LEGAL OPINION OF THE BECKET FUND FOR RELIGIOUS LIBERTY

(A NON-GOVERNMENTAL ORGANIZATION IN CONSULTATIVE STATUS

WITH THE ECONOMIC AND SOCIAL COUNCIL (ECOSOC) OF THE UNITED NATIONS)

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INTRODUCTION

The Becket Fund for Religious Liberty is an international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. For over ten years, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, and other religious believers in American domestic courts, in the domestic courts of foreign domestic governments such as Sweden and Australia, and before international tribunals such as the European Court of Human Rights and the United Nations Human Rights Committee. As a Non-Governmental Organization (NGO) in consultative status with the Economic and Social Council (ECOSOC) of the United Nations, of which Malaysia is a member, The Becket Fund's global interest in protecting religious exercise and expression is implicated by Lina Joy's case.

The Becket Fund respectfully issues this legal opinion paper in analysis of Malaysia's obligations to guarantee each of its citizens the religious liberty, freedom of expression, and equal protection of the laws secured by customary international law as demonstrated in, *inter alia,* Article 18 of the Universal Declaration of Human Rights ("UDHR"),[1] and Articles 18, 19, and 26 of the International Covenant on Civil and Political Rights ("ICCPR").[2] Should the Federal Court uphold the Court of Appeal's decision—which imposes legal disadvantages on Lina Joy *solely* because of her religious status as a person who converted from Islam to Christianity—Malaysia will be in violation of bedrock principles of international human rights law.

ARGUMENT

I. The Government's Refusal to Recognize Lina Joy's Conversion Away from Islam Is a Violation of International Law.

A. *Under customary international law, the freedom to hold religious beliefs of one's choice includes the freedom to convert to another religion.*

The Charter of the United Nations, which according to its Article 103, is supreme over all other international treaties, states in Article 1 that a purpose of the United Nations is the promotion of and respect for human rights. U.N. Charter art.s 1, 103. Article 56 expressly states that all member states "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55," which includes "universal respect for, and observance of, human rights and fundamental freedoms for all." *Id.* art.s 55-56.

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[1] G.A. Res. 217A (III), art. 16, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

[2] G.A. Res. 2200A (XXI), art. 18, U.N. Doc. A/6316 (Dec. 16, 1966), *entered into force* Mar. 23, 1976.

Article 26 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")[3] specifically provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 further provides that adherence to domestic law is no justification for failure to perform the obligations of a particular agreement.[4] Accordingly, pursuant to the Vienna Convention, Malaysia is bound to adhere to the terms of the Charter of the United Nations, which forms part of the corpus of Malaysian law.

Malaysia is further bound by international law norms that have so entered into the lexicon of fundamental rights protected by law around the world that those norms enter into binding customary international law. A rule is customary if it reflects state practice and when there exists a conviction in the international community that such practice is required as a matter of law.[5] While treaties only bind those states which have ratified them, customary law norms are binding on all states.

Since its adoption in 1948, the Universal Declaration of Human Rights ("UDHR") has become the most-translated document in the world, available in over 300 different languages.[6] The UDHR is the single most cited human rights document in the world by courts. Courts have recognized the UDHR as a binding expression of international law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 881-84 (2d Cir. 1980) (UDHR is "an authoritative statement of the international community" and has developed into "a part of binding, customary international law." (citations omitted)). The UDHR provides in Article 18:

> 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 public or private, *to manifest his religion* or belief in teaching, practice, worship and observance.

UDHR, *supra* note 1, art. 18. Religious believers thus are free to adhere to the theological beliefs of their choice, and to change religion or belief.

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[3] Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980.

[4] International agreements to which Malaysia is bound preempt domestic law under the doctrine of *lex superior*.

[5] Customary international law can be discerned by a "widespread repetition by States of similar international acts over time (State practice); Acts must occur out of sense of obligation (opinio juris); Acts must be taken by a significant number of States and not be rejected by a significant number of States." S. Rosenne, *Practice and Methods of International Law* 55 (Oceana 1984).

[6] The Universal Declaration of Human Rights, http://www.unhchr.ch/udhr/index.htm (last visited June 26, 2006).

As a standing member of the United Nations, Malaysia has agreed to adhere to the principles set forth in the Charter of the United Nations, and the UDHR. Malaysia has itself recognized this obligation. In an address by the Honourable Abdullah Ahmad Badawi, Prime Minister of Malaysia, to the General Assembly of the United Nations, 59th Session, in New York on 27 September 2004, the Prime Minister declared, "Adherence to the Charter of the United Nations should be a solemn obligation, not a matter of choice."[7]

Regarding customary international law, the Third Restatement of US Foreign Relations Law explains that a state "violates international law if, as a matter of state policy, it practices, encourages or condones...[s]ystematic religious discrimination." *Restatement of the Law, Third, Foreign Relations Law of the United States* § 702, § 702 cmt. j (1987). The *Restatement* also affirms that the UDHR, adopted as a resolution of the General Assembly of the United Nations, is a powerful and authoritative statement of the customary international law of human rights. It further observes:

> United Nations Charter (Articles 1, 13, 55) links religious discrimination with racial discrimination and treats them alike; to the extent that racial discrimination violates the Charter religious discrimination does also. Religious discrimination is also treated identically with racial discrimination in the principal covenants and in the constitutions and laws of many states.

