CONVERSION AND THE *KITABIA* IN MALAYSIA

I

One of the perennial problems of private international law resides in the effect of a conversion to Islam. Students of local family law are, at an early age, invited to consider the mysteries of *P.P.* v. *White*[1] and *A.G.* v. *Reid*,[2] and to brood upon the meaning of those cryptic words in Nawawi's *Minhaj et Talibin*,[3] an authoritative text on Shafi'i's teachings:

> An infidel of whatever religion who is converted to Islam while married to a woman whose religion is founded upon some holy scripture keeps her as his wife; but if she is an idolatress or a fire-worshipper, and is not converted with him, separation takes place immediately *ipso facto*, when the marriage has not yet been followed by cohabitation. Otherwise the continuation of the marriage depends upon whether the woman embraces the faith before the end of her period of legal retirement. If, before the expiry of this period the wife's conversion has not yet taken place, the marriage is considered to have been dissolved from the husband's conversion; and the same rule is observed if it is the wife who is converted, while the husband remains in a state of religious blindness. When, on the other hand, both parties embrace the faith at the same time, the marriage remains valid.

The same author defines "infidels whose religion is founded upon a holy scripture"[4] as "those people who follow one of the actually existing divine revelations though abrogated by the Koran, *i.e.*, Jews and Christians; but not adherents of religious sects founded only on the psalms of David, and so on. Jewesses may become wives of Moslems, even when not strictly speaking of the race of Israel, provided their nation was converted to Judaism before that revelation was abrogated by the Koran, and

[1] (1940) M.L.J. 214.

[2] [1965] A.C. 720 (P.C.)

[3] English text, from the French, London, 1914, p. 295.

[4] *Ibid.*, p. 294.

before the text of the law of Moses had been altered by theologians." The author adds, "some jurists, however, consider only the first of these two conditions as strictly necessary."

This question of a conversion of a husband to Islam is the subject of comment by Fyzee.[5] He affirms that "[a] according to Islamic law conversion to Islam on the part of a man following a scriptural religion, such as Judaism or Christianity, does not dissolve his marriage with a woman belonging to his old creed. The rule, however, is different if the couple belong to a non-scriptural faith. In that case the Muslim husband could not lawfully retain a non-*kitabiyya* wife; wherefore, Islam was to be 'offered' to her and, on her refusal, a decree of dissolution was to be passed." Fyzee qualifies these eminently logical observations, however, by observing that "(t)hese rules, however, cannot be applied in a modern state where "all religions are equal in the eye of the law' and where 'the court, judicially administering the law, cannot say that one religion is better than another.' "

Fyzee states that "[a] non-Muslim, lawfully married in accordance with his own law, cannot by a mere conversion to Islam dissolve his own marriage" (his authority here being Tyabji's *Muslim Law*, fourth ed., 1969, para. 199, and the case of *Keolapati* v. *Harnam Singh* (1936) 12 Luck. 568, 581). In consequence, affirms Fyzee, "if a Christian, lawfully married to a Christian woman, were to declare himself a convert to Islam and marry a Muslim woman in Muslim fashion, the second marriage would be, in the judgment of the Privy Council, of doubtful validity" (the relevant authority here being cited as *Skinner* v. *Orde* (1871) 14 M.I.A. 309, 324). This, again, is qualified by a Calcutta case (*John Jiban* v. *Abinash Chandra* (1939) 2 Cal. 12) holding that a married Christian, domiciled in India, after his conversion to Islam is governed by Muhammadan law, and is entitled, during the subsistence of his marriage with his former Christian wife, to contract a valid marriage with another woman according to Muhammadan rites. "This decision," observes Fyzee,[6] "appears to overlook the important principle that a previous marraige in accordance with

[5] *Outlines of Muhammadan Law* (4th ed.) Oxford, p. 180 *et. seq.*

[6] p. 182.

one scheme of personal law cannot be destroyed by the mere adoption of another faith by *one* of the spouses. It is also in conflict with the opinions of Ameer Ali, Tyabji, Wilson and Fitzgerald, and it is submitted that it is erroneous." Whether this admirable principle can be accepted generally is doubtful.

