

## LEGISLATING FAITH IN MALAYSIA

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Although the *Federal Constitution* is the supreme law of the land, the dual legal system in Malaysia basically means Muslims in the country are governed under the Islamic or Syariah law. The matter relating to conversion to and renouncement of Islam is not specifically stated in the State List under the *Federal Constitution*. There has been considerable controversy on this matter in recent times. Challenges and difficulties faced by individuals in the predicament of conversion and/or renouncement seemed insurmountable with the civil courts refusing to hear such matters on the ground that they lack jurisdiction. This article will assess the viability and feasibility of legislating on faith in multi-racial and multi-religious Malaysia by analyzing the applicable constitutional provisions and the relevant cases, including the controversial *Lina Joy* case.

### I. INTRODUCTION

Events in recent months have highlighted the unsatisfactory position and unresolved issues facing individuals who seek to exercise their freedom of religion in Malaysia. This has been worsened by the jurisdictional approach taken by judges in recent cases which resulted in applications being dismissed on the preliminary objection that the matter of conversion or renouncement falls within the jurisdiction of the Syariah Courts. This article attempts to put matters into perspective by tracing the legal history and analyzing the matter from the constitutional point of view.

The claim that Malaysia is an Islamic state is looked at and related cases which adopted the stand pertaining to the primacy of Islam are discussed. An analysis of the Malaysian legal structure is then undertaken to assess the validity of the claim. The impact of such a mindset is then revealed in the discussion and elaboration of cases where freedom of religion was sought to be recognized. The constitutionality of provisions regulating faith is then explored and questioned.

Finally, reasons are laid down for the submission on why the matter of conversion or renouncement should remain within the jurisdiction of the civil courts. The judiciary being the final and only avenue open to individuals who seek to enforce the fundamental liberties guaranteed to them under the *Federal Constitution*<sup>1</sup> must not forsake nor abdicate their duty to preserve, protect and defend the Constitution by proclaiming that the matter comes within the jurisdiction of the Syariah Courts.

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<sup>1</sup> *Federal Constitution of Malaysia*, 1957.

## II. HISTORICAL BACKGROUND

Malaysia has a dual legal system, the civil law and the Syariah law. Civil law here is used to mean the system of law as passed by the legislature, including the common law and rules of equity embodied in the decisions of the courts. Syariah law on the other hand means Islamic law passed by the State Legislatures and, for the Federal Territories, Islamic law passed by Parliament. The scope of Islamic law applicable in Malaysia is laid down in paragraph 1 of the State List in the *Federal Constitution*. The peculiarity of the dual system has its roots in history.<sup>2</sup>

Before the British came to the Malay States, as Peninsular Malaysia was then known, the sultans in each of their respective States were the heads not only of the religion of Islam but were also the political leaders in their States. The applicable laws then were the Syariah law and customary law. The sultans were regarded as God's vicegerent and were entrusted to run the States in accordance with the law ordained by Islam. The earliest record of Islamic law being practiced in the Malay States dates back to the early 14<sup>th</sup> century. Through a series of treaties with the sultans and the numerous advice given by the British Residents, the role of the sultans was redefined and their powers were confined to personal laws and customs. The rulers were regarded as a sovereign within his territory and ceased to be regarded as God's vicegerent on earth. In so doing, the system of governance was turned into a secular institution as opposed to one based on Syariah.<sup>3</sup>

The colonization of the Malay States saw the importation of English law and the relegation of Islamic law to a narrower sphere of personal law. With the introduction of English law as the basic law via the Charters of Justice, particularly the Charter of Justice 1826, Islamic law was confined to personal laws and customs of local Malays and other Muslims. The role of Islamic law in the public sphere was thus curtailed. The application of English law in Malaysia is as stated in sections 3 and 5 of the *Civil Law Act 1956*.<sup>4</sup> Section 3 provides for the reception of the common law of

<sup>2</sup> Asmida bt. Ahmad, Fork Yow Leong & Paul Linus Andrews, "Tracing the Development of the Legal System," online: ASEAN Law Association <<http://www.aseanlawassociation.org/legal-malaysia.html>>.

<sup>3</sup> See Ahmad Mohamed Ibrahim, "The Administration of Islamic Law in Malaysia;" (Kuala Lumpur: Institute of Islamic Understanding Malaysia, 2000). The Institute of Islamic Understanding Malaysia, or Institut Kefahaman Islam Malaysia (IKIM) is an Institute set up by the Malaysian government. A series of lectures and papers by the late Prof. Ahmad Mohamed Ibrahim were compiled and published by the institute.

<sup>4</sup> *Civil Law Act 1956* (Act 67, Rev. 1972), s. 3 [*Civil Law Act*] provides:

- (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—
  - (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7<sup>th</sup> day of April, 1956;
  - (b) in Sabah, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on the 1<sup>st</sup> day of December, 1951;
  - (c) in Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application as administered or in force in England on the 12<sup>th</sup> day of December, 1949, ...

provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

England, rules of equity and statutes of general application. Section 5 relates to the application of English law in commercial matters.<sup>5</sup> Syariah law remains applicable only to Muslims and is confined to the matters listed under paragraph 1, List II, Ninth Schedule of the *Federal Constitution*, which includes not only personal and family law but also the determination of matters of Islamic law and doctrine and Malay custom.<sup>6</sup>

In the case of *Ramah v. Laton*,<sup>7</sup> the Court of Appeal in a majority decision held that Islamic Law is not foreign law but is the law of the land. However, the judges of the civil courts felt they were incompetent to deal with questions of Islamic Law. A device was adopted giving the civil courts power to refer questions of Islamic Law and Malay customs to the State Executive Council of various States. This power under *The Muhammadan Law and Malay Custom (Determination) Enactment, 1930*<sup>8</sup> was repealed with the passing of legislation for the administration of Muslim Law in each State and the setting up of the Syariah Courts. Thus, the dual system of courts was set up. The Syariah Courts were removed from the structure of the courts under the *Courts Ordinance 1948*<sup>9</sup> and ceased to be federal courts. They became courts under each State.

### III. ISLAMIC STATE V. CONSTITUTIONAL SUPREMACY

In recent years there have been increasing claims that Malaysia is an Islamic state. The basis cited for such claims is premised upon; *inter alia*, Article 3 of the *Federal Constitution*.<sup>10</sup> This trend is reflected by a number of cases where the said argument was presented before the courts.<sup>11</sup> The claim is based on the flawed premise of the primacy of Islam due to its status as the religion of the Federation.

This argument was rejected in the case of *Che Omar bin Che Soh v. Public Prosecutor*.<sup>12</sup> In that case, it was submitted that since Islam is the religion of the Federation as stated under Article 3(1) of the *Federal Constitution* and since the *Federal Constitution* is the supreme law of the land as stated under Article 4(1), the imposition of the death penalty under the *Dangerous Drugs Act 1952*<sup>13</sup> and the *Firearms (Increased Penalties) Act 1971*<sup>14</sup> is contrary to Islamic injunctions and is

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(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

<sup>5</sup> See Wu Min Aun, *The Malaysian Legal System*, 3rd ed., (Petaling Jaya, Selangor: Pearson Malaysia Sdn. Bhd., 2005).

<sup>6</sup> This is expressly stated in the *Federal Constitution*, Ninth Schedule, List II, para. 1.

<sup>7</sup> (1927) 6 F.M.S.L.R. 128 (C.A., F.M.S).

<sup>8</sup> Federated Malay States Enactment No. 4 of 1930.

<sup>9</sup> Ord. 43, 1948.

<sup>10</sup> *Federal Constitution*, art. 3(1) states: "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation."

<sup>11</sup> *Che Omar bin Che Soh v. Public Prosecutor*, [1988] 2 M.L.J. 55 [*Che Omar*]; *Hajjah Halimatussaadiah binti Haji Kamaruddin v. Public Services Commission Malaysia & Anor.*, [1994] 3 C.L.J. 532; *Meor Atiqulrahman bin Ishak & Ors v. Fatimah bte Sihi & Ors*, [2000] 5 M.L.J. 375; *Fatimah Sihi v. Meor Atiqulrahman bin Ishak*, [2005] 2 M.L.J. 25.

<sup>12</sup> *Ibid.*

<sup>13</sup> Act 234, Rev. 1980.

<sup>14</sup> Act 37, Rev. 1999.

therefore unconstitutional. Tracing the historical context of the law in Malaysia, the Supreme Court found that the concept of sovereignty of the rulers introduced by the British severed the divine source of legal validity and turned the system of governance into a secular institution. Islamic law was limited to the narrow confines of the law of marriage, divorce and inheritance and was applicable only to Muslims as their personal law. It is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word of “Islam” in the context of Article 3.<sup>15</sup>

The Supreme Court held that Article 3 cannot be relied upon to support the said submission. The contention of counsel that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic principles and that any law of general application in Malaysia must conform to Syariah law was rejected by the Supreme Court. It was held that such a position will be contrary to the constitutional and legal history of the Federation and also to the *Civil Law Act*<sup>16</sup> which provides for the reception of English law into Malaysia. The august court reiterated that the law in Malaysia is secular law. This position stands in stark contrast to the current claims of an Islamic state which has permeated not only the general public’s mindset but also more significantly, the administrative machinery in the government. The existence of provisions regulating faith at state level together with the insistence by the ruling government that Malaysia is an Islamic state have adversely affected the exercise of the freedom of religion by individuals who seek to leave the religion of Islam.<sup>17</sup> In the absence of a Syariah Court’s declaration or order that a person has renounced Islam and is no longer a Muslim, the person is deemed a Muslim despite the fact that he or she has in fact professed another faith and is practicing a new religion.