§ 702 cmt. j.

The principle of freedom of religious choice is further supported as customary international law by other widely adopted, legally binding, human rights instruments that recognize the right.

Malaysia acceded to the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") in 1995.[8] Pursuant to the Vienna Convention, Malaysia is bound to adhere to the terms of CEDAW, which forms part of the corpus of Malaysian law.[9] CEDAW ensures equality and non-discrimination for

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[7] Honourable Abdullah Ahmad Badawi, Prime Minister of Malaysia, Address to the General Assembly of the United Nations, 59th Session (Sept. 27, 2004), *available at* http://www.pmo.gov.my/WebNotesApp/PMMain.nsf/abcde1cdcc0a065e48256c0600157906/28757d1d8af82b5248256f1d00364c82/$FILE/pm-un59-malayeng040927.pdf.

[8] Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

[9] Although Malaysia originally made a reservation to Article 16, which relates to family life, it has withdrawn several parts of that reservation including subsections (1)(b) and (e). The CEDAW Committee further "remains convinced that reservations to article 16...are imcompatible wit the Convention and therefore impermissible and should be reviewed and modified or withdrawn." *Report of the Committee on the Elimination of Discrimination Against Women (Eighteenth and nineteenth sessions*), at 49, para.s 16-17, U.N. Doc. A/53/38/Rev.1 (1998), p. 49, para. 16-17, *available at* http://www.un.org/womenwatch/daw/cedaw/reports/18report.pdf.

women on the basis of equality with men, but also on the basis of equality among different groups of women. The CEDAW Committee, which oversees compliance to CEDAW, has recognized that women "may also suffer from multiple forms of discrimination based on...grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors." The Committee recognizes the intent of CEDAW to protect from discrimination on these bases as well.

As a State party to CEDAW, Malaysia must work "to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights" Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 3, U.N. Doc. A/34/46 (1979), *entered into force* Sept. 3, 1981. The State has an obligation to take measures to eliminate such discrimination against Muslim women and ensure that all women and men in Malaysia, whether Muslim or non-Muslim, have "the same right freely to choose a spouse" *id.* at art. 16(1)(b), and, ultimately, can enjoy the rights to equality and non-discrimination.

The International Covenant on Civil and Political Rights ("ICCPR"), the legal expression of the principles outlined in the UDHR, unequivocally protects the individual's right to "adopt a religion or belief of [one's] choice." G.A. Res. 2200A (XXI), art. 18, U.N. Doc. A/6316 (Dec. 16, 1966), *entered into force* Mar. 23, 1976. Sixty-seven states are signatories to the ICCPR, and an additional 156 are parties. Moreover, the Human Rights Committee of the United Nations has recognized the fundamental character of the freedom of religion and belief in its preservation even in times of public emergency: "The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency."[10]

Lina Joy has affirmatively stated under oath that she "no longer profess[es] Islam and [has]...embraced Christianity."[11] The Committee has further commented:

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[10] Religion is among grounds of discrimination forbidden in other principal international instruments. *E.g.*, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 2(2), U.N. Doc. A/6316 (Dec. 16, 1966), *entered into force* Jan. 3 1976; Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, 213 U.N.T.S 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 *respectively*; American Convention on Human Rights art. 1, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978; African [Banjul] Charter on Human and People's Rights art. 2, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, *entered into force* Oct. 21, 1986. Fear of persecution on account of religion (as well as race) is included in the definition of a "refugee" under the Convention Relating to the Status of Refugees. In 1981, the General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. G.A. Res. 36/55, at 171, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

[11] Lina Joy's affidavit in support:

> 6(c). "Since 1990, I have been introduced to and have understood Christianity. Now I have wholeheartedly believe [sic] in the Christian Faith." Certificate of Baptism dated 11.5.1998.

> [T]he freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another....

See U.N. ESCOR, Hum. Rts. Comm., 48th Sess., General Comment 22, The Right To Freedom of Thought, Conscience and Religion (1993) (emaphasis added).

Thus, as a matter of customary international law, the Malaysian government has an obligation to safeguard Lina Joy's "freedom to choose a religion or belief, including the right to replace one's current religion or belief with another."

