

# MEMORANDUM

## SAFEGUARD RIGHTS OF WIVES AND CHILDREN UPON CONVERSION OF HUSBANDS TO ISLAM

### Comments and Recommendations on:

- (a) **The Law Reform (Marriage and Divorce) Act 1976 (Act 164);**
- (b) **Section 5 of the Guardianship of Infants Act 1961;**
- (c) **Article 12(4) of the Federal Constitution; and**
- (d) **Section 2 of the Distribution Act 1958, and the Inheritance Act 1971.**

Submitted by:

### **Joint Action Group for Gender Equality (JAG)**

Comprising:

- Women's Aid Organisation (WAO)
- Women's Centre for Change, Penang (WCC)
- Sisters in Islam (SIS)
- All Women's Action Society (AWAM)
- Women's Development Collective (WDC)
- Malaysian Trade Union Congress (MTUC) – Women's Section

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## MEMORANDUM

### SAFEGUARD RIGHTS OF WIVES AND CHILDREN UPON CONVERSION OF HUSBANDS TO ISLAM

#### I. INTRODUCTION: UPHOLD AND PROTECT WOMEN'S RIGHTS

This memorandum is submitted by and on behalf of the **Joint Action Group for Gender Equality (JAG)**, which comprises six Malaysian women's rights groups, namely Women's Aid Organisation (WAO), Women's Centre for Change Penang (WCC), Sisters in Islam (SIS), All Women's Action Society (AWAM), Women's Development Collective (WDC) and Malaysian Trades Union Congress (MTUC) - Women's Section.

We call for a review of the relevant laws relating to conversions of non-Muslim spouses to Islam, based on the principles of justice, equality and non-discrimination, in order to protect the rights of non-converting spouses and children.

JAG's vision is to uphold the fundamental principle of equality between men and women in every sphere, which we believe encompasses not only formal but also substantive equality, i.e. the equality of opportunity and of results. Such equality must inevitably include equality of access to laws and of just results under those laws for both men and women. We are concerned that due to inherent or systemic gender inequality and ambiguity in our laws, whether in their substance, structures (interpretation and application) or in the cultural matrix in which these laws exist, women experience discrimination at various levels.

The women's groups in Malaysia have long been receiving requests for assistance from non-Muslim women whose spouses have converted, or are planning to convert, to Islam. These women have grave concerns about the impact such a conversion will have on their rights and expectations, which are based on the civil law marriage they entered into, and what options they have once the conversion has occurred. Their fears centre on issues of divorce, division of assets, maintenance, distribution and inheritance. Custody and guardianship of children, and the ability to have an equal say in determining their religion and upbringing, are also matters of great concern.

These apprehensions are well-founded as the law governing such situations is either unclear, inadequate, or has been interpreted inaccurately or unjustly, leaving such women with little hope that their rights will be protected. The plight of Shamala a/p Sathiyaseelan,<sup>1</sup> who unsuccessfully contested her husband's unilateral conversion of their children to Islam, and the dilemmas of others like her, reinforces these fears. Shamala's

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<sup>1</sup> *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 CLJ 416, and *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505.

case demonstrates that Malaysia's legal system can leave someone with no court in which she can seek a legal remedy, even while acknowledging that she had been wronged.<sup>2</sup>

JAG is especially concerned about the following specific rights:

- (a) The right of married non-Muslim women to continue to rely on the rights and obligations contained in a civil law marriage agreement when their spouses convert to Islam;
- (b) The right to have all issues relating to a civil law marriage settled according to civil laws and adjudicated only in civil courts;
- (c) The right to petition for divorce on the basis that conversion to Islam has led to a breakdown of her marriage;
- (d) Upon divorce, the right to receive maintenance, for herself and her children, as provided for in the civil laws;
- (e) The equal right, as a parent, to decide on matters relating to her children's upbringing;
- (f) The continued right to inherit from a family member who converts to Islam; and
- (g) The right to be informed of her spouse's conversion to Islam.

JAG fully supports each individual's absolute right to profess the religion of her/his choice. However, we are concerned where the exercise of that right impinges upon the rights of that individual's family and where such an impingement has a retrogressive effect, leaving family members with fewer rights and thus worse off than before. We urge that special provision be made to take account of non-converting family members and to protect their rights under the civil laws.