The recent case of *Lina Joy v. Majlis Agama Islam Wilayah & Anor*<sup>18</sup> brings into sharp focus the obstacles faced by those who chose to leave the religion of Islam in Malaysia. The law and government agencies do not recognize renouncement of Islam unless there is an order of the Syariah Court. In this case, a Malay lady renounced Islam and became a Christian. She made several applications to change the name in her identity card and to delete the word ‘Islam.’ The National Registration Department required her to produce an order from Syariah Court confirming her status before it exercised its power to delete the word ‘Islam’ from her identity card. She sought declaratory orders against the religious authority, the Majlis Agama Islam Wilayah Persekutuan and the Government of Malaysia. The case was initially premised on constitutional law issues. It was argued that the National Registration Department’s refusal of her application to delete the word ‘Islam’ from her identity

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<sup>15</sup> See Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (Kuala Lumpur: Govt. Press, 1957) at para. 169; also known as the Reid Commission’s Report [*Reid Commission’s Report*].

<sup>16</sup> *Supra* note 4.

<sup>17</sup> *Lina Joy v. Majlis Agama Islam Wilayah & Anor*, [2007] 4 M.L.J. 585 [*Lina Joy*], aff’g [2005] 6 M.L.J. 193, aff’g [2004] 2 M.L.J. 119; *Daud bin Mamat & Ors v. Majlis Agama Islam & Anor*, [2001] 2 M.L.J. 390; *Kamariah bte Ali dll v. Kerajaan Negeri Kelantan, Malaysia dan satu lagi*, [2005] 1 M.L.J. 197, aff’g [2002] 3 M.L.J. 657; *Priyathaseney & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*, [2003] 2 M.L.J. 302.

<sup>18</sup> *Lina Joy*, *ibid.*

card breached her Article 11 rights.<sup>19</sup> It was submitted further that the *Administration of Islamic Law (Federal Territories) Act 1993*<sup>20</sup> and other state laws enacted pursuant to Article 74(2) which prohibited or restricted conversions out of Islam were void for being inconsistent with Article 11 of the *Federal Constitution*.

The trial judge in *Lina Joy* dismissed the application.<sup>21</sup> A very restrictive interpretation of Article 11 was adopted by the trial judge. Article 3 which declares Islam as the religion of the Federation was construed as limiting the scope of Article 11. Additionally, the interpretative clause of Article 160(2) which defines 'Malay' was relied upon by the learned judge to preclude the conversion out of Islam by Malays.<sup>22</sup> The legal identity of Malay is a conflation of religion, language and custom. Ethnicity is not the criterion in the legal definition of Malay. The reliance on the definition of 'Malay' to restrict the substantive right of the freedom of religion results in the ludicrous conclusion and the reality that a Malay person cannot exercise freedom of religion. This is contrary to the guarantee under Article 11 which applies to 'every person.' It is undeniable that the issue of renouncement of Islam is a politically sensitive and emotive issue in Malaysia. Events over the past few years and particularly in the year 2006 are proof of the extent of this sensitivity.<sup>23</sup>

At the Court of Appeal, it was agreed by all the parties concerned that the issue be confined to one of administrative law. Thus, the constitutional issue was abandoned. Subsequently, the Federal Court, in a 2:1 decision, affirmed the majority decision of the Court of Appeal that the issue concerning renouncement of Islam is a matter of Islamic law which falls squarely under the jurisdiction of the Syariah Court.<sup>24</sup> It held that Article 11(1) of the *Federal Constitution* ought not to be forwarded as the provision which gives unlimited freedom of religion. The right to profess and practice any religion is held to be subject to the principles and practices determined by that religion. The reason cited for holding the policy of the National Registration Department (requiring the determination of the religious authority on whether or not the person is an apostate) reasonable was the fear that it would offend the Muslim community. The fear that it would facilitate a born Muslim to abandon the religion in order to escape from the punishment for offences under Islamic law was given as an example. This is in addition to the stand that the said department takes the risk of wrongly labeling a person as a non-Muslim when he is still a Muslim under

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<sup>19</sup> *Federal Constitution*, art. 11(1): "Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it."

<sup>20</sup> Act 505, Rep. 2002 [*Administration of Islamic Law Act*].

<sup>21</sup> For a critique of this case, see Thio Li-Ann, "Apostasy and Religious Freedom: Constitutional Issues Arising From The Lina Joy Litigation," (2006) 2 M.L.J. i-cxvi.

<sup>22</sup> *Federal Constitution*, art. 160(2): "A 'Malay' is a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs and was born in the Federation or Singapore before Merdeka Day or born of parents one of whom was born in the Federation or Singapore or is on that day domiciled in the Federation or in Singapore or is the issue of such a person."

<sup>23</sup> See online: The Truth of the Matter <<http://www.accin-badailies.org/>> for some of the comments on recent events which involved the controversy over the proposal to set up the Interfaith Commission; Dr Chandra Muzaffar, "What Pluralism Means To Islam," *The Star* (18 June 2006), online: *The Star* <<http://thestar.com.my/news/story.asp?file=/2006/6/18/focus/14577667&sec=focus>>, visited on 7 December 2006; a response to the Mufti of Perak's call to review the practice of celebrating joint festivals in Malaysia.

<sup>24</sup> Rayuan Sivil No.: 01-2-2006 (30 May 2007), online: Malaysian Court Website <<http://www.kehakiman.gov.my/judgment/fc/latest/lina%20joy.pdf>>.

Islamic law if it merely accepts the declaration by the individual that he is no longer a Muslim. This reasoning given by the Honorable Chief Justice, clouded by the fear as stated in his judgment, hardly qualifies as legal reasoning, yet it forms the basis of His Lordship's decision.<sup>25</sup>

Despite acknowledging the fact that there are no legal provisions in the *Administration of Islamic Law Act*<sup>26</sup> governing apostasy, His Lordship agreed with the majority decision of the Court of Appeal that the insistence of the department on an order by the Syariah Court pertaining the status of the appellant is reasonable as it is 'a matter of Islamic law,' thus bringing the matter within the jurisdiction of the Syariah Court. A person is therefore still required to get an order from the Syariah Court even though there are neither procedures nor legal provisions on renouncement. Jurisdiction of the said court is assumed. It is difficult to follow this reasoning as it ignores the reality that whether or not a person has renounced Islam is actually a question of fact, not of law. How can the renouncement of an individual of his faith be 'a matter of Islamic law'? When there is no provision at all in the said Islamic law on the matter of renouncement, how can it be 'a matter of Islamic law'?

The manifestations of Islam in every day life seem to be growing by the day in Malaysia, due to the fact that it is taken to reflect the religiousness and piety of the individuals and society.<sup>27</sup> It is also the easiest to regulate as it is the physical and external expression of faith.<sup>28</sup> The assertion of the right to practice one's religion in the form of one's dressing as an expression of that faith is found in the case of *Hajjah Halimatussaadiah binti Haji Kamaruddin v. Public Services Commission Malaysia & Anor.*<sup>29</sup> The applicant, a clerk at the office of the Perak State Legal Adviser was dismissed for wearing 'purdah,' a form of dressing which covers all parts of the body except the eyes. This was in contravention of the dress code for civil servants. One of the issues before the Supreme Court was whether the circular which prohibits the wearing of such attire had infringed her constitutional right to practice her religion. It was held by the Supreme Court that such a prohibition does not affect her constitutional right to practice her religion and that wearing 'purdah' has nothing to do with her constitutional right to profess and practice her religion. It was held that wearing 'purdah' is not a requirement in Islam and is not specified in the Quran.

In *Meor Atiqulrahman bin Ishak & Ors v. Fatimah bte. Sihi & Ors*,<sup>30</sup> the guardian of one boy who is the father to the other two boys challenged the principal of the school and the authorities in regard to the prohibition on 'serban,' a form of headgear worn by the boys. The boys were suspended from school for their refusal to abide by the ruling. The argument for the primacy of Islam found favor in this case. The trial

<sup>25</sup> It is to be noted that the judgment was delivered in the Malay language. A better and well-reasoned decision is found in the dissenting judgment by Richard Malanjum FCJ, delivered in English, online: Malaysian Court Website <<http://www.mahkamah.gov.my/kehakiman/judgement/fc/latest/Lina%20Joy%20v%20Majlis%20Agama%20Islam%20%202%20Ors-J%20dissenting-RM.pdf>>.

<sup>26</sup> *Supra* note 20.

<sup>27</sup> See Ian McIntyre, "MB defends dress code," *The Star* (6 December 2006), online: The Star <<http://www.thestar.com.my/news/story.asp?file=/2006/12/6/nation/16232962&sec=nation>>.

<sup>28</sup> This is reflected succinctly in provisions found in the various state legislation pertaining to the administration of Islamic law and customs and Syariah offences, which are elaborated below.

<sup>29</sup> [1994] 3 C.L.J. 532.

<sup>30</sup> [2000] 5 M.L.J. 375.

judge refused to abide by the decision in *Che Omar*.<sup>31</sup> The judge was of the view that Islam occupies a special position under the Constitution and is the primary religion in Malaysia. Islam is therefore, according to the judge, above other religions. Islam being a complete way of life, he surmised that it is a universal religion which is acceptable by all other religions. Article 3 was to be given a 'proper interpretation' by extending it beyond rituals and ceremonies.