B. ***The Malaysian government's discrimination based on religious status in application of its national identity card program, and consequently, of its civil marriage laws, is a violation of international law and renders Lina Joy's right to freedom of religion ineffective and illusory.***

The Malaysian government's failure, through the National Registry Department, to recognize Lina Joy's conversion, and subsequent refusal to grant her a civil marriage license on the basis of her religious status, renders her exercise of a right to freedom of religion, as her counsel has stated it, "ineffective and illusory."

In *Employment Division v. Smith*, the United States Supreme Court observed:

> **The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires**. . . . **The government may not compel affirmation of religious belief**,[12] punish the expression of religious doctrines it believes to be false,[13] **impose special disabilities on the basis of religious views or religious status**,[14] . . . or lend its power to one or the other side in controversies over religious authority or dogma.[15]

6(f). "I am...convinced that my decision to practise Christianity is my true desire and my decision is final."

7. "I verily state that I have renounced Islam and embraced Chrisitianity willingly and without any duress or force by anyone. I am of sound mind."

14.2. "Thus far, I have endured suffering as I have been unable to set up my desired household and family all this while."

[12] *See Torcaso v. Watkins*, 367 U.S. 488 (1961).

[13] *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

[14] *See McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953).

[15] S*ee Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'lPresbyterian Church*, 393 U.S. 440, 445-52 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725 (1976).

Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (emphasis added) (citations footnoted). The Court further observed that the "'exercise of religion' often **involves not only belief and profession but the performance of (or abstention from) physical acts**: such as assembling with others for a worship service, . . . proselytizing, [and] abstaining from certain foods. . . ." *Id*. (emphasis added).

The Human Rights Committee recognizes this point by stating that "[p]olicies or practices having the same . . . effect" of "restricting acess to . . . the rights guaranteed" are "similarly inconsistent" with the religious freedom provisions in these international instruments.[16] Malaysian domestic law also protects the individual's right "to change his religion or belief" and provides that no citizen will be discriminated against by the state because of their religious belief and provides that no citizen will be discriminated against by the state because of his or her religious belief. Article 11(2) of the Malaysian Constitution provides that "[e]very person has the right to profess and practise his religion." Federal Constitution art. 11(2) (Malay). Lina Joy's right to "profess and practise" her religion will be rendered meaningless if the government disqualifies her from civil marriage simply for that profession and practice.

The National Registration Department ("NRD") changed its regulations on January 10, 1999 such that the word "Islam" had to be registered on the identity card of any Muslim. Because Lina Joy's MyKad national identity card stated that she was a Muslim, she could not obtain a marriage license. The NRD rejected her demand for the word "Islam" to be removed from her MyKad, requiring a certificate of apostasy from the Islamic court. These requirements effectively deprive her of any meaningful freedom of religion to change her religious belief.

In violation of CEDAW Lina Joy is further denied the right of equality as opposed to other groups of women on the basis of her religious status. As a woman born into Islam, she is denied the right to convert away from her religion of birth and choice of marriage partner that other non-Muslim women in Malaysia do not face. The result of the NRD's decision—meant to protect the Muslim community—is ironically to discriminate only against women who are from a Muslim background, as they alone are deemed unable to profess and practice the religion of their choice according to their consciences without the approval of a Syariah court.

Moreover, Article 16 of the Universal Declaration of Human Rights also confers a right to marry without limitation due to religion: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." (UDHR art. 16; emphasis added) The result of the NRD's practice of requiring that Lina Joy obtain a statement that she is a *murtad* from the Syariah court is, on the sole

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[16] U.N. ESCOR, Hum. Rts. Comm., 48th Sess., General Comment 22, The Right To Freedom of Thought, Conscience and Religion (1993).

basis of her religious status, to deprive Lina Joy of the right to marry and to found a family in violation of the UDHR and CEDAW.

II. The Federal Court Has a Duty to Protect Fundamental Rights, Including the Freedom to Profess and Practice a Religion of One's Choosing, in Its Application of Administrative Law

A. *Protection of fundamental rights in administrative law is a bedrock principle of constitutional rule of law.*

According to Article 4 of the Federal Constitution, the Federal Constitution is the supreme law of the country, and any other law that is inconsistent with the Federal Constitution is subordinate. The only exceptions are those authorized by the Constitution itself. There is nothing in the Constitution that contravenes the right of any persons to choose their religion. The Administration of Islamic Law (Federal Territories) Act 1993 must therefore be read in conformity with the Federal Constitution.

This interpretation is consistent with the general principle that administrative law operates under constitutional principles fundamental to countries governed by the rule of law. Constitutional principles such as due process, rights of representation, and the safeguard of fundamental freedoms—including religious rights—are widely considered to be applicable to administrative decision-making and processes. The power of constitutional review of administrative bodies is fundamental to an independent judiciary.