Syeed Ameer Ali states[7] that "[a]ccording to the Musulman law conversion to the Islamic Faith on the part of a man following any of the revealed or Scriptural (*Kitabia*) religions, such as Judaism and Christianity, does not lead to a dissolution of his marriage with a woman belonging to his old creed." He offers two rules, where the parties are "non-Scripturalist", dependent on the place of conversion, *viz.*,

a. where the husband is converted in an Islamic country, Islam must be offered to the wife; if she adopts Islam, the marriage remains intact, if not, "the judge should separate the couple";
b. where the conversion takes place in a country where "the Laws of Islam are not in force," the dissolution of the marriage occurs on the completion of three of the wife's "terms".

In this context, it can be assumed that Malaysia is an Islamic country. Whether the remaining propositions are valid depends, it would seem, on the interpretation of what is a "revealed" or "Scriptural" religion. Here, the loose descriptions of those geographers who include as religions Confucianism, Taoism and Buddhism are of little avail. To all intents and purposes, the writers are here dealing essentially with Judaism and Christianity.

The cases of *A.G.* v. *Reid*[8] and *P.P.* v. *White*[9] of course raise the issue of bigamy: their basis being the existence of a valid subsisting marriage, and the question of the degree to which that marriage is protected by the provisions of the penal law on bigamy. For this reason, perhaps, Fyzee does not review the cases in relation to the effect of a conversion: and indeed, the former case alone is mentioned (and that but once) in his text.

[7] *Mahommedan Law* (7th. ed), 1976 Vol. II, p. 344.

[8] Supra.

[9] Supra.

Professor Ahmad Ibrahim, in a recent book,[10] deals with these and other cases, in a short survey of the local position: but the reader is left in doubt as to the existing position in Malaysia. The matter is obscure, full of conflict, and needs resolution by authority: but who can, or dare, take action?

One Singapore case, that of *Abdul Razak* v. *Lisia binte Mandagie alias Maria Menado*,[11] in 1964, might have offered some guidance but, as Professor Ahmad Ibrahim points out,[12] the judgment there was a consent judgment; the wife being at the time of her marriage a Christian but, according to the judgment, one "whose ancestors were converted to Christianity after the coming of the Prophet Muhammad." Professor Ahmad Ibrahim points out that the judgment avoiding the marriage appears to have been based upon the ground "that the term *Kitabiah* only included a Christian or Jewess who belongs to a nation who followed Christianity or Judaism, as the case may be, at the time of the coming of the Prophet Mohamed." In his article Professor Ahmad Ibrahim sums up the views of the various Schools of Law.

We can accept, it seems, the proposition that a Muslim man can marry a non-Muslim woman who is a *kitabiyya*. The term *kitabiyya* (like *fetua*, variously anglicized) is derived from the word *kitab*, meaning a book, so that a *Kitabiyya* is "a woman who believes in a religion revealed through a book, but not in idolatry or fire worship,"[13] and the term —

> is intended to convey the idea of a heavenly revealed religion received through some books. As to what constitutes a *kitabi* religion has not been finally settled. It seems to have been conceded by a general consensus of opinion that it covers the case of Christians and Jews but that it does not cover the case of persons who worship stars or idols. The question of whether Buddhists are *Kitabis* was left undecided by the Privy Council (*Abdul Razack* v. *Aga Mohd. Jaffer* 21 Cal. 666

[10] *Family Law*, Singapore, 1978, pp. 2–5.

[11] Shariah Court Case No. 42 of 1964.

[12] Marriages of Muslims with non-Muslims [1965] M.L.J. xvi.

