Freedom of Religion in Malaysia: A Tangled Web of Legal, Political, and Social Issues

Dian Abdul Hamed Shah
Mohd Azizuddin Sani Mohd

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Freedom of Religion in Malaysia: A Tangled Web of Legal, Political, and Social Issues

Dian Abdul Hamed Shah† and Mohd Azizuddin Mohd Sani‡‡

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† Bright Sparks Fellow, University of Malaya and S.J.D. student, Duke University School of Law.
‡‡ Dr. Mohd Azizuddin Mohd Sani is a Senior Lecturer in Political Science and Chair of the International Studies Program at the College of Law, Government and International Studies, Northern University of Malaysia. He graduated with a Ph.D. in Politics and International Relations from Keele University, United Kingdom. Some of his notable publications include Freedom of Political Speech and Social Responsibility in Malaysia (Bangi: UKM Press, 2010) and The Public Sphere and Media Politics in Malaysia (Newcastle Upon Tyne: Cambridge Scholar Publishing, 2009). His writing and research interests are in fields of political theory, human rights, media politics, and Malaysian politics and laws.

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I. Abstract

Malaysia takes great pride in being a melting pot of different cultures, races and religions, co-existing under the purportedly moderate Islamic nation model. Despite the fragility that normally exists in multiethnic societies, Malaysia has largely managed to maintain harmonious co-existence between its citizens. Nevertheless, the vibrant development of human rights awareness and advocacy throughout the past decade introduced an additional element into the dynamics of pluralism in the country. Human rights have become standard talking points even amongst those in the vanguard of cultural, political, and religious conservatism.

In Malaysia, race and religion are important, interconnected issues, but they are also traditionally jealously guarded. There is reluctance—at least in the public domain—to openly debate these matters through the pretext of protecting multiethnic sensitivities. However, several cases invoking the constitutional right to religious freedom have been brought to the public eye and caused considerable uproar in the Muslim-majority nation. They include, but are not limited to, apostasy, religious conversions, and acceptance of non-mainstream religious doctrines. These cases raise pertinent questions about the boundaries of religious freedom for Muslims and non-Muslims alike, especially when pitted against considerations for religious rules, societal norms, and the grander idea of collective social responsibility and national stability.

This paper explores the conundrum between the fundamental right to religious freedom enshrined in the international human rights corpus and the exercise of that right in Malaysia. In doing so, it examines controversial cases which tackle the essential question of whether the Malaysian conception and practice of religious freedom is consistent with international human rights standards and entrenched constitutional rights. This paper will
demonstrate that the parameters of freedom of religion in Malaysia are shaped by various political and legal forces, as well as the desire to maintain stability among the multiracial and multi-religious population. By demonstrating the impact of prevailing practices, it is hoped that this paper will prompt further discourses to draw an acceptable idea of religious freedom that learns from universal views of human rights, whilst maintaining aspects of common traditional and cultural values.

II. Introduction

Malaysia takes great pride in its recognition as a "moderate Islamic country." As a result of inter-communal compromises in 1956, drafters of the post-colonial Federal Constitution (hereinafter "Constitution") agreed to establish Islam as the religion of the Federation. This acceptance of Islam was "part of a political settlement in return of which [the non-Malays] would obtain citizenship and the right to education in their mother tongue." The constitutional grounding of Islam however, does not affect the right of non-Muslims to practice and profess their own religions. Indeed, this is the central feature of religious freedom in Malaysia, enumerated in Article 11 of the Constitution.

Almost fifty years later, the rise of several high-profile cases


2 Joseph M. Fernando, The Position of Islam in the Constitution of Malaysia, 37 J. SOUTHEAST ASIAN STUD. 249, 253 (2006) (citing the Alliance Memorandum to the Reid Constitutional Commission on September 27, 1956, which states that "[t]he religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions.").


5 See CONST. OF MALAYSIA (1957), art. 11 (Malay.).
invoking the right to religious liberty reveals serious problems regarding the parameters of that right. In 2004, Lina Joy sought to change her religious status on her national identity card at the National Registry Department (NRD). Born a Muslim, Joy converted to Christianity and was baptized in 1998. The NRD refused her application in the absence of an order from a Syariah court affirming her conversion. Joy did not seek recourse through the religious courts, but applied to the civil courts on the grounds that the denial to remove "Islam" from her identity card interfered with her right to practice the religion of her choosing under the Constitution. The appeals proceeded to the Federal Court—the highest court in the land—but Joy was unsuccessful.

Needless to say, the aftermath of the Lina Joy case drew criticism from journalists, human rights lawyers, activists, and organizations. Lina Joy was only one of the many cases questioning the right to religious freedom in Malaysia. The landmark ruling was expected to "[d]efine Malaysia’s character as a nation," and to settle once and for all, questions of whether Malaysia "[w]ill go down the line of secular constitutionalism or whether that Constitution will now be read subject to religious requirements." Joy’s lawyer, Malik Imtiaz Sarwar—himself a Muslim—sees the Federal Court verdict as "a potential dismantling of Malaysia’s . . . multi-ethnic [and] multi-religious [character]." Clearly, this case has many ramifications in store for the social, political and legal outlook of Malaysia. On the one hand, Joy’s case is seen as a grave violation of a fundamental right

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7 Id.
8 Id.
9 Id. at 410.
10 Id. at 409.
11 Id. at 410.
13 Id.
enunciated in the Universal Declaration of Human Rights ("UDHR"). On the other, there is a fine distinction between freedom of religion as understood in the UDHR, and the more limited, carefully crafted religious liberty provision in the Constitution. The latter is also supported by considerations of Syariah law which prohibit apostasy. Thus, the extent to which constitutional recognition of freedom of religion is consistent with the purported universal idea of the same right is still a matter of great debate. This tension also demonstrates a broader theme: the tussle between universalist and relativist conceptions of human rights.

The UDHR has evolved from an aspirational statement to a body of norms accepted either as “part of customary international law, or as an authoritative interpretation of the [UN] Charter’s human rights provisions.” Its professed “universality” attracts much criticism, especially from those resistant to the UDHR’s supposedly “Western ideas.” With the rise of nationalism and claims of “[c]ulture as national essence,” human rights are challenged as a product of the individualistic, liberal West, and inconsistent with communal, conservative or non-liberal values.

For others, the idea of a common standard of fundamental rights that one attains by the virtue of being human, rights which are inalienable and indivisible regardless of race, creed, and nationality, is a noble aspiration. Today, the human rights movement has gone beyond mere idealism; it has transcended national boundaries, infiltrated international institutions, and embedded itself in the world’s modern consciousness. But this

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16 See CONST. OF MALAYSIA, supra note 5, art. 11.

17 See Barry, supra note 6, at 410.

18 Henry J. Steiner, et al., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 161 (Henry J. Steiner, et al. eds., 3d ed. 2007) [hereinafter Steiner et al.].

19 Sally Engle Merry, Human Rights and Gender Violence, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, supra note 18, at 524, 527 (arguing that “[c]ulture as national essence” is fundamental to claims to indigenous sovereignty and ethnonationalism, often in resistance to human rights).

20 See id.

21 See Press Release, General Assembly, Ordinary People throughout the World
rapid development has caused considerable tension in the claims
to human rights universality and the relativity of culture, raising
important questions that warrant our attention.

In multicultural and multi-religious Malaysia, disputes on
matters of religion and race are expected. The more important
questions, however, revolve around the manner in which politico-
legal forces resolve these disputes, and the impact on the dynamics
of pluralism in Malaysia. In an attempt to address these issues,
this article will proceed in four parts. Part III explains the
international human rights conception of the freedom of thought,
conscience and religion, and the two competing perspectives on
the issue, namely the universalist and relativist debate. Part IV
underlines related provisions of the Constitution and some
historical background as to how Malaysia’s forefathers envisioned
those crucial constitutional provisions. Part V examines recent
cases with regard to the Malaysian experience in dealing with
freedom of religion issues. Finally, Part VI evaluates the issues
challenging and shaping the extent of freedom of religion in
Malaysia and attempts to reconcile the universalist-relativist
arguments on that freedom. This paper will demonstrate that the
parameters of freedom of religion in Malaysia are shaped
by various political and legal forces, as well as the desire to maintain
stability among the racially and religiously diverse population.

