve a jail sentence: see section 27(8A) and also section 27A(7) of PA 1967.

10 See section 27(6) of the PA 1967.

PRIVATE CHURCH MEETINGS

Given the possible deterrents and legal implications of holding meetings in public places, it is advisable for churches to have their meetings in private places, such as church buildings and residential premises. If public meetings or conferences are unavoidable because the church or residential premises cannot accommodate the anticipated turnout then it is our opinion that the alternative option would be to apply to the police for a licence to "make" the meeting place a private one.

Let us now see how this can be done. First, neither the Police Act nor any other related statute defines the term "public places." Thus, we will turn to section 2 of the Interpretation Acts 1948 and 1967 which regards public places as including "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.*" It is submitted that 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 regardless of where it is held.

Nevertheless, we must also note section 27A of the PA 1967 which says that the police also have the power to stop activities that "take place on land or premises which do not constitute a public place." In simpler terms, the police have wide powers even if the meeting is held in a private place. The section stipulates that the police may stop a meeting and disperse the participants on the basis that the activity:

(1) is directed toward or is intended to be witnessed or heard by people outside the land or premises; or
(2) attracts the presence of 20 persons or more outside the land or premises; or
(3) is likely to prejudice the security of Malaysia or to excite a disturbance of the peace.

Refusal to obey the order amounts to an offence,[11] in which case the police may arrest the offender without a warrant.[12]

All told, it is more judicious to hold a church meeting in a "private place" as elucidated in the paragraph above. This will save the church the hassle of applying for a licence from the police. Besides, it limits the power of the police to interfere with the meeting on the grounds stated above. As long as the meeting is kept private and does not cause any disturbance or attract the presence of the general public outside its premises, the meeting is lawful.

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11 The punishment is similar to that contained in section 27 (8) and section 27 (8A). *Supra*. n 7.

12 See section 27A(5).

Legally speaking, there should be no obstacles to holding church meetings in places like hotel ballrooms, civic halls, multi-purpose auditoriums, etc. A licence is not necessary provided the above principle is strictly observed. 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.

- ◆ How does a church apply for a "professional visit pass" for a foreign speaker/ lecturer?
- ◆ What are the possible consequences if the foreigner speaks without such a pass (i.e. if he/she only obtains a social/business visit pass)? Are there other alternatives?

If a foreigner is invited to speak in a church or to lecture at a conference, he would, legally speaking, need to apply for a "professional visit pass" under the Immigration Regulations 1963. He or she will be categorised as a foreign speaker for religious activities. An application must be made to the Immigration Headquarters in Kuala Lumpur or any Immigration State Office. Such an application usually takes about one to four weeks to process.[13]

The application must be made by the employer or sponsor of the visitor, before he or she can enter Malaysia. The required documents include:

(1) An application letter from the employer or sponsor;
(2) Form IMM.12 (one copy);
(3) Form IMM.47 (one copy, if any);
(4) Photocopy of passport or visitor's travel document;
(5) Security bond; and
(6) Four copies of passport-sized photograph.

However, going by the experience of some churches and religious organisations, such passes are difficult, if not impossible to obtain. Each church must decide for itself whether or not to apply for such a pass in view of the tedious process involved. Nevertheless, it seems that presently, the government is not actively enforcing the Immigration rules as far as religious activities are concerned. Thus, many speakers who have been invited to speak in Malaysia enter the country using an ordinary visitor's pass.

13 See *Dealing with the Malaysian Civil Service*, Pelanduk Publications, 1993, at p. 395.

CHAPTER 8

Social Work

- What are the procedures that a church must observe when setting up a community/charitable centre (e.g. drug rehabilitation centre, child care centre, kindergartens, 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 care centres, drug rehabilitation and after-care centres and kindergartens.

CARE CENTRES

Care centres in Malaysia can be divided into two kinds, i.e. child care centres and care centres other than child care centres such as drug rehabilitation centres. Both types of centres are governed by different statutes which provide for their institution and registration.