[13] Babu Ram Verma, *Mohammedan Law in India and Pakistan* (4th Ed.), 1974, pp. 79–80.

at 674). Ameer Ali is of opinion that mariages between Muslims and a woman of Brahmo sect or even a Hindu woman whose idolatry is merely nominal and who really believes in God would be lawful. It is however doubtful if this view can be accepted.[14]

The issue of whether a woman is a *kitabiyya* is relevant not only to the question of her capacity at the time of marriage to a Muslim male, but becomes acute when the question of a conversion to Islam by the husband arises. One writer[15] affirms —

When a non-Muslim spouse embraces Islam, Muslim law lays down that if the parties belong to *dar al-Islam* (which in effect means a country whose state religion is Islam) Islam has to be offered by the *qadi* to the non-Muslim spouse and if the non-Muslim spouse does not accept it even after three offers, the *qadi* will break off their matrimonial bond; and then the Muslim convert will be free to contract another marriage. On the other hand, where the parties belong to *dar al-harb* (a 'foreign country' as Chakravarty J. puts it in *Rakeya Bibi's* case (1948 2 Cal. 119)) the marriage stands dissolved at the completion of a period equivalent to *'idda*.

A description of the situation arising in Malaysia is given by an English judge (Wood J.) in the course of the recent (1979) case of *Viswalingam* v. *Viswalingan*. In the course of the case, the judge having heard two expert witnesses, summed up the current position in Kuala Lumpur, as he saw it, as follows:

By substantive Muslim Law, a Muslim woman can only marry a Muslim man. A Muslim man, however, can marry a Muslim woman and also a *Kitabiyya*. . .. A loose definition of *Kitabiyya* would be a Jewess or Christian. If she was not a *Kitabiyya*, then the marraige would be irregular and would not be valid.

If a married man embraces Islam, the effect upon his existing marriage will depend upon whether his wife (unless she becomes a Muslim) is a *Kitabiyya* or not. If she is not, then unless she also turns to Islam within three months of her husband's conversion, the marriage ceases to

[14] *Ibid.*

[15] B.N. Sampath, in "Conversion and Interpersonal Conflict of Laws" in *Islamic Law in Modern India*, ed. Tahir Mahmood (Bombay 1972) p. 128.

subsist and the date of such cessation reverts to the date of his conversion. During this period of three months the Shafii school does not require the husband to offer the Muslim religion to his wife.

A simple declaration of faith in Islam and the saying of a prayer aloud before a witness constitutes conversion. No certificate of any kind is necessary by the substantive Islamic Law, athough as a matter of administration there is a register of converts maintained in the State of Selangor.

The effect of conversion cannot be compared with the English notion of nullity because the marriage until cessation is perfectly valid and has no flaw in it.

There is no need, perhaps, to labour the general proposition that "[u]nder the Muslim law conversion to Islam on the part of a man following a religion based on a revealed scripture, such as Judaism or Christianity does not dissolve his marriage with a woman belonging to his old creed."[16] It appears to be accepted as a safe working rule, for those called upon to advise upon the effect of the conversion to Islam of a non-Muslim husband. Yet the Chancery lawyers in our midst will have already noted that there is a weakness in the accepted principles of law, in that the nature of those religions "founded upon some holy scripture" has not yet been "finally settled". Even so, "[l]egal reasoning was inherent in Muhammadan law from its very beginnings."[17] The elaboration of Nawawi's principles, as set out in the *Minhaj et Talibin,* are themselves based upon skilful and successful efforts to systematize and maintain a logic consistent with the maintenance and advancement of Islam itself, to keep it alive in the same manner as the common law judge keeps the spirit of the common law itself alive. We may now look, briefly, at the manner in which Islam in Malaysia has sought to refine the principles of Shafi'i in relation to conversion.

[16] M. Siraj (Mrs.), "The Legal Effect of Conversion to Islam", (1965) 7 Mal. L.R. 95.