III. International Standards on Religious Freedom: Theories
and Perspectives

A. International Human Rights Instruments

Following the devastation of World War II, human rights rose
to prominence in the legal and political fora. The promulgation
of the UDHR purports to establish a foundational document that
transcends national boundaries and protects rights that are

Want Human Rights of Universal Declaration ‘Translated into Reality,’ UN High
Commissioner Tells Committee; Special Adviser Presents Report on Myanmar;
Committee Also Hears from Chair of Committee on Migrant Rights; Special Rappoteurs

Nancy Flowers, A Short History of Human Rights, HUMAN RIGHTS HERE AND
NOW: CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS,
http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-
history.htm.
fundamental by virtue of being human. Religion is precisely one of those rights. Article 18 of the UDHR provides the right of every individual to the freedom of thought, conscience and religion. This is a truly broad provision—one that envisions not just the right to practice and profess a religion, but also the right to change one's religion. The UDHR permits limitations to the exercise of rights and freedoms "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Armed with the promise of respect for pluralism, equality and non-discrimination, successive documents built on the UDHR's provisions in greater detail. For instance, Article 18(2) of the International Covenant on Civil and Political Rights ("ICCPR") prohibits coercion that would impair a person's freedom to choose his religion or belief. This right, however, is not absolute. Article 18(3) of the ICCPR allows limitations on manifestations of religious beliefs that are "[p]rescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Thus, according to the Human Rights Committee ("HRC"), Article 18 "[d]oes not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice." The HRC also states that "[l]imitations may be applied

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23 Id.
24 UDHR, supra note 15.
25 Id.
26 Article 18 of the UDHR states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." UDHR, supra note 15, art. 18.
27 Id. art. 29(2).
29 Id. at 178.
30 Id.
31 UN Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter HRC General Comment].
only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated."  

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Beliefs ("1981 Declaration") also further refines the parameters of religious freedom.  

One striking provision is Article 2's prohibition on discrimination on the basis of religion or other beliefs.  

It also sets forth the right of parents or legal guardians of a child "[t]o organize the life within the family in accordance with their religion or belief."  

B. The Universal Argument  

The key feature of the UDHR, or any of the subsequent human rights instruments, is their universal aspirations, both in nature and application. This is evident within the UDHR preamble, which speaks of the "inherent dignity and of the equal and inalienable rights of all members of the human family" and proclaims "a common standard of achievement for all people and all nations."  

Similarly, the 1981 Declaration proclaims the "universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion."  

The language of these human rights instruments does not contemplate any differences that may exist between peoples or nations. They address all regions and states, regardless of the form of government, socio-economic situation or religious-cultural traditions. However, in terms of application, what 'universal' entails is a more complex question. Does this imply that all rights

32 Id.  
34 Id.  
35 Id.  
36 See UDHR, supra note 15.  
37 Id.  
38 Id.  
39 1981 Declaration, supra note 33.  
40 Steiner et al., supra note 18, at 517.
are to be conceived and implemented in the same manner everywhere? There are different schools of thought on what 'universalism' involves, but the underlying belief of the universal movement is that the basic values and concepts underlying human rights are common to all people. While this is plausible on its face, a deeper reflection of this idea may expose inherent dangers. In this respect, Donnelly flags the problem of moral imperialism, especially given radical universalists’ prioritizing of the “demands of the cosmopolitan moral community over all other (‘lower’) moral communities.”

On the freedom of religion, advocates of universality claim that it is and must be the same everywhere, just like rights to equal protection, physical security, fair trials, free speech, and free association. Universal laws of human rights apply to all regardless of their religion, and nation-states cannot deny the duties of humanity on the mere basis of religious differences. As Higgins argues, “[h]uman rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned.” The human rights movement insists on non-theistic ideas as the basis for the modern human rights regime, reflecting a “[q]uest for universal acceptance and universal commitment to a common moral intuition articulated

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41 See Jack Donnelly, Cultural Relativism and Human Rights, 6 HUM. RTS. Q. 400, 400 (1984), available at http://www.jstor.org/stable/762182 (stating that “radical universalism” would hold that moral rights and rules are universally valid and culture is irrelevant). Donnelly appears to reject the idea of radical universalism as it denotes a “complete denial of national and subnational ethical autonomy and self-determination…” Id. at 402.

42 Id.

43 Mary Ann Glendon, A World Made New, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 139, supra note 18, at 142 (arguing that universalists accept that this claim applies only to the general content of such rights, and they do in fact recognize that many basic rights allow for historically and culturally influenced forms of implementation and realization).


45 Rosalyn Higgins, Problems and Process: International Law and How We Use It, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, supra note 18, at 539.
in specific agreed-upon terms.” For this reason, human rights are often dismissed as promoting highly individualistic and secular ideas which differ from prevailing (and varying) cultural norms and practices.

C. The Cultural Relativist Argument

The relativist argument is based on the idea of autonomy and self-determination, both of which are not unknown concepts to international law. Amongst the relativists, the Western Enlightenment foundations of human rights ideals render these ideals’ validity to other cultures and regions questionable. They argue that the UDHR says very little about collective rights and is more directed towards a post-war human rights regime focused on individual rights. Relativists also consider it hard, if not impossible, to translate human rights into cultures which emphasize the role of the family and community living, particularly in cultures where religion (or religions) play an important role. Donnelly identifies different types of cultural relativism, but their basic claims about human rights are


47 Id. at 233.

48 Donnelly, supra note 41, at 400.


51 Id. at 105.

52 See id. at 118.

53 “Strong cultural relativism holds that culture is the principal source of the validity of a moral right or rule . . . . [T]he presumption is that rights (and other social practices, values, and moral rules) are culturally determined, but the universality of human nature and rights serves as a check on the potential excesses of relativism . . . . Weak cultural relativism holds that culture may be an important source of the validity of a moral right or rule.” The latter would “recognize a comprehensive set of prima facie universal human rights and allow only relatively rare and strictly limited local variations and exceptions.”). Donnelly, supra note 41, at 400-01.
grounded on respect for ethical and cultural diversity.\textsuperscript{54} Rights and rules about morality depend on cultural contexts; "culture" is used broadly to include not only indigenous traditions and customs, but also political and religious ideologies.\textsuperscript{55} Hence, on the basis that there are no trans-cultural ideas of rights that can be agreed upon,\textsuperscript{56} we have witnessed the emergence of "Asian Values" and Islamic human rights.

Relativists find great difficulty in reconciling universal rights with the differing ideas of religious freedom.\textsuperscript{57} They also invoke the bigger idea of social responsibility and national stability to defend practices that arguably contradict such freedom.\textsuperscript{58} It is argued that ideas and morality of religions differ from those of human rights, not only in their sources of authority, but also in their forms of expression and elements.\textsuperscript{59} The secular human rights doctrine is deemed contradictory to the fundamental tenets of monotheistic religions because the former is based on individual autonomy and responsibility and systemic-rational principles, while the latter "is based on the subjection of the individual and the community to the will of God."\textsuperscript{60} Different religions also claim their respective moral codes as the basis of ethical, moral and social order, taking precedence over man-made laws and rights.\textsuperscript{61} The human rights corpus, underived from any

\textsuperscript{54} See id. at 402.

\textsuperscript{55} Steiner et al., supra note 18, at 518; see also Azizuddin Sani, Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights, paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia in Melbourne, at 2 (July 1 – 3, 2008) (stating the argument advanced by Malaysia’s former Prime Minister Mahathir Mohamad, who explained that the Malaysian perspective of Asian Values is based on Malay-Islamic culture and that the Western conception of rights can corrupt Malaysian culture and religious beliefs).

\textsuperscript{56} Steiner et al., supra note 18, at 518.

\textsuperscript{57} See Henkin, supra note 46, at 237.

\textsuperscript{58} See Baldwin Robertson, Refocusing the Human Rights Debate in East Asia: A Review of Recent Writings, CARNEGIE COUNCIL: THE VOICE FOR ETHICS IN INTERNATIONAL AFFAIRS (Sept. 4, 1995), http://www.carnegiecouncil.org/resources/publications/dialogue/1_02/articles/510.html.

\textsuperscript{59} Henkin, supra note 46, at 230.

\textsuperscript{60} Frances Raday, Culture, Religion and Gender, 1 INT’L J. CONST. L. 663, 668 (2003).

\textsuperscript{61} "Religions have not had confidence in an ideology that does not claim divine origin or inspiration and has no essential place for the Deity.” Henkin, supra note 46, at
holy texts or supreme higher order, is questioned by adherents who see themselves bound by the moral codes of their respective faiths.\textsuperscript{62}

Therefore, the UDHR is confronted with the question of "how the right mediates between its purportedly secular and objective position, and the subjectivity of particular religious norms."\textsuperscript{63} The tension is evidenced in the concepts of religious duty and religious freedom, especially because in some religions there is a clear rejection of at least some religious choice, condemnation of apostasy, and resistance towards the proselytizing of their constituents by other religions.\textsuperscript{64}

IV. The Malaysian Constitutional Framework on Religion and Religious Freedom

To conceptualize freedom of religion in Malaysia, it is important to understand several provisions of the Constitution. First, although the Malaysian legal system modeled after the Westminster system, it is often taken for granted that there is a written Constitution in place.\textsuperscript{65} The Constitution, according to Article 4, is the supreme law of the land.\textsuperscript{66} It is at the apex of the legal hierarchy, so any Acts of parliament to the contrary may be deemed unconstitutional.\textsuperscript{67} Federal Judge Raja Azlan Shah’s account on constitutional supremacy is particularly telling:

[T]he Constitution . . . is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is

\textsuperscript{233} "The Universal Declaration is neither antireligious nor nonreligious. It is – many believe – a magnificent articulation of our common morality, and an essential support for religion, for religions, for humankind, in the troubled hopeful world at the new millennium." \textit{See id.} at 234.

