

THE RIGHT TO FREEDOM OF RELIGION AND JURISDICTIONAL CONFLICTS IN MALAYSIA^{©Σ}

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ABSTRACT

In Malaysia, the Federal Constitution provides significant legal protections for religious freedom. Article 11 (1) guarantees the right to profess and practice one's religious beliefs freely, except for restrictions on propagation among Muslims under the federal and state laws (Article 11(4)). Furthermore, according to Article 3 (1), Islam holds a special position in the country. The Malaysian legal system consists of the civil laws and the Syariah laws with two court systems, (example, the Syariah courts and the civil courts). While the former serves as an essential institution for Muslims and maintain the Islamic identity of the nation, issues of jurisdiction have become a subject of contention, particularly in interfaith cases. This study explores an overview of Malaysia's Universal Periodic Review (UPR) on religious freedom and analyses jurisdictional conflicts through interviews with the national legal experts. After carefully considering Malaysia's unique historical and socioeconomic context, it is concluded that upholding the Federal Constitution is of utmost important and implementing the UPR recommendations should be separated from it.

Keywords: freedom of religion and the Malaysian's social contract, the special position of Islam under the federal constitution, safeguarding Muslim faith and jurisdictional conflicts, propagation of other faiths among Muslims, human rights, and the Universal Periodical Review (UPR).

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Σ **Article Info:** Submission date: 21 December 2022; Acceptance date: 10 May 2023; Publication Date: 31 July 2023.

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HAK KEBEBASAN BERAGAMA DAN KONFLIK BIDANG KUASA DI MALAYSIA

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ABSTRAK

Di Malaysia, Perlembagaan Persekutuan menjamin hak kebebasan beragama ke atas setiap individu. Perkara 11 (1) menjamin hak setiap individu untuk menganut dan mengamalkan agamanya. Tertakluk kepada fasal (4), pengembangan agama bukan Islam di kalangan orang Islam adalah dilarang sama sekali (Perkara 11(4)). Tambahan pula, Perkara 3 (1) memberi kedudukan istimewa kepada agama Islam. Terdapat dua sistem perundangan di Malaysia yang terdiri daripada perundangan sivil dan Syariah serta dua sistem mahkamah iaitu mahkamah Syariah dan mahkamah sivil. Walaupun mahkamah Syariah berfungsi sebagai institusi penting bagi umat Islam dan mengekalkan identiti Islam negara, isu pertindihan bidang kuasa sering terjadi, terutamanya dalam kes yang melibatkan dua pihak yang berbeza agama. Kajian ini meneroka Kajian Berkala Sejagat (UPR) Malaysia tentang kebebasan beragama. Kajian ini juga menganalisis konflik bidang kuasa melalui temu bual dengan pakar undang-undang negara. Selepas mempertimbangkan dengan teliti konteks sejarah dan sosioekonomi Malaysia yang unik, dapat disimpulkan bahawa menjunjung Perlembagaan Persekutuan adalah amat penting dan melaksanakan syor UPR hendaklah diasingkan daripadanya .

Kata Kunci: *kebebasan beragama dan kontrak sosial di Malaysia, kedudukan istimewa agama Islam dalam perlembagaan persekutuan, menjaga aqidah Islam dan konflik bidanguasa, pengembangan agama bukan Islam kepada orang Islam, hak asasi manusia dan Semakan Berkala Sejagat (UPR)*

Introduction

In general, Malaysia has significant tolerance when it comes to pluralism and religious freedom (see *Law of Malaysia 2009*). This is reflected by the constitutional guarantees provided in Article 3 (religion of the Federation), Article 8 (rights to non-discrimination and equality before the law), and Article 11 (freedom of religion). Articles 3, 8, and 11 establish a solid constitutional framework for religious freedom and non-discrimination. Nonetheless, several constitutional limitations on freedom of religion may only be partially compatible with international human rights laws and norms. Malaysia has yet to ratify Article 18 of the 1948 Universal Declaration of Human Rights (UDHR) or Article 18 of the 1966 International Covenant on Civil and Political Rights (ICCPR) (*UNHR 2021*).

During Malaysia's most recent Universal Periodic Review (UPR) on November 8, 2018, the country received 268 recommendations. Of these, 149 were accepted, 36 were partially accepted, and 83 were noted (*UNHRC November 8, 2018*). The third cycle's thematic list of recommendations showed that the implementation level of the recommendations for religious freedom, which falls under the 'civil and political right' category, has only slightly improved in its implementation (*COMANGO 2021*). In the previous cycle (second), Malaysia received six recommendations. One was entirely accepted, three were partially accepted, and two were noted (*UNHRC November 8, 2018*).