For example, the law must be reformed, where necessary, to ensure that when an individual embraces Islam, the convert's spouse (or ex-spouse), children and other family members' rights and entitlements under civil laws remain unchanged. Regardless of such conversion, all issues arising out of the marriage must be settled according to civil law, and not state Islamic law enactments,<sup>3</sup> since the marriage was solemnised or registered under civil law. Furthermore, legislation must be adopted to specify that only the civil courts have jurisdiction to hear any matter arising out of such a marriage, including jurisdiction over the converting spouse.

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<sup>2</sup> The High Court stated that one parent could not convert a child without the consent of the other parent, and that any such unilateral conversion would not be binding on the non-consenting parent. However, the court still declined to review her application to nullify the children's conversion.

<sup>3</sup> We note that "Islamic law" is in fact *fiqh*, i.e. human interpretations of the Syariah. It has constantly changed over centuries and has never been permanent. The fact that each Muslim nation has a different law demonstrates that these laws are not sacred and immutable revealed Syariah, but are *fiqh* as interpreted and codified by humans. To reflect this, we use the term "state Islamic law enactments" in this memorandum instead of "Syariah law".

## II. CASE STUDIES

Examples of the dilemmas that have been documented by women's groups include the following:

- (a) A woman, whose husband converted to Islam and left the matrimonial home, does not want to convert. She still loves her husband and queries why he has to leave her just because he is now a Muslim. She wants to know if there are any options for them to continue living together as a family.
- (b) A married woman, whose husband deserted her 20 years previously, finds out that he has converted to Islam, married a Muslim woman and has a son from this marriage. She is concerned what would happen to her assets such as pension funds, savings and EPF benefits in the event that she dies intestate. Under the Distribution Act 1958, her husband is entitled to one-third of her estate because she is still legally his wife. If, on the other hand, she were to seek a divorce, her hard-earned assets accumulated in his absence may be subject to division.
- (c) A woman and a man had a child out of wedlock before they were married but separated shortly after the birth of their child. The child's birth certificate lists the man as the child's father. The man has since converted to Islam. The woman is concerned that the child's father will take the child away and convert him without her knowledge or consent. She is also unsure whether her child is automatically a Muslim by virtue of the father's conversion.
- (d) A woman whose husband left her, converted to Islam and is living with a Malay woman (whom he may have married), is concerned about her assets. She and her husband have some property in both their names and another property in his name. She wants to know the significance of the laws governing divorce when one spouse converts to Islam, and what will happen if she divorces him.
- (e) Shamala a/p Sathiyaseelan was a Hindu mother whose husband converted to Islam in 2002 after about 4 years of marriage. He then converted their two infant children to Islam without her knowledge or consent. In January 2003, he commenced custody proceedings in Syariah High Court and obtained an ex parte temporary Hadanah (custody) Order on 31 January, when custody proceedings were already underway in the civil court.

In July 2004 the civil High Court refused to respect Shamala's rights as a parent of the child, and ordered her to raise her children as Muslims and not expose them to her own Hindu faith. The judge dismissed Shamala's application for a declaration that the conversion of her two children to Islam by her husband violated her equal right, as their parent, to determine their religious upbringing. It said that since the children are now Muslims, the Syariah Court is the only qualified forum to determine their religious status, even though the judge acknowledged that the Syariah Court has no jurisdiction to hear Shamala's case

since she is not a Muslim. As a result, Shamala did not have any avenue to seek justice. Shamala and her husband are both appealing to the Court of Appeal.

- (f) R. Subashini and T. Saravanan were married on July 26, 2001 in accordance with civil laws and they now have two sons, aged 1 and 3. The husband, now Muhammad Shafi Saravanan Abdullah, embraced Islam in May 2006. He has sought to dissolve his civil marriage at the Syariah Court. He has also sought to obtain custody of their 3-year old son whom he claims also converted to Islam that May.

In August 2006, R. Subashini was granted an interim injunction that prevented her husband from pursuing legal proceedings in the Syariah Court with respect to their marriage and the conversion of their children. In September 2006, that injunction was set aside and Subashini's appeal is now awaiting judgment at the Court of Appeal. However, the Judicial Commissioner who set aside that injunction granted an *Erinford* stay order, which prevents Saravanan from continuing with legal proceedings in the Syariah Court until the appeal has been disposed of.

- (g) S is a Hindu woman who underwent a customary marriage according to Hindu rites to a Chinese man in 1991. They have 3 children, all aged between 9 and 15 years old. The children's father converted to Islam in 2004 and married a Malay woman. He subsequently died on 19 March 2004. Twelve days after his death, the 3 children were unlawfully converted to Islam without their mother's permission, allegedly by their Malay stepmother and/or the Majlis Agama Islam Selangor.