(1) Child Care Centre Act 1984 (Act 308)

"Child care centre" in this Act covers all premises used for looking after four or more children under the age of four from more than one household for a fee.[1] Under this Act, all child care centres have to be registered with the Director General of Social Welfare on prescribed forms, failing which the person running such a centre is liable, upon conviction of such offence, to a maximum fine of RM1,000 and RM2,000 for the second and subsequent offences.[2] The Director General, nonetheless, has the

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1 The definition of "child care centre" is enunciated under section 2 of the Child Care Centre Act 1984.

2 Section 6 of the Child Care Centre Act 1984.

discretion to either allow or refuse applications for registration. Upon granting the licence to set up a care centre, the Director General (or *Ketua Pengarah Kebajikan Masyarakat*) may impose terms and conditions such as limiting the number of children taken in by the centre, compliance with the requirements relating to building structure, fire precautions, health, etc. Non-compliance might result in cancellation of the registration.[3]

There are two kinds of child care centres which may be registered under the Act:

(a) *Home-based child care centre:* a centre that receives not more than 10 children into the home; and
(b) *Institution-based child care centre:* a centre that receives more than 10 children.

(2) Care Centre Act 1993 (Act 506) (hereinafter referred to as "the CCA 1993")

This Act expressly excludes its application to child care centres,[4] kindergartens[5] and drug rehabilitation or after care centres.[6] Care centre in this Act includes:

(a) *Day care centre:* premises used for four or more persons receiving care exceeding three hours per day;[7] and
(b) *Residential centre:* premises where four or more persons are receiving care whether for reward or otherwise.

Such care centres, whether day care or residential, must be registered with the Director General of Social Welfare on prescribed forms.[8] Terms and conditions which may be imposed by the Director General include limits on the number of persons that may be accepted by the centre and the proper equipment for medical, health and recreational purposes. Non-compliance may result in the registration being cancelled.[9] The possible penalties for failure to register are a maximum jail term of two years and a fine of RM10,000.[10]

Drug Rehabilitation and After-Care Centres

The relevant legislature here is the Drug Dependants (Treatment & Rehabilitation) Act 1983[11] (hereinafter referred to as "the DDTRA 1983"). It stipulates the terms and conditions for the establishment of drug rehabilitation centres by the government as

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3 Section 12 of the Child Care Centre Act 1984.
4 Section 3(b) of the CCA 1993.
5 Section 3(c) of the CCA 1993. Kindergartens are governed by the new Education Act 1996 (Act 550).
6 Section 3(d) of the CCA 1993. Such centres are regulated under the Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283). See the next section for a discussion on such centres.
7 'Day' here means between the hours from sunrise to sunset.
8 Section 6(1) or the CCA 1993.
9 Section 11(a) of the CCA 1993.
10 Section 5(2) of the CCA 1993.
11 Refer also to the Drug Rehabilitation Centre Rules, 1983.

well as the private sector. In order to prevent the occurrence of any undesirable event, this statute contains strict provisions concerning the establishment of such centres. Nevertheless, the government does encourage the speedy integration of former drug dependants into the community with the help of the private sector.

Churches that intend to start or organise drug rehabilitation activities or after-care centres should be mindful of section 16 of the DDTRA 1983. This section allows a private individual, organisation, body or group of persons to apply to the Minister of Home Affairs 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.

CHAPTER 9

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.?

POSITION OF THE ORANG ASLI UNDER THE CONSTITUTION

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 1991, the population of the Orang Asli in Peninsular Malaysia was 82,807.[3]

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.

Furthermore, cognisant of the relative disadvantage suffered by Orang Asli, the Constitution expressly permits affirmative action to be taken towards redressing the same. Article 8(1) legitimises the legislation in favour of Orang Asli by way of provisions in the law 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.

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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 the Aboriginal Peoples Act 1954, section 2. This will be elaborated in the later part of this chapter.

3 An estimated figure taken from the 1991 Census Report, *Information Malaysia 1996 Yearbook*, Berita Publishing Sdn Bhd, 1996, at p. 55.

