DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANGKUASA RAYUAN)
PERMOHONAN SIVIL NO. 08-690-11/2013

ANTARA

TITULAR ROMAN CATHOLIC ARCHBISHOP OF KUALA LUMPUR **PEMOHON**

DAN

MENTERI DALAM NEGERI & 8 LAGI **RESPONDEN-RESPONDEN**

Outline Submission for the Applicant

1. Introduction: The Leave Questions

.1 The Revised Leave Questions are annexed to this Outline Submission as '*Appendix A*'.

.2 They are based on the legal issues that have arisen from the decision made by the Minister of Home Affairs in the purported exercise of his powers under the Printing Presses and Publications Act, 1984 (the Act) imposing a ban on the use of the word '*Allah*' in one of the publications of the Applicant.

.3 There has been a sharp division of opinion over the legality of the exercise of this power. The High Court struck down the ban by issuing an order of certiorari to quash the decision, and further issued declaratory orders declaring the violation of the Applicants' constitutional rights under

Articles 3, 8, 10, 11 and **12** of the **Federal Constitution** [Tab 1].

.4 The Court of Appeal reversed the High Court and affirmed the Order made by the Home Minister. The learned Judges of the Court of Appeal each gave a separate judgment. The separate judgments have emphasised different aspects of the dispute at hand but have all come to the same conclusion. However there is a difference among the learned judges as to the source of the Minister's power to impose the ban as will be discussed below.

.5 An analysis of the judgment of the High Court and of the judgments of the Court of Appeal show a sharp difference in legal approach as to the Minister's power and the issue of public order; further a difference exists as to the relevant legal principles applicable to the exercise of discretion by the Minister; and of the constitutional safeguards of freedom of expression and freedom of religion.

2. <u>The Issue</u>

In summary, the issue before the High Court and the Court of Appeal was whether the then Minister of Home Affairs had acted in accordance with law under the Act in imposing the ban on the use of the word '*Allah*' in the Bahasa Malaysia edition of the Catholic weekly called '*The Herald*'. In answering this question, the judgments of the High Court and of the Court of Appeal had to

deal with the principles of administrative law and constitutional law pertaining to the issue at hand.

3. Scope of the Application

.1 The present leave application is made under both limbs of **Section 96**, namely, paragraphs **(a)** and **(b)** [Tab 2]. It may be noted immediately that the leave requirements under paragraphs (a) and (b) of Section 96 are significantly different.

.2 Section 96(b) is specific to questions of constitutional law and does not carry the qualifying conditions contained in Section 96(a), namely, of whether it is '*a question of general principle decided for the first time*' or '*a question of importance upon which further argument and a decision of the Federal Court would be to public advantage*'.

.3 Accordingly the requirement to be satisfied under Section 96(b), it is respectfully submitted, is only for the Federal Court to be satisfied that the constitutional questions now posed for consideration arose in the courts below.

.6 It follows that the Part A and C Questions will fall under Section 96(a), and the Part B Questions under Section 96(b).

.7 As regards the Section 96(a) requirements and the guidelines provided by the **Terengganu Forest Products** [Tab 3] case (2011) 1 CLJ 51, it is respectfully submitted that as a general

proposition the conditions are met in the following respects in the present case. Firstly, the decision of the High Court was reversed by the Court of Appeal, and therefore a difference of opinion exists at the two levels as to the legality of the Minister's action, calling for the Federal Court as the apex court to settle the issue.

.8 Secondly, the issues raised in these proceedings are of general public importance as reflected in the wide publicity and commentary engendered by the decision of the Court of Appeal both domestically and internationally. It follows that it will be to public advantage for the Federal Court to decide authoritatively on the issues at hand which are discussed below.

.9 Meanwhile it should also be noted that the 1st and 2nd Respondents did not oppose the Leave application for judicial review in the High Court. It will be inconsistent for them to now oppose the Leave application for a final determination of the dispute by the Federal Court.

4. The Ambiguity Created by the Judgments of the Court of Appeal

.1 There is considerable ambiguity today over the scope of the Court of Appeal judgments. The Minister's order was directed as a prohibition only against the use of the word '*Allah*' in the Bahasa Malaysia edition of the Herald. It made no reference to the use of the word in the Al-Kitab (the

Bahasa Malaysia version of the Bible) or the Indonesian Bible or in publications like the Bup Kudus (the Iban Bible) or the Al-Kitab Berita Baik or the use of the word in the worship services by Bumiputra Christians in East and West Malaysia or Bahasa Malaysia-speaking Christians in Peninsular Malaysia. However, the terms of the judgments of the Court of Appeal and the reasoning applied by the Court seemed to have sanctioned a general prohibition against the use of the word '*Allah*' by members of the Christian community in Malaysia for their religious purposes. This stems from the holding by all three judgments, but largely adopting the reasoning of Mohd Zawawi Salleh JCA that the use of the word '*Allah*' is not an essential and integral part of the Christian faith and would not therefore enjoy the protection of Article 11(1) and (3) of the Federal Constitution.

.2 This conclusion has had a widespread ramification creating uncertainty and disquiet especially in the Bumiputra Christian community of East Malaysia and the Bahasa Malaysia speaking Christian congregations in West Malaysia. The Bumiputra Christian community of Sabah and Sarawak constitute 64% of the Christian population of Malaysia. The word '*Allah*' has for centuries been used by them in their worship services and liturgy. It is the word used to describe '*God*' in the Iban Bible called the Bup Kudus.

.3 In his Affidavit in support of the Motion herein, Archbishop Datuk Bolly Anak Lapok of Kuching, Sarawak, and the current Chairman of the Association of Churches Sarawak, has deposed of his own knowledge of the consequences of the Court of Appeal judgments as follows:

(i) The finding of the Court of Appeal that the word '*Allah*' is not an integral part of the faith and practice of Christianity affects the rights of 1.6 million Bumiputra Christians in Sabah and Sarawak who use Bahasa Malaysia and their own native tongues as the medium to profess and practice their Christian faith;

(ii) The word '*Allah*' as referring to God has always, continuously and consistently been used by these Bumiputra Christians in all aspects of the Christian faith including all forms of religious services, prayers, worship and religious education and there is irrefutable historical evidence in support of this.

(iii) The finding of the Court of Appeal has emboldened certain Muslim religious authorities to seize copies of the Al-Kitab Berita Baik and the Bup Kudus the Bible in the Iban language (in which the word '*Allah*' is used) which were specifically imported into Malaysia for the use of these Bumipura Christians thereby jeopardizing their inalienable rights to complete religious freedom as guaranteed under the Malaysia Agreement and the Federal Constitution.