\textsuperscript{62} \textit{See id.} at 233.

\textsuperscript{63} Danchin, \textit{supra} note 50, at 96.

\textsuperscript{64} Henkin, \textit{supra} note 46, at 231.

\textsuperscript{65} \textit{See} ANDREW J. HARDING, LAW, GOVERNMENT AND THE CONSTITUTION IN MALAYSIA 47 (1996).

\textsuperscript{66} CONST. OF MALAYSIA, \textit{supra} note 5, art. 4, sec. 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." \textit{Id.}

\textsuperscript{67} \textit{See id.}
the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of the government.\footnote{Loh Kooi Choon v. Gov't of Malaysia, 2 M.L.J. 187, 188 (1977).}

\textbf{A. Islam as Religion of the Federation}

Unlike the United States Constitution, the Malaysian Constitution does not prohibit the establishment of religion. Article 3(1) states that Islam shall be the religion of the Federation, but other religions may be practiced in peace and harmony within the Federation.\footnote{CONST. OF MALAYSIA, supra note 5, art. 3, sec. 1.} This provision is a product of inter-communal compromises reached in a pre-independence memorandum (hereinafter "Alliance memorandum") constructed by the three main political parties in 1956 to safeguard the rights and interests of all communities.\footnote{Tommy Thomas, Is Malaysia an Islamic State?, 4 MALAY. L. J. ARTS. 15, 17 (2006).}

Scholars have advanced various interpretations of Article 3, primarily connected to its ceremonial, historical and traditional significance.\footnote{Id.; Fernando, supra note 2, at 249.} For instance, Sheridan and Groves argue that Article 3 entails the use of Muslim rites in religious parts of federal ceremonies.\footnote{See L. A. Sheridan & Harry E. Groves, The Constitution of Malaysia 31 (4th ed. 1987) (stating "[t]he intention in making Islam the official religion of the Federation was primarily for ceremonial purposes."). See also Thomas, supra note 70, at 29.} Thomas suggests that the incorporation of Article 3 gives due regard to the elements and traditions of the Malay states long before the colonial period, i.e., the Sultanate, Islamic religion, Malay language, and Malay privilege.\footnote{Thomas, supra note 70, at 31.} The constitutional ideas of the Malay states stem from the Melaka Sultanate in the fifteenth century, where Buddhist, Hindu and Islamic influences permeated through the systems of law and
Shad Faruqi stressed that "[t]he implication of adopting Islam as the religion of the Federation is that Islamic education and way of life can be promoted for Muslims. Islamic institutions can be established. Islamic courts can be set up. Muslims can be subjected to Syariah laws in certain areas provided by the Constitution."\(^7^5\)

Historical evidence suggests that although the Alliance memorandum discussed Islam as a religion for Malaysia, it emphasized that this should not affect non-Muslims' right to profess and practice their religion, and there is no implication that the State is not a secular State.\(^7^6\) Chief Justice Abdul Hamid, the Reid Commission member from Pakistan, opined that the provision on Islam as the religion of the State is innocuous.\(^7^7\) However, "secular" as intended by the founding fathers, does not connote an anti-religious or anti-Islamic state of governance.\(^7^8\) The Constitution envisages Syariah laws which would govern the personal law requirements of Muslims, though it recognizes that the Syariah would not be made the supreme law.\(^7^9\)

All these views were espoused by the Malaysian Supreme Court in the landmark case of *Che Omar bin Che Soh v. Public Prosecutor*.\(^8^0\) The Court reiterated the secular character of the law

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\(^7^4\) HARDING, supra note 65, at 5-6 (1996).


\(^7^6\) The White Paper issued by the British Government on June 14, 1957, which contained the constitutional provisions for an independent Malaya, reiterated that a declaration of Islam as "the religion of the Federation . . . will in no way affect the present position of the Federation as a secular State." Thomas, supra note 70, at 18-19. "Although Article 3 names Islam as the religion of the Federation, it has until recently always been agreed that this provision does not in any sense establish an Islamic state, but merely provides for the religious nature of state ceremony." Harding, supra note 3, at 506.

\(^7^7\) Thomas, supra note 70, at 19.


\(^7^9\) *Id.* ("Unlike the Constitution of Pakistan that entrenches the *Syariah* as the basis of all law, the Federal Constitution does not accord the *Syariah* law such status.").

\(^8^0\) *Che Omar bin Che Soh v. Public Prosecutor*, 2 M. L.J. 55 (1988). In this case, the accused was faced with a mandatory death sentence for drug trafficking. He challenged the sentence on the basis that the imposition of the death penalty for the
and governance system, which resulted from colonial Anglo/Malay treaties.\textsuperscript{81} It also emphasized that the British establishment of secular institutions separated Islam into public and private aspects; Islamic law "[w]as rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only."\textsuperscript{82} It is only in this sense of dichotomy that the framers of the Constitution understood the meaning of the word Islam in Article 3.

Despite the foregoing arguments, it is notable that the establishment of a particular religion over the State is not unique to Malaysia. In Norway, primacy of Christianity means that the king and a majority of the cabinet are required to be members of the state church.\textsuperscript{83} Additionally, in England, the Anglican Church remains at the center of public policy and has substantial support from the state.\textsuperscript{84}

\textbf{B. Freedom of Religion}

Article 11 guarantees the freedom of religion,\textsuperscript{85} which on its

offence is contrary to Islamic injunction and therefore, unconstitutional and void. \textit{Id.} at 55.

\textsuperscript{81} See \textit{id.} at 56.

\textsuperscript{82} See \textit{id.}

\textsuperscript{83} Dinah Shelton & Alexander Kiss, \textit{A Draft Model Law on Freedom of Religion} (1996) \textit{in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS supra note 18, at 575.}

\textsuperscript{84} \textit{Id.} at 576.

\textsuperscript{85} \textit{CONST. OF MALAYSIA, supra} note 5, art. 11. Article 11 reads:

(1) Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of religion other than his own.

(3) Every religious group has the right –

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes; and

(c) to acquire and own property and hold and administer it in accordance with law.

(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
face seems comprehensive enough to safeguard this fundamental right for the pluralistic Malaysian society. A citizen reserves the right to profess, practice and—subject to Article 11(4)—to propagate his religion. Religious groups have the right to manage their own religious affairs or any matters relating to the properties and the establishment of religious institutions. Article 11, on its face, prohibits the conversion of a Muslim. At the same time, unlike the international human rights instruments on religious freedom, it does not explicitly include the right to change one’s religion. However, it is suggested that Article 11 can be construed broadly to include one’s freedom to relinquish or change a religious belief (albeit with limitations for Muslims under specific religious laws), and even not to be religious.

Article 11 is also bolstered by other constitutional provisions. First, to combat subversion, Article 149 permits the enactment of laws which would otherwise be inconsistent with selected fundamental rights such as freedom of speech or personal liberty. However, it does not permit any encroachments on religious freedom. Second, even if a state of emergency is declared, any emergency laws enacted thereafter cannot curtail freedom of religion. Third, Article 8 prohibits discrimination on the grounds of religion against public sector employees; in the acquisition or holding of property; and in any trade, business or profession. It is also notable that freedom of religion is in no way affected by Article 3’s establishment of Islam as the religion of the

(5) This article does not authorize any act contrary to any general law relating to public order, public health or morality.

Id.

86 See id. art. 11(4).
87 See id. art. 11(3).
88 See generally id. art. 11 (discussing the freedom of religion).
89 See id.
90 Thomas, supra note 70, at 34.
91 See id.
92 See id.
93 Id.
94 CONST. OF MALAYSIA, supra note 5, art. 150(6A).
95 Id. art. 8.
FREEDOM OF RELIGION IN MALAYSIA

Be that as it may, the freedom of religion is subject to several restraints. Article 11(5) limits this freedom on grounds of public order, public health or morality. Thus, any religious act deemed contrary to general laws relating to these grounds is unsustainable under Article 11. In the case of Muslim citizens, there may be additional restraints to religious freedom by virtue of Schedule 9, List II, Item I of the Constitution. This grants power to State Assemblies to enact laws to punish Muslims for offences against the precepts of Islam, such as khalwat, adultery, apostasy, gambling, drinking and deviationist activities.