The third cycle of the UPR of Malaysia made seven remarks related to 'religious freedom' (*UNHRC November 8, 2018*). Recommendations for the country are as follow:

- **Table 1: UPR Remarks on the Freedom of Religion in Malaysia**

No.	Recommendation	Government Response
151.127	Enhance protections for the right of freedom of religion or belief for all people in Malaysia, including the right to freely choose and practice their faith (United States of America).	Taken note of
151.129	Take measures to fully guarantee the right to freedom of religion and belief (Albania).	Taken note of
151.131	religious intolerance, including against the Christian community (Croatia).	Taken note of
151.132	Amend the National Registration Act to remove all references to religion on identity cards, in follow-up to recommendations in paragraphs 146.87 and 146.152 of the Second Cycle (Haiti).	Taken note of
151.133	Take the necessary measures to ensure that all persons are free to exercise their right to freedom of religion and belief, especially the right to change their religion, without fear of judicial sanction, in follow-up to recommendations in paragraphs 146.87 and 146.152 of the second cycle (Haiti).	Taken note of

151.134	Make more efforts in the framework of freedom of religion and belief (Iraq).	Partially accepted
151.135	Undertake administrative, policy and legislative measures to guarantee freedom of religion and belief for all in Malaysia, consistent with the Constitution (Kenya).	Accepted in full

Source: Compiled and adapted by the Authors from the (UNHRC November 8, 2018).

Nevertheless, we conducted semi-structured (elite) interviews with experts¹ in Malaysian law and constitution to gain a better understanding of religious freedom and jurisdictional conflicts in Malaysia. Through these interviews, we were able to provide a balanced perspective on the situation of religious freedom in Malaysian society while also contextualizing global concerns raised by the UPR. Our interviews included prominent figures such as Emeritus Prof Datuk, Dr Shad Saleem Faruqi, Datuk Mohd. Zawawi Salleh, Dato' Dr Naim, Professor Nik Ahmad Kamal, Professor Datin Faridah Jalil, Mr Jerald Joseph, and Mr Andrew Khoo (see the list of interviews). Nevertheless, these renowned experts have argued that the Malaysian constitution establishes a constitutional right to freedom of religion. This includes the right to profess and practice one's religion and, subject to Article 11(4), the right to propagate it (restrictions of propagation against Malaysian Muslims).

Our discussions with these eminent experts resulted in several key findings presented in this article. We first provide an overview of Malaysia's legal and political-religious freedom landscape. We then examine the dual legal system in Malaysia, which separates civil and Syariah courts, and discuss whether this system is beneficial or detrimental to jurisdictional conflicts and the protection of religious sensitivity in Malaysia's diverse society. Finally, we will offer our critical appraisals and recommendations on the matter. Nonetheless, However, it is essential to acknowledge that concerns regarding apostasy, the conversion of minors, and proselytism among Malaysian Muslims have significant implications for the relationships between Muslim and non-Muslim communities in Malaysia. These issues cannot be ignored or downplayed.

Freedom of Religion in the Federal Constitution of Malaysia

The Federal Constitution establishes three main aspects of religious freedom: the right to profess, practice, and propagate religion (Wan Husin and Haslina Ibrahim 2016, 1216). In Malaysia, the constitution guarantees the right to freedom of religion, including the right to profess and practice one's religion and propagate it subject to Article 11(4). However, there is a 'disagreement' on what constitutes a religion and whether a particular belief system qualifies as one (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021; Nik Ahmad Kamal, Online interview with Authors, June 29, 2021; Mohd Naim Mokhtar, Online interview with author, August 2, 2021; Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021). Moreover, in a landmark court judgement, Mohd Zawawi expanded the definition of religious "practice" by specifying which acts can be considered religious under the law and therefore protected (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021). This ruling pertains to the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 8 MLJ 890.

Meanwhile, during our in-depth discussions with other renowned Malaysian legal experts, (Faridah Jalil, Online interview with Authors, July 2, 2021; Jerald Joseph, Online interview with Authors, July 28, 2021; Andrew Khoo, Online interview with

Authors, July 21, 2021), Malaysia's constitution does not provide complete religious freedom and favours Sunni Muslims over other religions. They argue that this means Malaysia does not fully practice religious freedom (Faridah Jalil, Online interview with Authors, July 2, 2021). In short, these three experts cite several reasons for their claim, including declaring Islam as the state religion, restrictions on Muslims converting out of Islam, and limitations on non-Muslims' religious propagation (Andrew Khoo, Online interview with Authors, July 21, 2021; Faridah Jalil, Online interview with Authors, July 2, 2021; Jerald Joseph, Online interview with Authors, July 28, 2021). These restrictive laws were influenced by Malaysia's historical background during the constitution drafting period, which considered pre-colonial elements, Malay states' customs and traditions, Sultan's role as the head of Islam, and the country's socio-economic situation (Dian Abdul Hamid and Mohd Sani 2011, 649).