.4 In his Further Affidavit Tan Sri Murphy Pakiam, the present holder of the office of Titular Roman Catholic Archbishop of Kuala Lumpur, has deposed as to the divergent interpretations given in public of the decision of the Court of Appeal as follows:

(i) Whether the judgment prohibits the use of the word '*Allah*' only in '*Herald – The Catholic Weekly*';

(ii) Whether the prohibition on the use of the word '*Allah*' is only applicable to non-Muslims in Peninsula Malaysia as opposed to Sabah and Sarawak; or

(iii) Whether the judgment had imposed a nation-wide prohibition on all non-Muslims on the use of the word '*Allah*'.

.5 In proof of the confusion and uncertainty created by the Court of Appeal Judgments on the scope of the ban, the Applicant has listed in Para. 5 of his Affidavit, the various contradictory public statements made by high officials in the newspapers on their understanding of the scope of the ban. Counsel will make reference to these statements at the hearing.

.6 It is respectfully submitted that the general prohibition imposed by the Judgments of the Court of Appeal has raised an issue of public importance within the meaning of Section

96(a). It impacts directly on the right of practice of their religion by the Christian community in Malaysia. It is therefore of public importance and in the interests of the nation that the apex court reviews the judgments of the Court of Malaysia for their correctness in every aspect including the scope of the prohibition.

5. Public Importance and the International Focus on the Judgments of the Court of Appeal

.1 It is a fact that since the pronouncement of the judgments by the Court of Appeal on 14.10.2013 there has been considerable international focus and commentary on the ban sanctioned by the Court of Appeal. Many of the comments have come from international Muslim scholars themselves. Most of them have been skeptical if not critical of the Court of Appeal's holding that the word '*Allah*' could enjoy exclusivity to any single religious community. These comments and criticisms continue up to today.

.2 However of greater significance is the disquiet expressed by international bodies and by United Nations high officials of the implication of the Court of Appeal Judgment on minority religious rights in Malaysia.

.3 It is a fact that apart from the usage of the word by the Bumiputra Christian community in East Malaysia, and the Bahasa speaking Christian community of West Malaysia, the word '*Allah*' appears 37 times in the Sikh Holy Book called

the '*Granth Sahib*' and used daily in the liturgical recitals of the Bahai community. Hence, the impact of the decision on minority religions.

.4 Accordingly, high officials from the United Nations comprising the United Nations Special Rapporteur on Religious Freedom, Mr. Heiner Bielfeldt, and the UN Expert on Minority Issues, Ms. Rita Izsak, and the UN Rapporteur on Freedom of Expression Mr. Frank La Rue, have expressed their disquiet on the status of religious minority rights in Malaysia as a result of the Court of Appeal Judgments. Their comments have been officially published in the UN Human Rights website on 25.11.2013, shortly after the judgments were delivered by the Court of Appeal. A copy of the Report is exhibited as Exb. MP-4 to the Further Affidavit of Archbishop Tan Sri Murphy Pakiam.

.5 It is respectfully submitted that the spotlight on the Court of Appeal Judgment by the relevant bodies of the UN, and by other international commentators, demonstrates the public importance of this case domestically and internationally.

.6 It also provides a compelling reason for the Federal Court as the apex court of the country to review the Court of Appeal's judgments for their correctness both as to principle and scope. In this regard the following points bear significance:

(i) a case of this importance with widespread domestic and international interest should ultimately be decided by the country's apex court;

(ii) the Federal Court is the country's constitutional court as seen in Article 128(2) and Article 130 of the Federal Constitution, and should therefore have the opportunity to express its opinion on the grave constitutional issues raised in this case; and

(iii) the Federal Court is established as the final apex court for all Malaysians to safeguard and protect their rights under the Federal Constitution. In cases where minority rights are alleged to be violated the injured minority group should be able to turn to the Federal Court to ultimately adjudicate on its complaint. In this respect, we may look to the assurance given by one of Malaysia's greatest judges Tun Suffian in his Braddell Memorial Lecture in Singapore in 1982 when he observed as follows:

> *'In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion – so that nobody reading our judgment with our name deleted could with confidence identify our race or religion, and* ***so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot.****'*

(Published in '**The Consitution of Malaysia Ed. F.A. Trindade & HP Lee** (1986 Edition) [Tab 4] at pp. 212-235 at 216.

6. The Part A Questions

.1 At the outset it should be noted that there seems uncertainty from the judgments of the Court of Appeal as to the source of the Minister's power to impose the ban. Contrary to the submissions of the learned Federal Counsel in the High Court that the power arose from **Section 26** [Tab 5] of the Act, the High Court had held that the power is reposed in **Section 12** [Tab 5].

.2 At the Court of Appeal, one of the learned Judges, Abdul Aziz JCA also held the power is to be found in Section 12 together with the Form B conditions (see at pp. 587 to 591 of Motion Papers at [14], [20] and [21]). However, in the judgment of Mohd Apandi Ali JCA (as he then was) the reliance seems to be on Section 26, or the implied power under the Interpretation Act 1967 as the source of the power, namely, Section 40 (see pp. 558-561 of Motion Papers).

.3 The Minister was himself silent in imposing the ban by his letter of 7.1.2009 as to the provision of law under which he acted (see p. 316 of Motion Papers). At the outset the source of the Minister's power to impose a ban on the use of a word by a religious body should be clearly settled by the Federal Court.

.4 The Part A Questions generally address the following issues which arise from the judgments of the Court of Appeal:

(1) that the Wednesbury test requires the Minister to have considered materials on which the Minister could reasonably have acted and with due regard to proportionality and the object to be achieved.

(2) the mere assertion by the Minister that it is a public order or national security issue would be insufficient.

(3) the doctrine of absolute discretion is not recognised in administrative law.

(4) the subjective/objective test as a fusion is a contradiction in terms.

(5) '*public order*' has to be assessed objectively.

(6) the test is not whether the Minister acted in good faith but whether he acted reasonably.

.5 It is proposed to address the above issues collectively but identifying them separately where the need arises.

.6 A starting point is the '*absolute discretion*' concept that found acceptance in the judgments of two of the learned Judges, namely, Mohd. Apandi Ali JCA at p. 553 in invoking

Section 6 of the Act and Abdul Aziz JCA at p. 586 [13] and p. 598 [31].

.7 It is respectfully submitted that absolute discretion is today an anachronistic concept. All discretionary power is today subject to review and the concept of an unlimited discretion has long been discarded: see the well-known **Sri Lempah** case (1979) 1 MLJ 135 [Tab 6] at 148; please also see Edgar Joseph FCJ in **Menteri Sumber Manusia** v. **Association of Banks** (1999) 2 MLJ 337 [Tab 7] at 359F: '*... the idea of absolute discretion or unfettered discretion has no place in public law*'.