A more controversial provision is Subsection 4’s limitation on the propagation of religion among Muslims. It would appear that this subsection contradicts the idea of religious freedom, especially for those religions that regard proselytizing as a crucial part of worship. Contrary to this view are some important arguments. First, laws controlling propagation are meant “to prevent Muslims from being exposed to heretical religious doctrines, be they of Islamic or non-Islamic origin, and irrespective of whether the propagators are Muslims or non-Muslims.” Shad Faruqi adds that such restrictions are meant to protect Muslims against organized international missionary activities and to preserve social harmony, rather than prioritizing any particular religion. Second, Subsection 4 does not in and of itself restrict propagation. Sheridan and Groves argue that it merely renders it constitutional for state law (or federal law in the case of the Federal Territories) to control or restrict propagation.

96 Id. art. 3(1).
97 Id. art. 3(4).
98 Id. art. 11(5).
99 See id.
100 See CONST. OF MALAYSIA, supra note 5, art. 11(5); see also Masum, Freedom of Religion under the Malaysian Federal Constitution, 2 CLJ i, iii (2009).
101 Sheridan & Groves, supra note 72, at 31.
102 Masum, supra note 100, at iii-iv.
103 See Shad Saleem Faruqi, Support for Religious Liberty, SUNDAY STAR (Feb. 25, 2001).
104 See Sheridan & Groves, supra note 72, at 76.
Case law has to a certain extent, been instrumental in developing restraints on religious freedom. This is particularly true of the word ‘practice’ in Article 11, culminating in the non-mandatory practices doctrine. In essence, this means that freedom of religion extends only to those practices and rituals that are essential and mandatory.¹⁰⁵ In Hjh Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Another,¹⁰⁶ the court rejected a woman’s appeal to wear a purdah (a headress covering a woman’s entire face except the eyes) to work because the government was entitled to forbid non-essential and optional religious traditions in the interests of the public service. Similarly, in Meor Atiqulrahman bin Ishak & Others v. Fatimah Sihi & Others,¹⁰⁷ the court rejected demands by Muslim boys to be allowed to wear turbans to school.

V. The Malaysian Experience: Religious Freedom in Practice

Despite the constitutional grounding of religious freedom in Malaysia, this issue remains very complicated in practice. The frontiers of freedom of religion are not always clear, and this is further obscured by political, social and racial elements. The problem arises not only between Muslim and non-Muslim citizens, but also within the Muslim community. This implicates a contest between those intent upon a modern liberal interpretation of universal human rights principles, and those insistent on communally-based, constitutional-contract politics in Malaysia.¹⁰⁸

A. Religious Conversations and Inter-faith Conflicts

Constitutionally, religious conversions not only involve questions of religious freedom, but also the role of Islam as religion of the Federation, specific Islamic rules on apostasy, the role of Syariah courts, as well as one’s ethnic status. The most pertinent issue is whether the exercise of this freedom includes the

¹⁰⁵ Masum, supra note 100, at 4.
freedom of Muslims to renounce the Islamic faith. The Malaysian courts have dealt with conversions and apostasy many times over the years, and the results are quite varied. For one, there is the notable case of Soon Singh. Soon Singh was brought up as a Sikh but converted to Islam, later renounced Islam, and sought a declaration in the Kuala Lumpur High Court that he was no longer a Muslim. The court dismissed his application on the grounds that the subject matter in the application fell within the jurisdiction of the Syariah Courts. In Kamariah bte Ali, a cult member was sentenced to two years in jail for apostasy. There is also the case of Siti Fatimah Tan Abdullah v. Majlis Agama Islam Pulau Pinang, which saw the courts exercising some degree of leniency in allowing the appellant, who converted to Islam to marry an Iranian, to later renounce the religion.

However, it was Lina Joy that has gained international attention and widespread local debate. Joy argued that the National Registration Department’s (NRD’s) requirement of a Syariah court’s confirmation of her conversion violated her constitutional right to freedom of religion. The Federal Court, however, upheld the NRD’s requirement before Joy could officially change her religious status on her identity card. The majority opinion also held that one can renounce Islam but still must follow Islam’s procedure to do so, and agreed with submissions of various Muslim Non-Governmental Organizations (NGOs) that wilful and whimsical conversions could cause chaos

110 See id.
111 Id. at 502.
113 See id.
117 See id. at 464.
to Islam and its adherents.\textsuperscript{118} Although this case was largely an administrative law matter, it was also rife with important constitutional questions.

First, if we view the rights provisions as a mechanism of preventing State interference with a citizen's fundamental liberties, Joy's argument is plausible. Indeed, civil and political rights, such as religious freedom, are of a negative nature; that is, the State simply must not encroach upon a citizen's exercise of those rights. Second, the fact that the majority required adherence to particular procedures for renouncing Islam (namely, a Syariah court confirmation), and that considering the effect on Muslims is contestable, this suggests that Article 11 is being read in light of Article 3.\textsuperscript{119} The constitutional basis of this approach is problematic because Article 3(4) clearly states that the establishment of Islam as the religion of the Federation does not affect other provisions of the Constitution.\textsuperscript{120} The majority holding also treads on the constitutional guarantee of equality regardless of race or religion.\textsuperscript{121} From an Islamic perspective, it is worth mentioning that apostasy, once committed (for instance, by pronouncing oneself to have or intend to renounce Islam), is considered valid regardless of its endorsement by any particular authority.\textsuperscript{122}

Perhaps the most problematic aspect of the decision is the apparent side-stepping of constitutional issues and deference to the Syariah court in matters implicating one's freedom of religion. It reveals a crucial lacuna in the legal system due to the overlapping of civil and Syariah jurisdictions.\textsuperscript{123} On the one hand, constitutional rights and interpretation fall squarely within the purview of the civil courts. Harding argues that matters within the Islamic jurisdiction are personal rather than constitutional, and that

\textsuperscript{118} See Evans, \textit{supra} note 115, at 463-64.

\textsuperscript{119} See \textit{id.} at 464. \textit{See also} Harding, \textit{supra} note 3, at 511 (arguing that the ruling that Joy could only convert with an order of the Syariah court "[e]levated article 3 to a higher status than article 11").

\textsuperscript{120} See discussion \textit{supra} Part II.B.

\textsuperscript{121} See Loo Lai Mee, \textit{supra} note 116, at 626.


\textsuperscript{123} See discussion \textit{infra} Part VI.A. (analyzing the conflict between civil and Syariah jurisdictions).
the "[c]onstitutional law requires that jurisdiction of the ordinary courts to rule finally on matters of legality should be preserved."

On the other hand, conversions out of Islam are deemed a matter for the _Syariah_ courts due to the separation of the civil- _Syariah_ jurisdiction in 1988. The problem here is that state-enacted Islamic laws regulating conversions are not always consistent with the notion of religious freedom. Moreover, barring a few states, there is no clear legislative enactment on how to deal with apostates or those who seek to convert. It is also unlikely that individuals would voluntarily go to the _Syariah_ courts to convert because those efforts may either be futile, or they will be subjected to punishment and/or counselling sessions. In _Lina Joy_, the government did not produce any evidence that the courts ever granted the requested certificates, considering apostasy is a serious sin in Islamic law and one that the community of believers is obliged to prevent.

The outcome of _Lina Joy_ restricts freedom of religion and, to a certain extent, puts it in a state of flux. There is no clear answer to whether the Federal Court would be willing to fight tooth and nail to uphold Article 11 and permit conversions among Muslims. The trend of side-stepping issues of constitutional importance and obscuring the boundaries of religious freedom in Malaysia

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124 HARDING, _supra_ note 65, at 138.


126 _See generally_ Simon, _supra_ note 112, at 660 (discussing how sustained applications to the _Syariah_ courts were rejected). The Court of Appeal however, held that the legislation in question—the state of Kelantan’s section 102 of Enactment 4/1994—does not prevent a Muslim from renouncing Islam. _Id_. But this cannot be done unilaterally and a declaration must be sought from the _Syariah_ court. _Id_. _See also_ Daud bin Mamat & Others v. Majlis Agama Islam & Another, 2 M. L.J. 390, 402 (2001) (suggesting that the right to exit a religion is not within the scope of Article 11 and the fact that the plaintiffs are Muslims ousted the court’s subject matter jurisdiction).

127 _See_ the state of Negeri Sembilan’s Sections 119(1) and 119(8) Administration of Islam Enactment (Negeri Sembilan)(2003), http://www.ecoi.net/file_upload/1997_1293698291_mys33057.pdf (requiring an individual who seeks to convert to first apply to a _Syariah_ court for a declaration that he or she is no longer a Muslim; the convert will then be counselled for a year, and if his or her position does not change, the court may grant the application).