The article "Islam as the Religion of the Federation" in Malaysia's constitution, specifically Article 3, plays a crucial role in understanding religious freedom in the country (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021). While the clause guarantees that no provision in the constitution should be derogated, the interpretation of Islam's role remains a topic of debate (see Thomas 2006; Sheridan and Groves 1987). Some argue that Islam's unique position elevates it against other religions and should be prioritized. In contrast, others believe Malaysia should be a secular state, with Islam only serving as the official religion in federal ceremonies (see Thomas 2006; Dian Abdul Hamid 2017). Legal experts agree that Malaysia is neither a fully-fledged Islamic state nor wholly secular (Mohamed Adil December 28, 2018). Regarding having an official religion, it is worth noting that other countries, such as the Republic of Sri Lanka, the Vatican, Palestine, Myanmar, Monaco, and Morocco, have designated a specific religion as their official religion (Mohd Naim Mokhtar, Online interview with author, August 2, 2021; Nik Ahmad Kamal, Online interview with Authors, June 29, 2021). Like Malaysia, their constitutions also guarantee the practice of other religions (Faridah Jalil, Online interview with Authors, July 2, 2021).

Malaysia is often accused of not adhering to religious freedom practices due to the perceived restrictions on Muslims who wish to leave Islam and convert to another religion (Faridah Jalil, Online interview with Authors, July 2, 2021). The case of Lina Joy, also known as Azalina Jailani, gained international attention as an example of this issue. Lina Joy, a Malay woman, applied to convert to Christianity to marry her boyfriend but faced legal obstacles due to Article 160 of the Malaysian Constitution, which defines *Malays* as those who practice Islam, speak Malay regularly, and follow Malay customs (see Harding and Dian Abdul Hamid 2018). As such, article 11 (4) also implicitly prohibits Muslims from converting, and the link between Malay identity and the Islamic religion further complicates the matter of conversion (Wan Husin and Haslina Ibrahim 2016, 1217).

As per Article 11(4) of the Constitution, non-Muslims are not allowed to spread their religion among Muslims in Malaysia. "State Law and Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, Federal Law may control and restrict the spread of other faiths or religious beliefs toward Muslims".² On the other hand, Muslims in Malaysia are allowed to spread Islam to other religious communities. This has been viewed as a limitation to the religious freedom rights of non-Muslims, including minority sects like Shia and Ahmadiyya (Andrew Khoo, Online interview with Authors, July 21, 2021; Jerald Joseph, Online interview with Authors, July 28, 2021). The reason behind this restriction is to maintain peace and harmony and prevent any social or national instability (Nik Ahmad Kamal, Online interview with Authors, June 29, 2021).

Protecting the national interest also means safeguarding the official religion and preventing people from freely converting to Islam (Mohd Naim Mokhtar, Online interview with author, August 2, 2021; Shad Saleem Faruqi, Online interview with Authors, August 13, 2021).

Dual legal System in Malaysia: A Source of Jurisdictional Conflict?

In many former colonised countries that practice legal pluralism (dual separation between civil and Syariah court administration and jurisdiction), conflicts between laws are fairly expectable (see also Whittington, Kelemen and Caldeira 2010). In Malaysia, which is home to a diverse and multicultural society, the issue of religious freedom and jurisdictional disputes are closely linked (Hamid 2019). While Malaysia's dual court system is crucial in preserving its Islamic identity, it has also resulted in several legal conflicts between interfaith groups (Quraishi 2020; Harding and Dian Abdul Hamid 2018; Lee 2017). These conflicts cover a range of issues, including the religious status of minors, custody rights in interfaith marriages, the Muslim status of individuals raised by non-Muslims, renunciation from Islam (apostasy), and proselytism. Malaysia must recognize these tensions and disputes surrounding religious freedom between civil and Syariah courts and establish appropriate legal solutions that balance conflicting interests (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021).

