

**Mandates of the Working Group on the issue of discrimination against women in law and in practice;
the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on violence
against women, its causes and consequences**

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Excellency,

We have the honour to address you in our capacities as Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Special Rapporteur on freedom of religion or belief; and Special Rapporteur on violence against women, its causes and consequences pursuant to Human Rights Council resolutions 23/7, 22/20, and 23/25.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the situations of Ms. [REDACTED] and Ms. [REDACTED], resulting from the existence of a dual legal system composed of civil and Syariah law, inconsistent with international human rights law and standards, in Malaysia.

According to the information received:

The case of Ms. [REDACTED]

On 10 April 1993, Ms. [REDACTED] and Mr. [REDACTED], now known as Mr. [REDACTED], got married under the Law Reform (Marriage and Divorce) Act 1976. They had three children. On 11 March 2009, Mr. [REDACTED] converted from Hinduism to Islam and on 2 April 2009, he converted his three children, [REDACTED] aged 12, [REDACTED] aged 11 and [REDACTED] aged 11 months old at the time, while Ms. [REDACTED] decided to remain of Hindu faith. It is reported that the registration of the three children as Muslims was done in their absence and without Ms. [REDACTED]'s knowledge and consent.

According to the Administration of the Religion of Islam (Perak) Enactment 2004, a valid administrative conversion to Islam requires that "the person must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith" known as 'Kalimah Shahadah', "must be aware that they mean 'I bear witness that there is no God but Allah and I bear witness that the Prophet Muhammed S.A.W. is the

Messenger of Allah” and that “the utterance must be made of the person’s own free will” as stated by section 96. Furthermore, section 106 stipulates that a person who has not attained the age of eighteen years must have his/her parents or guardian consents in written to support his/her application for a conversion to Islam. It is reported that none of Ms. [REDACTED]’s children said the Affirmation of Faith nor made an application to convert supported by the consent of both parents.

It is important to note that since Ms. [REDACTED] did not convert to Islam within the three months following her husband’s religious conversion, Mr. [REDACTED] is no longer considered married to Ms. [REDACTED] under Shariah law. However, as the marriage was registered under civil law, Ms. [REDACTED] who is not of Muslim faith remains married to her husband until she seeks divorce under civil law. It is reported that to date, she has not filed any request for divorce.

On 8 April 2009, a Syariah Court granted an ex-parte interim custody order of the three children to Mr. [REDACTED], following his conversion to Islam. On 29 September 2009, the Syariah Court confirmed this decision by granting a permanent custody order to Mr. [REDACTED], notwithstanding the existence of section 50 of the Perak Enactment which only gives jurisdiction to the Syariah Court to hear matters only when the proceedings are related to Muslims and despite Ms. [REDACTED] being a non-Muslim. At the time of Mr. [REDACTED]’s religious conversion, the two elder children, Ms. [REDACTED], aged 12 and Mr. [REDACTED], aged 11, were residing with Ms. [REDACTED] while the youngest child, Ms. [REDACTED], who was 11 months old, was with her father. Following the Syariah Court’s decision, Ms. [REDACTED] filed an application (no. 25-10-2009) for judicial review in the Ipoh High Court to contest the alleged and illegal religious conversion to Islam of her children.

On 25 July 2013, the Ipoh High Court granted custody of the couple’s children to Ms. [REDACTED] ordering that Mr. [REDACTED] return the youngest of the children, Ms. [REDACTED], and declared the conversion certificates to Islam of the three minors null and void. Mr. [REDACTED] reportedly held the youngest of the children, Ms. [REDACTED] with him despite the Court’s decision. The Ipoh High Court’s decision was appealed by Mr. [REDACTED] (in case Civil Appeal No. A-02-1826-08/2013) as well as by the Perak Islamic Religious Department director, the Registrar of Muallaf and the Perak state government in case Civil Appeal No. A-01-304-08/2013, and the Ministry of Education (Kementerian Pelajaran Malaysia) and the government of Malaysia (Kerajaan Malaysia) in case Civil Appeal No. A-01-316-09/2013.

On 30 December 2015, the Court of Appeal decided that the validity of the conversion to Islam of Ms. [REDACTED]’s three children by their father could only be determined by a Syariah court. This decision was mainly based on the interpretation of article 121 (1A) of the Federal Constitution, which prohibits civil courts from interfering with the Syariah court. As the Syariah court does not have jurisdiction over non-Muslims and civil affairs, a non-Muslim parent, like Ms.

██████████, is not able to seek redress in front of the Syariah Court nor a civil court and being left with de facto no access justice.