The Aboriginal Peoples Act 1954 ("the APA") provides a modicum of recognition of the right of Orang Asli to occupy state land as mere tenant at will. The Protection of Wild Life Act 1972 recognises the right of Orang Asli to shoot, kill or take certain wildlife for the purpose of food. Apart from these desultory efforts at protecting the welfare of the Orang Asli, little else have been done by way of legislation to protect and advance the rights of Orang Asli. Indeed, there are various legislations on land and land resources which negatively impact upon Orang Asli with regard to their land rights and their livelihoods which pay scant regard to their rights. Benevolent social legislation have 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" 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. It is also pertinent to note the recent decision of the High Court holding that Article 8(5) of the Federal Constitution and the 1961 Statement of the Policy Regarding the Administration of Orang Asli in West Malaysia (see below) impose fiduciary duties upon the state and the Federal Government with the obligation to protect the welfare of the Orang Asli.

The administration of Orang Asli affairs is not only governed by the Constitution and the law. Executive powers of government can be exercised even if there is no legislation. There is an official "Statement of Policy Regarding the Long Term Administration of the Aborigine People in the Federation of Malaysia" issued by the then Ministry of the Interior on 20 November 1961. The Policy Statement identifies several broad principles to be adopted in relation to various aspects of 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 1957 (see below). Unfortunately, as will be evident from the discussion below, these foundational principles are not translated into hard law in the provisions of the APA or other legislation. They do not appear to have been pursued with any real sense of commitment and are honoured more in breach than in compliance.

The Policy statement recognises the right of the Orang Asli to benefit equally with the other sections of the community and the need to promote their social, economic and cultural development. There is also the necessity to adopt special measures for protecting their institutions, customs, mode of life, person, property and labour. It sets out integration as opposed to assimilation, as the objective of social, economic and cultural development among the Orang Asli. The basic principle of collaboration with Orang Asli in all matters concerning their welfare and development is stated as an imperative of the government.

In relation to land, the special position of Orang Asli in respect of land usage and land rights is recognised. Orang Asli are not to be moved from their traditional areas without their full consent. Recognising the nomadic way of life of some Orang Asli groups as well as the hunting and gathering way of life including the practice of swidden agriculture of

others, the Policy Statement acknowledges the need for a relaxation of forest policies and objectives in favour of Orang Asli.

INTERNATIONAL STANDARDS AND NORMS REGARDING TREATMENT OF INDIGENOUS PEOPLES

The plight of indigenous minorities worldwide has an international dimension as well. The rights of indigenous peoples are no longer a domestic issue. It has become the subject of international concern. General prescription of human rights whether civil and political or economic, social or cultural apply equally to all human beings and the denial of the same to indigenous peoples is unacceptable. Special attention on the rights of indigenous peoples are reflected in the setting of international standards and norms on the treatment of indigenous and tribal people. These were first established by the Indigenous and Tribunal Population Convention 1957 (Convention No. 107). Subsequently, the Indigenous and Tribal Peoples Convention 1989 (Convention 169) was adopted and opened for ratification. In 1995, the United Nations Economic and Social Council commenced deliberations on the text of a Declaration on the Rights of Indigenous Peoples.

MAIN FEATURES OF THE ABORIGINAL PEOPLES ACT 1954

The Aboriginal Peoples Act 1954 (“the 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 APA was enacted to protect the interest 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

The APA refers to the Minister who has the power to make regulations for carrying into effect the purposes of the Act. Elsewhere, he is also given the power to confirm the appointment of non-hereditary Orang Asli headmen. The APA does not define who the Minister is. Pursuant to Order made under the Ministerial Functions Act 1969, the Minister charged with responsibility for Orang Asli affairs is now Minister for Rural Development who took over this function from the Minister of National Unity and Social Development. The Act was initially under the purview of the Minister of Home Affairs.

The Director General of Orang Asli Affairs

Section 5 provides for the appointment of the Director General of Orang Asli Affairs. Under section 6, he is charged with the responsibility for the “administration, welfare and advancement of the aborigines.” He is given the authority to do all acts reasonably necessary and incidental to or connected with the performance of his functions under the APA. By virtue of the Titles of Office Act 1949, he is now referred to as the Director General for Aboriginal Affairs.