The Hindu mother's application for custody of the children was initially granted by the High Court in September 2006 in the Malay wife's presence. In spite of this, the Syariah Court was scheduled to hear an application by the Malay wife for full custody of the children despite that existing High Court custody order. In a recent development, however, the Court for Children granted custody to the Malay wife as a result of an application made under the Child Act.<sup>4</sup>

As part of civil society, JAG views cases that affect the lives of women and lead to injustice, such as the cases described above and others like them, as matters of public interest and key importance in our efforts to promote and protect substantive equality in general and women's human rights in particular.

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<sup>4</sup> Section 17(1)(h) of the Child Act states that: "[A child is in need of care and protection if] there is such a conflict between the child and the parent or guardian, or between his parents or guardians, that family relationships are seriously disrupted, thereby causing him emotional injury."

### **III. NEED FOR LEGISLATIVE REFORM**

As a starting point, JAG is dismayed that the underlying premise of the civil laws (such as Section 51 of the Law Reform (Marriage And Divorce) Act 1976 (Act 164) (“LRA”)) appears to be that when one spouse to a marriage (but not the other) converts to Islam, the marriage breaks down and thus divorce should be sought. For example, a woman whose husband converts to Islam faces limited choices: she can either convert to Islam herself or initiate divorce proceedings under Section 51 of the LRA. If she does not convert and the couple decides to continue to live together, the Muslim husband faces the risk of being charged with *zina*,<sup>5</sup> or at least with *khalwat*.<sup>6</sup> A converting wife may be even more likely to face this risk as, due to unequal power relations between men and women, she may experience more difficulty either declining sexual relations with her husband or convincing him to petition for divorce.

We do not view conversion to Islam as a choice that should jeopardise relationships and family ties. We strongly urge that discussion be undertaken to explore possible options to allow the marriage to continue. This is important because some individuals may have compelling reasons for not initiating divorce, e.g. if both spouses want to continue the marriage, or for other personal or religious reasons.

We call for a review of the relevant laws relating to conversions to Islam, to ensure that conversion is not used for personal gain or to escape obligations.

JAG’s input on various key areas is provided in the following sections.

#### **A. Conversion to Islam: Marital, Parental and Familial Rights and Obligations under Civil Laws Continue**

JAG believes that conversion to Islam cannot be used as a basis for the converting party to evade the obligations and responsibilities (to the spouse, children and parents) that s/he already incurred under civil laws prior to the conversion. Therefore, whether the convert is married or already divorced at the time of conversion, the convert’s spouse or ex-spouse’s rights and entitlements under civil laws must remain unchanged, irrespective of the conversion. The same applies to the rights and entitlements of the convert’s children and other family members (such as her/his parents and siblings, where distribution and inheritance laws are concerned). JAG welcomes the recent statement by former High Court judge Dato’ Faiza Thamby Chik that conversion to Islam “cannot be used as a

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<sup>5</sup> The crime, under state Islamic law enactments, of having sexual intercourse with someone who is not your legal spouse. In this case, since the wife is a non-Muslim and their marriage is a civil law marriage, the man would not be recognised as being married to her, and they can thus be charged with *zina*.

<sup>6</sup> The crime, under state Islamic law enactments, of being in “close proximity” with someone who is not your legal spouse, under circumstances which may give rise to suspicion that you were both engaged in immoral acts.

ground for avoiding [a Muslim convert's] legal obligation under the non-Muslim marriage.”<sup>7</sup>

Currently, Section 3 of the LRA provides that the Act shall not apply to “a Muslim” or to “any person who is married under Islamic law”. JAG calls for this section to be amended to stipulate that the LRA (and related laws) will, however, apply to all issues arising out of a civil law marriage, whether or not one of the spouses subsequently professes Islam after being married. We propose the use of the term “a person professing the religion of Islam”, as this is the relevant consideration and is a recognised term.

We are of the opinion that all maintenance, custody, distribution, inheritance and ancillary issues must be decided upon and all duties and payments discharged accordingly before or at the same time as when a civil law marriage is dissolved by the civil court. Furthermore, a converting spouse should not be able to marry again until s/he has settled all these matters with her/his (previous) non-converting spouse and child(ren).