United Kingdom

Similarly, under British law, a court can review administrative decisions based upon the principles of reasonableness and relevancy. The court determines *relevancy* by "investigat[ing] the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account matters which they ought to take into account." *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223, 233-4. *Civil Serv. Unions v. Minister for the Civil Serv.*, [1985] A.C. 374, applied this principle in holding that it was proper for a civil service minister to make a decision without consultation when she thought national security required it. The court found that the administrative decision was reviewable on two bases: 1) whether "the [minister] adduced evidence to show that national security considerations did in fact weigh" in the decision, and 2) "if there is such evidence adduced, was the exercise of discretion a proper one?" *Id.* at 386.

A *Wednesbury* unreasonableness analysis includes the issue of whether decision or policy is "proportional" in comparison to the fundamental right it infringes. *Regina v. Sec. of State for the Home Dept*, [1991] 1 A.C. 696 (holding that Wednesbury reasonableness includes issue of whether decision or policy is "proportional" in comparison to the fundamental right it infringes); *Regina v. Ministry of Defence ex parte*

Smith, [1996] Q.B. 517, 554. Furthermore, "[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable." *Regina v. Ministry of Defence ex parte Smith*, [1996] Q.B. 517, 554.

Canada

In Canada, the decisions of administrative bodies are reviewable under the principle of judicial review based upon fundamental justice, in which a reviewing court may set aside an administrative decision if it is patently unreasonable. The Supreme Court has explicitly recognized that "an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the [Canadian Charter of Rights and Freedoms]." *Multani v. Comm'n scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, ¶ 31. Regarding the reviewability of the lower tribunal's decision, the Supreme Court observed:

> [T]he fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the *Canadian Charter* establish a *minimum* constitutional protection that must be taken into account by the legislature and by every person or body subject to the *Canadian Charter*.

See id. at ¶ 16 (emphasis in original). In *Multani*, the Candian Supreme Court vacated a decision of a lower court preventing a student from exercising his religious obligation as a member of the Sikh faith by wearing a *kirpan* in school. The Court declared, "[a]ccommodating G and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities."

India

The Indian Supreme Court claims and exercises normative discipline over legislative power and generated fairness control over administrative action. *State of Up & Anor v. Johri Mal*, [2004] 2 L.R.I. 526 explained that supervisory jurisdiction of the courts overseeing tribunal functions are to see that its decisions do not occasion miscarriage of justice. In Pakistan, the power to pass writs of mandamus and certiorari to review administrative law decisions is a Constitutionally guaranteed power. In Australia, administrative law is subject to the prescriptions of constitutional law. *See* Sir Anthony Mason, *Judicial Review: A View from Constitutional and Other Perspectives*, 28 Federal Law Review 331 (2000).[17]

[17] Even in civil law countries, administrative courts are subject to judicial review. In France, for example, the administrative courts use the Conseil d'État as a court of last resort.

United States

In the United States, as in Malaysia, "The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down." *United States v. Butler*, 297 U.S. 1, 62 (1936); *see also* U.S. Const. art. VI, cl. 2. Because of the Constitution's supremacy, "[i]t is clear that an administrative body must act strictly...within constitutional limitations." *Waterbury v. Comm'n on Human Rights & Opportunities*, 278 A.2d 771, 773 (Conn. 1971). Thus, administrative actions that contravene constitutional limitations are unconstitutional and invalid.

The Administrative Procedures Act provides for the mechanism with which unconstitutional administrative rulings may be set aside. Administrative Procedures Act, 5 U.S.C. § 706(2)(B) (2006). It "explicitly authorizes the court to set aside any agency action 'contrary to constitutional right.'" *Porter v. Califano*, 592 F.2d 770, 780 (5th Cir. 1979). In addition, claims against administrative bodies concerning constitutional rights can be brought "directly under the constitution" before a court. *See id.* at 781.

In *Turner v. Safley*, the United States Supreme Court considered a state regulation promulgated by the Missouri prison system that only permitted inmates to marry with the permission of a prison superintendent and only where there were compelling reasons to do so. *Turner v. Safley*, 482 U.S. 78, 82 (1987). The Court concluded that the marriage restriction was "constitutionally infirm." *Id.* at 99-100.

This approach was illustrated as early as 1883, when the case of *White Lick Quarterly Meeting of Friends* established that although civil courts had no ability to interpret religious doctrine, they could "interfere in church controversies where civil rights...are involved." *White Lick Quarterly Meeting of Friends, by Hadley v. White Lick QuarterlyMeeting of Friends, by Mendenhall*, 89 Ind. 136, 151 (1883). The civil court thus retains its ability to decide cases that involve religious organisations, only where resolution of the case does not require the interpretation of religious doctrine. This line of reasoning has been affirmed in subsequent decisions. *See State ex rel. Hatfield v. Cummins*, 85 N.E. 359, 361 (Ind. 1908); *Ramsey v. Hicks*, 91 N.E. 344, 350 (Ind. 1910).