The case of Ms. ██████████

In 2003, Ms. ██████████ and Mr. ██████████, now known as Mr. ██████████, got married under civil law. They had two children, ██████████ now aged 11 and ██████████ now aged 8, who were raised as Hindus, religion of Ms. ██████████ and her husband at the time of their marriage.

It is reported that between 16 August 2007 and 9 April 2014, Ms. ██████████ lodged more than twenty police reports against her then-husband, including cases of domestic violence, to the Royal Malaysia Police. To date, no effective action has reportedly been taken by the authorities to respond to these complaints.

In November 2012, Mr. ██████████ converted from Hinduism to Islam. On 4 April 2013, he reportedly unilaterally converted his two children without the knowledge and the consent of their mother, Ms. ██████████.

On 19 September 2013, the Syariah Court granted custody of both children to Mr. ██████████. As a Hindu, Ms. ██████████ was not able to appear in front of the Syariah Court to plead for custody.

On 30 August 2013, the Magistrate Court in Jelebu granted Ms. ██████████ an Interim Protection Order (IPO). On 7 April 2014, the High Court decided to grant custody of the children to Ms. ██████████ while approving her divorce request, under civil law. Two days after the civil court decision, Mr. ██████████ reportedly violently abducted their son, ██████████, at Ms. ██████████'s house. It is reported that Ms. ██████████ was injured during the incident. After reporting the abduction to the Jelebu Police Station on 9 April 2014, the Investigating Officer reportedly said that the arrest of Ms. ██████████'s former husband was not possible as there were two conflicting court orders from the High Court and the Syariah court.

On 12 April 2014, the Inspector General of Police publically stated that the police would not investigate the abduction of Ms. ██████████'s son by her former husband since the Syariah court had granted him full custody of both children. It is reported that later the Home Minister supported the Inspector General of Police's statement and decision in this case.

On 21 May 2014, the Seremban High Court granted to Ms. ██████████ a Recovery Order to have her son back. On 23 May 2014, it was served to the police at the national headquarters at Bukit Aman. The police reportedly stated that no action would be taken until they consulted with the Attorney General's

Chambers. On 11 June 2014, the Inspector General of Police publically stated that no decision made by civil courts would be enforced by the police in interfaith custody battles where one party was Muslim.

On 26 June 2014, the Attorney General and the Inspector General reportedly sent an application to the Court of Appeal in order to suspend the Recovery Order. On 14 January 2015, the Federal Court authorized Mr. [REDACTED] to appeal against the Custody Order and the Recovery Order, and authorized the Attorney General's Chambers and the Inspector General of Police, who became interveners in the case, to appeal against the Recovery Order.

On 10 February 2016, after hearing both sides as well as the children, the Federal Court ruled that the Law Reform (Marriage and Divorce) Act 1976 was the exclusive law governing the dissolution of marriage and custody for parties who registered their marriage under civil law. However, the Federal Court ruled that the Recovery Order issued in 2014 by the High Court in Ms. [REDACTED]'s favour was improper due to the conflicting Syariah Court Order granting custody of both children to her former husband being still valid, despite the Federal Court's recognition that the Syariah Court had no jurisdiction to grant such order. Finally, the Federal Court ruled that it was in the best interest of the children to remain in their respective living situations, meaning the son who was living with Mr. [REDACTED] would stay with his father and the daughter who was living with Ms. [REDACTED] would stay with her mother. It is reported that the Federal Court took into account the wishes expressed by the children.

While we do not wish to prejudge the accuracy of these allegations, we wish to express serious concern regarding the consequences of the decision taken by the Court of Appeal in the case of Ms. [REDACTED], which leaves her without the possibility to appeal this decision, access justice and seek redress.

We express further concern at the consequences of the decision taken by the Federal Court in the case of Ms. [REDACTED], which may justify and legitimize acts of gender-based violence as Ms. [REDACTED]'s history of abuse by her former husband as well as the alleged violent abduction of her son by him were not given due consideration during the judicial process regarding the custody of her children. We are further concerned at the lack of action from the Malaysian authorities including the police after Ms. [REDACTED] reported acts of abuse and domestic violence several times between 2007 and 2012.

We are concerned that, in both cases, the abovementioned judicial decisions violate the equal rights and responsibilities of women in matters relating to their children and may impinge upon children's exercise of freedom of religion or belief. Furthermore, the unilateral religious conversion of a child by only one parent, without the knowledge or the consent of the other one who is not converting, undermines Ms. [REDACTED]'s

and Ms. [REDACTED]'s equal rights as parents in matters relating to their children.