#### **B. Civil Law Marriages: Resolve All Issues under Civil Laws**

Marriages between non-Muslims in Malaysia are registered under the civil law known as the Law Reform (Marriage And Divorce) Act 1976 (Act 164) (“LRA”). JAG calls for the LRA to be amended to specifically protect the rights of non-converting spouses, usually women, when their spouses, usually men, convert to Islam.

Our position is that, for a marriage solemnised or registered under civil law, all issues arising out of the marriage must be settled according to those civil laws, not state Islamic law enactments or “Syariah-compliant” laws.<sup>8</sup> The marriage contract was made between two non-Muslim parties, each of whom must be able to continue to rely on the rights, duties and expectations generated by the marriage agreement. It is unjust for a non-Muslim spouse to unexpectedly find herself/himself and her/his marriage subject to laws other than those s/he had agreed to at the time of marriage.

Furthermore, under no circumstances can state Islamic law enactments be applied to persons who do not profess Islam, nor can non-Muslims be compelled to appear in the Syariah courts.

#### **C. Jurisdiction: Only Civil Courts Have Jurisdiction over Civil Law Marriages**

As per the Federal Constitution, the civil courts must adjudicate all matters relating to a convert's civil law marriage, including issues of divorce, maintenance, custody,

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<sup>7</sup> Dato' Faiza Thamby Chik, “Legal Effect of Conversion to Islam: An Experience from Malaysian Court”. Keynote address, International Family Law Conference 2007 (16-17 January 2007), organised by International Islamic University Malaysia and Department of Syariah Judiciary Malaysia, p.5.

<sup>8</sup> Civil laws that are interpreted and/or implemented in a manner so as to comply with state Islamic law enactments.

distribution and inheritance, as non-Muslim parties are involved and the applicable laws are civil laws.

Furthermore, Article 121(1A) states that the civil High Courts have no jurisdiction in matters within the Syariah courts' jurisdiction. Given that the Syariah courts have no jurisdiction over non-Muslims, it follows that the civil courts must necessarily have jurisdiction in any matters involving at least one non-Muslim party. We echo Dato' Faiza Thamby Chik's viewpoint that, since "the Syariah Court does not have jurisdiction over non-Muslims it would result in grave injustice to non-Muslim spouses and children if it were held that the civil high court did not have jurisdiction in such matters".<sup>9</sup>

JAG therefore calls for clear implementation of these provisions to ensure that, with respect to any matter arising out of a civil law marriage:

- (a) only the civil courts have jurisdiction to hear such matters, including jurisdiction over the converting spouse; and
- (b) civil courts must exercise such jurisdiction, to ensure that the non-Muslim family members have access to a legal remedy.

This approach must apply to all relevant enactments, including the LRA, Inheritance Act, Distribution Act, and state Islamic laws.

State Islamic law enactments such as Section 46(2)(b) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) already stipulate that a Syariah High Court's civil jurisdiction relates to "actions and proceedings in which all the parties are Muslims" (emphasis added). Such provisions must be given effect.

For additional protection, and in order to avoid conflicts of jurisdiction and the exploitation of the judicial system through "jurisdiction shopping", the relevant enactments should clearly state that the Syariah court has no jurisdiction to hear any matters relating to a civil marriage. This is crucial as JAG is aware of instances, such as in Shamala's case, where the Syariah court and the civil court each issued conflicting orders to the respective spouses. Such conflicts between the courts would inevitably erode public confidence in our legal system generally and the judicial process in particular.

Furthermore, if the Syariah court erroneously exercises jurisdiction and subsequently issues a decision or an order, the aggrieved party must be able to appeal against this to the civil High Court for judicial review. The civil court must exercise its judicial authority to set aside the Syariah Court order, if necessary.

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<sup>9</sup> Dato' Faiza Thamby Chik, "Legal Effect of Conversion to Islam: An Experience from Malaysian Court". Keynote address, International Family Law Conference 2007 (16-17 January 2007), organised by International Islamic University Malaysia and Department of Syariah Judiciary Malaysia, p.5.

## **D. JAG's Views on Specific Legislative Provisions**

Further to the above, JAG calls for particular provisions to be incorporated in the LRA specifying as follows:

- (a) that the converting spouse may have equal access to the LRA;
- (b) that civil court orders under the LRA and other relevant civil laws shall be valid against the converting spouse, notwithstanding any other written law to the contrary; and
- (c) that only the LRA shall apply under such circumstances.