[17] Schacht, *The Origins of Muhammadan Jurisprudence,* Oxford, 1950, p. 269.

II

An appeal was heard by the Court of Appeal of the Federated Malay States in 1927.[18] In the course of that appeal, the Court (in the words of the Legal Adviser of the day) "determined that the former practice of the Courts of treating local Muhammadan law as foreign law and ascertaining it by taking evidence"[19] as wrong. The question then arose, of how Muslim law was to be proved. The draftsman and the legislature rose promptly to the challenge, and the Muhammadan Law and Malay Custom (Determination) Enactment took its place upon the statute book of the Federated Malay States in 1930.[20] The measure was prepared in order, in the words of the Legal Adviser, to enable "the Courts to refer questions of Muhammadan law or Malay custom to the State Council," whose decision on the point "will be authoritative and must be followed." Malay custom was included in the law, observed the Legal Adviser, "as custom and law are in many cases interwoven and inseparable."

The Enactment of 1930 was a short one of but four sections, enabling "any Civil Court before which any question of Muhammadan law or Malay custom" arose to refer such question to "the State Council of the State within which the suit" had been instituted, for its decision. Once the decision of the State Council was given, the Enactment provided that the Court "shall proceed to determine the matter before it in accordance with such decision;" and it was provided that no appeal should lie from any decree or order to a Court "in so far as such decree or order" was "based on and in accordance with a decision of the State Council," given under the Enactment. In other words, on questions of Muslim law or Malay custom, the decision of the State Council was, as the Legal Adviser said, "authoritative." Matters affecting Malay custom and religion were of course outside the scope of the advisory treaty; the State Council

[18] *Ramah* v. *Laton* (1927) 6 F.M.S.L.R. 128.

[19] F.M.S. *Government Gazette*, Vol. 21 (July-December 1929) pp. 2559.

[20] Enactment 4 of 1930.

itself was in effect a "purely advisory" body;[21] so sovereignty in the matter rested, ultimately, with the Ruler of the State.

The Enactment of 1930 remained in force in Selangor (to deal with but one of the former Federated Malay States) until the coming into force of the Administration of Muslim Law Enactment 1952;[22] a measure still in force in the Federal Capital, it seems, and following a pattern common to other States.

In Selangor the religion of the State is "the Muslim religion as heretofore professed and practised in the State," although "all other religions may be practised in peace and harmony by the persons professing them in any part of the State."[23] The "Head of the Religion of the State" is the Ruler, who "may cause laws to be enacted for the purpose of regulating religious affairs and for the Constitution of a Majlis Ugama Islam dan Adat Istiadat Melayu . . . to aid and advise His Highness in all matters relating to the religion of the State and Malay Custom."[24] These provisions are embodied in the State Constitution, which is guaranteed by the Federal Constitution;[25] and under that Constitution the Ruler may act in his discretion in the performance of "any function as Head of the Muslim religion or relating to the custom of the Malays."[26] Without wishing to go into the niceties of constitutional law on the extent, if any, to which the Ruler's discretionary powers may be fettered by legislation to which he has assented, we may affirm that the Ruler retains the authority he had in 1930.

[21] To use the words of Braddell, *The Legal Status of the Malay States*, p. 33.

[22] 3 of 1952. In this essay, I have used the Selangor law as the basis of illustration. Laws of the other States are similar: although the similarity should not be pursued too far. As far as the Federal Territory is concerned, the Selangor law applies: see Selangor Enactment 4 of 1973.

[23] The Laws of the Constitution of the State of Selangor 1959, art. XLVII.

[24] *Ibid.*, art. XLVIII.

[25] Constitution of Malaysia, art. 71.

[26] Ibid., Eight Schedule, 1.1, and Laws of the Constitution of the State of Selangor, art. LV (2)(↑).