The decision in *Meor Atiquhrahman bin Ishak & Ors v. Fatimah bte Sihi & Ors*<sup>32</sup> was overturned by the Court of Appeal but the appellate court did not seize the opportunity to address the trial judge's pronouncements on Article 3 of the *Federal Constitution*.<sup>33</sup> The Federal Court recently affirmed the Court of Appeal's decision and had no difficulty in accepting the position that it is for the civil courts to determine whether the limitation of a practice of a religion is constitutional.<sup>34</sup> It was stated, albeit *obiter*, that "whether we like it or not, we have to accept that Malaysia is not the same as a Malay State prior to the coming of the British. She is multi-racial, multi-cultural, multi-lingual and multi-religious."<sup>35</sup>

The special position of Islam was also referred to by the Court of Appeal in *Kamariah bte Ali dll v. Kerajaan Negeri Kelantan, Malaysia dan satu lagi*.<sup>36</sup> This position is contrary to the UN Human Rights Committee *General Comment No. 22*, which states at paragraph 9:

The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.<sup>37</sup>

The claim that Malaysia is an Islamic state was confirmed by the Government of Malaysia in its response to SUHAKAM's *Annual Report 2002*.<sup>38</sup> According to the Malaysian government, Malaysia is an Islamic state based on the following reasons:

1. Malaysia was formed by Muslims;
2. The Head of State and Government are held by Muslims;
3. The majority of the population in Malaysia are Muslims and most of their cultural and social aspects are influenced by the Islamic culture;
4. Muslims are free to practice Islam, in fact they are assisted by the Government;

<sup>31</sup> *Che Omar*, *supra* note 11.

<sup>32</sup> [2000] 5 M.L.J. 375.

<sup>33</sup> See *Fatimah Sihi v Meor Atiquhrahman bin Ishak*, [2005] 2 M.L.J. 25.

<sup>34</sup> No. 01-3-2005(N), [2006] MYFC 18 (12 July 2006), online: CommonLII <<http://www.commonlii.org/my/cases/MYFC/2006/18.html>>.

<sup>35</sup> *Ibid*.

<sup>36</sup> [2002] 3 M.L.J. 657 [*Kamariah*].

<sup>37</sup> Office of the United Nations High Commissioner for Human Rights, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4 (30 July 1993) [*General Comment No. 22*]. online: Office of the United Nations High Commissioner for Human Rights <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument)>, visited on 9 November 2007.

<sup>38</sup> Suruhanjaya Hak Asasi Manusia (SUHAKAM), *Annual Report 2002* (Kuala Lumpur: Suruhanjaya Hak Asasi Manusia, 2003), Appendices. SUHAKAM is the Human Rights Commission in Malaysia.

5. The system to increase *ibadah munakahat* and *muamalat* is being carried out throughout the country;
6. Islamic studies are taught from primary to tertiary education and the standard is constantly being improved;
7. The existence of the Syariah courts and Syariah law; and
8. The existence of various institutions to propagate the teachings of Islam.

Additionally, it was stated that Malaysia fulfilled several other criteria which shows that it is an Islamic state:<sup>39</sup>

1. The provision in the *Federal Constitution* that Islam is the religion of the Federation [Article 3(1), (2), (3), (5) and Article 74 which provides for the administration of Islam under the authority of the State Government and the Federal Government];
2. Recognition by the world community that Malaysia is an Islamic state; and
3. Most of the provisions in the *Federal Constitution* are not inconsistent with Islam.

The stand taken by the Government of Malaysia is further reflected by the ongoing exercise of the Syariah division of the Attorney-General's Chambers which has been tasked to ensure that all legislation is Syariah compliant.<sup>40</sup>

How accurate is this assertion? An analysis of the Malaysian legal structure as provided in the *Federal Constitution* reveals several features which cannot and must not be ignored. Firstly, the supremacy of the *Federal Constitution* is clearly stated and declared in Article 4 of the *Federal Constitution*.<sup>41</sup> It is therefore more appropriate to ensure that all Syariah law is consistent with the *Federal Constitution* rather than ensuring that all legislation is Syariah compliant. Secondly, the *Federal Constitution* was created and agreed upon by the various sectors of the society prior to independence based on the understanding that the independent nation consists of a multi-racial and multi-religious society.<sup>42</sup> It is incorrect to state that Malaysia was formed by Muslims, without acknowledging the existence and contribution of the other groups of the society at that time. The Alliance Party which played a major role in the whole process of negotiating and formulating the *Federal Constitution* and hence the formation of Malaysia, consisted of various races with different religious beliefs and not just Muslims.

The twin objectives of the Reid Commission's<sup>43</sup> recommendations were that there must be the fullest opportunity for the growth of a united, free and democratic nation and that there must be every facility for the development of resources of the country

<sup>39</sup> *Ibid.*

<sup>40</sup> The Syariah Section under the Advisory Division of the Attorney-General's Chambers is responsible for, *inter alia*, harmonization of Syariah and civil law. It "conducts research and prepares opinions from Syariah perspectives on the interpretation of the *Federal Constitution* relating to the administration of Islam, relationship between the Federal and the State jurisdiction of the courts, ...and conflict between civil and Islamic law with a view to give a harmonized reading and to resolve the conflict of laws." See online: Attorney-General's Chambers <<http://www.agc.gov.my/agc/agc/adv/adv.htm>>.

<sup>41</sup> *Federal Constitution*, art. 4(1) states: "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

<sup>42</sup> See *Reid Commission's Report*, *supra* note 15.

<sup>43</sup> *Ibid.*



and the maintenance and improvement of the standard of living of the people.<sup>44</sup> The social compact underlying the *Federal Constitution* is the secularity of the nation although Islam is recognized as the official religion. The secular nature of the country was noted and affirmed during the process of consultation prior to the Declaration of Independence and this was recorded in the Reid Commission's Report:

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 were inserted it should be made clear that it would not affect the civil rights of non-Muslims...and shall not imply that the State is not a secular State.<sup>45</sup>

Thirdly, the Islamic legal system in Malaysia is limited only to Muslims and is still being developed today. The scope is limited to "Islamic law and personal and family law of persons professing the religion of Islam."<sup>46</sup> This is pursuant to Articles 74 and 77 of the *Federal Constitution* which provide for the legislative power of the Parliament and the Legislature of the various States. Islamic law in Malaysia is limited in its meaning as affirmed by the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor*.<sup>47</sup> Hence, the extent and scope of Islamic law applicable in Malaysia is not all inclusive and embracing as it would be if Malaysia were an Islamic state as claimed.<sup>48</sup> Suffice to say that the claim is a political statement and aspiration.<sup>49</sup> This has left a considerable impact on the mindset of society generally and that of the judiciary specifically, as will be seen in several cases discussed in this article.

#### IV. FREEDOM OF RELIGION

In the context of international law, freedom of religion is found in Article 18 of the *Universal Declaration of Human Rights*, which states:

Everyone has the right to freedom of thought, conscience and religion; this right includes *freedom to change his religion or belief*,<sup>50</sup> and freedom, either alone

<sup>44</sup> *Ibid.* at para. 14.

<sup>45</sup> *Ibid.* at para. 169.

<sup>46</sup> *Federal Constitution*, *supra* note 6.

<sup>47</sup> *Supra* note 11.

<sup>48</sup> This has not stopped the Islamic religious authorities from presuming jurisdiction over non-Muslims. See the recent case of *Jabatan Agama Islam Selangor v. Rayappan Anthony* (Unreported). The widow and her two daughters were subpoenaed by the *Syariah* court to give evidence on the status of the deceased. See Bernama, "Chaos At The KL Hospital Morgue Over Rights To Body" (30 November 2006), online: Bernama.com <<http://www.bernama.com/bernama/v3/news.php?id=233573>> [Rayappan].

<sup>49</sup> The various other grounds cited by the government in its response to SUHAKAM are insufficient to form the basis to support the claim that Malaysia is an Islamic state. Several of the grounds mentioned blatantly ignored historical facts. There was no Muslim majority at the time when Independence was being negotiated. In fact, they formed less than 50 percent of the population at that time, which made it crucial to ensure the recognition and special status of the Malays at that time. More importantly, Article 4 of the *Federal Constitution* which declares the Constitution as the supreme law of the land was significantly left out and not referred to at all.

<sup>50</sup> Emphasis added. In reality, the freedom to change his religion or belief is not available to Muslims in Malaysia. See the case of *Daud bin Mamat & Ors v. Majlis Agama Islam & Anor*, [2001] 2 M.L.J. 390 (H.C.); *Kamariah*, *supra* note 36 and *Lina Joy*, *supra* note 18.

or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>51</sup>

The provision for freedom of religion is repeated and reiterated in various international instruments such as Article 18 of the *International Covenant on Civil and Political Rights*<sup>52</sup> and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.<sup>53</sup> The applicable principles are also found in the various instruments including the *General Comment No. 22* of the Human Rights Committee on Article 18 of the *International Covenant on Civil and Political Rights*, Article 13 of the *International Covenant on Economic, Social and Cultural Rights*,<sup>54</sup> Article 5 (vii) of the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>55</sup> Articles 2, 14 and 30 of the *Convention on the Rights of the Child*<sup>56</sup> and the *Convention on the Elimination of All Forms of Discrimination against Women*.<sup>57</sup>

Malaysia has to date only ratified the *Convention on the Rights of the Child* and the *Convention on the Elimination of All Forms of Discrimination against Women*.<sup>58</sup> Although the courts in Malaysia have accepted the argument that the *Universal Declaration of Human Rights* has no legal binding force in Malaysia,<sup>59</sup> it is submitted that the very fact that Malaysia is a member of the United Nations obligates it to uphold and respect the *Universal Declaration of Human Rights*. Looked at through a constitutional lense, provisions under state legislation governing faith which are inconsistent with Article 11 of the *Federal Constitution* are *ultra vires* the Constitution. They are accordingly void to the extent of such inconsistency.<sup>60</sup> Should the illegality of such provisions be ignored as is the present situation, it is instructive to place them in the context of existing international legal instruments and principles (even though Malaysia has not ratified most of the above named instruments)

<sup>51</sup> *Universal Declaration of Human Rights*, GA Resolution 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948) 71, art. 18.

<sup>52</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 18:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>53</sup> UN GA Res. 36/55 of 25 November 1981, UN GAOR, UN Doc. A/36/684.

<sup>54</sup> 16 December 1966, 993 U.N.T.S. 3.

<sup>55</sup> 4 January 1969, 660 U.N.T.S. 115.

<sup>56</sup> 20 November 1989, 1577 U.N.T.S. 3.