In Malaysia, there are two legal systems: the common law system, which applies to everyone in the country, and the Islamic law system, which only applies to Muslims. However, religious freedom issues involving Muslim parties often result in conflicts between the two legal systems, with Syariah courts often favoured (*OIRF* 2020; Foo 2010; Tew 2011). The relationship between Syariah and civil law needs to be clarified, often resulting in civil courts deferring to Syariah courts. This can lead to situations where Syariah's judgments impact non-Muslims, even though they are not bound by Islamic law. Non-Muslims cannot appeal or defend themselves against a Syariah court ruling, which has caused significant issues in cases involving custody, divorce, inheritance, burial, and conversion in interfaith families (*OIRF* 2020, 6).

The amendments to Article 121(1A) were intended to resolve disagreements between Syariah's decisions and civil courts. It is important to note that the purpose of amending Article 121(1A) was not to eliminate the jurisdiction of civil courts but rather to remedy jurisdictional disputes between the two courts. For Muslim citizens, religious freedom may be limited under Schedule 9, List II, Item I of the Constitution (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021). This allows State Assemblies to pass laws that penalize Muslims for violating Islamic principles such as *khalwat* (proximity between unmarried couples), adultery, apostasy, gambling, drinking, and other deviant activities (Lee 2017, 24). It is a common misconception that Article 121(1A) removes the civil courts' jurisdiction over all cases related to Islamic law. If a constitutional challenge is made against the jurisdiction of either the High Court or Syariah courts, it should be addressed by the Federal Court. However, the changes have led to further confusion, ambiguity, and conflict (Lee 2017, 27).

Shad Faruqi has pointed out that Article 121 (1A) lacks clear guidelines for separating jurisdictions and resolving conflicts between them (Shad Saleem Faruqi, Online interview with Author, August 13, 2021). The case of Lina Joy highlights the conflict between a person's constitutional right to religious freedom and the Syariah court's authority to reject Islam. This has raised the question of which court has the final say (Dian Abdul Hamid 2017). Article 121 (1A) only protects the Syariah court in matters that fall within its jurisdiction and do not cover constitutional provision interpretation.

Furthermore, it raises doubts about the Syariah court's ability to address the issue of apostasy, as it remains silent.

According to Schedule 9 List II, paragraph 1, it is clear that Syariah courts do not hold any authority over non-Muslims.³ Therefore, if the superior civil courts decide to refer such cases to Syariah courts for resolution, it would be a severe violation of their judicial oath to uphold, protect, and defend the Constitution. This could result in severe concerns regarding injustice, as assigning a matter to a court that lacks jurisdiction over one affected party is unfair. One such case was that of Indira Gandhi, whose ex-husband unilaterally converted their children. Although the High Court initially ruled in his favour, the decision was eventually overturned by the Federal Court.

There are several examples of this dispute. *Subashini Rajasingam v Saravana Thangathoray* ([2007] 2 MLJ 798), *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 3 CLJ 557, and *Viran a/l Nagupan v Deepa a/p Subramaniam* ([2015] 3 MLJ 209) are some of the notable cases relating to the jurisdictional dispute between the two courts. The most recent cases involve *Rosliza Ibrahim v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor* ([2021] 3 CLJ 301) and *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* ([2018] MYFC 3 (paras 42, 47)). The latter two cases have established new principal rulings in the Malaysian legal framework regarding the religious status of a child in an interfaith marriage as well as an illegitimate child.

Apostasy

The ability to freely choose one's religion is closely linked to the right to freedom of religion or belief. However, the issue of apostasy in Malaysia is complex and influenced by different factors such as politics, society, economy, religion, history, and constitution. Cases of religious conversion raise several constitutional and human rights concerns, including the extent to which citizens can assert their right to religious freedom. There are also concerns about the role of Islam as the country's religion, Islamic regulations on apostasy, the function of Syariah courts, and one's ethnic background. The main question is whether Muslims have the right to renounce Islam as part of their freedom. Over the years, Malaysian courts have heard many cases of apostasy and conversions, leading to various outcomes (Dian Abdul Hamid 2017).

In Malaysia, there are controversial issues surrounding apostasy and religious conversion, including the application of apostasy by Muslims, determining the religious status of a person raised as a non-Muslim but who is now Muslim, removing the words "Bin" and "Binti" from the National Identification Card, and punishment for religious conversion.

It is complicated for Muslims to renounce their religion officially, as such cases typically fall under the jurisdiction of Syariah courts.⁴ In these courts, apostasy is regarded as a severe crime. The case of *Daud Mamat v Majlis Agama* ([2001] 2 MLJ 390; [2002] 3 MLJ 728) further highlights that the act of leaving one's religion is not considered a part of freedom of religion for Muslims. Although legal routes are available in some states for apostasy, they are challenging to navigate (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021). It is worth noting that apostasy was

not punishable in Malaysia until the 1970s, but since the case of Jamaluddin Othman, it has been considered entirely immoral and politically explosive (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021).