This will in turn affect or bear upon the implementation of the following legislative provisions, amongst others, which will be discussed in further detail below:

- (e) Sections 3, 51, 77, 81 and 92 of the LRA;
- (f) Section 5 of the Guardianship of Infants Act 1961;
- (g) Article 12(4) of the Federal Constitution; and
- (h) Section 2 of the Distribution Act 1958, and the Inheritance Act 1971.

### **1. The LRA**

#### ***a. Sections 3 and 51: Right to Petition for Divorce***

Sections 3 and 51 of the LRA currently permit only the non-converting spouse to petition for divorce. JAG calls for both the converting and non-converting spouses to be given the same right to petition for divorce on the grounds of conversion to Islam, should the conversion lead to a breakdown of the marriage. JAG urges that conversion to Islam also be made available as a ground for judicial separation, which is provided for in section 64 of the LRA.

Also, Section 51 presently requires that such divorce petitions be presented only after three months have lapsed since the date of the conversion. JAG proposes that the party wishing to petition for divorce may do so immediately, without having to wait for the three months to elapse, as there may be situations where a petition needs to be filed urgently to obtain immediate relief, e.g. in order to obtain an order relating to the preservation of property. Such provision would eliminate the need to determine the actual date of conversion, which may not be a straightforward issue nor a matter that the non-converting party can prove (as was seen recently in the Court of Appeal hearing for Subashini's case, where it is alleged that her petition is prematurely filed). It is acceptable, however, that the decree of divorce can only be made after the three months have elapsed.

We believe that only civil courts have the power to dissolve marriages contracted under the LRA, following a petition for divorce. We agree with former High Court judge Dato'

Faiza Thamby Chik's reported statement that "a non-Muslim marriage continues to exist even when one party converts to Islam".<sup>10</sup>

Our viewpoint is that conversion to Islam cannot, in itself, operate to dissolve a civil law marriage ("automatically" or otherwise), nor can Syariah courts dissolve such a marriage. Such dissolution would be extremely problematic, especially in situations, such as those we have already seen, whereby the spouse and family may not even be aware of the conversion. It would also lead to an anomalous situation whereby the non-converting spouse remains, from a civil law perspective, married to a converted spouse who, from an Islamic law perspective, is no longer married.

Similarly, a Muslim spouse who renounces Islam cannot dissolve her/his marriage under civil law because the marriage was solemnised under state Islamic law enactments.

We urge that Section 3, specify that, consistent with Section 51, the civil courts may make any order relating to pertinent matters, including the division of matrimonial property, maintenance for the wife, custody and maintenance for children, variation orders for custody or maintenance of children and all ancillary matters. Section 3 should also stipulate that such ancillary orders, in addition to the decree of divorce, shall be valid against the converting spouse notwithstanding any other written law to the contrary.

***b. Sections 77 and 81: Maintenance for Spouse***

*i) Section 77: Orders for Maintenance*

Section 77 of the LRA outlines the situations whereby a court may order a man to pay maintenance to his wife or former wife. JAG advocates that this provision should continue to apply irrespective of either spouse's conversion to Islam. If the husband converts, his obligation to pay maintenance to his current or previous non-Muslim spouse remains. If it is the wife who converts, she would still be eligible to apply for maintenance from the non-Muslim husband.

Section 77 also states that the court can order a woman to pay maintenance to her husband or former husband if he is partially or wholly incapacitated from earning a livelihood. We support the principle of reciprocal rights and therefore call for this provision to still apply to wives who convert although, under Islamic principles, a Muslim wife is not obliged to pay maintenance to her former husband.

Our viewpoint is that in respect of a civil law marriage, all related obligations and issues must be settled according to the laws under which the marriage was contracted, and not under state Islamic law enactments or "Syariah-compliant" laws. Parties who enter into a marriage agreement must be able to continue to rely on the rights, duties and expectations

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<sup>10</sup> "Ex-judge: Converts must support families", New Straits Times, 17 January 2007.

generated by the marriage agreement and provided for under civil law or state Islamic law enactments, as the case may be.

Conversion to another religion alone should not be an excuse for any party to claim additional rights or to evade existing responsibilities at the expense of the other party's legitimate rights and expectations.

As an illustration, a woman's conversion to Islam must not allow her to evade her obligations to pay maintenance to her incapacitated non-Muslim husband, whose rights must be preserved. As the husband is not converting to Islam, neither his family nor *Baitulmal* has any responsibility to provide for him. The court must therefore be authorised to order a converting wife, who is in the position of paying maintenance to her non-converting former husband, to do so.

ii) *Section 81: Duration of Maintenance Orders*

As it stands, Section 81 provides that an order for maintenance will be valid until the death of either spouse, or the spouse in whose favour it was made, depending on whether the maintenance was unsecured or secured, respectively.