<sup>57</sup> 18 December 1979, 1249 U.N.T.S. 13.

<sup>58</sup> *Supra* notes 56 and 57.

<sup>59</sup> *Kajing Tubek & Ors v. Ekran Bhd. & Ors*, [1996] 2 M.L.J. 389.

<sup>60</sup> *Federal Constitution*, art. 4(1): "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

to assess their consistency and compliance or otherwise with existing international legal standards.

Freedom of religion can be broadly categorized into two; *forum internum* and *forum externum*. The former relates to the internal conviction of the faith and belief whereas the latter relates to manifestation of the religion or belief which includes the practice of the religion and all external manifestation of the religion. The freedom to profess a religion or belief resides in the internal sanctum of the individual. This is to be protected unconditionally.<sup>61</sup> This is in line with the stand in the *Holy Quran* itself that there should be no compulsion in religion.<sup>62</sup> The practice and manifestation of religion on the other hand, can be regulated to a certain extent. Article 18.3 of the *International Covenant on Civil and Political Rights* permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. This position is partially reflected in Article 11(5) of the *Federal Constitution* which subjects the freedom of religion in Malaysia to the general law relating to public order, public health or morality.<sup>63</sup>

#### A. Freedom of Religion in Islam

The Syariah or Islamic law can be broadly categorized into two; that of *ibadat*, laws dealing with acts of worship, and *mu'amalat*, laws dealing with worldly affairs. The former is based on the commandment to love God with all of one's mind, heart, soul and strength.<sup>64</sup> This covers proper belief and liturgical acts of worship. Proper belief requires a Muslim to acknowledge the existence of one God, Angels, Holy Scriptures, Prophets and Messengers and the Last Day, which includes the Day of Resurrection of all human souls, followed by the Day of Judgment by God and the admission of human souls into heaven or hell. A Muslim cannot reject any of the five creedal beliefs above without rejecting the faith. The five liturgical acts of worship are popularly known as the Five Pillars of Islam, and these are the testimony of faith [*shahada*], which is to say the words, "I bear witness that there is no god but God, and I bear witness that Muhammad is the messenger of God," the five-time daily prayer

<sup>61</sup> *General Comment No. 22, supra* note 37 at para. 33.

<sup>62</sup> *The Holy Quran*, trans. by Abdullah Yusuf Ali (Kuala Lumpur: Saba Islamic Media Sdn. Bhd., 2000) [*Holy Quran*]: "Let there be no compulsion in religion: Truth stands out clear from Error ..." [2:256]; "Say: O ye that reject Faith! I worship not that which ye worship, nor will ye worship that which I worship ... To you be your Way, and to me mine." [109:1-6]; "Those who believe, then reject faith, then believe (again) and (again) reject faith, and go on increasing in disbelief, God will not forgive them nor guide them on the Way." [4:137]; "Those who believe, the Jews, and the Christians, and the Sabians; anyone who believe in God and the Last Day, and work righteousness, shall have their reward with their Lord; on they shall have no fear, nor shall they grieve." [5:69].

<sup>63</sup> *Federal Constitution*, art. 11(5). This article does not authorize any act contrary to any general law relating to public order, public health or morality.

<sup>64</sup> Although this commandment predates the Islamic era, it is nevertheless appropriate and valid as it is acknowledged in the *Holy Quran* itself that revelations and Messengers were sent prior to the establishment of Islam. See for example: "We have sent thee inspiration, as We sent it to Noah and the Messengers after him: We sent inspiration to Abraham, Ismail, Isaac, Jacob and the Tribes, to Jesus, Job, Jonah, Aaron, and Solomon, and to David We gave the Psalms. Of some Messengers We have already told thee the story; of others We have not;—and to Moses God spoke direct." [4:163-164] of the *Holy Quran, supra* note 62.

[*solah*], alms or charity payments [*zakat*], fasting during the month of *Ramadhan* and pilgrimage to Mecca [*haj*].

Is there freedom of religion in Islam? It is submitted that there is. One needs only to refer to the *Holy Quran*, being the main source of *Syariah*, to come to this conclusion.<sup>65</sup> Freedom of religion is openly acknowledged in the *Holy Quran*. In fact the plurality and diversity of religions and beliefs are part and parcel of God's scheme of things.

### B. Freedom of Religion in Malaysia

Article 11, one of the fundamental liberties under Part II of the *Federal Constitution*, guarantees that every person has the right to profess and practice his religion. The freedom of religion is subject to the general law relating to public order, public health or morality. A limitation found in Article 11 is clause 4 which permits State law to control or restrict the propagation of any religious doctrine or belief among Muslims.<sup>66</sup> It is reflective of the protectionist approach towards Islam in Malaysia.<sup>67</sup> This restriction, although enshrined in the Constitution, sets the stage for discriminatory law, policies and practices.

An example of a provision against propagation of other religious doctrines or beliefs among persons professing the Islamic faith is section 5 of the *Syariah Criminal Offences (Federal Territories) Act 1997*,<sup>68</sup> which makes it an offence.<sup>69</sup> The efficacy of this provision is limited as the *Syariah* courts have jurisdiction only over Muslims. In other words, this provision can only be utilized against a Muslim who propagates other religious doctrines or beliefs to fellow Muslims.<sup>70</sup>

The scope of the freedom of religion in Malaysia is yet to be conclusively determined. A good starting point is the case of *Minister of Home Affairs v. Jamaluddin Othman*.<sup>71</sup> The applicant in this case was detained under the *Internal Security Act 1960*<sup>72</sup> for his involvement in a program to propagate Christianity amongst Malays. He challenged, *inter alia*, the grounds of his detention. The Minister of Home Affairs

<sup>65</sup> There are numerous hadiths on the point of freedom of religion [or the lack of it] often quoted by those who want to justify the action of criminalizing conversion out of Islam. It is not the intention of the author to go into the authenticity of the hadiths as that is the purview of a more qualified Islamic scholar and is beyond the intent of this paper. As such, hadiths are not included nor quoted in this article. In any event, hadiths must not contradict the *Holy Quran*. Several of the relevant verses have been referred to in *supra* note 62.

<sup>66</sup> *Federal Constitution*, art. 11(4): "State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."

<sup>67</sup> One of the functions of the Yang di-Pertuan Agong is to protect the religion of Islam and to uphold the rules of law and order in Malaysia. This is stated in the Oath of Office of the Yang di-Pertuan Agong found in the Fourth Schedule of the *Federal Constitution*.

<sup>68</sup> Act 559, Rep. 2002 [*Syariah Criminal Offences Act*].

<sup>69</sup> Upon conviction, the person is liable to a fine not exceeding three thousand ringgit or to imprisonment not exceeding two years or to both.

<sup>70</sup> A case which could have utilized such a provision is *Minister of Home Affairs v. Jamaluddin Othman*, [1989] 1 M.L.J. 418. The appellant was instead detained under the *Internal Security Act 1960* (Act 82, Rev. 1972).

<sup>71</sup> [1989] 1 M.L.J. 418 [*Jamaluddin*].

<sup>72</sup> Act 82, Rev. 1972.

filed an affidavit stating that he was satisfied that the detention was necessary with the view to prevent him from acting in a manner prejudicial to the security of Malaysia. It was held by the trial judge that the Minister had no power to deprive a person of his right to practice his religion as guaranteed under the Constitution. The Minister appealed against the decision.

The Supreme Court agreed ‘wholeheartedly’ with the trial judge but added that the right or freedom to profess and practice one’s religion is subject to the general laws of the country as stated under Article 11(5) of the *Constitution*. The freedom to profess and practice one’s religion is not a license to commit unlawful acts or acts affecting the public order, public health or morality. Needless to say acts contrary to the security of the country cannot hide behind the guise of freedom of religion. It was held by the Supreme Court that the mere participation in meetings and seminars by the applicant did not pose a threat to the security of the country. Similarly, the alleged conversion of six Malays cannot by itself be regarded as a threat to the security of the country. This decision is significant in its recognition and affirmation of the freedom of religion in Malaysia. It recognizes the individual’s right to profess and practice his religion as guaranteed under Article 11 of the *Federal Constitution*. This case also reflects the perception that conversions out of Islam pose such a threat to the society to the extent that the individual was detained under the *Internal Security Act*.<sup>73</sup>

Freedom of religion as enshrined in Article 11 of the *Federal Constitution* is however an elusive and illusionary right for those who seek to exercise it, particularly when it involves the conversion out or renouncement of Islam. The court in the case of *Daud bin Mamat & Ors v. Majlis Agama Islam & Anor*<sup>74</sup> even went to the extent of insisting that the right to profess and practice religion under Article 11 does not include the right to renounce the religion. The trial judge held that the act of exiting the religion could not be equated with the right to profess or practice religion. To do so, according to the learned judge, would “stretch the scope of Article 11(1) of the Federal Constitution to ridiculous heights and rebel against the canon of construction.”<sup>75</sup> This is contrary to Article 18 of the *Universal Declaration of Human Rights* which specifically includes the right to change religion or belief. To hold otherwise will negate and render meaningless the right to profess and practice religion.

The *Universal Declaration of Human Rights* is a resolution of the General Assembly, passed in 1948. As such, no ratification is required. The question that is still being debated today is whether the said Declaration is legally binding on states. There are two schools of thoughts on this basic point. The first advocates that the Declaration being a resolution of the General Assembly is not legally binding. The second puts forth the stand that the Declaration is not just a resolution, it is an exceptional resolution which has been adopted and adhered to by many states as forming the basic minimum standards of human rights and may have even evolved to the status of international customary law.

Malaysia’s membership in the United Nations basically means it upholds and adheres to the basic principles of the United Nations. The undertaking to observe the principles and further the purposes of the United Nations Charter includes the

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<sup>73</sup> *Ibid.*

<sup>74</sup> [2001] 2 C.L.J. 161 [*Daud*].