Thus various jurisdictions widely reflect that where administrative adjudications violate constitutional principles or law, administrative law is overruled.

Malaysia's own jurisprudence reflects this principle through the doctrine of "reading down" a statutory provision to make it conform with the Constitution. Where there are two possible interpretations of a statutory provision, the interpretation that makes the statutory provision conform with the Constitution is preferred. *See Kedar Nath v. State of Bihar*, [1962] Supp. (2) S.C.R. 769; *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara malaysia & Anor*, (1999) 1 C.L.J. 4 (CA); *Jagdish Pandey v. Chancellor, University of Bihar* [1967] I.N.S.C. 176. As the learned Gopal Sri Ram JCA wrote in his dissent at the Court of Appeal in the instant case:

> [I]t is a principle of statutory interpretation that Parliament is presumed not to legislate or empower the making of subordinate legislation that is not harmonious with the Constitution. This is also known as the presumption of constitutionality. See *Jilubhai Nanbhai Khachar v State of Gujarat* AIR 1995 SC 142. Another is the principle that Parliament is presumed not to intend an unfair or an unjust result. See *Maranthei v JG Containers (JV) Sdn Bhd* [2003] 2 MLJ 337.

See *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193, 217 ¶ 55. According both to general principles of rule of law and to Malaysian law, the questions at issue in this case should be resolved according to constitutional principles.

B. ***Civil courts have a constitutional duty to protect fundamental freedoms, including the freedom to profess and practice a religion of one's choosing, without interfering in matters of religious doctrine***

Civil courts have found that in order to protect fundamental religious liberties, they may neither compel an individual's religious participation nor interpret religious doctrine. By refraining from doing either, they safeguard both an individual's freedom of religion, and the ability of religious institutions to determine their own membership. An individual has a right to profess and practice the religion of her choosing, regardless of whether or not she is considered a Muslim under Islamic law, or a Christian under Catholic doctrine. Similarly, the civil courts may not force the Islamic community to accept any individual as a Muslim or the Catholic Church to baptize any individual into its membership. Thus the honorable Federal Court may protect the fundamental right to freedom of religious choice without interfering in questions of religious doctrine. In Lina Joy's case, she retains her right to "profess and practice" any religion regardless of whether the Syariah courts recognize her as a Muslim under Islamic law; however, the Islamic community at all times retains the right to determine for itself whether it considers her to be a part of its community.

1. **Civil courts should neither compel an individual's religious participation, nor interpret religious doctrine.**

That the government may not compel an individual's religious participation is a lynchpin of freedom of religion. In *Employment Division v. Smith*, discussed *supra*, the United States Supreme Court observed:

> **The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.** Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." **The government may not compel affirmation of religious belief**, punish the expression of religious doctrines it believes to be false, **impose special disabilities on the basis of religious views or religious status**, . . . or lend its power to one or the other side in controversies over religious authority or dogma.

Employment Div. v. Smith, 494 U.S. at 877 (emphasis added)(citations omitted). The Court further observed that the "'exercise of religion' often **involves not only belief and profession but the performance of (or abstention from) physical acts**, such as assembling with others for a worship service, proselytizing, [and] abstaining from certain foods. . . ." *Id*. (emphasis added).

The European Union has similarly recognized the right to conversion and the incidences of religious exercise. In *Hoffmann v. Austria*, the applicant was a Jehovah's Witness who was denied custody of her children pursuant to divorce from a Roman Catholic man. In Austria, religious freedom is guaranteed by a provision in the Basic Law (Staatsgrundgesetz), which reads:

> (1) Complete freedom of beliefs and conscience is guaranteed to everyone.
>
> (2) Enjoyment of civil and political rights shall be independent of religious confessions; however, a religious confession may not stand in the way of civic duties.
>
> (3) No one shall be compelled to take any church-related action or to participate in any church-related celebration, except in pursuance of a power conferred by law on another person to whose authority he is subject.

However, Austria's domestic law provision, the Religious Education of Children Act, forbade children to be taught a religion other than the one two parents shared at the time of marriage. *Hoffmann v. Austria*, App. No. 12875/8, 17 Eur. H.R. Rep. 293 (1993). The European Court of Human Rights found this statute to violate one parent's human rights because it resulted in a difference of child custody treatment based solely on the mother's religious confession, despite the fact that she had converted during the marriage after agreeing with her husband that the children would be brought up in the Roman Catholic Church.