The responsibility for implementing the law and the executive policies of the Government on Orang Asli affairs is assigned to the Director General of Orang Asli Affairs who answers to the Minister of Rural 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 Hal Ehwal Orang Asli

The Department of Orang Asli Affairs, 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 policy of the government. This is in contrast with the administration for bumiputeras, consisting of the Malays and the natives of Sabah and Sarawak, who enjoy special privileges under Article 153 of the Federal Constitution. The administration of bumiputeras is the responsibility of the Cabinet which is undertaken inter-ministerially and by a host of departments and agencies, as well as statutory bodies.

Traditional Leadership

The hereditary headman of an Orang Asli community shall continue to be the headman. 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 (Section 16). 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 (proviso to Section 4).

"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."

Protection of Orang Asli Children

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.

Right to Education

In regard to education, no positive obligations are imposed. However, section 17(2) of the APA prohibits the exclusion of any Orang Asli children from attending any school.

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 parents or guardian to the Director General (section 17(2)). 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 male parent 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
(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 provided that the person 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:

(a) continues to follow an aboriginal way of life and customs; or
(b) 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.[4]

"… the Orang Asli will not lose their privileges under the Act because they exercise their right to freedom of religion under the Federal Constitution."

Aboriginal Lands

The larger part of the APA deals with lands inhabited by Orang Asli and matters connected therewith. For a fuller treatment see below.

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 such areas. 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. Regretfully, the Act does not specify the exact grounds for allowing such exclusions. Thus, the discretion granted to the Minister is in some way, unfettered. Once the order is issued and served upon such person, the Act makes it an offence for such person to enter the specified area.[5] The police or the Director General may arrest the offender without a warrant.[6]

4 Section 3(3) of the Act. The word 'Minister' is not defined in the Act but presumably, refers to the Minister of Home Affairs.

5 Section 14(5) of the Act.

6 The maximum penalty is a RM1,000 fine.

Removal of Undesirable Persons: Section 15

The Director General and the police are also given 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." Such person will be removed from the area within seven days from the date of detaining him. Again, as to 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.

LAND USAGE AND LAND RIGHTS

A distinctive feature of indigenous minorities worldwide is their almost total dependence and close affinity with the land and the resources which are 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.

It is granted that land is a state matter whilst the advancement, protection and well-being of the Orang Asli is one within the purview of Federal executive and legislative power (Ninth Schedule: State List, item 2, and Federal List, item 16 respectively). This is the often cited reason why the protection of Orang Asli lands and the recognition of their land right 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" (the "policy Statement"). The broad principle which is to be adopted 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 this to bring them economically into line with other communities in their country. Aborigines will not be moved from their traditional areas without their full consent.

Aboriginal Lands under the Aboriginal Peoples Act 1954

Classification of Orang Asli lands under the Act: The Aboriginal Peoples Act 1954 (APA) refers to and defines three categories of such lands, viz aboriginal inhabited places, aboriginal areas and aboriginal reserves (Section 2).

The term "aboriginal inhabited place" appears to be self-explanatory. It is defined as any place inhabited by an aboriginal community. Any areas predominantly or exclusively inhabited by aborigines and where it appears unlikely that the aborigines will remain permanently in that place may be declared an aboriginal area (Section 6(1)). Any area exclusively inhabited by aborigines and where the aborigines are likely to remain permanently may be declared an aboriginal reserve (Section 7(1)). The declaration of

Orang Asli areas and reserves is to be notified in the Gazette.

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 be constituted 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. Where there is no such declaration, the Act confers no express protection over aboriginal inhabited places.

Within aboriginal areas and reserves, no lands shall be declared as a Malay reservation or a wild animal or bird sanctuary reserve (sections 6(2) and 7(2)). Furthermore, 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)). However, 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 only confers the right of occupancy which title is that of a tenant-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. The Act, however, does not make it a duty to declare all Orang Asli inhabited areas as aboriginal reserves or aboriginal areas or for the circumstances under which they ought to be so gazetted. On the other hand, it permits the State Authority to revoke the declaration of Orang Asli reserves or areas.