128 _See_ Evans, _supra_ note 115, at 461.
continued in a recent child conversion case. In that case, a Hindu woman appealed against a High Court decision affirming the validity of her children’s conversion to Islam without her consent. Shamala and her husband were both Hindus at the time of their marriage, but her husband later converted to Islam along with their minor children. The High Court ruled that Shamala’s application to invalidate the conversion was not within its jurisdiction because the children were now Muslims and as such, they were subject to the Syariah jurisdiction. The High Court accepted that Shamala, being a non-Muslim, was without recourse, as she was not within Syariah jurisdiction. The Court only suggested that Shamala seek assistance from the Islamic Council of the Federal Territories. The case was referred to the Federal Court.

One of the crucial questions on appeal was whether the Syariah court has exclusive jurisdiction to determine the validity of minors’ conversions to Islam once they have been registered as Muslims. The Court was also called upon to determine the appropriate forum for a non-Muslim parent to assert his or her rights and remedies in cases of unilateral conversion of children. In November 2010, the Federal Court rejected Shamala’s referral application on the basis that Shamala was in contempt of a High Court order requiring her to bring her children to Malaysia. Shamala had apparently left the country with her children in 2004. Commentators criticized the Federal Court’s apparent

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129 See Shamala Sathiaseelan v. Dr. Jeyaganesh C. Mogarajah & Another, 2 M.L.J. 648 (2004) (ruling that the consent of a single parent is enough to validate the conversion of a child).
130 See id. at 655-56.
131 See id.
132 Id. at 657-58.
133 See id.
134 See id. at 658.
136 See id.
137 See id.
hands-off approach as a mere skirting on technicalities.\(^\text{139}\) It appears that the Court had failed to appreciate the gravity of the constitutional issues presented before it,\(^\text{140}\) and that it missed the opportunity to clarify those issues, especially as there are other similar cases awaiting resolution.\(^\text{141}\)

**B. Religious Doctrines**

The extent of religious freedom in Malaysia is also challenged by restrictions on religious doctrines. As the preceding section demonstrates,\(^\text{142}\) States reserve the right to restrict or control propagation of any religious doctrines among Muslims. These limitations affect both Muslims and non-Muslims communities alike. The first implication is that non-Muslims’ freedom to practice their religion may be severely curtailed with respect to propagation of their religion to Muslims.\(^\text{143}\) There are some State and Federal laws restricting the right to propagate any non-Muslim religious doctrine or belief among Muslims, such as Terengganu’s The Control and Restriction of the Propagation of Non-Islamic Religious Enactment 1980.\(^\text{144}\) For the Federal Territories, Article 5 of the *Syariah* Criminal Offence Act 1997 states:

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\text{[A]ny person who propagates religious doctrine or belief other than the religious doctrine or beliefs of the religion of Islam among persons professing the Islamic faith shall be guilty of an offence and shall on conviction be liable to fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.} \]

As a matter of constitutional law, these legislations are perfectly constitutional by virtue of Article 11(4).\(^\text{146}\)

\(^{139}\) See Harun, *supra* note 135.

\(^{140}\) See *id.*


\(^{142}\) See discussion *supra* Part IV.B.

\(^{143}\) See *id.*


\(^{146}\) Andrew Harding, *The Keris, The Crescent and the Blind Goddess: The State,*
Restrictions on propagation may well be connected to concerns of widespread proselytism and conversions among Muslims.\textsuperscript{147} While such restrictions interfere with the right to practice a religion, it is often taken for granted that proselytism itself may be deemed a serious encroachment of religious freedom. If this right is to be meaningful, individuals should also be free from any compulsion or undue influence to adopt a particular belief. Thus, conversion resulting from compulsion or undue influence is more problematic than conversion out of one’s free will. In a multiethnic society like Malaysia, the former is potentially divisive and may threaten social order. An instructive case on this is Minister of Home Affairs & Another v Jamaluddin bin Othman,\textsuperscript{148} where an individual was detained under Internal Security Act 1960 (“ISA”) for allegedly disseminating Christianity among Malays and converted six Malays to Christianity. It was suggested that this could ignite tensions between the Christian and Muslim communities and pose a threat to national security.\textsuperscript{149} However, the Supreme Court (as it then was) held that such detention was unlawful, as it was contrary to the religious right conferred by article 11(1).\textsuperscript{150} The Minister, according to the Court, could not exercise the ISA to restrict the right of the respondent to profess and practice his religion.\textsuperscript{151} Furthermore, the Court ruled that mere participation in meetings and seminars on Christianity and conversion of Malays could not be regarded as a national security threat.\textsuperscript{152}

The second issue arising from the Article 11(4) restriction is that state laws may prohibit the propagation of other doctrines within Islam itself. On this limitation, Mohamed Salleh argues that:

\[T\]his limitation is logical as it is necessary consequence that follows naturally from the fact that Islam is the

\textsuperscript{147} See id. at 168.

\textsuperscript{148} Ahmad Ibrahim, Minister of Home Affairs & Another v. Jamaluddin bin Othman, 1 M. L. J. 418 (1989).

\textsuperscript{149} Id.

\textsuperscript{150} Id. at 419.

\textsuperscript{151} Id.

\textsuperscript{152} Id. at 420.
religion of the Federation. Muslims in this country belong to the Sunni Sect which recognizes only the teachings of four specified schools of thought and regards others school of thought as being contrary to true Islamic religion. It is with a view to confining the practice of Islamic religion in this country within the Sunni Sect that State Legislative Assemblies and Parliament as respects the Federal Territory are empowered to pass laws to protect Muslims...153

Thus, state laws may prohibit deviations from the Sunni sect.154 Since Muslims in Malaysia adhere to Sunni teachings, non-Sunni schools of thought are absolutely forbidden.155 Although there is no constitutional provision entrenching the position of Sunni teachings among Muslims in Malaysia, the States’ legislation provides that Muslims must conform with Sunni teachings, with emphasis given to the Shafi’I school of thought.156 The executive and state religious departments have been fairly active in crackdowns against adherents of other sects. For example, between October 2000 and January 2001, the Federal government detained six Shia followers under the ISA.157 Surprisingly, none of them were charged either in civil or Syariah courts, although the respective Fatwa Committees in the country, including the one at the Federal level, issued a fatwa labeling the group as “deviant.”158 More recently, authorities detained more

154 See id.
156 Unlike Perlis, it is stated that Muslims in this state must adhere to the Sunni’s teaching, with no specific school preferable. See Othman Ishak, Fatwa Dalam Perundangan Islam, 87-89 (1981); see also Ahmad Hidayat Buang, Analisis Fatwa-fatwa Syariah di Malaysia (2004) in Fatwa di Malaysia 166 (Ahmad Hidayat Buang ed., 2004).
158 See id.; see also Jamila Hussain, Freedom of Religion in Malaysia: The Muslim Perspective , in Public Law in Contemporary Malaysia 125 (Wu Min Aun, ed., 1999) (“In March 1998, the New Straits Times reported that the Selangor Fatwa Committee had ruled Shiite teachings to be deviant with the result that those
than 200 Muslim Shiites in Selangor on grounds that the *Shia* doctrine is a threat to national security. The government claimed that *Shia* doctrine allows for the killing of Muslims considered to be infidels—i.e., non-Shiite Muslims. However, it has not been revealed whether these threats are true, and if true, whether these threats are serious and imminent at all.

Another Islamic group that faced the same action is the *Arqam* movement. Ashaari Muhammad formed a *dakwah* group in 1968 and called for the rejection of a secular way of life in favor of an Islamic way of life. Its members, through *Aurad Muhammadiah* teachings, believe in self-sufficiency and adherence to Islamic teachings. By 1994, it was estimated *Arqam* ran forty-eight small residential communities throughout Peninsular Malaysia. The settlements were complete with their own schools and clinics. The total number of its members was estimated at about 100,000 with middle class Malay professionals forming the majority. Most of its male members normally dressed in turbans and long green robes while female members covered their faces entirely. In 1994, the National *Fatwa* Council declared *Arqam* as deviant and unlawful, and its members were told to disband. Later, the government, through the Minister of Home Affairs, declared *Arqam* unlawful under the Societies Act of 1966. In the latest development, it has been reported that the disseminating such teachings could be charged with an offence under state Islamic legislation.

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160 *Id.*

161 *Id.*, supra note 155, at 64.

162 *Id.* at 10.

163 *Id.* at 64.

164 *Id.*

165 *Id.*

166 *Id.*, supra note 155, at 11.