In cases where a person's religious freedoms or a religion's doctrine are not implicated, civil courts may still resolve matters involving religious parties. In *Jones v. Wolf*, 443 U.S. 595, 602-3 (1979), the Supreme Court of the United States articulated the "neutral principles" test, whereby courts could resolve matters involving civil issues in disputes involving religious parties as long as neutral principles of law alone could be applied to decide the issues. Courts base their careful navigation of religious organizations and religious agreements on the presumption that the religious associations are "voluntary." *See id.* For purposes of the privileges and duties of members within the confines of an organization, however, the United States civil courts will neither enforce nor contradict religious rulings. *See id*.

The principle of neutrality is such that civil courts should refrain from interpreting religious doctrine while still safeguarding a religious community's ability to define its own membership. In *Jones*, the United States Supreme Court stated that "[t]he right to

organize **voluntary** religious associations...to express and disseminate any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members...within the general association, is unquestioned." *Jones*, 443 U.S. at 602-3 (emphasis added). The main premise of religious protection was that religious participation was voluntary. The court would maintain the organization's ability to determine its membership, so long as membership was voluntary.

a) **Civil courts will not compel individuals to participate in religious activity.**

Courts in the United States have thus refused to force individuals to participate in religious activity. In *Aflalo v. Aflalo*, the court refused to compel a husband to procure a *get*, a divorce under Jewish law, because such an order would violate the husband's First Amendment religious freedom rights, which applies to the states through the Fourtheenth Amendment's Due Process Clause. *Aflalo v. Aflalo*, 295 N.J. Super. Ct. 527, 538-39 (1996). The court specifically refused to force the husband to participate in a "religious act." *Id*. Further, "the conclusion that an order requiring the husband to provide a 'get' is not a religious act nor involves the court in the religious beliefs or practices of the parties is not at all convincing." *Id*.; *see also Victor v. Victor*, 177 Ariz. 231, 233-34 (Ariz. Ct. App. 1993) (holding that compelling a husband to take part in a Jewish divorce proceeding or finding the *Ketubah*, a Jewish marriage contract, to be a binding antenuptial agreement where sufficient specificity under civil contract law was lacking would be a violation of his freedom of religious exercise; "Provisions of an antenuptial agreement must be sufficiently specific to be enforceable.").

Courts have similarly enforced contracts with religious origins to the extent that they satisfied civil contract standards, but not where contracts do not meet the requirements of constitutional and civil protections for the parties involved. For example, in *In re Marriage of Dajani*, the court would not enforce a *Mahr*, part of an Islamic marriage contract, because its terms violated exisitng state law regarding "profiteering by divorce."[18] On the other hand, in *Aziz v. Aziz*, a New York court enforced a *Mahr* since it conformed with existing civil statutory requirements. *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct.1985) ("The document at issue conforms to the requirements of section 5-701(a)(3) of General Obligations Law and its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony."); *cf. Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct.195) (holding that a *Sadaq*, and Islamic antenuptial agreement, was not enforceable based on its failure to comply with the Statute of Frauds where "this SADAQ fails on three different points of law"—"materiality, specificity, and insufficiency.").[19] The courts in these cases carefully navigated religious contracts by applying protections

[18] *In re Marriage of Dajani*, 251 Cal Rptr. 871, 872 (Cal. Ct. App. 1988).

[19] *See also Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (*Sadaq* was valid and enforceable because it fulfilled Florida contract law, which "applies to the secular terms of the sadaq").

contemplated in civil law, but did not reject them simply on the basis of their religious origin.

b) **Civil courts should not interpret or enforce religious law.**

Courts have also refused to enforce religious laws, where doing so would the require the courts to interpret religious doctrine or require individuals to behave act in violation of conscience. In *Ran Dav's County Kosher, Inc. v. State* involved the regulation of kosher foods in keeping with principles of Orthodox Judaism. *Ran-Dav's County Kosher, Inc. v. New Jersey*, 129 N.J. 141 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993). The state of New Jersey implemented regulations of merchants to ensure that they would keep kosher according to a particular school of Judaism. The court held that the state of New Jersey's "kosher regulations [of merchants] violate the Establishment Clauses of the federal and state constitutions" because "the regulations impose substantive religious standards for the kosher-products industry and authorize civil enforcement of those religious standards with the assistance of clergy." *Id.* at 145-46. The court explained, "The constitutional strictures on government action concerning religion seek to avoid certain evils," including "discrimination among religions, [...] sponsorship of the religious mission of a group, excessive entanglement between government and religion, and political divisiveness incited by the government's favoritism of a particular religious faith." *Id.* at 152.