Degazetting Reservations of Orang Asli Reserves and Areas: Orang Asli inhabited places which have been declared to be Orang Asli areas or reserves may lose the limited protection granted by the Act upon the revocation of the declaration. This may be done by a mere gazette notification. Thus section 6(3) and 7(3) provide that the State Authority may by notification in the gazette revoke wholly or in part or vary any declaration of an aboriginal area or reserve. In such a case, Section 12 provides for compensation to be paid for any such revocation or variation or excision. No obligation is imposed upon the State Authority to declare other lands as aboriginal areas or reserves to replace those lands degazetted as such.

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 the said 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 de-gazetted Orang Asli traditional lands—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 shall pay such compensation as shall appear just to the state authority. The payment shall be made in accordance with section 12.

High Court upholds rights to forest resources under the Act: In *Koperasi Kijang Mas and 3 others v Kerajaan Negeri Perak & 2 Others* [1991] CLJ 486 the High Court held that the State Government of Perak had breached the Aboriginal Peoples Act 1954 when it accepted Syarikat Samudera Budi Sdn. Bhd.'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 have 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.

"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."

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 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 are yet to be gazetted. Orang Asli residing in such approved lands have the same statutory rights as they have in respect of residence 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 v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, the High Court made declarations that the Orang Asli of Sg. Linggiu had common law rights besides their rights under the APA over their ancestral lands. These rights are protected by the Federal Constitution. The Court assessed compensation in the sum of RM25.6 million to be paid to the 424 Orang Asli in the area. The judgement was upheld by both the Court of Appeal and the Federal Court.

In *Adong*, the High Court held that the 52 Orang Asli 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. The High Court relying on the Australian decision of *Mabo (No. 2)* and a host of other authorities from other common law jurisdictions inter alia the United States, New Zealand and Nigeria held that under the common law, the Orang Asli had the common law rights to live on their ancestral lands as their forefathers had done.

The 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 plaintiff to be deprived of their rights and the plaintiffs had not been compensated for such deprivation. Accordingly, the deprivation was unlawful.

The Court awarded compensation to the plaintiff for the following items of loss of rights:

(1) deprivation of heritage land;
(2) deprivation of freedom of inhabitation and movement under Article 9(2);
(3) deprivation of produce of the forests;
(4) deprivation of future living for himself and his immediate family; and
(5) deprivation of future living for his dependants.

In *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, the High Court dealt with a case of lands occupied by Temuans from which they were evicted and 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 including the plaintiffs. 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 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* [2002] 2 MLJ 591, the Court also held that the State Government of Selangor and the Federal Government owed fiduciary duties towards the Orang Asli plaintiffs. This is founded on Article 8(5) of the Federal Constitution and the 1961 Statement of the Policy Regarding the Administration of Orang Asli in West Malaysia. In essence, this consist 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

"Native title rights are not necessarily confined to the traditional use of ancestral land... but might well include rights to exploit resources which are consistent with ownership of the land ..."

The recognition of Orang Asli rights over their customary lands is founded upon the concept of native title at common law. 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 can be no logical reason why the common law rights of Orang Asli to the produce of their ancestral lands are not protected as well.

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. 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 their procedural correctness but also, to their constitutionality and their substantial merits. 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 as to tantamount 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.

CHAPTER 10

Miscellaneous

> ◆ Can a church allow illegal immigrants (e.g. Indonesians, Filipinos) to worship and/or take part in any activity organised by the church? Are there any legal consequences for doing so?

An illegal immigrant[1] is prohibited from entering or remaining in Malaysia by virtue of section 8 of the Immigration Act 1959/1963[2] (hereinafter referred to as "the IA 1959/63"). Such an immigrant includes anyone who enters into Malaysia with a valid pass or permit, which subsequently expires or is terminated.[3] 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.[4]

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?

There are a few fundamental concepts that are relevant to our discussion here:

(1) The Federal Constitution guarantees the right to profess and practise religion to "every person," whether citizens or otherwise.[5] Thus, we can assume that an immigrant, whether illegal or not, is entitled to this right as well. However, the extent to which a right can be granted to an illegal immigrant is arguable.