<sup>75</sup> *Ibid.* at 172, para. a.

acceptance of the *Universal Declaration of Human Rights* as it is one of the very basic documents containing the principles and standards of human rights for mankind. It is the author's position that Article 11 of the *Federal Constitution* ought to be interpreted in consonance with Article 18 of the *Universal Declaration of Human Rights*. How is a person to exercise his right to profess his religion when he is not allowed to change his religion even when his faith in that religion no longer exists? How is he to profess and practice his new religion? Insisting that Muslims can only profess and practice Islam ignores the *Holy Quran* itself which acknowledges the right to change one's religion. It is acknowledged that the abandonment of the faith will however, be punishable in the Hereafter, as stated in the *Holy Quran*.<sup>76</sup>

Provisions in state legislation governing the administration of Islamic law and Syariah offences include restrictions on the right to renounce Islam.<sup>77</sup> The sensitivity of the issue and the insistence on the primacy of Islam have somewhat prevented the due recognition of the freedom of religion in Malaysia.

## V. PROVISIONS GOVERNING FAITH

### A. State Provisions

The law governing the Islamic faith is found, *inter alia*, in the Administration of Islamic Law Enactments and the Syariah Criminal Offences Enactments. These enactments are at state level and are not uniform. Various aspects of faith are regulated, including that of belief in God. The fact that the manifestation of that belief takes it to the public sphere is not denied. It is precisely because of this public dimension that such regulations are in existence, as elaborated below. Besides conversion and renouncement, there are provisions governing wrongful worship, false doctrine and claims, propagation of religious doctrine, failure to perform Friday prayers, eating in public during the *Ramadhan* [fasting month], non-payment of *zakat* or *fitrah* [tithe] and insulting or bringing into contempt the religion of Islam.<sup>78</sup> There are many other provisions governing the day to day practices of Muslims.

Under the *Administration of Islamic Law (Federal Territories) Act 1993*,<sup>79</sup> provisions are made for the conversion to Islam.<sup>80</sup> For a valid conversion, a person is required to utter in reasonably intelligible Arabic the Affirmation of Faith. The person must at that time be aware of the meaning of the Affirmation of Faith and the utterance must be made of the person's own free will.<sup>81</sup> Additionally, he must be of sound mind and has attained the age of eighteen years. Those below eighteen

<sup>76</sup> "Those who reject Faith and keep off (men) from the way of God, have verily strayed far, far away from the Path. Those who reject Faith and do wrong,—God will not forgive them nor guide them to any way—Except the way to Hell, to dwell therein for ever. And this to God is easy." [4: 167-169] of the *Holy Quran*, *supra* note 62.

<sup>77</sup> Currently, such provisions vary from state to state. In fact, there are several states, including the Federal Territory, which have no such provisions.

<sup>78</sup> See *Administration of Islamic Law Act*, *supra* note 20 and *Syariah Criminal Offences Act*, *supra* note 68 for the Federal Territories. Each state has its own legislation.

<sup>79</sup> *Administration of Islamic Law Act*, *supra* note 20.

<sup>80</sup> *Administration of Islamic Law Act*, *supra* note 20, Part IX.

<sup>81</sup> *Administration of Islamic Law Act*, *supra* note 20, s. 85.

require the consent of his parent or guardian.<sup>82</sup> There are no provisions for the conversion out of Islam under the said legislation. Only several States have provisions on renouncement.

This is reflective of public perception in Malaysia that a Muslim cannot renounce Islam. It is deemed a grave sin and those who 'assist' a person to renounce Islam also bear the burden of the sin. The generally accepted approach is not to allow renouncement. The individual's right to profess is now subject to the various provisions in state legislation which typically requires the person who wishes to renounce Islam to obtain an order from the Syariah court. The exercise of this right to profess is however criminalised under the offence of apostasy. Attempts to renounce Islam result in the person being detained for purposes of 'education' and 'rehabilitation'. The requirement of 'repentance' is also imposed on those who seek to renounce the religion of Islam. If a person repents, that basically means he no longer wishes to renounce the religion. The renouncement is thus negated. This effectively ensures that no renouncement will ever succeed because the person who renounces is required to repent. The repentance overrides the earlier renouncement. In the past, there was registration of conversions out of Islam. Such registration actually acknowledges that such cases do exist. It is to be noted that this is no longer the practice. Hence, there is no legal recognition of renouncement, making it realistically and practically impossible, as can be seen in the numerous cases before the court and which are discussed in this article.

Such provisions are in fact inconsistent with the approach in and the essence of the *Holy Quran* which exhorts against compulsion in religion. They are also contrary to Article 18 of the *Universal Declaration of Human Rights* which clearly states that the right to freedom of religion includes the freedom to change his religion or belief.<sup>83</sup> The only limitation permissible under Article 11 relates to the prohibition of propagation of other doctrines and beliefs to persons professing Islam.<sup>84</sup> This has not, however, stopped State legislatures from passing legislation limiting and negating the exercise of the freedom of religion.

### B. *Constitutionality of Provisions Governing Faith*

In Malaysia, the private domain of faith or the *forum internum*, known as *aqidah*, is in the public sphere as it is being regulated via legislation in so far as Muslims are concerned. No longer is faith a matter between the individual and God. Whilst the *Holy Quran* emphasizes on the freedom of religion and acknowledges the diversity and plurality of religions, such an approach which is in fact more suited to the multi-racial and multi-religious society in Malaysia has not been adopted. Instead, various provisions have been put in place to regulate faith in the guise of legislation

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<sup>82</sup> *Administration of Islamic Law Act*, *supra* note 20, s. 95. This point was ignored in the case of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah*, [1999] 60 M.L.J.U. 1 [*Soon Singh*].

<sup>83</sup> *Universal Declaration of Human Rights*, art XIII states: "Every person has the right to freedom of conscience and worship in accordance with his religious beliefs."

<sup>84</sup> *Syariah Criminal Offences Act*, *supra* note 68, s. 5 makes such propagation an offence. It carries a fine not exceeding three thousand ringgit or imprisonment for a term not exceeding two years or to both.

governing the administration of Islamic law, customs and Syariah offences. The constitutionality of these provisions is suspect.

Are State legislatures empowered to legislate on faith? The State legislatures are only empowered to pass laws on matters listed under the State List.<sup>85</sup> The matters enumerated under the said List are Islamic law and personal and family law of persons professing the religion of Islam. The limited scope of Islamic law has already been established in *Che Omar*.<sup>86</sup> No mention is made of conversion or renouncement of the religion in the State List.<sup>87</sup> The State legislatures are further empowered to legislate on, *inter alia*, the “creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List.”<sup>88</sup> Is conversion or renouncement, which is the exercise of a constitutional right and one of personal choice ‘against precepts of Islam’? Is the criminalisation of the exercise of the right to renounce Islam constitutionally defensible?

It is submitted that State legislation which regulates faith is *ultra vires* Article 11 of the *Federal Constitution* in so far as it seeks to limit and negate the right to renounce, which is an inherent component of the right to profess the religion of one’s choice. In fact, the State legislature has no power to legislate on the matter at all as it is not even stated under paragraph 1 of the State List. However, such provisions remain as law until they are declared unconstitutional by the courts. The validity of these provisions can only be challenged by individuals in a proceeding for a declaration that the said provisions are invalid. The commencement of the said proceeding requires the leave of the Federal Court.<sup>89</sup> So far such a challenge has not succeeded.<sup>90</sup>

In the case of *Kamariah bte Ali dan Lain-lain v. Kerajaan Negeri Kelantan, Malaysia dan satu lagi*,<sup>91</sup> leave was granted by the Federal Court for the appellants to appeal on the grounds, *inter alia*, whether the limit or restriction imposed under section 102 of the Kelantan’s *Council of Muslim Religion and Malay Custom Enactment 1994* is inconsistent with Articles 8, 11(1) and (5) and 74 of the *Federal Constitution* and therefore invalid.<sup>92</sup> The Federal Court did not address the issue before it and merely dismissed the issue as irrelevant. According to the Federal Court, section 102, which refers to converts, should not be interpreted strictly or

<sup>85</sup> *Federal Constitution*, art. 74(2).

<sup>86</sup> *Che Omar*, *supra* note 11.

<sup>87</sup> See *Federal Constitution*, Ninth Schedule, List II, para. 1.

<sup>88</sup> Criminal law is under the Federal List, see *Federal Constitution*, Ninth Schedule, List I.

<sup>89</sup> *Federal Constitution*, art. 4(3) and (4).

<sup>90</sup> In *Lina Joy*, *supra* note 17, the challenge to the constitutionality of such provisions was abandoned at the appellate stage. It was agreed by all the parties that the appeal be confined to the issue of administrative law. The Federal Court affirmed the decision of the Court of Appeal that the issue on renouncement falls under the jurisdiction of the *Syariah* court despite the absence of any express legal provision.

<sup>91</sup> [2005] 1 M.L.J. 197.

<sup>92</sup> Kelantan’s *Council of Muslim Religion and Malay Custom Enactment 1994* (Kn. En. 4/1994), s.102 provides:

- No person who has confessed that he is a Muslim by religion may declare that he is no longer a Muslim until a court has given its validation/confirmation to that effect.
- If a Muslim purposely attempts to abandon Islam, the Court may if so satisfied, order such person to be detained for up to 36 months in a Pusat Bimbingan Islam for the purpose of educating him and he shall be asked to repent.



literally. It should include those who are born Muslims. It should be noted that if the section is interpreted strictly as it should, it will result in it violating the equality clause, Article 8 of the *Federal Constitution*.