In *Ran Dav's County Kosher*, the court declined to use the civil law to enforce religious standards. The court did, however, suggest an alternative, constitutional way to prevent kosher-fraud by requiring "those who advertise food products as 'kosher' to disclose the basis on which use of that characterization rests." *Id*. at 167. Such regulations, unlike the instant ones that would involve civil enforcement of religious beliefs, would "'compel [the merchant] to perform a secular obligation to which he contractually bound himself' by virtue of the fact that a merchant represents food as being kosher." *Id*. at 168 (quoting *Avitzur v. Avitzur*, 459 N.Y.S.2d 572, 575 (N.Y. 1983)). In this way, the court suggested, the interests of religious communities could be safeguarded—by expanding their knowledge and choice, rather than enforcing one standard of religious doctrine over the other. Kosher foods in America now have the names of the religious authorities and rabbis under whose supervision and approval the foods were produced or processed, enabling the consumer to make informed decisions about whether those foods satisfy the standards of their chosen religious community's beliefs.

c) **Civil courts should not interfere with a religious community's ability to exclude members.**

Just as an individual cannot be forced to enter into a religious community, religious organizations cannot be forced to accept members whom they determine do not satisfy their religious standards.

In *Ferreira v. Harris*, a federal court in the United States recently declared that the state could enforce trespassing laws against an individual who had been "disfellowshipped" and cut off from a religious community. *Ferreira v. Harris*, 2006 U.S. Dist. Lexis 41734 (N.D. Okl., June 20, 2006). The petitioner in *Ferreira* was a dissident member of a Woodland View Jehovah's Witness Congregation. Following doctrinal disagreements, the church informed Ferreira that he had been "disfellowshipped." When Ferreira continued to attend services anyway, first the church asked him to sit in the back of the congregation, and later it asked him to leave. When he refused, the Congregation called the police who arrested him for trespassing. Ferreira then filed suit in federal court claiming that the city and church officials violated his state and federal constitutional rights. The federal court held that governmental enforcement of civil trespassing statutes did not violate Ferreira's free exercise rights. While Ferreira retained his right to free speech, and thus could continue to call himself a Jehovah's Witness, by refusing to accept that religious community's doctrines, he could not force that religious community to accept his membership. *See also Hatfield v. Cummins et al.* (declining to reinstate the petitioner to membership in a church congregation after he had been found by the United Brethren in Christ Church to be expelled from membership for "Disobedience to the Order of the Church.") *Hatfield*, 85 N.E. 359, 361 (S.Ct. Ind. 1908).

Thus, membership within a religious organization remains voluntary, respecting the freedom of religious choice, but religious groups are able to maintain the integrity of their message by rejecting unacceptable applications for membership. The "pertinent question" in this case, having nothing to do with religious doctrine, is whether or not Lina Joy has the right under international and constitutional law to convert to another religion, regardless of what Islamic law says. Notably, even though Lina Joy retains her freedom to convert away from the Islamic faith without state interference, she could not commandeer state power to force the Islamic community to accept her as a member. While the Islamic courts retain the right to reinstate her into the community, or even to continue to consider her a Muslim, religious courts should not be able to infringe on her inviolable international and constitutional right to profess and practice the religion of her choice.[20]

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[20] Even in countries that have had a history of formal alliance with a particular religion, constitutionalism has come to protect the freedom of choice and religion of citizens. Spain is a country where the state was formally aligned with the Catholic Church. The state officially professed Catholicism until 1978, when the enactment of the Constitution prohibited discrimination based on religious grounds. The Constitution of 1978 "effectuated a gradual transformation of the Spanish confessional state into a regime based on religious freedom without breaking abruptly with the nation's historical tradition." Javier Martinez-Torron, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 B.Y.U.L. Rev. 711 (2001). Henceforth, freedom of religion and belief would define state policy on religious affairs. Four constitutional principles, including freedom of religion, constitute the fundamental, informing guides of the government's relationship to the Catholic Church and other faiths, including Islam.

2. **Lina Joy has a right to profess and practice the religion of her choosing, regardless of whether or not she is considered a Muslim under Islamic law, thus the Court may protect her fundamental right to freedom of religion without interfering in Islamic doctrinal questions.**

In Lina Joy's case, the honorable Federal Court may decide whether she has the civil right to convert to another religion without suffering government punishment, and whether she has exercised her right to "profess" another religion through her open declaration of conversion, and baptism in the Catholic Church, of which she has furnished documented proof. This decision does not involve the Court in deciding doctrinal questions within Islam, and so should not require a determination from Syariah courts. The indisputable fact is that Lina Joy has decided to leave Islam – what the Syariah courts may have to say about this is inapposite to the decision the Federal Court faces. To be sure, the Islamic community retains the right to make any declaration it wishes regarding her spiritual status within the community.

Regulation 4 of the National Registration Regulations 1990 requires a person who applies for a replacement identity under Regulation 14, which Lina Joy did, to give certain particulars to the registration officer. The NRD is permitted according to the regulations to request "any other documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted."

> In her statutory declaration dated 21 February 1997 [Lina Joy] stated, among other matters: (i) that she had never professed or practised Islam as her religion since birth; (ii) that she had embraced Christianity in 1990; and (iii) that she intended to marry a Christian. . . . The form she attempted to submit on 3 January 2000 makes it clear in column 31 that she no longer wished to be a Muslim.