(2) Assuming that an illegal immigrant has such a right, a church or any religious body that disallows an immigrant to participate in any religious meeting which forms part of such person's religion is in fact denying that person his or her constitutional right.

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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 Act 155 (Revised 1975).

3 Section 8(3)(o) of the IA 1959/63.

4 Section 57 of IA 1959/63.

5 *Commr HRE v Lakshimindra* (1954) SCR 1005.

(3) The IA 1959/63 only stipulates that an offence is committed under section 56(1)(d) if a person "knowingly harbours[6] any person" whom he knows or has reasonable grounds to believe has contravened the Act. In other words, the person who harbours or "conceals an offender (in this case, an illegal immigrant) with the intention of shielding him"[7] will be prosecuted under this provision. The penalty may extend to a RM10,000 fine and five years' imprisonment.[8]

"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."

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. Rationally, allowing an alien to attend a church activity will definitely not amount to providing shelter for the purpose of concealing him or her from the authorities. There is also no apparent legal duty placed on the public to report the presence of illegal immigrants.[9]

Thus, there is no reason why a church should not welcome an immigrant, legal or otherwise, to church services and other activities, provided the provision under section 56 of IA 1959/63 is not contravened.

- Can a non-Muslim female carrying a baby fathered by a Muslim partner be prosecuted in Court (whether civil or Syariah Court)?
- Is it an offence if she refuses to convert to Islam after marrying a Muslim?

The main issue here is whether a non-Muslim can be prosecuted for any offence under the Islamic law in a Syariah Court. Let us examine this by first looking at a few basic legal and constitutional settings in Malaysia.

(1) As discussed in chapter 1, Malaysia is a *secular state*. Islam as the religion of the Federation is very much restricted to only the rituals and ceremonies of that particular religion. It does not dilute in any way the fact that Malaysia is a not an Islamic state. As far as the legal system is concerned, Malaysia has a unique dwi-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.

6 "Harbouring" means sheltering or providing refuge: *Butterworth's Australian Legal Dictionary*, Butterworth, 1997, at p. 543.

7 K.J.Aiyar's *Judicial Dictionary*, The Law Book Co Pte Ltd, 11th Ed, 1993, at p. 553.

8 Section 56(1)(bb) of the IA.

9 Section 45(1): Except for the master of vessel and the captain of aircraft who have the legal duty to report to the immigration or police officer of any person, passenger or crew on board who fails to continue his journey.

(2) The Federal Constitution also spells out that the Civil Court will have no jurisdiction with respect to matters within the jurisdiction of the Syariah Court.[10] The jurisdiction of the Syariah Court is spelled out in the Syariah Court (Criminal Jurisdiction) Act 1965[11] to include:

(a) jurisdiction over *persons professing the religion of Islam*;
(b) jurisdiction in respect of any matters enumerated in List II of the State list of the Ninth Schedule to the Federal Constitution;
(c) 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 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 is obvious that a non-Muslim will not and 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. Unless and until a person has converted into the Islamic faith, the Islamic laws in Malaysia are not applicable to him or her. Nor is he or she subject to the Syariah Court by virtue of the Statute mentioned above.

"... it is obvious that a non-Muslim will not and 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."

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 pregnancy 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." At worst, the baby is considered illegitimate in the eyes of the law if he or she is born out of wedlock. If the woman decides to marry the man but does not want to convert to Islam, the only option left for them is for the man to convert out of Islam since Islamic law in Malaysia prohibits the union between a Muslim and a non-Muslim.

10 Article 121(1A): a clause which was added and came into force on 10 June 1988 by virtue of Amendment Act A704.
11 Act 355, Revised 1988.