In interpreting section 102 liberally by including those who are born Muslims, the Federal Court ignored the proper rule of construction. It wrongly relied on cases which are authorities on the construction of provisions in the Constitution for the interpretation of a provision in a state legislation. It is a well-established principle that constitutional provisions, particularly provisions on fundamental rights, are to be interpreted and construed with less rigidity and more generosity than other statutes.<sup>93</sup> The proper rule of construction of a statutory provision which seeks to restrict any fundamental liberty is for it to be read strictly and literally. It was further held by the Federal Court in *Kamariah* that the applicants' renouncement did not affect their subsequent punishment by the Syariah court as otherwise any Muslims can resort to renouncement to escape the charges against them in the Syariah Court.<sup>94</sup> Such a situation, according to the court, will affect the administration of Islamic law in Malaysia. The basic issue of the restriction to the exercise of the fundamental right under Article 11 was side-stepped and not addressed at all. It is submitted that this decision has not conclusively settled the issue due to its poor reasoning and avoidance of the issue. This point was revisited by Richard Malanjum FCJ in *Lina Joy*.<sup>95</sup>

In my view apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalize it which in turn raises the question involving federal-state division of legislative powers... Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing Article 121(1)(1A). In my view the said Article only protects the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Federal Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function. Legislations criminalizing apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution are constitutional issues in nature which only the civil courts have jurisdiction to determine...

In the constitutional framework which places the Constitution as the supreme law of the land as opposed to Islamic law which derives its legality via Article 74(2) of the *Federal Constitution*, any inconsistency between the State laws, such as provisions regulating faith and the creation of the offence of apostasy, and the Constitution will result in the State law being void to the extent of its inconsistency.<sup>96</sup> The constitutional right to profess and practice the religion of one's choice is a right of

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<sup>93</sup> See *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan*, [1996] 1 M.L.J. 261; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan*, [1996] 1 M.L.J. 481; *Ramachandran, R v. The Industrial Court of Malaysia*, [1997] 1 A.M.R. 433. This position is still developing with the Federal Court overruling Court of Appeal decisions on this point. See the Federal Court decisions in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*, [2002] 4 C.L.J. 104 [*Sugumar*] and *Beatrice A/P AT Fernandez v. Sistem Penerbangan Malaysia & Ors*, [2005] 3 M.L.J. 681.

<sup>94</sup> *Supra* note 91 at 208.

<sup>95</sup> *Lina Joy*, *supra* note 17 at para. 65 of the dissenting judgment.

<sup>96</sup> *Supra* note 41.

every person as guaranteed under Article 11 of the *Federal Constitution*. That right prevails over any statutory provision which seeks to limit or negate that right. It is crystal clear that when there is inconsistency between Article 11(1) and provisions regulating faith, the right to profess and practice religion under the said Article ought to prevail as it is a fundamental liberty guaranteed under the *Federal Constitution*.

This matter has thus far not been satisfactorily decided by the courts as the preliminary objection over the civil courts' lack of jurisdiction has succeeded in 'hijacking' it. The basis for the preliminary objection is Article 121(1A) of the *Federal Constitution* which states: "The [High Courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

This provision was the result of the constitutional amendment in 1988.<sup>97</sup> Unfortunately, conflicts between the two courts still remain in many areas even after the amendment. For example, section 51 of the *Law Reform (Marriage and Divorce) Act 1976*<sup>98</sup> which applies to non-Muslims provides that where a party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce, after the expiration of three months from the date of conversion. In many cases, the party who had not converted either does not wish to get the divorce or may not be aware of the fact that his/her spouse had converted.<sup>99</sup> The party who has converted has no right to apply for a divorce in the High Court. Although he or she can apply to the Syariah Court for the dissolution of the said marriage under Islamic law, the dissolution order is not binding on the spouse who had not converted as he or she is not a Muslim.<sup>100</sup> The Syariah Court has no jurisdiction over non-Muslims.<sup>101</sup> Hence, it becomes a catch-22 situation, with both parties who are already estranged unable to resolve the matter in any court as both courts have no jurisdiction over the other party.

It is interesting to note that section 46(2) of the *Islamic Family law (Federal Territories) Act 1984*<sup>102</sup> provides that the conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Syariah Court. In addition to the issue above, obtaining maintenance from the spouse who had converted to Islam may pose problems as well since he or she is a Muslim and section 3(3) of the *Law Reform (Marriage and Divorce) Act 1976*<sup>103</sup> precludes the operation of section 77 with respect to a Muslim.<sup>104</sup> However, the Supreme Court in *Tan Sung Mooi v. Too Miew Kim*<sup>105</sup> ruled that the civil court is empowered to decide on the application by the appellant for ancillary relief following her divorce from her husband, despite the fact that her husband had subsequently embraced Islam.

Far from resolving conflicts of jurisdiction between the civil courts and Syariah courts as intended, Article 121(1A) has consistently thwarted the applications before

<sup>97</sup> Act A704/88. For comments on the said amendment, see Ahmad Ibrahim, "The Amendment of Article 121 of the Federal Constitution: Its Effect on the Administration of Islamic Law," [1989] 2 M.L.J. xvii.

<sup>98</sup> Act 164, Rep. 2001.

<sup>99</sup> *Eeswari Visuwalingam v. Government of Malaysia*, [1990] 1 M.L.J. 87.

<sup>100</sup> *Ng Siew Pian v. Abdul Wahid and Another*, [1993] 5 Kanun (2) at 126.

<sup>101</sup> *Pedley v. Majlis Agama Islam, Pulau Pinang*, [1990] 2 M.L.J. 307.

<sup>102</sup> Act 303, Rep. 2001.

<sup>103</sup> *Supra* note 98.

<sup>104</sup> *Letchumy v. Ramadason*, [1984] 1 M.L.J. 143.

<sup>105</sup> [1994] 3 M.L.J. 117.

the High Courts for declarations in relation to Article 11.<sup>106</sup> The substantive matter of the exercise of the freedom of religion and the challenge to the constitutionality of provisions regulating faith have not been addressed but merely redirected to the Syariah Courts which have so far applied the provisions as found in the state legislation, as it should. The Syariah Courts cannot address the issue of constitutionality of those provisions as it is not within its jurisdiction to do so. The proper avenue for this issue is the High Court.

## VI. SEEKING A REMEDY IN THE HIGH COURTS

There are several valid reasons why cases relating to conversion or renouncement are still being filed at the civil High Courts. First and foremost, it relates to the exercise of the freedom of religion, a fundamental liberty guaranteed under Part II of the *Federal Constitution*. It is therefore an issue of the enforcement of a fundamental right which falls under the jurisdiction of the High Courts. Secondly, even if one were to ignore the first point and rely on the State legislation, there is a lacuna in the majority of State legislation in so far as renouncement is concerned. Most of the States have no provisions on renouncement even though there are provisions on conversion into Islam. There is a tacit understanding that a Muslim must not and cannot be allowed to renounce Islam. Thirdly, even where there are specific provisions governing renouncement, so far those who have sought to renounce Islam under those provisions have not been granted the said order by the Syariah court.<sup>107</sup> Instead, the applicants have been charged and convicted for the offence of apostasy.<sup>108</sup> Those who attempt to 'abandon the faith of Islam' are ordered to be detained at the state's rehabilitation centre for 'education' or 'counseling' and are ordered to repent. Detention at the rehabilitation centre can extend up to 36 months.<sup>109</sup>

### A. Review of High Court Applications

In *Kamariah*,<sup>110</sup> the four appellants who are Malays and were raised as Muslims were convicted of the offence of performing a ceremony contrary to Islamic law and were sentenced to two years imprisonment by the Syariah High Court in Kota Bharu in 1992. On appeal, the Syariah Court of Appeal ordered that the imprisonment be replaced by bonds of good behaviour between three to five years. During that period, the appellants were required to present themselves before the *Qadhi* every month to declare their repentance. Prior to the sentencing for a subsequent charge of disobeying the earlier order, the appellants informed the Syariah High Court that they had renounced Islam through statutory declarations. They were nevertheless sentenced. They applied to the civil High Court for a writ of *habeas corpus* and

<sup>106</sup> For an overview of the conflict of jurisdiction, see Abdul Hamid bin Hj Mohamad, "Civil and Syariah Courts in Malaysia: Conflict of Jurisdictions," [2002] 1 M.L.J. cxxx.

<sup>107</sup> See *Daud*, *supra* note 74; *Kamariah*, *supra* note 36; *Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*, [2003] 2 M.L.J. 302.

<sup>108</sup> *Kamariah*, *supra* note 36.

<sup>109</sup> See *supra* note 92.

<sup>110</sup> *Supra* note 36.

declarations *inter alia* that section 102 of the said enactment was inconsistent with Article 11 and therefore invalid.

The purpose behind the section, according to the Court of Appeal, is to avoid confusion on whether a person is legally a Muslim. Nevertheless, the court acknowledged the fact that only God knows whether the person is a Muslim or not. It was held that the said provision does not prevent a Muslim from renouncing the Islamic faith. It merely requires the prior leave of the Syariah court and its validation of that fact. Until such validation is obtained, the person is deemed to be a Muslim. In reality, however, it is impossible to get such a validation as it is not merely an administrative or procedural requirement as stated by the Court of Appeal and as submitted by the Attorney-General at the Federal Court. The said provision acts as a control mechanism over individuals who wish to renounce. The persons concerned are liable to be detained for 'education' and are compelled to repent.

In the case of *Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*,<sup>111</sup> the issue was whether renouncement of Islam falls within the jurisdiction of the Syariah Court, and if so, whether the civil court was ousted from dealing with the matter. The first plaintiff who is ethnic Malay and was born a Muslim renounced the religion and adopted Hinduism as her religion. She changed her name and married the second plaintiff and they had two children. Whilst pregnant with her second child, the first plaintiff was arrested and charged under the state law for apostasy and for cohabitation outside of lawful Muslim wedlock with the second plaintiff.<sup>112</sup> She pleaded guilty and paid the fine upon advice of her counsel.