JAG advocates that this provision should continue to apply irrespective of either spouse's conversion to Islam.

Under state Islamic law enactments, on the other hand, a husband is only bound to maintain his former wife for the *iddah* period of 3 months (unless she is pregnant), after which her family or *Baitulmal* will take care of her. However, this state Islamic law provision should not apply in the case of a converting husband as he ought to still be bound to fulfil his marriage obligations under the civil laws. His conversion to Islam must not be permitted to impinge on his non-converting wife's rights and expectations embodied in the civil marriage contract.

Provisions of state Islamic law enactments cannot be imposed on the non-Muslim wife. Furthermore, the rationale for this provision is inapplicable in this instance since, as a non-Muslim, the non-converting wife has no legal structure of support as neither her family nor *Baitulmal* has any obligation to provide for her once she is divorced.

A converting spouse must therefore pay maintenance in full according to civil laws, even after conversion.

As an alternative approach, we propose that upon divorce, the court be allowed to quantify and award maintenance by way of a lump sum which may be paid as a one-off settlement or in instalments, if the husband does not have the resources at hand to pay it in one lump sum. The parties themselves should be given the liberty to agree upon this type of financial arrangement.

c. **Section 92: Maintenance for Children**

A parent's duty to maintain, or contribute to the maintenance of, her/his children is laid down in Section 92 of the LRA. As defined in Section 2, "child" includes an illegitimate child of, and a child adopted by, either spouse.

Our viewpoint is that this obligation for maintenance payments should remain unchanged even after a parent has converted to Islam, regardless of the religion of the child. A parent cannot evade responsibilities to a child, including an illegitimate or adopted child, just by a change of religion. The converting parent must continue to fully support and care for the children of the marriage, even after conversion.

2. **Section 5 of The Guardianship of Infants Act 1961: Custody and Guardianship of Children**

JAG's position is that the best interest of the child is the paramount consideration.

We urge that effect be given to Section 5 of the Guardianship of Infants Act 1961, which gives each parent equal guardianship rights over the children, as well as Section 11, which requires judges and courts, in the exercise of their powers, to consider the wishes of both parents, where applicable. A mother's equal right to make decisions relating to long term issues such as welfare, education and religion must be fully upheld and protected.

Furthermore, we urge that Malaysia's 1995 ratifications of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child (CRC) be upheld. Each of these treaties contains clear and unequivocal provisions that oblige States Parties, such as Malaysia, to ensure that each parent has equal rights (and equal responsibilities) in raising their children.<sup>11</sup>

JAG therefore advocates that, in cases where one parent has converted to Islam, any question relating to the welfare, education and religion of a child must still be jointly determined by both parties, with the best interests of the child as the paramount consideration. One parent's consent alone cannot suffice, as it deprives the other parent of her/his rights as an equal guardian of the child

We urge that courts should grant custody without caveats such as that imposed on Shamala, who was told she would lose custody of her children if there are grounds to believe that she would influence their new religious beliefs, even though the children

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<sup>11</sup> Article 16(d) of CEDAW states that States Parties must ensure that men and women have the "same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount". Article 18(1) of CRC states that "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child" and "the best interests of the child will be their basic concern".

were converted without her knowledge or consent. The boundaries of conduct in respect of such a caveat are not clear, yet the consequences of its violation are grave.

### **3. Article 12(4) of the Federal Constitution: Religion of Child**

JAG calls for Article 12(4) of the Federal Constitution, which states that “the religion of a person under the age of 18 years shall be decided by his parent or guardian”, to be upheld. This provision has been judicially interpreted to mean that both the father and mother shall decide the religion of a child under 18 years of age. We believe that this must be the correct interpretation, in light of the amendment to Article 8(2) of the Federal Constitution to provide that “there shall be no discrimination against citizens on the ground only of ... gender” and the provisions (relating to the Guardianship of Infants Act, CEDAW and CRC) discussed in the previous section. However, that interpretation has not always been upheld; Shamala’s and Subashini’s cases are examples).