APPENDIX 1

COMPARISON OF CONTROL & RESTRICTION OF PROPAGATION OF NON-ISLAMIC RELIGIONS ENACTMENTS IN MALAYSIA

Provisions \ State E'nctmt		T'gnu 1980	K'tan 1981	K'dah 1988	M'ca 1988	S'gor 1988	Perak 1988	Phg 1989	Johor 1991*	N.S. 1991
Offence of persuading, influencing, of inciting a Muslim to change faith		s.4	s.4	s.4	s.4	s.4	s.4	s.4	s.4	s.4
Maximum Penalty	Imprisonment (mths)	12	12	48*	12	12	48	48	36	12
	Fine (RM '000)	10	10	—	10	10	10	10	10	10
Offence of subjecting a Muslim under the age of eighteen years to influences of a non-Islamic religion		s.5	s.5	s.5	s.5	s.5	s.5	s.5	s.5	s.5
Maximum Penalty	Imprisonment (mths)	12	12	48*	12	12	48	48	36	12
	Fine (RM '000)	10	10	—	10	10	10	10	10	10
Offence of approaching a Muslim to subject him to any speech on or display of any matter concerning a non-Islamic religion		s.6	s.6	s.6	s.6	s.6	s.6	s.6	s.6	s.6
Maximum Penalty	Imprisonment (mths)	6	6	36*	6	6	24	24	24	6
	Fine (RM '000)	5	5	—	5	5	5	5	5	5
Offence of sending or delivering publications concerning any non-Islamic religion to a Muslim		s.7	s.7	s.7	s.7	s.7	s.7	s.7	s.7	s.7
Maximum Penalty	Imprisonment (mths)	3	3	36*	3	3	24	24	24	3
	Fine (RM '000)	3	3	—	3	3	5	5	5	3
Offence of distributing in a public place publications concerning non-Islamic religion to Muslims		s.8	s.8	s.8	s.8	s.8	s.8	s.8	s.8	s.8
Maximum Penalty	Imprisonment (mths)	—	—	36*	—	—	24	24	12	—
	Fine (RM '000)	1	1	—	1	1	5	5	3	1
Offence relating to the use of certain words and expressions of Islamic origin (see Schedule below)		s.9	s.9	s.9	s.9	s.9	s.9	s.9	s.9	s.9
Maximum Penalty	Imprisonment (mths)	—	—	36*	—	—	24	24	6	—
	Fine (RM '000)	1	1	—	1	1	5	5	1	1

* For a second or subsequent similar offence, an additional year is added to all maximum terms (e.g. the maximum term for violating section 4 is four years' imprisonment. Thus for a second or subsequent violation, the maximum term of imprisonment is five years.).

APPENDIX 2

ISLAMIC LAW ENACTMENTS IN ALL STATES

STATE	ENACTMENTS/ORDINANCES (E/O)	E/O NO.	REMARKS
1. Sarawak	i. Ordinan Mahkamah Syariah	4/91	
	ii. Ordinan Undang-undang Keluarga Islam	5/91	
	iii. Ordinan Kesalahan Jenayah Syariah	6/91	- no provision/penalty for converting out/ apostasy (murtad) - 'loose' provision
	iv. Ordinan Acara Mal Syariah	7/91	
	v. Kanun Acara Jenayah Syariah	8/91	
	vi. Ordinan Keterangan Syariah	9/91	
2. Sabah	i. Administration of Islamic Law Enactment	13/92	- no provision/penalty for apostasy & restriction on propagation
	ii. Syariah Court Enactment	14/92	
	iii. Islamic Family Law Enactment	15/92	
	iv. Syariah Court Evidence Enactment	16/92	
	v. Zakat and Fitrah Enactment	6/93	
	vi. Syariah Civil Procedure Enactment	9/93	
	vii. Syariah Criminal Procedure Enactment	10/93	
	viii. Syariah Criminal Offences Enactment	3/95	- more detailed than the S'wak Ord. - S.65: makes apostasy a punishable offence
3. Malacca	i. Administration of Islamic Law Enactment	1/59	- the whole enactment has been repealed by En. 5/91, except Part IX
	ii. Islamic Family Law Enactment	8/83	
	iii. Administration of Syariah Court Enactment	6/85	
	iv. Syariah Criminal Procedure Enactment	2/86	
	v. Administration of Syarak Law Enactment	5/91	
	vi. Syariah Criminal Offences Enactment	6/91	
	vii. Syariah Court Evidence Enactment	12/94	