Furthermore, serious concern is expressed at the existence of an inconsistent dual legal system of civil and Syariah law, especially regulating marriage and family matters, which results in gender-based discrimination against Ms. [REDACTED] and Ms. [REDACTED] in these areas, by undermining their access justice and right to remedy as well as their equal rights in matters relating to their children and their custody. These judicial decisions also undermine the primacy of constitutional laws and rights over religious and customary laws, which should have a primary status as set in international human rights norms and standards and in the Malaysian Constitution. The inconsistency of the dual legal system made of civil law and religion-based law results in the violation of women's rights to equality in law, to access justice, to remedy and non-discrimination in marriage and family relationships and it downplays acts of gender-based violence.

In connection with the above alleged facts and concerns, please refer to the Reference to international law Annex attached to this letter which cites international human rights instruments and standards relevant to these allegations.

Since it is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned opinions and allegations.
2. Please provide detailed information on the measures that the Malaysian authorities intend to take, to ensure that Ms. [REDACTED] and Ms. [REDACTED] have access to justice and to remedy, and therefore, be able to exercise their equal rights in matters relating to their children, as set in international human rights law.
3. Please provide information on the measures taken to ensure that the children of Ms. [REDACTED] and of Ms. [REDACTED] can exercise their right to freedom of religion or belief.
4. Please provide the details, and where available the results, of any investigation, medical examinations, and judicial or other inquiries which may have been carried out in relation to the police reports filled by Ms. [REDACTED] against her former husband, including the one regarding the alleged violent abduction of her son.
5. Please provide detailed information on any measures taken, such as legal reform, to avoid any violation of women's rights to equality and non-discrimination in marriage and family relationships deriving from the existence of

a Malaysian dual legal system, between civil law and Syariah law, in light of international human rights legal standards.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

Eleonora Zielinska
Chairperson-Rapporteur of the Working Group on the issue of discrimination against
women in law and in practice

Heiner Bielefeldt
Special Rapporteur on freedom of religion or belief

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Annex
Reference to international human rights law

In connection with the above concerns, we would like to refer you Excellency's Government to the Universal Declaration of Human Rights (UDHR). The UDHR ensures the rights of all individuals, without distinction of any kind, including of sex (art. 2), to an effective remedy by the competent national tribunals for acts violating one's fundamental rights granted by the constitution or by law (art. 8) and to freedom of thought, conscience and religion (art. 18).

In this connection, we would like also to refer your Excellency's Government to the Human Rights Committee General Comment 28 on "equality and rights between men and women", which highlights that reference to freedom of thought, conscience and religion may not be relied upon to justify discrimination against women.

The cases of Ms. [REDACTED] and Ms. [REDACTED] undermine a number of rights and principles guaranteed under the Convention on the Elimination of all forms of discrimination against women (CEDAW), ratified by Malaysia on 5 July 1995. The Convention condemns all forms of discrimination against women and girls (art.2), requires the modification of social and cultural patterns of conduct in order to eliminate discrimination against women and girls (art.5), recalls that States Parties shall accord to women equality with men before the law, as well as treat them equally in all stages of procedures in courts and tribunals (art.15 (2)), and guarantees the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children, respecting the best interests of the children (art. 16 (1) (d)). With regards to the reservations entered by the Government of Malaysia at Article 16 of the Convention, we wish to recall that the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) stated that this article, along with article 2, is considered as core provisions and that "reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn".¹

In this connection, we would like also to refer your Excellency's Government to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) General Recommendation 21 on "equality in marriage and family relations", which states that whatever form the family takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as set at article 2 of CEDAW. Furthermore, General Recommendation 33 on "access to justice" of the CEDAW Committee indicates that States parties have obligations under articles 2, 5 (a) and 15 of the Convention and under other international human rights instruments to ensure that women's rights are equally respected and that women are protected against violations of their human rights by all components of plural

¹ See section on "Reservations to CEDAW", <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

justice systems (GR 33, para. 61). In addition, with the aim to eliminate discrimination against women, General Recommendation 33 refers to the importance for States parties to ensure that women have access to all available judicial and non-judicial remedies (GR 33, para. 19 (a)) and provide effective and timely remedies and ensure that they respond to the different types of violations experienced by women, as well as adequate reparation (GR 33, para. 19 (g)).

With regards to the alleged acts of violence suffered by Ms. [REDACTED] from her then-husband, we would like also to refer to Article 4 (c & d) of the United Nations Declaration on the Elimination of Violence against Women, which stipulates that States should exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. To this end, States should develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence. Women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered. States should, moreover, also inform women of their rights in seeking redress through such mechanisms.