167 *Id.* at 64. Ashaari, who was living in Thailand at the time of the order, was extradited and detained. *Id.* After a nationally televised confession to deviating from Islam, he and six aides were released without charge but had their movements restricted. *See* Saeed & Saeed, *supra* note 157, at 129-30. *See also* Jamila Hussain, *supra* note 158,
group has re-activated the movement under a new business company, *Rufaqa*.168

VI. Evaluation: Challenges to Freedom of Religion in Malaysia

A. The Dualistic Jurisdiction: A Legal Lacuna?

A 1988 constitutional amendment mandated the separation of the civil and Islamic justice systems in Malaysia through Article 121(1A).169 It simply states that the civil courts were to have no jurisdiction in matters within the Syariah court’s jurisdiction.170 Thus, Muslims are subjected to Syariah laws in certain matters, and any conduct contrary to Islamic precepts is liable to prosecution. Little did the promulgators of this amendment know that such simple provision would later give rise to serious jurisdictional conflicts, as well as tensions within the plural

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168 Adil, *supra* note 155, at 64.
169 Const. of Malaysia, *supra* note 5, art. 121(1A).
170 *Id.* This provision must be read together with the Ninth Schedule, List II, Item 1 which reads:

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dowry, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; *Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; *Zakat*, *Fitrah* and *Baitulmal* or similar Islamic religious revenue; mosques or any Islamic public places of worship, 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; the constitution, organization and procedure of *Syariah* courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

*Id.*
While the amendment is justified, *Syariah* is a distinct field that requires expert handling by those trained in Islamic jurisprudence. One problem with the separation of jurisdiction is that it did not create an authoritative machinery to resolve an overlapping of jurisdiction. The *Lina Joy* case, like other cases implicating Islam and the freedom of religion, exposed a legal lacuna on jurisdictional propriety. Joy’s case, for instance, involved the tension between one’s constitutional right to religious freedom and separate proceedings under the *Syariah* court to renounce Islam. Which court has the authority to definitively rule on the matter? In *Lina Joy*, dissenting Judge Richard Malanjum demonstrated greater fidelity to constitutional supremacy by arguing that “civil superior courts should not decline jurisdiction by merely citing article 121(1A).” He also added that Article 121 (1A) “[o]nly protects the *Syariah* Court in matters within their jurisdiction, which does not include the interpretation of the provisions of the Constitution.”

The other important question is whether the *Syariah* courts have jurisdiction over matters of apostasy, even in the absence of legislation granting them the power to do so. It bears reiteration that religion is a state matter and List II of Schedule 9 provides matters—such as the administration of Islamic law—in which states may legislate. In *Lina Joy*, no Federal Territories law referenced how to deal with apostates. A *Syariah* High Court in the Federal Territories should only have criminal jurisdiction to try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law (Federal Territories) Act 1984 or under any other written law prescribing offences against precepts of Islam. The *Syariah* Criminal Offences

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171 Faruqui, *supra* note 75.
173 *Id.* at 631.
174 *Id.*
175 The Federal Territories are not states per se, so laws on administration of Islam are enacted by Parliament. *Id.*
176 Admin. of Islamic L. (Fed. Territories) § 46(2)(a) (Malay.).
(Federal Territories) Act 1997 is silent on apostasy. Furthermore, the fact that Joy was no longer a Muslim raises the question of whether she could properly be adjudicated under a Syariah court.

There are two competing views on the jurisdiction of Syariah courts. The first is that not all Syariah laws apply per se. On this point, Sarwar criticizes the “[e]rroneous assumption that ‘unwritten’ (or un-enacted) Syariah law . . . can be applied in the Syariah courts.” Put differently, whether a matter falls under the jurisdiction of Syariah courts is essentially up to the laws enacted by State Assemblies (or Parliament in the case of the Federal Territories). This proposition—that state laws must expressly confer jurisdiction to the Syariah courts—has found favor in earlier decisions. Therefore, because no laws govern

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179 Id. (“[I]t is the erroneous assumption that ‘unwritten’ (or un-enacted) syariah law or the established principles of hukum syara’ can be applied in the syariah courts that has led to the insistence that some matters must, or can only, be dealt with by the syariah courts, notwithstanding the absence of any written law to that effect.”).

180 Malik Imtiaz Sarwar, Latifah Mat Zin: Reaffirming the Supremacy of the Constitution (II), DISQUIET (Aug. 16, 2007), http://malikimtiaz.blogspot.com/2007/08/latifah-mat-zin-reaffirming-supremacy.html (“[I]t does not matter that a particular principle of Islamic law exists by virtue of the Al-Quran, the Hadith or the scholarly works of jurists, until such principle is codified into law by the legislature in a constitutional manner the principle is not applicable as law.”).

181 See Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor. (No 2) 3 M. L. J. 487, 489 (1991) (“[S]yariah court derives its jurisdiction under a state law, (for Federal Territories – Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution. If State law does not confer on the Syariah court any jurisdiction to deal with any matter in the State List, the Syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.”); Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor., 1 M. L. J. 1, 7 (1992) (“Clause 1A of art. 121 [sic] of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law. . . . [I]f there are clear provisions in the state Enactment the task of the civil court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim
apostasy in the Federal Territories, the decision in *Lina Joy* to defer to the *Syariah* court creates a significant loophole in the system.\(^{182}\) The other view, one that is adopted by the majority in *Lina Joy*, is that *Syariah* courts possess jurisdiction by implication, i.e., that the power is inherent in State List of Schedule 9.\(^{183}\) In other words, just because State laws do not confer jurisdiction to the *Syariah* courts to adjudicate apostasy issues, this "does not mean that such issues are to be adjudicated automatically by a civil court."\(^{184}\) Indeed, in a string of cases before *Lina Joy*, this appears to be the position of the courts.\(^{185}\) To the contrary, Judge Malanjum argues that where fundamental rights are implicated, "[t]here must be as far as possible [the] express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted."\(^{186}\)

The first view seems more persuasive, especially in a constitutional democracy like Malaysia. It is quite absurd that while the Constitution is the supreme law of the nation, it can be thwarted by un-enacted State laws that are merely implied from

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182 See *Syariah Crim.*, Offences (Federal Territories) Act, Part III (Offenses Relating to the Sanctity of the Religion of Islam and Its Institution).


185 See Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur, 1 M.L.J 681, 688-89 (1998) ("[B]y virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the syariah court on its wider jurisdiction over a person professing the religion of Islam even if no express provisions are provided in the Administration of Islamic Law (Federal Territories) Act 1993 . . . . [I]ts absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court."); *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM)*, 1 M.L.J. 489, 501-2 (1999) (adopting the jurisdiction by implication approach and held that even where state legislations do not confer jurisdiction to the *Syariah* courts, this can be implied from the language of the legislation. "[I]t does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the *Syariah* Courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.").

the state legislative list. On this point, Judge Malanjum argued—perhaps rightly so—that the State legislative lists of power are subordinate to fundamental rights of the Constitution.\textsuperscript{187} The continuous side-stepping by the civil courts in an area as important as the constitutional right to religious freedom renders the issue uncertain. It is also frustrating for citizens who resort to the highest court in the land to uphold their rights, only to see their appeals being turned down on technicalities.

\textbf{B. Compliance with International Standards: The ‘Asian Values’ Debate}

The UDHR’s freedom of thought, conscience and religion provision includes one’s right to change his or her religion.\textsuperscript{188} If we further explore the meaning of religious freedom in the international human rights regime, we may also find that “any coercion that would impair the right to have or to adopt a religion or belief” is prohibited, “including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs.”\textsuperscript{189} This is the position of the Human Rights Committee (HRC) in its general comments to article 18(2) of the International Covenant on Civil and Political Rights (“ICCPR”).\textsuperscript{190} While those comments are not specifically directed at the UDHR, we can extrapolate those formulations to understand what is envisaged by the universal human rights regime in construing the meaning of religious freedom.\textsuperscript{191} After all, the ICCPR is a manifestation of the UDHR in its binding form (although the former is stated in considerably greater detail), and both documents are considered part of the international human rights corpus.

On its face, the Malaysian constitutional provision on religious

\textsuperscript{187} Id. at 624-5 (Malanjum, J., dissenting).
\textsuperscript{188} UDHR, supra note 15, art. 18.
\textsuperscript{191} See UDHR, supra note 15, art. 18.
freedom compares favorably to international standards. Nonetheless, the Federal Constitution’s careful omission of the freedom of a person to renounce or change his religion or belief without punishment (although some argue that this freedom can be implied) may raise questions as to the true extent of this constitutional provision. In practice, conversion does not seem to be an option—at least to Muslims—due to certain state laws imposing punishment for apostasy. While capital punishment is never imposed on apostates in Malaysia, those who convert may be required, by state law, to attend counseling sessions. Such forced rehabilitation is arguably contrary to the Constitution’s guarantee of personal liberty. Even where there is no state law on point, such as in Lina Joy, it seems that the exercise of that right is virtually impossible because of uncertainties within the legal system.