We oppose the practice of children being unilaterally converted to Islam without the consent of the non-converting parent, as has happened to Shamala, Subashini and S. We also disagree with the view that minor children are “automatically” converted to Islam once one parent converts, and that the conversion is effective even if the other parent opposes it. Civil courts must be authorised to declare a conversion to be null and void if only one parent, but not the other parent or any other guardian, has consented to the conversion.

While we support an individual’s absolute right to profess and practise the faith of her/his choice, we are alarmed when a change of faith impinges on his or her spouse's rights, such as the right of decision-making with respect to their children, and causes injustice. We call for each spouse to be treated on an equal basis as the other spouse in terms of her or his right to make decisions about their children’s upbringing, and that each spouse’s religion is treated on an equal basis as the other’s. One spouse’s religion should not take precedence over the other spouse’s religion. Articles 8(1)<sup>12</sup> and (2)<sup>13</sup> of the Federal Constitution must be put into practice.

If, however, the parents cannot jointly agree on the child’s religion, the *status quo* before the parent’s conversion should be maintained, i.e. the child’s religion at that time should be preserved and the child alone should have the right to choose her/his religion upon reaching the age of 18. Each parent, whether or not s/he has custody of the child, should have the right to educate the child in her/his respective religion. Under no circumstances should either parent be allowed to unilaterally convert any child (as has happened in Shamala’s and Subashini’s cases), into any particular religion. The Islamic religious authorities should not accept conversions of minors unless both parents, or all guardians, have explicitly consented in writing.

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<sup>12</sup> “All persons are equal before the law and entitled to the equal protection of the law.”

<sup>13</sup> “... there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender...”

The civil court must be given exclusive jurisdiction to resolve any disagreement, but only with respect to the issues of custody, welfare and education, with the child's welfare as the court's overriding consideration. Although it is appropriate for the court to intervene in these matters, court intervention is not appropriate where the child's religion is concerned, as the personal matter of religion should not be decided by a third party.

This is because, if the court decides that the child's religion should be Islam, the child may have grave difficulty professing a different faith later on if s/he later wishes to do so. The government authorities' and the courts' recent interpretation and practice have not upheld an individual's absolute right to profess and practise her/his religion although the right is constitutionally guaranteed. Therefore, a court's determination that a child's religion is Islam will persist, and the child will effectively be unable to ever profess any other faith. This has specific implications because being Muslim, unlike the other religions, carries with it obligations that are enforceable in law.

Where parents are unable to jointly agree on the child's religion, the child alone must determine her/his religion upon reaching the age of majority, and not a third party. The court should give weight to the child's wishes. JAG believes that the clear provision in Article 11(1) of the Constitution that "Every person has the right to freely profess and practise ... his religion" must be fully respected. In addition, JAG calls for the constitutional guarantee of Article 12(3)<sup>14</sup> to be upheld.

#### **4. Section 2 of the Distribution Act 1958, and the Inheritance Act 1971: Distribution and Inheritance**

Section 2 of the Distribution Act 1958 provides that the Act shall not apply to the estate of any person professing the Muslim religion, and non-Muslims are generally not allowed to inherit under *faraid* principles of asset distribution. As a result, the non-converting next-of-kin of a Muslim convert is adversely affected by the conversion, as they fall between the cracks and are unable to inherit under either civil law or according to *faraid* principles.

JAG calls for the Distribution Act to be amended to provide for situations where one spouse of a civil law marriage converts to Islam and dies intestate, in order to safeguard the right of the deceased's non-Muslim next-of-kin to inherit.

Our position is that if a non-Muslim (whether married or not) converts to Islam, her/his next-of-kin (such as spouse, children, parents and siblings) who remain non-Muslims must continue to be able to inherit upon the convert's death. An individual's next-of-kin must not be disinherited by virtue of that individual's exercise of the right to profess Islam. Furthermore, the principle of reciprocity must be respected as the converting

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<sup>14</sup> "No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own."

spouse, as a Muslim, still enjoys the right to inherit from his non-Muslim family members.

As such, we call for the Distribution Act to be amended accordingly.

We believe that the system of distribution must provide that **all** property belonging to a deceased convert at the time of death (regardless of when the property was acquired, whether prior to or after the conversion) be shared **equitably** among the non-Muslim and the new Muslim family members. Each family must be treated equally.