In this connection, we would like to recall that the CEDAW Committee recognised gender-based violence as a “form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” in its General Recommendation 19 on violence against women (1992). Furthermore, we would like to highlight paragraph 9, which stipulates that “under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”, as well as paragraph 24 (a) which mentions that “States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act”.

We would like to also refer your Excellency’s Government to the Working Group on the issue of discrimination against women in law and in practice’s report on discrimination against women in cultural and family life (A/HRC/29/40) which highlights that plural legal systems create complex and confusing legal situations and that these systems limit women’s enjoyment of the right to equality in their private and public lives (paragraph 61). It also stated that neither cultural diversity nor freedom of religion may justify discrimination against women (paragraph 17) and that the State has an obligation to punish and to put an end to impunity and excuses or justification that perpetuate gender-based discrimination in cultural and family life (paragraph 69). Furthermore, the Working Group recommended to States parties to bring parallel customary, religious and indigenous law systems into line with international human rights law, particularly in respect of gender equality, and to grant women the right to appeal, in State courts,

decisions of religious, customary or indigenous authorities, whether formal or informal, that have violated their right to equality (paragraph 73 (a) (viii)).

We would like also to refer to the Special Rapporteur on freedom of religion or belief's report on the elimination of all forms of religious intolerance (A/68/290) which states that as a human right, freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls (paragraph 30).

We would like also to highlight CEDAW's Concluding Observations on Malaysia (CEDAW/C/MYS/CO/2), in which the CEDAW Committee already expressed concern about the existence of the dual legal system of civil law and religious law, which resulted in continuing discrimination against women, in particular in the area of marriage and family matters. Therefore, we would like to recall that the CEDAW Committee urged Malaysia to undertake a process of law reform to remove inconsistencies between civil law and Syariah law, including by ensuring that any conflict of law with regard to women's rights to equality and non-discrimination and it encouraged Malaysia to take all necessary steps to increase support for law reform, including through partnerships and collaboration with Islamic jurisprudence research organizations, civil society organizations, women's non-governmental organizations and community leaders.

We would like also to refer your Excellency's Government to the Convention on the Rights of the Child (CRC), ratified by Malaysia on 17 February 1995, which guarantees the best interests of the child as a primary consideration (art.3) and children's right to freedom of thought, conscience and religion (art.14).

We would also like to highlight that the primary responsibility for supporting the child in the exercise of his or her human rights lies on the parents. According to article 5 of the Convention on the Rights of the Child, they should provide "appropriate guidance and direction" to the child in that regard. Article 14, paragraph 2, of the Convention further specifies that general understanding by enshrining due respect for the rights and duties of the parents "to provide direction to the child in the exercise of his or her right" to freedom of religion or belief. Both parents must be able to provide that guidance on an equal footing, without discrimination based on their gender or religion. Article 5 also states that parental guidance must be "consistent with the evolving capacities of the child". The child, once capable of forming personal views, must be given the chance express such views freely. Article 12, paragraph 1, of the Convention requires that the views of the child be "given due weight in accordance with the age and maturity of the child". Thus, the child should in the course of time assume an increasingly active position in the exercise of his or her rights, including freedom of religion or belief.

Furthermore, we would like to refer your Excellency's Government to some Malaysian constitutional and legislative standards relevant to the cases of Ms. [REDACTED] and Ms. [REDACTED], including articles 8 and 11 of the Federal Constitution, which respectively ensure equality and protection of all persons before the law as well as non-discrimination on the ground of gender, and the right to freedom of religion, including for children. We would like also to refer to article 12 which guarantee

that the “[n]o person shall be required to receive instructions in or take part in any ceremony or act of worship of a religion other than his own” (art.12 (3)) and that in light of the preceding statement, “the religion of a person under the age of eighteen years shall be decided by his parent or guardian” (art.12 (4)). Article 12 (4) must be read with Article 160 of the Federal Constitution as well as the Eleventh Schedule of the Federal Constitution which govern the interpretation of the constitutional text. Indeed, the Eleventh Schedule declares that “words in the singular include the plural, and words in the plural include the singular”. Therefore, article 12 (4) should be read as requiring that the religion of a separated couple’s children, defined as a person under eighteen years old, is to be decided by both parents, in cases where both parents are alive. Finally, we would like to refer your Excellency’s Government to the Cabinet directive of 22 April 2009, stating that children of an estranged couple should remain in the religion of the parents at the point of their marriage, in order to avoid unilateral and forced religious conversion of children.