For the Enactment of 1952 opens with a saving that nothing therein shall, save as expressly provided in the Enactment, "derogate from or affect the prerogative rights and powers of His Highness the Sultan as the Head of the religion of the State, as declared and set forth in the Laws of the Constitution of Selangor."[27] Subject thereto, under the Enactment a Majlis Ugama Islam dan Adat Istiadat Melayu, acting "on behalf of and under the authority of His Highness the Sultan" is established as "the chief authority in the State" in "all matters relating to the religion of the State and Malay custom"[28] The Majlis is required to "take advice and act upon all written laws in force in the State, the provisions of the Hukum Shara' and the ancient custom of the State or Malay customary law."[29]

In this context it is noteworthy that the Enactment lays down the authorities "ordinarily" to be followed by the Majlis in issuing any *fetua,* in the following order of priorities:

a. the orthodox tenets of the Shafeite sect;
b. if such tenets are "opposed to the public interest" (whether this is the interest of the general public, or only the Muslim sector thereof is not clear) then "the less orthodox tenets of the Shafeite sect" shall be followed, unless the Ruler otherwise directs;
c. if these, too, are "opposed to the public interest", then "with the special sanction" of the Ruler, the tenets of such of the other three surviving orthodox schools as may be appropriate may be followed.

However, due regard must always be had to the Adat Istiadat Melayu or Malay customary law of the State. Any person may seek from the Majlis "a *fetua* or ruling on any point of Muslim law or doctrine or Malay customary law," and in giving such a ruling the Majlis will follow the above

[27] Selangor Enactment 3 of 1952, s. 3.
[28] *Ibid.*, s. 37.
[29] *Ibid.*, s. 38.

principles. Rulings may be gazetted and, if so, are then "binding on all Muslims resident in the State."[30]

It would seem, then, that the Majlis has taken over the powers of the State Council under the Enactment of 1930: and for our purposes we need not pursue the constitutional issues that may arise in relation to the prerogative powers of the Ruler. With the enactment in 1952 of a reasonably comprehensive code of Muslim law there was established a legal framework within which Muslim law in the State could develop; and the situation was preserved by the events of 1957, and the adoption of a Constitution providing for federal independence.

III

With the establishment of Islam as the religion of the Federation,[31] the confirmation of the status of each Ruler as Head of the religion of Islam in his State,[32] and the formal establishment of the Conference of Rulers as the sovereign authority in all "religious acts, observances or ceremonies" throughout the Federation,[33] it clearly became desirable to create machinery for a uniform policy on all such matters: and in October 1968 the Conference of Rulers established a National Council for Islamic Affairs, consisting of a chairman appointed by the Conference of Rulers (usually, it seems, the Prime Minister), State representatives, and five persons appointed by the Supreme Head of State with the consent of the Conference of Rulers.

[30] Ibid., ss. 41–42. It is perhaps worth noting that in Singapore, on questions affecting succession and inheritance in Muslim law, the Court is "at liberty to accept as proof of the Muslim law any definite statement on the Muslim law" made in all or any of seven books set out in section 108(1) of the Administration of Muslim Law Act (Cap. 42 in the 1970 edition of the Statutes). These books include Nawawi's *Minhaj et Talibin*, Fyzee's *Outlines of Muhammadan Law*, Tyabji's *Muhammadan Law* and Syed Ameer Ali's *Muhammadan Law*, in addition to Baillie's *Digest* and Wilson's *Anglo-Muhammadan Law*. These books are largely concerned with Indian and Pakistani – mainly Hanafi and not Shafi'i – Muslim law.

[31] Malaysian Constitution, art. 3(1).

[32] *Ibid.*, art. 3(2).

[33] *Ibid.*, art. 38(2)(b).

This august body is endowed with general advisory functions, and *inter alia* is empowered "to advise the Conference of Rulers, State Governments, and State Religious Councils on matters concerning Islamic law or the administration of Islam and Islamic education, with a view to *imposing* (my italics), standardizing or encouraging uniformity in Islamic law and administration."[34] The Council has a committee of Muslim scholars (including the Muftis of all States) to consider matters of Islamic law: the committee being known, significantly it would seem, as the Fatwa Committee.