The second plaintiff, the husband, went through a formal conversion to Islam which he alleged was done under duress as he was advised that his wife would go to jail unless he converted. Both the plaintiffs sought various declarations under the *Federal Constitution*, *inter alia*:

1. That no permission or decision from the Syariah Court is necessary for the first plaintiff to profess the religion of her choice since such a requirement is *ultra vires* Article 11 of the *Federal Constitution*.
2. That the first plaintiff is no longer a Muslim since she professes herself to be a Hindu and practices that faith.
3. That the first plaintiff is no longer a Muslim in view of her conviction for apostasy and that she had paid the fine imposed by the Syariah Court.
4. That the plaintiffs should not be subjected to any arrest or detention if they choose to profess and practice a religion of their choice pursuant to their fundamental liberties under the *Federal Constitution*.
5. That the conversion of the second plaintiff was made under coercion or duress and thus is null and void.

A preliminary objection was raised by the defendants with regard to the court's jurisdiction to hear the case. Although counsel for the plaintiffs submitted that the

<sup>111</sup> [2003] 2 M.L.J. 302 [*Priyathaseny*].

<sup>112</sup> Perak, *Administration of Islamic Law Enactment 1992* (Pk. En. 2/1992) [*Perak Enactment*], s. 13 provides that a person who commits apostasy is guilty of an offence of deriding the religion of Islam and shall on conviction be liable to a fine not exceeding RM3,000 fine or imprisonment for a term not exceeding two years or to both.

matter requires the consideration of the constitutional validity of the relevant State enactment and that the plaintiffs do not profess the Islamic faith, the High Court upheld the preliminary objection and dismissed the application. The court held that the matter was within the jurisdiction of the Syariah Court.

Similarly in the recent case of *Lim Yoke Khoo v. Pendaftar Muallaf, Majlis Agama Islam Selangor & Yang Lain*,<sup>113</sup> the applicant applied to the High Court for declarations that her change of religion from Islam to Christianity is valid and that section 113 of the *Administration of The Religion of Islam (State of Selangor) Enactment 2003*<sup>114</sup> which deems a *muallaf*, i.e. a convert, as a Muslim is not valid and is inconsistent with the *Federal Constitution*. Her application was dismissed by the High Court due to the perceived lack of jurisdiction.

Interestingly, even the religious authority turned to the civil High Court to seek for a writ of *habeas corpus* in *Majlis Agama Islam Negeri Sembilan v. Hun Mun Seng*.<sup>115</sup> In this case, an eighteen year old girl had embraced Islam. Two months later she returned to her father's house and announced her wish to leave Islam at a press conference. The *Majlis Agama* [religious council] applied for a writ of *habeas corpus* against her father. The application failed as she was not detained against her will by her father. The court however stated that her renouncement must be in accordance with the provisions on renouncement in the *Negeri Sembilan Administration of Muslim Law Enactment 1991*.<sup>116</sup> It is obvious that an application was made at the High Court for the remedy sought. In this case, even though the subject matter is renouncement of Islam, the remedy lies with the High Court.

Another reason is the fact that the Syariah Court only has jurisdiction over Muslims. There have been cases where the religious status of the deceased is disputed by his next of kin who are non-Muslims. If one were to accept that the matter comes within the jurisdiction of the Syariah Court, the next of kin are left with no remedy at all. Where claims are made by the religious authorities over the body of a deceased who according to the said authority is a Muslim, the order is obtained from the Syariah Court. The family members of the deceased who are not Muslims cannot contest the order before the Syariah court. In the case of *Kaliammal a/p Sinmasamy v. Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dll*,<sup>117</sup> the widow applied to the High Court for various declarations, *inter alia*, that her husband was

<sup>113</sup> [2006] 4 C.L.J. 513 [*Lim Yoke Khoo*].

<sup>114</sup> Sel. En. 1/2003.

<sup>115</sup> [1992] 2 M.L.J. 676.

<sup>116</sup> The *Administration of Muslim Law (Negeri Sembilan) Enactment 1991* (N.S. En. 1/1991) has detailed provisions on the procedures for renouncement. Section 90A provides:

A Muslim shall not renounce or be deemed to have renounced Islam as his religion, unless and until he has obtained a declaration to that effect from the Mahkamah Tinggi Syariah

The applicant shall state the grounds upon which he wishes to renounce Islam and the application shall be supported by affidavit stating all the facts that support the grounds of the application

The judge may defer the hearing for 30 days and refer the applicant to the Mufti for counseling with a view to advise the applicant to reconsider his wishes to renounce Islam

The judge may, upon the facts presented before him, declare that the applicant has renounced Islam or may refuse the declaration

The order that he has renounced Islam shall be registered and until such order is registered, he shall be treated as a Muslim.

<sup>117</sup> [2006] 1 M.L.J. 685 [*Kaliammal*].

not a Muslim at the time of his death. The High Court held that it has no jurisdiction to hear the application of the widow as the matter was within the jurisdiction of the Syariah Court. The deceased was buried as a Muslim.

It must be acknowledged that the Syariah Courts have jurisdiction only over persons professing the religion of Islam<sup>118</sup> and in respect only of any of the matters included in paragraph 1 of the State List. In the case of *Nyonya Tahir*,<sup>119</sup> the Syariah Court actually took evidence from the deceased's adult children who are non-Muslims. It subsequently made an order that the deceased was not a Muslim based on the said evidence. Although this case was hailed by the mass media as proof that the Syariah Courts are fair and objective to non-Muslims as well, it ignored the crucial fact that Syariah Courts only have jurisdiction over persons professing the faith of Islam. Similarly, in the recent case of *Rayappan Anthony*,<sup>120</sup> the Syariah High Court actually rescheduled the hearing to allow the widow to testify on why the body of the deceased should be released to her. Both the wife and daughters of the deceased were subpoenaed to attend the hearing at the Syariah High Court. The widow and the daughters of the deceased, who are Christians, refused to attend the proceeding at the Syariah Court. The move requiring the attendance of the widow and the daughters disregards the limited jurisdiction of the Syariah courts and is a blatant assumption of jurisdiction over non-Muslims. This case received the attention of the Prime Minister and the Cabinet.<sup>121</sup> The Attorney-General was directed to determine the religious status of the deceased. The case was resolved when the State's religious authority withdrew its claim over the body of the deceased.<sup>122</sup>

In *Shamala Sathiyaseelan v. Dr. Jeyaganesh C. Mogarajah & Anor*,<sup>123</sup> the plaintiff's husband had converted to Islam in November 2002 and shortly after, converted the two children who were then four and two years old. She commenced proceeding at the High Court for the custody, control and care of the children. In January 2003, at the hearing, the husband sought an adjournment. In the meantime, he made an *ex-parte* application to the Selangor Syariah Court for the custody of the children. In February 2003, the Syariah Court's custody order was served on the wife. The issues before the High Court were the effect of the custody order by the Syariah Court and the custody of the children.

The dilemma of the applicant, a Hindu, in her effort to challenge the validity of the conversion of her two minor children was acknowledged but not addressed by

<sup>118</sup> See *Administration of Islamic Law Act*, *supra* note 20, ss. 46 and 47. This is in line with *Federal Constitution*, Ninth Schedule, List II, para. 1.

<sup>119</sup> *Majlis Agama Islam Negeri Sembilan, Jabatan Hal Ehwal Agama Islam Negeri Sembilan dan Pengarah Jabatan Hal Ehwal Agama Islam Negeri Sembilan v. Nyonya Tahir* (Unreported). This case was widely publicized in the mass media shortly after the case of *Kaliammal*. See Bernama, "Syariah Court Decides Nyonya Tahir Not A Muslim," (23 January 2006) online: Bernama.com <[http://www.bernama.com/bernama/v3/news\\_lite.php?id=177118](http://www.bernama.com/bernama/v3/news_lite.php?id=177118)>.

<sup>120</sup> *Rayappan*, *supra* note 48. See Dr Wan Azhar Wan Hamad, "Whither jurisdictional conflict?," *The Star*, (15 May 2007), online: The Star <<http://thestar.com.my/news/story.asp?file=/2007/5/15/focus/17723780&sec=focus>>.

<sup>121</sup> Syed Azhar, "Cabinet wants religious status of dead man verified," *The Star* (7 December 2006), online: The Star <<http://thestar.com.my/news/story.asp?file=/2006/12/7/nation/16249738&sec=nation>>.

<sup>122</sup> Cecil Fung, "Issue settled—Family claims Rayappan's body," *The Star* (8 December 2006), online: The Star <<http://thestar.com.my/news/story.asp?file=/2006/12/8/nation/16262106&sec=nation>>.

<sup>123</sup> [2004] 2 M.L.J. 648.

the court. The learned judge commented:

What then is [there] for her to do? The answer to that is, it is not for this court to legislate and confer jurisdiction to the Civil Court but for Parliament to provide the remedy... For the moment as the law stands today I think the only way open for the wife is to seek the help of Majlis Agama Islam Wilayah Persekutuan... In the present case since the two minors are now 'saudara baru' or 'muallaf' the wife can take them to Majlis Agama Islam Wilayah Persekutuan for help and advice to resolve the said issue.<sup>124</sup>

The learned judge concluded that by virtue of Article 121(1A) of the *Federal Constitution*, only the Syariah Court has the competency and expertise to determine whether the conversion of the two minors is valid or not.<sup>125</sup> In so doing, the applicant is left with no remedy as the Syariah Court has no jurisdiction over non-Muslims. With respect, the advice of the learned judge is misplaced and impractical.

This perceived lack of jurisdiction can be traced back to the case of *Soon Singh*.<sup>126</sup> It is submitted that this case was decided *per incuriam*. The Court of Appeal did not follow the Supreme Court's decision in *In re Susie Teoh; Teoh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu Kelantan*<sup>127</sup> and actually overruled the Supreme Court's decision in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*.<sup>128</sup> It summarily dismissed the application of Article 11 and held that the matter of conversion out of Islam came within the 'implied jurisdiction' of the Syariah Court and that the only qualified forum to hear the matter was the Syariah Court.