Lina Joy, 6 MLJ 193, 214 ¶¶ 58. The learned judge dissenting at the Court of Appeal rightly observed:

> **In these circumstances, an order from the Syariah Court does nothing to support the accuracy of the particular that the appellant is a Christian.** However the baptismal certificate dated 11 May 1998 produced by the appellant in evidence amply supports the accuracy of the particular that the appellant is a Christian. It follows from what I have said thus far that an order or certificate from the Syariah Court is not a relevant document for the processing of the appellant's application.

Lina Joy, 6 MLJ 193, 214 ¶¶ 58 (emphasis added.) The learned judge was examining the only necessary facts in this case that answer which religion Lina Joy has chosen to profess and practice. Requiring Lina Joy to obtain a statement from te Syaiah court that she has renounced her Islamic faith violates her right under customary international law

or Article 11 of the Malaysian Constitution to profess and practice a religion of her choosing. *See* Federal Constitution art. 11 (Malay).

On the other hand, the contrary view forces the Court into the untenable position of interpreting religious doctrine and choosing among competing religious claims. Either the Catholic Church is correct in its assessment of Lina Joy's Christianity through her baptismal certificate or the Syariah courts are correct in their assessment of her continued status as a Muslim under Islamic law.[21] The Federal, sworn to uphold the constitution, should not involve itself in religious doctrinal disputes, but instead should leave the question where it belongs—with Lina Joy's individual conscience. [22]

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[21] In another example of the complications that might arise in this kind of state involvement with religious doctrine, were there to be a difference of opinion between different Islamic authorities regarding Lina Joy's status as a Muslim, the Federal Court would be in the impossible situation of judging which Islamic law is correct. Were the Syariah court to find that Lina Joy is still a Muslim according to Islamic law, in denying Lina Joy an identity card that prevents her from enjoying the incidences of her religious choice on the basis of her religious status, the Federal Court would be forcing Lina Joy's participation in the Islamic faith. Further, it would subject her to the strictures of a faith that she neither professes nor practices.

[22] The learned judge in the Court of Appeal in this case wrote,

> [W]hether a person has renounced Islam is a question of Islamic law that is not within the jurisdiction of the NRD and that the NRD is not equipped or qualified to decide. What the Islamic law on the matter is has not been ventilated in this appeal. One might be tempted to think that the fact that a person affirms in a statutory declartion that he is no longer a Muslim or the fact that he has been participating in a Christian form of worship, or the fact that he has been baptised is sufficient, accoridng to Islamic law, to warrant others to treat him as having apostatized and as being no longer a Muslim. But is that so in Islamic law? The NRD would be right in taking the stand that it is not for it to decide. It may be that according to Islamic law no Muslim may be treated as having apostatized, no matter what he may have done or failed to do, unless and until he has been declared an apostate by some proper authority.

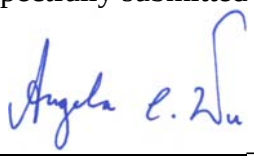
Yet it is irrelevant to the question of whether or not Lina Joy enjoys a constitutional freedom of religious choice whether under Islamic law, she is still considered a Muslim. The uncontrovertible fact is that the Islamic law court has not the jurisdiction to determine Lina Joy's constitutional rights. Their determination regarding how the Islamic community regards Lina Joy is inapposite to her rights under constitutional and international law. The learned judge futher wrote:

> If the NRD were to accept that a person has apostatized merely on his declaration, and on that basis officially stamp him a non-Muslim by deleting the word "Islam" from his identity card, it runs the risk of mistakenly stamping a person a non-Muslim who according to Islamic law has not apostatized. It will also be making it easy for persons who are born and bred as Muslims but who are indifferent to the religion to get classified as non-Muslims simply to avoid being punished for committed the offences that I have mentioned. **It will consequently be inviting the censure of the Muslim community.** It is for these reasons that I believe that the NRD adopts the policy that a mere statutory declaration is insufficient for it to remove the word "Islam" from the identity card of a

CONCLUSION

For the foregoing reasons, in compliance with the international obligations to which Malaysia is bound, the Federal Court should vacate the judgment below.

Respectfully submitted by:



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> Muslim. It is because renunciation of Islam is a matter of Islamic law on which the NRD is not an authority that it adopts the policy of requiring the determination of some Islamic religious authority before it can act to remove the word "Islam" from a Muslim's identity card.

(Emphasis added). That the learned judge notes a contrary ruling "will consequently be inviting the censure of the Muslim community" is abdicating entirely the independence of the judiciary and subordinating it to public opinion of a particular religious community, violating any semblance of neutrality by which a constitutional court could hope to uphold the rule of law.