Any *fetua* issued by or with the authority of the National Council for Islamic Affairs would therefore appear to be invested with an authority superior to that of any other religious authority within Malaysia: for while a State independence may technically exist in the matter, the only variation in the interpretation of Muslim law likely to be acceptable in future is that occasioned by Malay custom peculiar to one locality or community. This proposition may, admittedly, be open to argument: but at the national level, adherence to the common spirit of Islam, reinforced by the consensus of local scholars and the approval of the Conference of Rulers, suggests that the National Council's rulings are likely to be accepted as valid and authoritative throughout Malaysia, and that the power of the State Authorities to issue local *fetuas* is likely to fall into desuetude, except in so far as matters of local custom are concerned.

Indeed, the National Council may be regarded as the delegate or agent of the Conference of Rulers; and as that Conference has an effective authority in relation to "acts, observances or ceremonies" agreed by the Conference of Rulers to extend "to the Federation as a whole,"[35] it seems likely that a constitutional convention is in course of development. A precedent is set, a usage is established: although Malaysian practice suggests that at some suitable time the Constitution will be amended, to accord formal

[34] See Ahmad Ibrahim, "The Position of Islam in the Constitution", *The Constitution of Malaysia: 1957–1977*, ed. Suffian, Lee and Trindade, p. 60.

[35] Malaysian Constitution, art. 3(2).

recognition to the Council. If that day comes, the question of the authority of rulings of the Council will have to be considered afresh.

On 13 August 1977 it appears[36] that the National Council for Islamic Religious Affairs (presumably the National Council for Islamic Affairs) unanimously adopted a definition of *kitabiah* recommended by the Fatwa Committee. The decision and ruling of the Council, on the question of a non-Muslim husband and wife in the circumstances where one of them embraces Islam, and the question of a non-Muslim woman who, having embraced Christianity, marries a Muslim, was as follows:

> A *Kitabiah* is a Jewess or female Christian who
> (i) Is a descendant of Prophet Jacob if her ancestors are not known to have embraced the religion (Judaism or Christianity) after it was annulled (*i.e.* superseded by a subsequent religion such as Judaism being annulled by Christianity and Christianity being annulled by Islam) or
> (ii) Being a non-descendant of Prophet Jacob, if her ancestors are known to have embraced the said religion before it was annulled by a subsequent religion.
>
> *Ruling:* It is lawful to marry the above defined *Kitabiah.* It is unlawful to marry a Jewess or Christian who is not a *Kitabiah.*

This definition seems likely to raise a number of problems, although some may perhaps have already been resolved. While the Malaysian Constitution does, it is true, recognise that "Islam is the religion of the Federation," it also specifies that "other religions may be practised in peace and harmony."[37] The Constitution lays down a principle of equality in article 8, that "[a]ll persons are equal before the law and entitled to the equal protection of the law." These provisions are reinforced by article 8(2), which provides that "[e]xcept as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground

[36] From the judgment of Wood J. in the case of *Viswalingam* v. *Viswalingam* (Case No. 15785/77) delivered on 14 March 1979.

[37] Art. 3(1).

only of religion . .,. in the administration of any law relating to the acquisition, holding or disposition of property;" but article 8(5)(a) states that the article "does not invalidate or prohibit . . . any provision regulating personal law." Article 11(1) advances the matter: "[e]very person has the right to profess and practise his religion. .,.." In this situation, can any religious authority, however powerful, properly discriminate between wives professing different schools of the same religion?

What, then, is the consequence of the ruling of the National Council? The general policy of the ruling would seem, fairly enough, to advance the interests of the Muslim religion. However, such advancement cannot be at the expense of those non-Muslims entitled to practise their religion freely: and in that event, why, say, should a convert be penalised, and the non-convert not be penalised? Again, why discriminate between those sharing a common religion, on the basis of the belief of ancestors dead and gone these thousand years and more?