.8 An equally discarded concept is the old refrain that judicial review is only concerned with the decision-making process and not the decision itself. This is the pre-Ramachandran law (see **R. Ramachandran** v. **Industrial Court** (1997) 1 CLJ 147) [Tab 8] before its abandonment by the Federal Court. The current law is that determination of the reasonableness of a decision by a public authority permits review for substance as well as process. Please see recent judgments of the Court of Appeal in **Datuk Justin Jinggut** v. **Pendaftar Pertubuhan** (2012) 1 CLJ 825 [Tab 9] at [54] ('*scrutinise the authority's decision not only for process but also for substance*'), and the Federal Court in **Ranjit Kaur** v. **Hotel Excelsior** (2010) 8 CLJ 629 [Tab 10] at [15]: ('*the distinction between review and appeal no longer holds*').

.9 It is puzzling therefore to see the Court of Appeal resort to the old approach that limits review only to process: see judgments of Mohd Apandi Ali JCA at p. 543 [47] and Abdul Aziz JCA at p. 586 [12] where the reliance is on the pre-Ramachandran cases like the **Harpers Trading** case (1991) 1 MLJ 471[Tab11].

.10 As seen, the approach of the Court of Appeal on this subject is at variance with the other decisions of the Court of Appeal (as cited) on judicial review and therefore calls for a re-look at the question by the Federal Court.

.11 A related issue is whether the Minister's mere declaration that he acted on public order or national security grounds precludes review or whether the court has to be satisfied as to the reasonableness of this concern and of the materials on which he acted.

.12 The Court of Appeal judgments take the position that review is precluded. For example Abdul Aziz JCA seems to conclude that the mere declaration by the Minister that he acted on public order grounds is sufficient, and further that the absence of material before the courts is not significant given that there is no assertion that the Minister acted *mala fide*: see at p. 595-96 [26-28] and p. 601-602 [37-38]. It should be noted that administrative law makes a distinction between an unreasonable decision and a decision made in bad faith: see the **Wednesbury** [Tab12] case itself at p. 682.

.13 It is doubtful if it is any longer correct to hold that the mere assertion of public order or national security grounds by the relevant Minister precludes review. The case cited, namely, **Council of Civil Service Unions** v. **Minister** (1985) 1 AC 374 [Tab13] does not stand for this proposition: see **R** v. **S of S Exp. Brind** (1991) 1 AC 696 [Tab14] and the judgment of Abdoolcader SCJ in **JP Berthelsen** v. **DG Immigration** (1987) 1 MLJ 134 [Tab15] at 138 '*no reliance can be placed on a mere ipse dixit of the first respondent (the Director General)*'.

.14 It is further doubtful if the failure to depose as to the matters considered by the Minister or of materials relied on by him can be excused. In **JP Berthelsen**'s case, supra, the then Supreme Court observed that '*in any event adequate evidence from responsible and authoritative sources would be necessary*' (p. 138).

.15 The approach of the Court of Appeal is again at variance with an earlier decision of the Court of Appeal involving also a decision taken under the Printing Presses Act on alleged public order grounds. In **Dato' Syed Hamid Albar** v. **Sisters in Islam** (2012) 9 CLJ 297 [Tab16], in lifting the ban on a book said to cause '*confusion*' in the minds of women in the Muslim community, the Court of Appeal noted that '*no evidence of actual prejudice to public order was produced*' (at [19], and that the book had been in circulation for 2 years before the ban.

.16 These two decisions of the Court of Appeal close to each other and being decisions on public order grounds under the same Act are difficult to reconcile. It calls for the intervention of the Federal Court to settle the law on this subject.

.17 Today, developments in administrative law have recognised that where fundamental rights are allegedly violated by ministerial or executive orders the courts are obliged to engage in '*a closer or heightened scrutiny*' of the reasonableness of the decision on Wednesbury grounds or independent of it: see **Exp Smith** (1996) QB 517 [Tab17], 538; **R (Mahmood)** v. **S of S Home Department** (2001) 1 WLR 840 [Tab18]; and **R (Daly)** v. **S of S Home Department** (2001) 2 AC 532 [Tab19]. In the last case, Lord Steyn observed (p. 548):

> '*In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.*'

.18 In contrast, the Court of Appeal in the present case has approached scrutiny on a different footing altogether. The test applied by the Court of Appeal to determine Wednesbury reasonableness was '*subjectively objective*' per Apandi Ali JCA at p. 562 [29]. The term '*subjectively objective*' is a contradiction in terms as it incorporates two concepts that cancel out each other. Later in the judgment,

the learned Judge opted for the '*subjective test*' as the applicable test under the Printing Presses Act: see p. 574 [49].

.19 The '*subjective test*' was also endorsed by Abdul Aziz JCA in his judgment at p. 602 [39].

.20 It is highly doubtful if the '*subjective test*' is the correct test any longer in these matters. The reliance on cases like **Karam Singh** v. **Menteri** (1969) 2 MLJ 129 [Tab 20] relying on **Liversidge** v. **Anderson** (1942) AC 206 [Tab 21] is out-of-date. In like preventive detention cases, the Federal Court in **Mohd Ezam** v. **Ketua Polis Negara** (2002) 4 MLJ 449 [Tab 22], has opted for the objective test. See also Federal Court in **Darma Suria** v. **Menteri Dalam Negri** (2010) 1 CLJ 300 [Tab 23]. See also the Singapore Court of Appeal decision in **Chng Suan Tze** v. **Minister of Home Affairs** (1989) 1 MLJ 69 [Tab 24] which likewise adopted the objective test.

.21 The proposition that there could be a '*fusion*' of the 2 tests at the same time is altogether a new approach: see the earlier Court of Appeal decision in **Arumugam** v. **Menteri Keselamatan** (2013) 5 MLJ 174 [Tab 25]. It has no support in case-law anywhere to the best of our knowledge.

.22 It is respectfully submitted that it is appropriate that the Federal Court intervene in this issue to resolve the prevailing confusion as to whether, at least as regards the Minister's

decision under the Printing Presses Act, the applicable test is the subjective test or the objective test or a fusion of the two.

.23 A further issue is the reliance by the Court of Appeal on post-judgment occurrences of disturbance or disorder to justify the ban: see judgment of Abdul Aziz JCA at p. 602 [38-39].

.24 It is doubtful if this approach is legally justifiable. Judicial review is concerned with the reasonableness of the decision at the time of the decision. It must surely be based on facts, information and materials available to the decision-maker at the time of decision: see **Hong Leong Equipment** v. **Liew** (1996) 1 MLJ 481 [Tab 26] at 555.

.25 In this regard it does not matter if the test is objective, subjective or a fusion of the two because an ex-post facto justification based on subsequent events is unprecedented in judicial review cases.