Another potential friction with the international regime lies in the prohibition against propagation of any religious doctrines among Muslims. It is, without doubt, a challenge to the conventional idea of religious freedom, at least in the view of international human rights doctrine. Although the restriction is defended on the basis of protecting social stability, it implies some form of discrimination in the practice of religion and places other religions at a disadvantage vis-à-vis Islam. Moreover, restrictions on propagation of other Islamic doctrines may be seen as an over-regulation by state authorities seeking to impose their particular understanding of Islam on others. The controls may curtail religionists for whom proselytising is an integral part of worship. In turn, this may affect the freedom to teach and practice one’s religious beliefs. On the flip side, the concern with

193 See Masum, supra note 100, at vii-viii.
194 See Jamila Hussain, supra note 158, at 132.
195 See CONST. OF MALAYSIA, supra note 5, art. 11(4).
196 Note that the Constitution does not prohibit propagation per se, but where states enact laws against propagation, this would not be deemed unconstitutional. See discussion supra Part II.B.
197 Masum, supra note 100, at iv.
198 See id.
proselytism is that such practices may themselves exceed the bounds of religious freedom, especially when they amount to some form of coercion and undue influence on another to adopt another religion. It is worth mentioning that proselytizing is not only an issue in Malaysia; it has also been highlighted as something that “[c]ould eventually lead to the collapse of social norms and cultural identities [in Africa].”  

Nevertheless, the problem with the international checks and balances mechanism in Malaysia is the absence of any legally binding commitment to international human rights obligations. The standing of UDHR continues to be a matter of great debate. Although, as mentioned above, writers have argued that the UDHR has matured into customary international law, it is also not necessarily incorrect to insist on the declaratory nature of the UDHR (which imposes no obligation on states). Malaysia’s reluctance to veer towards a concrete international human rights obligation is hardly surprising. During the Mahathir administration, there was an obsession with the ‘Asian Values’ doctrine circling within the politico-legal atmosphere in Southeast Asia. This doctrine, perhaps the hallmark of the Universalist-Relativist tension in the human rights discourse, essentially challenges the universal human rights scheme based on Asia’s unique cultural traditions. The underlying idea is that preserving social harmony and collective welfare is more important than upholding a “western,” individualistic notion of human rights. Freeman argues that this distinction lies in the challenge to the value of rights.

However, among the political elites, there is a lack of consensus not only on what the doctrine means, but also whether it

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199 Steiner, et al., supra note 18, at 607 ( “Since the right to religious freedom includes the right to be left alone - to choose freely whether to believe and what to believe in - the rights regime by requiring that African religions compete in the marketplace of ideas incorrectly assumes a level playing field. The rights corpus not only forcibly imposes on African religions the obligation to compete... but also protects evangelizing religions in their march toward universalization.”).

200 See supra Part III.


202 See id. at 353.

203 Id. at 355.
is tenable at all.\footnote{Id. at 353.} For instance, Indonesia's Foreign Minister rejected the idea of an existing clash between the supposedly 'western' universal human rights concept and distinctively 'Asian' point of view.\footnote{Id.} On the other hand, Donnelly argues that if leaders such as Singapore's Lee Kwan Yew and Malaysia's Mahathir claim that if a substantial deviation from the common international human rights standard is based on culture, it is legitimately allowed.\footnote{Jack Donnelly, Universal Human Rights in Practice 107 (2003).} The Mahathir model of 'Asian Values' include the elements of strong authority, priority of community over the individual, and a strong family based society.\footnote{Mohd Azizuddin Sani, Mahathir as a Cultural Relativist: Mahathirism on Human Rights 4 (paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia in Melbourne, July 1-3, 2008), http://arts.monash.edu.au/mai/assaa/mohdazizuddinmohdsani.pdf.}

These concepts are important because they shape the way the government and, to some extent, the courts view the parameters of religious freedom. Thus, the underlying idea seems to be that restrictions on religious freedom may be justified in exchange for maintaining social order not only among Malaysia's multi-religious society, but also within the Muslim community itself. It is worth emphasizing that the basic responsibility of a State is to safeguard and prevent encroachments on the freedom of religion for all citizens. The problem in Malaysia, however, is the ostensibly over-regulation by the State of private matters. For Muslims, it seems very odd that 'personal sins' such as apostasy become matters between an individual and the state. Prominent Islamic scholars such as Mohammad Hashim Kamali have spoken out against this, arguing that it is not for the state to legislate punishments for personal sins.\footnote{Shanon Shah, Syariah Law Galore, Nut Graph (Dec. 14, 2009), http://www.thenutgraph.com/syariah-law-galore/}

\section*{C. Asian Values, and The Politics of Race, Religion, and Social Order}

The assertion of a constitutional right to religious freedom is bound to attract competing interests in the multiracial Malaysian
society. Thus, discussions on ‘Asian Values’ are incomplete without considering the socio-political and racial dimensions to the freedom of religion debate. For non-Muslims, freedom of religion is often taken for granted until various problems are brought to the public eye. These include cases implicating spouses and children, such as the religion that the children should be raised with. For the Malay-Muslim majority, the unease is attributable to the purported ramifications on ethnicity and politics.

Generally, the majority of Malays are deeply attached to their religion and any attempt to weaken a Malay’s faith may be perceived as an indirect attempt to erode Malay political power and identity. Renouncing Islam is viewed as deserting the Malay community; Article 160(2) of the Constitution defines a Malay as one who professes the religion of Islam. Furthermore, cases of apostasy strike instant correlations with proselytism and impressions of an indirect attack against the sanctity of Islam as the religion of the Federation. Faruqi suggested that wide-spread conversion of Malay-Muslims to other religions will have grave implications for the delicate racial balance between the Malay and non-Malay communities and may well jeopardize the stability of the nation.

In Lina Joy, it is evident that social order considerations played a role in the majority opinion. The majority alluded to several Muslim NGOs’ assertion that conversion at will could cause chaos among Muslims and the religion of Islam. It is accepted that the Constitution provides that the freedom of religion does not authorize any acts contrary to any general law relating to public order, public health or morality. However, the Lina Joy decision gave no clear guidance on when a ‘public order’

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209 Faruqi, supra note 103.
210 Id.
213 Id. at 612.
214 Id. at 616.
justification would be tenable.\textsuperscript{215} The majority did not explore this in great depth and it almost seems as if the ‘public order’ justification is a mere assumption.\textsuperscript{216} From an international human rights norm perspective, there is no doubt that the freedom of religion is not absolute. However, where derogations are permitted on the basis of public order, this affects only manifestations of belief and not the freedom to adopt or profess a belief.\textsuperscript{217}

To some, the rise of political Islam has some bearing on the way the Malay-Muslim majority views religion and their expectations on the status of Islam in the country.\textsuperscript{218} Although Islam’s role was initially thought to be merely ceremonial, the resurgence of Islam in the 1970s and 1980s arguably changed this.\textsuperscript{219} The Islamic Party, PAS, who vowed to establish an Islamic state where only Muslims would hold political power, and subsequently took over the state of Kelantan.\textsuperscript{220} In response to this change in the political climate, the ruling Barisan Nasional (“BN”) multiethnic coalition launched various Islamization initiatives in the legal, institutional, and educational sectors.\textsuperscript{221} While government policies leaned towards Islamic values, subsequent PAS electoral successes have put the federal government under considerable pressure.\textsuperscript{222} These events shaped the emergence of the “Islamic State” rhetoric. Harding observes:

The electoral successes of PAS created a new environment for the discussion of the role of Islamic law. Beginning around 1999, for example, there was public debate about the concept of an Islamic state, which intensified and broadened following an announcement by the Prime Minister Dr. Mahathir Mohamad in Parliament that Malaysia was an ‘Islamic state’. Dr Mahathir even went so far as to say that Malaysia was a ‘fundamentalist, not a

\textsuperscript{215} See id at 594.
\textsuperscript{216} See id.at 594.
\textsuperscript{217} See supra Part III.A.
\textsuperscript{218} Harding, supra note 3, at 502-03.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 502.
\textsuperscript{221} Id. at 503.
\textsuperscript{222} See id. at 504-06.
moderate Islamic state', and that it was also a 'model Islamic state.'

In conclusion, the language of 'social order,' often cited to curtail rights, is not a uniquely Malaysian concept. However, the more important question is where one draws the line between maintaining social stability and securing individual rights of religious practice and freedom of religion? This needs to be re-evaluated in Malaysia, where the politicization of the "Islamic State" identity and fear-mongering has had a considerable effect on defining the parameters of fundamental rights afforded to the citizens by the Constitution. The restrictions on rights of others due to mere political insecurity cannot be tolerated if we are to uphold human rights and respect for religious convictions.