As for the authority of a *fetua,* this remains in a kind of limbo. It was the subject of consideration in a recent case[38] involving a *wakaf* in Trengganu and the meaning of a provision in Section 21(3) of the Trengganu Administration of Islamic Law Enactment of 1955, under which a ruling of the Majlis there is, if gazetted, "binding on all Muslims resident in the State". As Wan Suleiman J, the trial judge, observed, "it is doubtful if the legislature had contemplated that a *fetua* should be issued as regards the validity or otherwise of a document such as the *wakaf*" which was the subject of the litigation; and he came to the view that the court retained an "unfettered discretion as to how much of such *fetua* it should accept" – a decision based upon the competency of the court to treat Islamic Law as local law, and so to propound it. In the Federal Court Suffian F.J. took the view that the trial judge "was right in ruling that he was not precluded by the gazetted *fetua* from himself determining the validity of

[38] See *Commissioner for Religious Affairs, Trengganu, and Ors. v. Tengku Mariam binti Tengku Sri Wa Raja and Anor.* [1970] 1 MLJ 222, and *Tengku Mariam binte Tengku Sri Wa Raja and Anor. v. Commissioner for Religious Affairs, Trengganu, and Ors.* [1969] 1 MLJ 110, together with *Tengku Nik Maimunah and Anor. v. Majlis Ugama dan Adat Melayu Negeri Trengganu and Ors.* [1979] 1 MLJ 257 at 261.

the *wakaf*"; and in this he was supported by Azmi L.P., but not by Ali F.J., who in a vigorous and lucid judgment took the view that Section 21(3) of the Enactment was "a legislative sanction against any further dispute on the validity of the *wakaf*", and that the court could not but "take notice of it". In all, the case is a fragile reed for those who assert the superior position of the courts to propound Muslim Law, in the face of a system devised by the competent legislative authorities, possibly to avoid the very type of litigation manifest in 1969. Yet the case is an illustration of the manner in which judges trained in the common law will seek, in the manner of the *Anisminic* case, to exercise a paramount control over other authorities. Islamic law is a special and sensitive area, and we have come a long way since Hackett J. could observe *(Fatimah v. Logan, 1877)* that "Mohammedan law is foreign law to us." What is now of perhaps greater significance are the constitutional implications arising from the inevitable incursion of Muslim into secular law.

Apart from constitutional issues – which appear to be of major import – there also arises at a less critical level, the matter of proof. It will be noticed that the definition creates a kind of presumption in favour of a Jewess or Christian woman falling within the first part of the definition, and a presumption against one falling within the latter part of the definition. It is one thing to prove that one's ancestors have not embraced a particular religion after, say, 622 A.D., and another thing to prove that they have done so before that date: but in each case the burden seems so impossible as to be almost incredible.

All in all, the observer cannot but be alarmed by the thought that perhaps not all the relevant constitutional issues have here been considered. It is, admittedly, difficult to reconcile the propositions laid down in articles 3, 8 and 11 of the Constitution: but an effort must surely be made. Wood J., in the 1979 case of *Viswalingam* v. *Viswalingam* seems to have accepted uncritically the definition and ruling of the National Council on this subject, and he may have been correct, in his own situation, in doing so. Yet, given the difficulties of proof, it is surely no easy matter – even if the definition itself is constitutionally correct – to ascertain whether it is correctly applied to an individual case. In the

case before Wood J., a Hindu Christian woman was, it seems, held not to be a *kittabia;* whether she was given an opportunity to challenge the definition, or to bring herself within it, we do not know, and can but surmise. Justice, equity and good conscience might, after all, be relevant.