.26 A further issue has been the determining factors of the reasonableness of the Minister's decision. It has been a consistent issue in this case. There is a difference between a prohibition and a restraint. It is a matter of proportionality, and whether the principle of maintaining a balance between competing interests was at all considered by the Minister. In this regard the question always is whether the measure is disproportionate to the objective sought to be achieved.

.27 The Court of Appeal in this case failed to consider the proportionality issue unlike earlier cases in the Court of Appeal where proportionality was the decisive factor in determining the reasonableness of the decision: see for example, **Justin Jinggut** v. **Pendaftar Pertubuhan** (2012) 1 CLJ 825 [Tab 9] involving deregistering a society; **Md Hilman** v. **Kerajaan Malaysia** (2011) 9 CLJ 50 [Tab 27] imposing a ban on political activities by students.

.28 There is no reason why the Court of Appeal took a different approach in the present case. The departure from the approach taken by the Court of Appeal in previous cases calls for review by the Federal Court as to whether there is a suggested change in the law.

.29 Further the failure of the Court of Appeal to maintain a proper balance between competing interests is also seen in the way it handled the '*public order*' and '*confusion*' issue. It does not reflect the measured approach taken by our courts in previous cases where there was a determination by the courts as to whether the ground proferred by the Minister could legitimately be a '*public order*' ground. See for example, **Minister for Home Affairs** v. **Jamaluddin** (1989) 1 MLJ 418 [Tab 28] where it involved the alleged conversion of 6 Muslims; or **Sisters in Islam** v. **Syed Hamid Albar** (2010) 2 MLJ 377 [Tab 29] at 392-93, where Mohd Arif J (as he then was) and later the Court of Appeal rejected the '*confusion*' argument as a '*public order*' issue saying that JAKIM's views on '*confusion*' do not bind the

Minister who has to make his own appraisal under the Act. The judgment was affirmed by the Court of Appeal **(2012) 9 CLJ 297** [Tab 16].

.30 There is no justifiable reason why the Court of Appeal could not likewise have taken a balanced approach in our case. The divergence in approach by the Court of Appeal in cases nearly similar to each other involving prohibitory orders imposed under the same Act calls for intervention by the Federal Court to determine the correct approach and the correct test to be applied.

.31 For all the above reasons, we pray for the Part A Questions to be admitted as adequately meeting the test under Section 96(a).

7. <u>The Part B Questions</u>

.1 At the outset we wish to respectfully state that the constitutional questions posed herein would fall under Section 96(b) of the CJA 1964. In the result, as stated previously, the Court need only be satisfied that the constitutional law questions posed by this application arose for consideration in the courts below.

.2 In this regard, it may be noted that the scope and effect of Articles 3, 10, 11 and 12 of the Federal Constitution fell for detailed consideration both in the High Court and in the Judgments of the Court of Appeal. In fact they formed the

subject matter of the declaratory orders issued by the High Court which were subsequently set aside by the Court of Appeal.

The Article 3 Questions: Questions 1 to 6

.3 It is respectfully submitted that a central issue in this case has been the scope and reach of Article 3(1). Accordingly this case provides an excellent opportunity for our apex court to review the scope and application of Article 3(1) and Article 3(4) of the Federal Constitution in religious freedom cases that have come before our courts and their impact on fundamental liberties in Articles 5 to 13.

.4 It is apparent that the basis which underpins the decision of the Court of Appeal hangs on the scope of Article 3(1). This can be seen from inter alia the following passages in the judgments of the Court of Appeal.

Judgment of Mohd Apandi Ali JCA (as he then was)

At paragraph [36]:

> *"Freedom of religion, under art 11(1), as explained above is subjected to art 11(4) and is to be read with art 3(1)."*

At paragraph [42]:

> *"Such publication will surely have an adverse effect upon the sanctity as envisaged under art 3(1) and the right for other religions to be practiced in peace and harmony in any part of the Federation."*

Judgment of Abdul Aziz JCA

At paragraph [104]:

> *"I would add however that the position of Islam as the religion of the Federation, to my mind imposes certain obligation on the power that be to promote and defend Islam as well to protect its sanctity."*

.5 In his judgment, Mohd Apandi JCA has sought to give Article 3(1) a position of precedence to be ranked higher in importance to the articles that follow after it. The learned judge at paragraph 31 of the judgment said:

> *"The article places the religion of Islam at par with the other basic structures of the Constitution, as it is the third in the order of precedence of the articles that were within the confines of Part I of the Constitution. It is pertinent to note that the fundamental liberties articles were grouped together subsequently under Part II of the Constitution."*

.6 It is respectfully submitted that this reasoning based on the order in which the provisions of a written constitution appear in the document is without precedence and not a recognised canon of interpreting a written constitution.

Article 3(1) and Article 3(4)

.7 We propose to deal with Article 3(4) first. The failure of the Court of Appeal to consider so important a constitutional provision as contained in Article 3(4) whilst giving

considerable emphasis on Article 3(1) undermines the basis of the Court of Appeal's interpretation on the scope and effect of Article 3(1). Article 3(4) reads as follows:-

> *"(4) Nothing in this Article derogates from any other provision of this Constitution*."

The term "*derogate*" is defined by the **Oxford English Dictionary** [Tab 30] to mean "*to repeal in part, to take away or impair the force and effect of; to lessen the extent or authority*." The plain sense therefore of Article 3 (4) is that the scope of the declaration in Article 3(1) cannot impair, abrogate or destroy the significance of any of the other articles.

.8 Unfortunately Article 3(4) has often been overlooked in the decisions of our courts which have applied Article 3(1) in isolation. This has prompted Richard Malanjum CJ (Sabah and Sarawak) to record his observation in this respect in **Lina Joy** lwn **Majlis Agama Islam Wilayah Persekutuan dan lain-lain** [2007] 4 MLJ 585 [Tab 31] at page 623. The learned CJ (Sabah and Sarawak) has this to say:

> *"I therefore begin by restating some well-entrenched legal principles which may seem obvious to many yet* ***often overlooked****."*

The learned CJ (Sabah and Sarawak) explains the effect of Article 3(4) as follows (pp. 623-624):

> *"Article 3(1) of the Constitution placed Islam in a special position in this country. However, art 3(4) clearly provides that nothing in the Article derogates from any other provision of the Constitution thereby implying that art 3(1) was never intended to override any right, privilege or power explicitly conferred by the Constitution (see Che Omar bin Che Soh v Public Prosecutor). Indeed this is consonant with art 4 of the Constitution which places beyond doubt that the Constitution is the supreme law of this country. Article 4 therefore is abundantly clear. It follows that to be valid all laws whether federal or state legislation of any kind and whether they are pre or post merdeka must be in conformity with the provisions of the Constitution including those dealing with fundamental liberties."*

.9 It is respectfully submitted that the Court of Appeal's ruling that "*freedom of religion, under art 11(1), as explained above is subjected to art 11(4) and is to be read with art 3(1)*" is wholly inconsistent with the assurance contained in Article 3(4).