Furthermore, we believe that:

- (a) The mechanics of the division of assets must be clearly spelled out, e.g. what the allocated portions will be for the non-Muslim and the Muslim family members. This division must be determined according to civil law, as civil law should apply when at least one non-Muslim party is involved. The portions can then be distributed to the non-Muslim and the Muslim family members according to civil law and *faraid* principles, respectively;
- (b) In accordance with civil law principles, where the husband converts to Islam, the non-Muslim wife should have the right to make a claim on property acquired by the husband after his conversion, if it can be proved that his ability to acquire those assets is due to her contribution during their marriage. This claim should be dealt with prior to distribution of the estate to his heirs; and
- (c) Laws relating to the distribution of EPF, insurance and savings account benefits must be clarified so that a non-converting spouse will still be able to benefit from a converting spouse's benefits. Currently, non-Muslims cannot inherit even if they are named as beneficiaries or nominees because amendments that have been made to the laws governing EPF and insurance benefits compel distribution according to *faraid*.

We call for the decision in *Eeswari Visuvalingam v Government of Malaysia*, [1990] 1 MLJ 86 to be upheld. The court in that case confirmed that a non-converting wife who does not seek divorce remains a dependent of the converting husband and is thus entitled to a share of his estate and his pension upon his death.

JAG understands that various computations may be required in order to value and divide matrimonial property, such as property that was purchased prior to conversion but may have been improved after conversion. The civil courts, which are the courts that have jurisdiction as there are non-Muslim parties involved, are well-versed in the technicalities of apportioning assets. We reiterate that the guiding principle is equitable division of assets among **all** family members, taking into consideration the non-converting spouse's contribution in the acquisition and improvement of such property, as well as her/his needs, and the needs of any children.

With respect to inheritance matters, JAG has similar concerns. The civil law governing inheritance (the Inheritance (Family Provision) Act 1971 (Act 39)) is of key importance as it protects family members who are disinherited, by ensuring they can still make a claim on a deceased person's property, if they are in need.

Our view is that this purpose of the law must be safeguarded, regardless of a spouse's conversion, so that dependents have a remedy if they are in need.

## **E. Other Concerns**

### **1. Equal Right of Each Parent to Consent to Child's Marriage**

According to Section 12 of the LRA, a person under 21 years of age must obtain parental consent before s/he can marry. With respect to such consent, this law currently gives priority to the father, i.e. the father's consent must be sought if he is alive. The mother's consent suffices only if the person is illegitimate or her/his father is dead.

JAG believes that each parent should have equal rights in giving consent for a child's marriage, as with the child's education, religious upbringing, welfare and other matters. As the Guardianship of Infants Act 1961 recognises "guardian" to mean either parent, for the sake of consistency either parent should be able to give consent in this case. In addition, we propose that, where appropriate, a court can waive the parental consent requirement.

We do not recommend requiring the consent of both parents as this can be an obstacle if, for example, the person's father has abandoned the family and cannot be located.

### **2. Authorities to Ensure Spouse/Family is Notified of Conversion**

JAG calls for the enactment of legal provisions requiring the convert to notify her/his spouse of her/his conversion to Islam. If the convert is not married, s/he must inform her/his immediate family members, such as parents, children or siblings. However, as there is no assurance that the convert will indeed inform her/his spouse or family, we are of the opinion that, before registering a conversion, the religious authorities must ensure, by receiving a written acknowledgment, that the spouse or family members have been notified.

We were heartened to read press reports in April 2006 that "a legislation to compel converts to inform family members of the change in religion is under discussion", but no progress on such legislation has been reported since.

Furthermore, if the convert is married or already divorced, the religious authorities must ensure that s/he has settled all her/his legal obligations and liabilities pertaining to that marriage, according to the law under which the marriage was solemnised or registered, before the conversion is registered.

#### **IV. CONCLUSION**

To conclude, JAG upholds each individual's freedom of faith and belief. However, we believe that conversion to Islam cannot be used as a basis for the converting party to evade the obligations and responsibilities, to the non-converting spouse (or ex-spouse), children and parents, which were already incurred under civil law prior to the conversion.

JAG calls for a review of the relevant laws to ensure that when an individual embraces Islam, the convert's spouse (or ex-spouse), children and other family members' rights and entitlements under civil laws remain unchanged. Specific legislation must be adopted to provide that all issues relating to the marriage must be settled in civil courts and according to civil law.

We are not calling for the introduction of new rights, but only that legitimate expectations are safeguarded and existing rights are preserved. It is unfair and retrogressive when a woman loses the rights she had upon marriage as a result of her spouse's change of faith.

We urge that provision be made to take account of the rights of non-converting family members based on the principles of justice, equality and non-discrimination.