Submission by counsel that the conversion was invalid due to the fact that he was then a minor was summarily dismissed as being irrelevant. This ignored the decision of the Supreme Court in *Teoh Eng Huat* which held that the parent or guardian exercises the right of religion on behalf of a minor.<sup>129</sup> This issue should in fact be addressed by the court as it directly affects the case. In accordance with the decision in *Teoh Eng Huat*, the conversion was in fact invalid. Hence the issue of jurisdiction is immaterial as the declaration sought becomes moot and unnecessary.

In the case of *Dalip Kaur*,<sup>130</sup> the mother of the deceased applied for a declaration that he was not a Muslim at time of his death and that she was entitled to the body of the deceased. There was an alleged renouncement via a deed poll prior to his death. The deceased was engaged to a Muslim girl. The High Court held that he was a Muslim. On appeal, the Supreme Court remitted the case to the High Court for several questions to be referred to the *Fatwa* Committee. After receiving the *fatwa*, the Judicial Commissioner confirmed his earlier findings and decision. The appeal was dismissed by the Supreme Court of three judges based on different grounds.

<sup>124</sup> *Ibid.* at paras. 12-13.

<sup>125</sup> *Ibid.* at para. 14. The case is now before the Court of Appeal. The decision of the Court of Appeal has been delayed pending the Federal Court's decision in *Lina Joy*. As at 1 September 2007, the Court of Appeal has yet to decide on the appeal even though the Federal Court has ruled in the *Lina Joy* case.

<sup>126</sup> *Soon Singh*, *supra* note 82.

<sup>127</sup> [1990] 2 C.L.J. 11; [1990] 1 C.L.J. (Rep) 277.

<sup>128</sup> [1992] 1 M.L.J. 1. [*Dalip Kaur*].

<sup>129</sup> *Federal Constitution*, art. 12(4): "...the religion of a person under the age of eighteen years shall be decided by his parent or guardian."

<sup>130</sup> *Dalip Kaur*, *supra* note 128.

Hashim Yeop Sani C.J. (Malaya) was of the view that clear provisions should be incorporated in all state Enactments to avoid difficulties of interpretation by the civil courts. His Lordship further held that Article 121(1A) of the *Federal Constitution* does not take away the jurisdiction of the civil courts to interpret any written laws of the states enacted for the administration of Muslim law. This position acknowledges the current lacuna in the state law and affirms the jurisdiction of the civil courts in the said matter. Mohamed Yusof S.C.J. on the other hand, was of the view that such a serious issue needed consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence and that it required substantial consideration of the Islamic law by relevant jurists qualified to do so. According to the His Lordship, the only forum qualified to do so is the Syariah Court.

The judge in *Soon Singh* opted for the dictum of Mohamed Yusof S.C.J. In ignoring and dismissing the main judgment of *Dalip Kaur* and adopting the dictum without any reasoning whatsoever, it is submitted that the Court of Appeal had erred. It did not follow the decision of the Supreme Court, thus overruling a Supreme Court's decision, which it is not entitled to do.

Despite the fact that the decision in *Soon Singh* was made *per incuriam*, it was followed by subsequent cases at the High Court level, resulting in the applications at the High Courts being dismissed for the perceived lack of jurisdiction.<sup>131</sup> However, in the case of *Sukma Darmawan Saasmitat Madja v. Ketua Pengarah Penjara Malaysia & Anor.*,<sup>132</sup> it was held that the jurisdiction of the Syariah Court under Article 121(1A) of the *Federal Constitution* only comes into play when it is a matter within the exclusive jurisdiction of the Syariah Court. The accused, who was charged for the offence of sodomy in the High Court, challenged the court's jurisdiction on the basis that the offence is within the jurisdiction of the Syariah Court under article 121(1A) of the *Federal Constitution*. The Court of Appeal held that the matter must be within the 'exclusive jurisdiction' of the Syariah Court to oust the jurisdiction of the High Court. The exercise of the freedom of religion, being a fundamental right guaranteed under Article 11 of the *Federal Constitution*, falls within the jurisdiction of the High Court. Even if one were to accept that Syariah law provides for the matter of renouncement, it must be acknowledged that the Syariah Court has no exclusive jurisdiction on the matter.

Finally, those who have renounced the religion of Islam do not see themselves as Muslims. This is to be contrasted with State legislation which has deeming provisions on the status of a Muslim. A person remains a Muslim until he obtains an order from the Syariah Court or upon registration of his renouncement. Yet, even in cases where the persons concerned were charged and convicted for apostasy, no registration of their renouncement has been subsequently made.<sup>133</sup>

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<sup>131</sup> *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur*, [1998] 1 M.L.J. 681 is a case prior to *Soon Singh* which held that even if there are no express provisions in the State Enactments, the jurisdiction of *Syariah* courts can be assumed as being inherent under Article 74, as it is within the competency of the legislature to legislate on the matter. Cases after *Soon Singh* include *Kaliammal*, *supra* note 117; *Priyathaseny*, *supra* note 111; and *Lim Yoke Khoon*, *supra* note 113.

<sup>132</sup> [1999] 1 M.L.J. 266.

<sup>133</sup> *Daud*, *supra* note 74; *Kamariah*, *supra* note 36; *Priyathaseny*, *supra* note 111.



### B. Abdication of Judicial Duty

The issue of freedom of religion is now submerged in the murky waters of the jurisdiction of the courts despite the crystal clear provision of Article 4(1) of the *Federal Constitution*. State legislatures have deemed it fit to pass various provisions governing faith including criminalizing the change of religion under the offence of apostasy.<sup>134</sup> Jurisdiction is ‘conferred’ by judges, not by the legislature, on the Syariah Court to deal with the matter of renouncement. As mentioned earlier, the matter of conversion and renouncement are not even listed in the State List. To worsen the situation, even when the state legislation is silent, the civil courts have held that the Syariah Courts have implied jurisdiction to deal with the matter.<sup>135</sup>

Citing Article 121(1A) of the *Federal Constitution* and the doctrine of *stare decisis*, the High Courts have proclaimed that they have no jurisdiction to hear the applications before them. In cases following *Soon Singh*, the judges felt bound by the said decision even though it was wrongly decided.<sup>136</sup> These applications are mainly for declarations pertaining to their right to profess and practice the religion of their choice. In so doing, the civil courts have abdicated its role as the final bastion for the enforcement and upholding of fundamental liberties. Section 25(2) of the *Courts of Judicature Act 1964*<sup>137</sup> clearly states the additional powers of the High Courts. The High Court has the power to issue directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the *Federal Constitution*, or any of them, or for any purpose.

It is perhaps necessary to refer to the Oath of Office and Allegiance of judges to be reminded of the basic function of a judge:

I, .....do solemnly swear that I will faithfully discharge my judicial duties in that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution.<sup>138</sup>

A judge is duty bound to preserve, protect and defend the *Federal Constitution* and this includes providing the relevant remedy for the enforcement of fundamental liberties guaranteed under Part II of the *Federal Constitution*. The subject-matter

<sup>134</sup> See, for example, *Perak Enactment*, *supra* note 112, s. 13. The State Legislatures of Kelantan and Terengganu have even passed *hudud* bills, which is the *Syariah* criminal law. These have not been gazetted presumably due to the fact that they are unconstitutional. Criminal law comes under the purview of the Parliament as it is clearly stated in the Federal List. The ‘push’ to Islamize the country has seen the various provisions regulating faith being passed by State legislatures and implemented by the religious authorities.

<sup>135</sup> See *Soon Singh*, *supra* note 82.

<sup>136</sup> These include *Daud*, *supra* note 74; *Kamariah*, *supra* note 36; *Priyathaseny*, *supra* note 111; *Nedunche-lian Uthidaram v. Nurshafiqah Mah Singai Annal & Ors*, [2005] 2 C.L.J. 306; *Kaliammal*, *supra* note 117; *Lim Yoke Khoon*, *supra* note 113.

<sup>137</sup> Act 91, Rev. 1972.

<sup>138</sup> *Federal Constitution*, Sixth Schedule. See also *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 M.L.J. 289, where it was observed by the Court of Appeal (per Gopal Sri Ram JCA.) that the amendment to Article 121(1) of the *Federal Constitution* via Act A704 which deleted the words “judicial power of the Federation” on 10 June 1998 did not have the effect of taking away the judicial power from the High Courts.

approach which brings forth the jurisdictional issue is inappropriate in cases involving fundamental liberties.

## VII. CONCLUDING REMARKS

It can be concluded from the cases discussed that Muslims in Malaysia are not able to nor are they allowed to exercise their constitutional right to renounce and change their religion.<sup>139</sup> It must be recognized that conversion and renouncement are not matters of Islamic law and doctrine alone. They are in fact, matters which involve the exercise of the constitutional right of the individual. Whether or not a person has converted or renounced is a question of fact that is to be determined on the basis of the person's declaration and evidence of his religious practices. As it involves the exercise of a fundamental liberty under the *Federal Constitution*, the matter should be brought before the civil High Courts. Until and unless the judiciary finds the wisdom and courage to address this issue, it remains unresolved, affecting the lives of those caught in this web of uncertainty and persecution.

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<sup>139</sup> The case of *Lina Joy* was brought to the attention of the UN Commission on Human Rights Special Rapporteur on freedom of religion or belief. See Commission on Human Rights, *Civil and Political Rights, Including the Question of Religious Tolerance—Addendum: Summary of cases transmitted to Governments and replies received*, UNESCO, 62<sup>nd</sup> Sess. E/CN.4/2006/5/Add.1 (27 March 2006) at paras. 246-250; online: Office of the UN High Commissioner for Human Rights <<http://www2.ohchr.org/english/issues/religion/annual.htm>>.