.10 It should be noted that Article 3(1) does not read: "*... and other religions may be practiced in peace so long as it is in harmony with Islamic precepts and doctrines*.". With great respect, the judgment of the Court of Appeal achieves this result. In his book "**Document of Destiny: The Constitution of the Federation of Malaysia**" [Tab 32], Professor Shad Saleem Faruqi made the following comment at p. 147:

> ***"On the existing provisions of the Constitution, Malaysia is not a theocratic, Islamic state. But a***

wide gap has developed between theory and judicial practice. A silent re-writing of the Constitution is taking place."

.11 The vital question therefore for consideration by the Federal Court is whether the reading of Article 3(1) to the exclusion of Article 3(4) distorts its true meaning and scope.

The Historical Constitutional Preparatory Documents

.12 The historical constitutional preparatory documents state that although Islam will be the official religion this will not affect Malaya and later Malaysia being a secular state. Article 3(1) concurrently provides assurance that notwithstanding the official position given to Islam, non-Muslims are free to practice their religion in peace and harmony. This assurance is reinforced by Article 3(4) and Articles 11 and 12 which set out the constitutional guarantee of freedom of religion to all persons and autonomy of religious groups to manage their religious affairs.

.13 In **Teoh Eng Huat** v **Kadhi Pasir Mas** [1990] 2 MLJ 301 [Tab 33], the Supreme Court considered the constitutional preparatory documents in order to discover the intention of the framers of the Constitution. There was recognition of the comprehensive work done by the Reid Report. The Supreme Court said (p. 301):

> *"The Malaysian Constitution was not a product of overnight thought but the brainchild of constitutional and administrative experts from UK, Australia, India and West Pakistan, known commonly as the Reid Commission… Prior to the finding of the Commission, there were negotiations, discussion and consensus between the British government, the Malay Rulers and the Alliance party representing various racial and religious groups."*

On religion, the Supreme Court specifically reproduced para 169 of the Reid Report which mentions the memoranda of the Alliance Party requesting for the insertion of Islam as the religion of Malaya. Para 169 stated as follows:-

> *"We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision was inserted it must be made clear that it would not in any affect the civil rights of non-Muslim. In the memorandum submitted by the Alliance it was stated:*
>
> *"the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals…"*

14 The **White Paper on the Constitutional Proposal for the Federation of Malaya (Legislative Council Paper No. 41 of 1957)** [Tab 34] tabled in the Legislative Council reaffirmed the continuance of the secular basis of the Federation notwithstanding the provision that Islam is the religion of the Federation in the following terms (Page 20 paragraph 57):

> *"There has been included in the proposed Federal Constitution that Islam is the religion of the Federation. This will no way affect the present position of the Federation as a Secular State…"*

.15 Later, at the formation of Malaysia in 1963, the role of Islam became the subject of discussions as to the terms on which Sabah and Sarawak were considering joining the Federation of Malaya. This is documented in the **Report of the Commission of Enquiry, North Borneo and Sarawak, 1962** [Tab 35], (commonly referred to as the Cobbold Commission). The corresponding Government of North Borneo Paper annexed to the Cobbold Commission Report states:

> *"The deliberations of the Consultative Committee have done much to clarify the position of religion in Malaysia. Islam is the official religion of the Federation of Malaya. Although Malaysia would have Islam as the official religion of the enlarged Federation no hindrance would be placed on the practice of other religions. Complete freedom of religion would be guaranteed in the Federal Constitution. North Borneo, which at present has no established religion would not be required to accept Islam as its State religion."*

This is now part of the **20 Point Agreement** [Tab 36] between the Borneo states and the Federation of Malaysia.

.16 Finally, useful reference may be made to the following passage in **Che Omar bin Che Soh** v. **PP** [1988] 2 MLJ 55 [Tab 37] at p. 56:

> *"The question here is this: Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century"*
>
> *...*
>
> *"In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter."*

.17 It is obvious that the judgment in the Court of Appeal failed to have regard to the decision of the Supreme Court in **Che Omar bin Che Soh** v **Public Prosecutor** [Tab 37] which is binding upon it.

.18 It is patently clear from the above that Article 3(1) is merely declaratory of the position of Islam as the official religion of Malaysia. It does not confer executive powers to the state. Article 3(1) carries in it as a protection for the non-Muslims that they may practice their religion in peace and harmony.

.19 Further the Court of Appeal found that the purpose and intention of the words "*in peace and harmony*" was to protect the sanctity of Islam as the religion of the county and to insulate it against any threat. With respect, this would not

be a natural reading of the provisions in Article 3(1). The words in their clear and ordinary meaning provides for the right of other religions to be practiced unhindered and without interference.

.20 In the result, it is respectfully submitted that the issues raised above involve important questions as to the true position of the state religion and of its impact on the other provisions of the Federal Constitution. The scope and reach of Article 3 is a fundamental question and it is appropriate that Questions 1 to 6 be admitted for full consideration by the Federal Court.

Part B: Questions 7 to 13 Relating to Article 11

.21 The Court of Appeal adopted the wrong test in arriving at its decision. The essential and integral part of the religion test is not the exclusive test.

.22 Mohd Zawawi Salleh JCA referred to several Indian authorities and applied the decision of the Court of Appeal in **Fatimah bte Sihi & Ors** v. **Meor Atiqulrahman bin Ishak & Ors** [2005] 2 MLJ 25 [Tab 38] ("MeorAtiqulrahman")

.23 The learned Judge ought to have instead applied the decision of the Federal Court in the same case reported in [2006] 4 MLJ 605. The Federal Court in **Meor Atiqulrahman** [Tab 39] held that the "integral part of a religion is not the only factor that should be considered". Abdul Hamid Mohamad

FCJ (as he then was) speaking for the Federal Court said (pp. 610-611):

> "*I must stress here that, we are only concerned with the words 'practice his religion'. There is no doubt that the 'integral part of the religion' approach has its merits. ... However, in my view, that test has its demerits too, because it would lead to the following results ... On the other hand, if the practice is not an integral part of a religion, it can even be prohibited completely. ...*
> ***I am therefore of the view that whether a practice is or is not an integral part of a religion is not the only factor that should be considered***. *Other factors are equally important in considering whether a particular law or regulation is constitutional or not under Art 11(1) of the Federal Constitution. I would therefore prefer the following approach. First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion. All these having been proved, the court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is of a compulsory nature or 'an integral part' of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it.*" ……
>
> *The next step is to look at the extent or seriousness of the prohibition. A total prohibition certainly should be viewed more seriously than a partial or temporary prohibition. ...*
>
> *In other words, in my view, all these factors should be considered in determining whether the 'limitation' or 'prohibition' of a practice of a religion is constitutional or unconstitutional under Art 11(1) of the federal Constitution.*"