STATE	ENACTMENTS/ORDINANCES (E/O)	E/O NO.	REMARKS
4. Kedah	i. Administration of Muslim Law Enactment	9/62	- no provision for converting out
	ii. Syariah Criminal Code Enactment	9/88	
	iii. Islamic Family Enactment	1/84	
	iv. Islamic Civil Procedure Enactment	2/84	
	iv. Syariah Court Enactment	4/94	- no provision/penalty for apostasy
5. Terengganu	i. Administration of Islamic Religious Affairs Enactment	12/86	
6. Perlis	i. Administration of Islamic Law Enactment	3/64	- no provision for converting out.
	ii. Criminal Offence in Syarak Enactment 1991	4/93	- no provision for apostasy and restriction of propagation
	iii. Mal Procedure of Syarak Court Enactment 1991	5/93	
	iv. Criminal Procedure of Syarak Court Enactment 1991	7/93	
7. Johor	i. Administration of Islamic Law Enactment	14/78	- s.141 provision on how to convert out - no provision to punish apostasy
	ii. Islamic Family Law Enactment	5/90	
	iii. The Syariah Court Enactment	12/93	
	iv. Syariah Evidence Enactment	13/93	
8. Pahang	i. Administration of the Religion of Islam and the Malay Custom of Pahang	8/82	- s.166: makes propagation of other religions a punishable offence - s.185: makes apostasy a punishable offence (but both amended provisions are not in force yet)
	ii. Islamic Family Law	3/87	
	iii. Syariah Court Enactment	1/90	

STATE	ENACTMENTS/ORDINANCES (E/O)	E/O NO.	REMARKS
9. N.Sembilan	i. Administration of Islamic Law Enactment	5/91	- no provision for converting out
	ii. Islamic Family Law Enactment	7/83	
	iii. Syariah Criminal (Negeri Sembilan) Enactment	4/92	- s. 48: apostasy is a punishable offence
	iv. Syariah Court Evidence Enactment	1/91	
	v. Enakmen Pentadbiran Hukum Syarak	5/91	
10. Perak	i. Administration of Islamic Law Enactment	11/65	- this Enactment which has been repealed by En. 2/92, includes deletion of s.146 which allows converting out
	ii. Crimes (Syariah) Enactment	3/92	- s.10: makes propagation of other religions a punishable offence - s.12: apostasy is an offence - s.13: word/action importing apostasy is an offence
	iii. Islamic Family Law	13/84	
	iv. Administration of Islamic Law	2/92	
	iv. Evidence (Syariah Court) Enactment	3/94	
	v. Criminal Procedure (Syariah) Code	4/94	
	viii. Syariah Court Civil Procedure 1996	2/96	
11. Penang	i. Administration of Islamic Religious Affiars of the State of Penang	7/93	- no provision for converting out
	ii. Administration of Muslim Law Enactment	3/95	
	iii. Syariah Criminal Offences (State of Penang) Enactment	3/96	- s.5: Makes propagation of other religions a punishable offence
	iv. Administration of Syariah Court	3/82	

STATE	ENACTMENTS/ORDINANCES (E/O)	E/O NO.	REMARKS
12. Kelantan	i. Council of the Religion of Islam & Malay Custom Enactment	4/94	- s.102: makes apostasy a punishable offence - s.124: causing a Muslim to leave his religion is made an offence
	ii. Evidence Enactment of Syariah	2/91	
	iii. Islamic Family Law	5/90	
	iv. Syariah Criminal Code	2/85	
	v. Syariah Criminal Procedure	5/84	
	iv. Administration of Syariah Court	3/82	
13. Federal Territories	i. Administration of Islamic Law (F.T.) Act 1993	Act 505	- no provision for converting out
	ii. Islamic Family Law (F.T.) Act 1984	Act 303	
	iii. Syariah Criminal Offences (F.T.) Act 1997	Act 559	
	iv. Syariah Criminal Procedure (F.T.) Act 1997	Act 560	
	v. Syariah Court Evidence (F.T.) Act 1997	Act 561	
14. Selangor	i. Administration of Muslim Law	3/52	- most parts have been repealed by later enactments
	ii. Islamic Family Law	4/84	
	iii. Syariah Criminal Procedure	6/91	
	iv. Syariah Civil Procedure	7/91	

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