D. Moving Away from the Universalist-Relativist Debate

The Malaysian experience with freedom of religion is demonstrative of the very tension between the universal conception of human rights and the relativity of cultural and religious norms. The former resists religious traditions that are arguably at odds with the modern liberal interpretation of universal human rights principles. The latter is most often advanced on the basis of 'social order' and the desire to maintain distinct 'Asian Values.' But the exposé on the Malaysian practices suggests that there are serious questions yet to be resolved. Thus, any firm reconciliation with international human rights standards is problematic, and local institutional and political obstacles to the exercise of religious freedom complicate this.

As a starting point, it is noteworthy that the two polar assumptions of human rights "[w]ould have been foreign to the framers of the [UDHR]." Moreover, the final Vienna Convention Document which all UN members have accepted stresses that it is the participating States' duty to implement human rights while bearing in mind that countries have different religious and cultural traditions. But the challenge to resolve the Universalist-Relativist gap in the context of religious freedom lies

223 Id. at 506.
224 Mohamad, supra note 108, at 155.
225 Mary Ann Glendon, supra note 19, at 139, 142.
226 Id.
not only in the tension between religious and secular spheres, but also in the relationship of religion to other conception of rights but also to one religion vis-à-vis another.

The problem plaguing the international human rights movement is the failure to appreciate the human rights canon as a whole. Hence, there lies an obstacle in properly conceiving the human rights morality when construing the freedom of religion. In resolving this, one should look at the UDHR in its call for everyone to “act in the spirit of brotherhood” as a starting point for refuting claims of individualism and that the human rights regime is discriminatory against non-Western cultures. The freedom of thought, conscience, and religion, must also be considered in light of Article 29, which emphasizes that “[e]veryone has duties to the community.” Quite interestingly, the UDHR is silent on the meaning, origin and enumeration of such duties, so much so that this is open to interpretation and incorporation according to varying cultural and religious norms.

“[R]eligious beliefs and human rights are complementary expressions of similar ideas, although the former invokes the language of duties rather than rights.” Therefore, human duties should not be ignored when one speaks of human rights. But this is not a solution in and of itself. Some religious duties may impinge on rights, and more often than not religious authorities will assert primacy of those traditions over rights. This is more challenging when that assertion is grounded upon highly

227 Danchin, supra note 50, at 102.
228 See An-Naim, supra note 49, at 95 (arguing that to restrict the debate of freedom of religion within these two polar extremes is not only misleading, but also counterproductive).
229 UDHR, supra note 15, art. 1.
230 Id. art. 29.
231 Nurhalida Mohamed Khalil, The Universal Declaration of Human Rights and the Renunciation of Faith: in Defense of What is Right and Not What is Good? Paper presented at the Conference on Religion, Law and Governance in Southeast Asia, at 8 (Jan. 29 - 31 2010). See also Henry J. Steiner et al., supra note 18, at 347-48 (stating that the ambit of human duties is wide; encompassing all dimensions of man’s life, be they physical, spiritual and mental; and that human duties are not merely a method of prescription of a subject’s relationship with the state alone: they are deeply embedded in social and familial relationships and also in man’s relationship with God and Nature).
232 Steiner et al., supra note 18, at 569.
233 Id.
conservative, counter-progressive conceptions of religion. Furthermore, religions are chiefly concerned with the rights of their constituents, including exercising the right to freedom of thought, conscience, and religion. So the question becomes: do rights come first, or duties? It is problematic for human rights to be strictly defined by duties, or vice versa. Religious duties, in the Islamic context, for example, offer different opinions on the extent of religious freedom, especially in cases of conversions and apostasy. More problematic is the differing implementation of religious laws in various States and respective claims of superiority by different religions. The human rights canon, as a general secular construct, did not provide for these intricate contingencies.

Perhaps the ultimate resolution lies in focusing on the human rights morality, which is grounded upon the notion of human dignity—that all human beings are born free and equal. This not only means that one’s fundamental rights must be respected in spirit and essence, but it also denotes respect for the exercise of rights by others. It is indeed moral to respect individual rights, the exercise of which is essential not only for one to develop as a person, but to contribute to community development because individuals are in fact part and parcel of a community. Thus, human duties must be carried out concurrently with assertions of human rights as far as those duties are compatible with human dignity and the human rights ideal of respecting individual beliefs, that is, “[w]here the government does not prescribe orthodoxy or prohibit particular religions or beliefs.” In the religious freedom context, it is consistent with human rights morality to respect one’s independent choice of belief. Human duties to community should be allowed to run their course by providing room for discussion and resolution. But if such process is ultimately futile, then the dignity of individual choice should be respected without unnecessary state-imposed hurdles.

234 Henkin, supra note 46, at 234. Henkin gives an example of the right to proselytize as freedom of expression, and that some religions may “[c]laim such a right as part of the right of their members to manifest their religion in teaching and practice. But some religions, we know, will resist the right of their members to change their religion.” Id.

235 Shelton & Kiss, supra note 83, at 575.
VII. Conclusion

Religion is an important feature of Malaysia by reason of tradition and history, and it will continue to be important in the social, political and legal discourse. The relationship between law and religion is a complex, albeit evolving issue. But with the increasing human rights consciousness and growing number of progressives among both the Malay-Muslim majority and other minorities, a shift in mentality is taking place.

The foregoing sections demonstrate that not only is the Malaysian practice complicated from a constitutional perspective, it also raises serious questions in light of the human rights regime on religious freedom. If, as previously suggested, the *Lina Joy* outcome will "[d]efine the nation’s character," then the plural Malaysian society has a lot to cringe about. The resolution of religious conversion cases and restrictions on religious doctrines do not seem to be conducive to maintaining religious harmony and pluralism in a divided society. The constitutional promise of religious freedom and equality, rosy as it may seem, is being eroded. The various political and social considerations, and unyielding insistence on ‘Asian Values,’ increase the complexity of this issue. While we remain cognizant of local conditions and allow society to evolve in shaping human rights consciousness through education and advocacy, courts also bear an important responsibility in defining the parameters of citizens’ constitutional rights.

The arguments above also have one thing in common—putting interests of morality, humanity, and social stability at the heart. Although human rights are secular and Western in origin, the UDHR is a document of persuasive moral authority. The morality stemming from respect for individual rights is important as the exercise of those rights will bear significant impact on community living and social order. It is also notable that duties to the community would be to some extent arbitrary or rather, a matter for domestic law and politics. We should be mindful of this because governments have an interest in imposing rules that

236 Prystay, *supra* note 12.

arguably violate individual rights to buttress their position and maintain the status quo. For that reason, there must be solid recognition of the role of human rights as a mechanism of checks and balances against the state. It must be emphasized that the basic responsibility of a state is to safeguard the freedom of religion; that is, to prevent encroachments on this fundamental right. The problem in Malaysia, however, is the seemingly over-regulation by the state of private matters. It seems very odd that ‘personal sins’ such as apostasy, alcohol consumption, and non-performance of Friday prayers for men become matters between an individual and the state. Prominent Islamic scholars such as Mohammad Hashim Kamali have spoken out against this, arguing that it is not for the state to legislate punishments for personal sins.238

A strong grounding on values, through both human rights and duties to the community, is the key to tolerance and social stability. We must leave the chauvinism on relativity of norms and focus instead on the common morality that can be derived from both Universalist and Relativist conceptions of human rights. Instead of getting bogged down in ideological antagonisms and arrogant dismissals, freedom of religion has to be understood in the proper context in order to promote progressive reconciliation with religious precepts. For one to believe that the other has the right to practice their faith freely, the conviction must begin from the firm morality of respecting human dignity and beliefs. Religious issues in a plural society such as Malaysia must be open to debates by all sections of the community. Sensitivities can only be resolved through civilized deliberation and dialogue between races in which decision must be reached in consensus and compromise. While concerns of social stability are understandable, actions must be reasonable and not at the expense of human dignity. If there are genuine concerns about a pandemic of conversions and apostasy in a particular religion, then the root cause of the problem should be examined, and not by the simplistic solution of curtailing rights of others for political convenience.239

238 Shah, supra note 208.
239 Abidin, supra note 122. Religious cleric Dr. Asri invites Muslims to study reasons of the apostasy phenomenon, rather than getting panicky over stories of
apostates. *Id.* He argues that from the evidence gathered from *hadiths* and the deeds of the Prophet's companions, the jurisprudential scholars state that it is necessary for the apostate to be given room for discussion, to clarify any confusion regarding the religion, and to call for repentance. *Id.*