.24 Two learned authors have commented on the Court of Appeal's reliance on the essential and integral part of the religion test. Professor Shad Saleem Faruqi in his article "**Storm in a Teacup**" **STAR 23.1.2014** [Tab 40] expressed the following view:

> "*A line of court decisions including Halimatussaadiah and Herald cases imply that freedom of religion is restricted to essential and integral part of the religion.* ***Surely this is not so***. ***Whatever is permitted, even if not mandated, is a fundamental right***"

Professor Andrew Harding in his article "**Language, Religion & the Law: A Brief Comment On the Court of Appeal's Judgment In The Case of the Titular Roman Catholic Archbishop of Kuala Lumpur**" in Praxis - Chronicle of the Malaysia Bar Oct - Dec 2013 [Tab 41] made this observation at page 14:-

> "*Here one questions why freedom of religion means freedom to practise religion only in ways that are an essential part of that faith.* ***Should the right question not rather be whether there is any consideration that prevents a person from practicing their religion in the way they think fit****?*"

.25 It may be noted that the judicial decisions which have applied the essential and integral part of the religion test are limited to their factual circumstances. These cases primarily involve the assertion of an impugned religious practice in the public sphere. Such religious practice if permitted would

interfere with the right of other persons. Take for instance, the case of the **Commissioner of Police and Ors** v **Archaya Jagadishwarananda and Anor** [2004] 12 SCC 770 [Tab 42]. A religious sect wanted to perform a religious dance with skulls and knives on the street of Calcutta. It is obvious that such dance by a group of people on a public street would be obstructive and intimidative.

.26 In **Hjh Halimatussaadiah bte Hj Kamaruddin** v **Public Services Commission of Malaysia** [1994] 3 MLJ 61 [Tab 43], the Supreme Court rejected a challenge by a dismissed civil servant against the government's regulation prohibiting its staff from wearing a headdress that cover the entire face except the eyes. The clear mischief underlying the government's regulation is to avoid confusion in the identity of the public servant whilst on duty in a public sphere. Such duty may include receiving and having access to records and information of the government and from the public. The regulation is intended for public protection.

.27 In the present case, the circulation of the Herald is confined to the Catholic Church, a private place and amongst Christians only and not to the public at large. As such the rights of others are not interfered with. It is therefore submitted that the essential and integral part of the religion test is irrelevant in the present case. It is further submitted that subject to Article 11(5), a religious community is

entitled to worship, pray and communicate to each other on matters of <u>their own religion</u> in complete freedom.

.28 The fact that the Herald has gone on-line is immaterial. That a Muslim may access the website containing the Malay section of the Herald cannot be a basis to deny the Applicant and its members their constitutional right. By analogy, the fact that a Muslim may decide to walk into a temple or a church during services cannot possibly be a ground to prohibit worship conducted in temples or churches. The church can only be responsible for its own conduct. It cannot be held responsible for nor should its constitutional rights be diminished by the conduct of others.

.29 In **<u>Meor Atiqulrahman</u>**, the Federal Court dealt with a litigant who wished to carry out a religious practice in the public sphere. The present case involves a religious practice carried out in a private place and amongst the persons of the religious group.

.30 It is respectfully submitted that any restriction on religious practice is limited to the grounds in <u>Article 11(5)</u>. A decision of the Federal Court is this regard would be of great utility.

.31 In this respect, the Applicant nevertheless maintains that the usage of the word '*Allah*' as a translation for '*God*' is an essential and integral part of the religion for the Bahasa Malaysia speaking Christians.

.32 Reference may be made to the historical evidence given in the affidavit of the Applicant on the usage of '*Allah*' in the Malay translation of Christian religious materials dating back to several centuries and of its common usage locally and overseas. See Paras. 144-149 of Motion Papers.

.33 In this regard it may be noted that the Minister in his Affidavit In Reply made a general and bare denial of the detailed evidence of the Applicant. A general and bare traverse without condescending to specifics is insufficient.

.34 In his judgment Mohd Zawawi Salleh JCA acknowledged that the "debate does not exist for Arabic speaking Christians who had continually translated '*Elohim*' and '*Theos*' (the primary terms for '*God*' in Biblical Hebrew and Greek) as '*Allah*' from the earlier known Arabic Bible translations in the eighth century till today". The same reasoning applies to the Bahasa Malaysia speaking Christians who have adopted the Arabic translation.

.35 It is respectfully submitted that it is not the judicial function of the Court to determine whether the translation of the word '*Allah*' for '*God*' is correct or not. That is not the function of the Court. Please see **United States** v **Ballard** (1943) 88 L Ed 1148 [Tab 44]. Nevertheless in his judgment Mohd Apandi Ali JCA has concluded that '*Allah*' is not the proper

translation for '*God*': see pages 574 - 575 of the Motion Papers.

.36 Arising from the above, it is respectfully submitted that this controversy is suitable for full consideration and determination by the Federal Court.

The Public Order Issue

.37 On this point we wish to quote Professor Andrew Harding in his article (see "**Language, Religion & the Law: A Brief Comment On the Court of Appeal's Judgment In The Case of the Titular Roman Catholic Archbishop of Kuala Lumpur**") [Tab 41] where he puts it very concisely at page 14 as follows:-

> "*As we have seen, propagation is an issue which simply does not arise on the facts. And yet the Court states that 'it is reasonable to conclude that the intended usage will cause unnecessary confusion within the Islamic community and is surely not conducive to the peaceful and harmonious tempo of life in the country'. One remains baffled by the idea that a Catholic speaking to each other about God could impinge upon the sanctity of Islam, cause confusion, or be a threat of any kind to anybody, let alone to national security*".

.38 There has been no untoward incident (i) for 14 continuous years since the publication of the Herald; (ii) in East Malaysia where the word '*Allah*' is mostly used and (iii) in all other Islamic countries.

.39 In any case, the 10 Point Solution which was agreed to by the Government of Malaysia in April 2011 completely negates any suggestion that the Minister could conceivably have thought that the usage of the word '*Allah*' constitutes a threat to national security.

.40 In fact, the 10 Point Solution follows the exemption P.U.(A) 134/82 under the Internal Security Act in which the government has permitted the Al Kitab to be used by Christians in churches.

.41 The Herald which is a Church publication quotes the Al Kitab which is the primary source. It is not at liberty to alter the words 'Allah' for '*God*' in the Bahasa translation.