What does seem clear is that there should be a definite ruling on this critical issue, one acceptable on all sides. In considering such a ruling, it may be worthwhile adopting the principle laid down by Tyabji: a rule that embodies (at least, for this writer) what seems to be fair. Marriage is, after all, a special form of contract – and the law is not especially kind to those who seek to vary the essential nature of a contract by any form of unilateral action. Tyabji laid down, or suggested, or stated, that [39]

> where persons not governed by Muslim law contract or celebrate a valid marriage in accordance with a system of law other than Muslim law, the marriage and its dissolution will be subject [in British India, writes Tyabji] to the provisions of that other system of law, and not to [Muslim law], notwithstanding that one of the parties to the marriage has after being so married been converted to Islam.

Clearly, such a provision would require incorporation in legislation, for it is in the nature of this area of conflict that secular and non-secular laws conflict, and it is not possible, it seems, to avoid such conflict, except by reference to a law binding on both Muslim and non-Muslim alike. As a non-Muslim, I would hope that such a solution is adopted: for otherwise, the tensions that arise from frustration are likely to add fuel to a bonfire likely to be ignited by the most trifling of events – as the *Hertogh* case illustrated in Singapore, some years ago. At any rate, let the matter be discussed with the various religious leaders, in the hope that, in this extraordinarily sensitive area of personal law, a happy compromise can be reached before any crisis arises.

[39] *Muslim Law*, 4th Edition, Bombay, 1968, para 199.

If, of course, the Law Reform (Marriage and Divorce) Act 1976 is brought into force, then sections 4 and 5 of that Act will get rid of some of the basic problems arising in this area of law. Yet even in Singapore, whose Women's Charter is a model for Malaysian law, the consequences of a marriage under the Charter between a Muslim and a non-Muslim have not yet been settled. Singapore can perhaps afford to wait until the Greek Kalends before legislating further on such a delicate issue; Malaysia probably cannot.

R.H. Hickling*

*Visiting Professor of Laws, University of Singapore.

EQUAL STATUS OF CHILDREN

> 'There has been a marked increase in the proportion of illegitimate births during recent years. These years too have seen a change in social attitudes towards extra-marital sexual relations. Whether as a cause or as a consequence of these changing attitudes out-of-wedlock pregnancies occur now with similar frequency across all social class.'[1]

This matter-of-fact statement of births outside marriage is typical of the growing acceptance of children born outside marriage, particularly in Western countries. This article does not propose to deal with social aspects of illegitimacy;[2] instead, it will focus on the legal implications of illegitimacy and the legal disabilities of illegitimate children. Discussion of the law in Malaysia will exclude the position of Muslim illegitimate children.

Legitimacy has been defined as a legal concept whereby a couple's child is entitled to full recognition as a member of their family group, enjoying the rights which that status involves.[3] The law determines who shall enjoy this status; it also defines the legal consequences of legitimacy or illegitimacy. At common law, an illegitimate child[4] was regarded as *filius nullius*,[5] the son of nobody, and it was from this concept that the disabilities of illegitimate children were derived. Originally, this legally defined status served to protect marriage and all that follows from it by leaving those born outside wedlock devoid of

[1] E. Crellin, M.L. Kellmer Pringle & P. West, *Born Illegitimate: Social and Educational Implications*, Report by National Children's Bureau, London (1971), 12.

[2] See Hinshawati Shariff, *The Protection of Illegitimate Children*, A Project Paper submitted to the Faculty of Law in the 1978/79 session; H.A. Finlay & A. Bissett-Johnson, *Family Law in Australia*, Melbourne: Butterworths (1972), 241–47.

[3] S.M. Cretney, *Principles of Family Law*, London: Sweet & Maxwell (1971), 309.

[4] In this article, the term 'illegitimate child' will be used synonymously with the terms 'child born outside marriage' and 'ex-nuptial child'.

[5] D. Hambly and J.N. Turner, *Cases and Materials on Australian Family Law*, Sydney: The Law Book Co. (1971), 478.