.42 Finally as regards '*public order*' it is doubtful if the '*salus populi*' maxim can be invoked. This maxim cannot exist outside the terms of a written constitution, like the Federal Constitution, and cannot override recognised rights under the Constitution which are enumerated.

.43 The Minister has therefore misconstrued his powers to act on public order grounds under the Act. This point is suitable for review by the Federal Court.

The Article 11(1) and 11(3) Rights

.44 The prohibition in the use of the word '*Allah*' for '*God*' in the Herald has a direct effect on the qualitative right of a Bahasa Malaysia speaking Christian under Article 11(1) as he is denied a right based on long established usage. There are thousands of East Malaysian Christians residing and working in West Malaysia today. The reason for the Bahasa section in the Herald is because of migration factor and not propagation to Muslims as perceived by certain quarters.

.45 Case-law on the meaning of "*matters of religion*" would show that courts would not decide on the details or components of a religion practice e.g. what persons are entitled to enter a temple, where they are entitled to stand and worship, how worship is to be conducted, etc. Please see **The Constitution of India A.I.R. Commentaries** [Tab 45] at page 457. At page 473 of this Commentaries it is stated the right '*to maintain*' implies the right to continue the institution according to the established usage, to carry on the worship and to make it function in the manner in which it has been functioning according to long established usage.

.46 It follows that on matters of religion the religious organization enjoys complete autonomy. Please see **The Commissioner, Hindu Religious Endowment Madras** vs **Sri Lakshmindra** A.I.R. 1954 S.C. 282 [Tab 46] at page 291. Article 11(3)(a) confers the right to the Catholic church

to decide on the choice of words to be used in its liturgy, religious practices and publications.

.47 The question therefore is whether the decision of the Minister had also infringed the right of the Catholic church to manage its religious affairs.

.48 For all the above reasons it is respectfully submitted that this is an eminent case for leave under Section 96(b) of the Courts of Judicature Act 1964.

8. The Part C Questions

.1 The Part C Questions deal with the appropriateness of a court of law discussing theological questions, and undertaking *suo moto* internet research for this purpose, and the legal implications of basing its judgment on the internet research materials without reference to counsel for their comment.

.2 It is acknowledged that there are certain areas that a court of law would not venture or adjudicate upon, namely, a purely political question, matters of foreign relations, matters of defence or deployment of the military, and of course spiritual questions on the tenets and merits of a religion. The reason is that these issues do not involve legal questions and are not determinable by judicially manageable standards.

.3 This factor seems to have been acknowledged by Mohd Apandi Ali JCA in his judgment that the court '*is not the proper forum*' for a study of comparative religions (see p. 575 [52] of Motion Papers). However, with respect, the learned Judges did not themselves abide by this recognised restraint. For example the judgment of Mohd Zawawi Salleh JCA is replete with a discussion of theological questions and the merits of the tenets of comparative religions which, with respect, is probably best left for another forum.

.4 It is also unfortunate that the internet sources relied on by the learned Judges, and which formed so much a part of the judgment of Zawawi Salleh JCA, are not unimpeacheable sources. The usual practice is to only cite reference sources that are established so that even textbook sources are not cited unless the author is an acknowledged authority on the subject.

.5 Accordingly, an aspect of the Part C questions is whether it is permissible for a court of law, of its own accord, to embark on internet research and thereafter rely on the results of the same in coming to a finding without first according to the litigating parties an opportunity to address the matter through adversarial means.

.6 The general rule relating to situations where the court wishes to take new matters that have not been submitted upon into account may be found in the case of **Hoecheong Products**

Co. Ltd. v. **Cargill Hong Kong Ltd.** [1995] 1 WLR 404 [Tab 47] where Lord Mustill stated as follows (at p. 409):

> "*It does, of course, happen from time to time that a court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them….*
> *The occasions when an appellate court would find it proper even to contemplate such a course after the conclusion of arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all*."

.7 The Federal Court in the case of ***Pacific Forest Industries Sdn Bhd & Anor*** v. ***Lin Wen-Chih & Anor*** [2009] 6 MLJ 293 [Tab 48] approved this position of law. In this connection, Zaki Azmi CJ stated as follows (*at paras [16] – [17]*):

> "*The court also decides a case after considering the evidence adduced by each party and documents produced by them. Neither party should be taken by surprise. Even in respect of law, whether it is the court at first instance or the appellate court, judges rely heavily on the submissions put forward by the respective counsel. ... It is therefore dangerous and totally unadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before*

> *them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point (see Hoecheng Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404 at pp 407–409). There have been instances where a judge may already form some opinion on certain issues, legal or otherwise, but after hearing submissions and views expressed by a party, he may conclude differently.*
> *The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the Latin maxim audi alteram partem, which literally means, to hear the other side, a basic principle of natural justice*."

.8 We would submit that this legal principle ought to apply to new matters arising out of internet research post hearing carried out by judges.

.9 Further the inherent dangers of internet research necessitate a strict application of this principle. In the case **Teddy St. Clair** v. **Johnny's Oyster & Shrimp, Inc.**, 76 F. Supp. 2nd 773 (1999) [Tab 49] decided by the United States District Court of Texas, the learned Judge viewed internet research with suspicion and cautioned upon any reliance on the same without a way to verify the authenticity of the results. In this regard, Kent J ruled as follows:

> "*While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So*

> *as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy.*
>
> *Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in FED.R.CIV.P. 807.*"

.10 Specifically in relation to a court of law relying on internet research, the New York State Supreme Court in the case of ***NYC Medical and Neurodiagnostic, P.C., as Assignee of Carrie Williams*** v. ***Republic Western Ins. Co.*** 2004 NY Slip Op 24526) [8 Misc 3d 33] [Tab 50] reversed the findings of the lower court which relied on its own internet research. The Supreme Court stated as follows (*at pp. 2-3 and 4-5*):

> "*In its decision and order denying the motion to dismiss, the court below made numerous findings of fact based not upon the submissions of counsel but rather upon its own Internet research. Among those findings, from defendant's own Web site, were that defendant was a wholly owned subsidiary of Amerco, whose other major subsidiaries included, inter alia, U-Haul, and that defendant was a "full service insurance company" which specialized, in part, in vehicular liability, operated in 49 states, and received approximately $170 million in premiums annually. From U-Haul's Web site, the court found, among*

> *other things, that U-Haul was the largest consumer truck and trailer rental operation in the world, and operated in all 50 states, that there were at least nine Queens U-Haul facilities, and that U-Haul promoted career opportunities for defendant, its sibling corporation. Finally, the court found, by going to the Web site of the New York State Department of Insurance, that, contrary to counsel's denial, defendant had been "licensed to do insurance business" in this state since April of 1980.*
>
> *…*
>
> *…*
>
> *This error was further exacerbated by the court's conduct in initiating its own investigation into the facts when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint.* ***In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance*** *(see Prince, Richardson on Evidence § 2-202 [Farrell 11th ed]).*"

.11 It is respectfully reiterated that the resort to and reliance on internet sources for any aspect of a legal judgment is a matter of sufficient importance for the Federal Court to admit and consider.

.12 Accordingly we pray that the Part C Questions be admitted for full consideration.

9. Conclusion

It is respectfully submitted that the issues raised by this application are of grave constitutional importance not only as to the proper scope of the constitutional provisions identified but also as to the power of a Minister to give directions to a religious body. We accordingly pray for admission of all the Questions proposed in this application for a full consideration by the Federal Court.

Dated 27 February 2014

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Solicitors for the Applicant

This **APPLICANT'S OUTLINE SUBMISSION** is filed by Messrs Fernandez & Selvarajah solicitors for the abovenamed Applicant whose address for service is No. 12B, 2nd Floor, Jalan Yong Shook Lin, 46200 Petaling Jaya, Selangor Darul Ehsan.
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Revised Leave Questions

Part A: The Administrative Law Questions

1. Where the decision of a Minister is challenged on grounds of illegality or irrationality and/or Wednesbury unreasonableness, whether it would be incumbent on the Minister to place before the Court the facts and the grounds on which he had acted?

2. Whether the decision of a Minister is reviewable where such decision is based on ground of alleged national security and whether it is a subjective discretion? Is the mere assertion by the Minister of a threat to public order, or the likelihood of it, sufficient to preclude inquiry by the Court?

3. Whether in judicial review proceedings a Court is precluded from enquiring into the grounds upon which a public decision maker based his decision?

4. Where the decision of the Minister affects or concerns fundamental rights, whether the Court is obliged to engage in a heightened or close scrutiny of the vires and reasonableness of the decision?

5. Whether the characterisation of the Minister's discretion as an absolute discretion precludes judicial review of the decision?

6. Whether the decision by the Minister to prohibit the use of the word '*Allah*' is inherently illogical and irrational in circumstances

where the ban is restricted to a single publication of the restricted group while its other publications may legitimately carry the word?

7. Whether the use of a religious publication by a religious group within its private place of worship and for instruction amongst its members can rationally come within the ambit of a ministerial order relating to public order or national security?

8. Can the Executive/State which has permitted the use of the word '*Allah*' in the Al Kitab prohibit its use in the Bahasa Malaysia section of the Herald – a weekly newspaper of the Catholic Church ('*the Herald*'), and whether the decision is inherently irrational?

9. Whether it is legitimate or reasonable to conclude that the use of the word '*Allah*' in the Herald which carries a restriction '*for Christians only*' and '*for circulation in church*' can cause confusion amongst those in the Muslim community?

10. Whether the claims of confusion of certain persons of a religious group could itself constitute threat to public order and national security?

Part B: The Constitutional Law Questions

1. Whether Article 3(1) of the Federal Constitution is merely declaratory and could not by itself impose any qualitative restriction upon the fundamental liberties guaranteed by Articles 10, 11(1), 11(3) and 12 of the Federal Constitution?

2. Whether in the construction of Article 3(1) it is obligatory for the Court to take into account the historical constitutional preparatory documents, namely, the Reid Commission Report 1957, the White Paper 1957, and the Cobbold Commission Report 1962 (North Borneo and Sarawak) that the declaration in Article 3(1) is not to affect freedom of religion and the position of Malaya or Malaysia as a secular state?

3. Whether it is appropriate to read Article 3(1) to the exclusion of Article 3(4) which carries the guarantee of non-derogation from the other provisions of the Constitution?

4. Whether it is a permissible reading of a written constitution to give precedence or priority to the articles of the constitution in the order in which they appear so that the Articles of the Federal Constitution that appear in Part I are now deemed to rank higher in importance to the Articles in Part II and so forth?

5. Whether on a true reading of Article 3(1) the words '*other religions may be practised in peace and harmony*' functions as a guarantee to the non-Muslim religions and as a protection of their rights?

6. Whether on a proper construction of the Federal Constitution, and a reading of the preparatory documents, namely, the Reid Commission Report (1957), the White Paper (1957) and the Cobbold Commission Report (1962), it could legitimately be said that Article 3(1) takes precedence over the fundamental liberties provisions of Part II, namely, Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

7. Whether the right of a religious group to manage its own affairs in Article 11(3) necessarily includes the right to decide on the choice of words to use in its liturgy, religious books and publications, and whether it is a legitimate basis to restrict this freedom on the ground that it may cause confusion in the minds of members of a another religious group?

8. Whether the avoidance of confusion of a particular religious group amounts to a public order issue to deny another religious group its constitutional rights under Articles 8, 10, 11(1), 11(3) and 12 of the Federal Constitution?

9. Whether it is reasonable or legitimate to conclude that the use of the word '*Allah*' for generations in the Al-Kitab (the Bahasa Malaysia/Indonesian translation of the Bible) and in the liturgy and worship services of the Malay speaking members of the Christian community in Malaysia, is not an integral or essential part of the practice of the faith by the community?

10. Whether the appropriate test to determine if the practice of a religious community should be prohibited is whether there are justifiable reasons for the state to intervene and not the '*essential and integral part of the religion*' test currently applied under Article 11(3)?

11. Whether the standards of reasonableness and proportionality which have to be satisfied by any restriction on freedom of speech in Article 10 and Article 8 is met by the present arbitrary restriction

on the use of the word '*Allah*' imposed by the Minister of Home Affairs?

12. Whether it is an infringement of Articles 10 and 11 of the Federal Constitution by the Minister of Home Affairs to invoke his executive powers to prohibit the use of a word by one religious community merely on the unhappiness and threatened actions of another religious community?

13. Whether the Latin maxim '*salus populi est suprema lex*' (the welfare of the people is the supreme law) can be invoked without regard to the terms of the Federal Constitution and the checks and balances found therein?

Part C: General

1. Whether it is appropriate for a court of law whose judicial function is the determination of legal-cum-juristic questions to embark *suo moto* on a determination of theological questions and of the tenets of comparative religions, and make pronouncements thereto?

2. Whether it is legitimate for the Court of Appeal to use the platform of '*taking judicial notice*' to enter into the non-legal thicket of theological questions or the tenets of comparative religions?

3. Whether the Court is entitled *suo moto* to embark upon a search for supportive or evidential material which does not form part of the appeal record to arrive at its decision?

4. Whether the Court can rely on information gathered from internet research without first having determined the authoritative value of the source of that information or rely on internet research as evidence to determine what constitute the essential and integral part of the faith and practice of the Christians?

5. Whether the use of research independently carried out by a Judge and used as material on which the judgment was based without it first been offered for comment to the parties to the proceedings is in breach of the principles of natural justice?