In 2004, Lina Joy applied to the National Registry Department (NRD) to change the religious designation on her national identification card. Joy had converted to Christianity and was baptised as a Christian in 1998, despite being born a Muslim (Barry 2009, 410). However, the NRD rejected her application as she did not have an order from a Syariah court validating her conversion. Joy took her case to civil courts, arguing that the refusal to remove the word "Islam" from her identification card violated her constitutional right to practise the religion of her choice. She later appealed to the Federal Court, but her appeal was denied because she had not obtained a Syariah Court declaration that she was no longer a Muslim (Herding and Abdul Hamid Dian 2018, 76).

State laws do offer legal options for renouncing Islam. Muslims, including those who converted from other religions, can request the Syariah court to declare that they are no longer Muslim. This process involves attending "counselling" sessions at the Department of Mufti for up to a year, after which a report is sent to the Syariah court for a judge to decide. The process is lengthy and meticulous due to the importance of safeguarding Islam as the official religion of the Federation (Article 3) and preserving its sanctity from public indecency. It also allows individuals to consider their decision to leave Islam carefully.

Although conversion from Islam is prohibited, Malaysia should have unambiguous jurisdiction over this subject. In the case of Lina Joy, there was uncertainty on whether courts would address the issue of apostasy because it involved the self-declared non-Muslim' and registered Muslim categories on the National Identification Card (NIC). This issue concerns the government's policy of including religious affiliation on national identification cards. For Muslims, religious affiliation is printed on the front, while for non-Muslims, religious information is saved in the card's electronic chip. This creates challenges for anyone wishing to conceal their religious affiliation.

Non-Muslims incorrectly registered as Muslims on their identification cards have significant difficulty changing their religious affiliation (*OIRF* 2020, 14). This is especially true for persons whose names contain the terms Bin or Binti, which are culturally connected with Islam. For example, despite being non-Muslims since birth, Rosliza Binti Ibrahim and Nusiah Binti Pulod encountered substantial bureaucratic obstacles in deleting the word Islam from their identification cards. The final court judgement in the matter of Rosliza Binti Ibrahim determined that assessing the status of someone who says they 'were never Muslims' (rather than 'are no longer Muslims') falls under the civil court's jurisdiction protected (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

Recently, the Federal Court made a significant decision, stating that civil courts have authority over individuals who claim they were never Muslims. However, the question of renouncing Islam among born Muslims falls solely under the jurisdiction of the

Syariah court (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

In regard to cases involving the removal of "Bin" and "Binti" from one's name, as well as a religious affiliation on the national identification card (NIC), Nik Ahmad Kamal is opposed to such actions, arguing that it is a vital aspect of Malaysia's culture and identity (Nik Ahmad Kamal, Online interview with Authors, June 29, 2021). While non-Muslims in Sabah and Sarawak traditionally use "Bin" and "Binti" despite their religious status, Nik Ahmad Kamal suggests that individuals who wish to renounce Islam and alter their name may do so by following the proper procedures set by the Registry Department (Nik Ahmad Kamal, Online interview with Authors, June 29, 2021).

Other renounced legal experts (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021; Mohd Naim Mokhtar, Online interview with author, August 2, 2021; Andrew Khoo, Online interview with Authors, July 21, 2021) agree that the use of "Bin" and "Binti" does not necessarily indicate one's religious status. For example, Iwan bin Ustad and Norizan Binti Ahmad have no religious connotation. Additionally, Muslims may have names that do not include "Bin" or "Binti", and new Muslim converts may continue to use their given name. "Bin" and "Binti" are used solely for administrative purposes, such as the Registration of Births and Deaths Act 1957, and do not necessarily relate to one's religion (Mohd Naim Mokhtar, Online interview with author, August 2, 2021). However, including one's religious status on the identity card is essential, particularly in Malaysia's dualistic legal system.

Overall, while there may be varying opinions on the use of "Bin" and "Binti" and its relation to one's religious status, it remains an essential aspect of Malaysia's culture and identity (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

Conversion of Minors

The issue of converting minors has caused confusion between civil and Syariah courts, as both have made conflicting rulings. One common scenario involves a former spouse converting to Islam and unilaterally converting the children, with custody granted through Syariah courts, despite the civil nature of the marriage. Two recent cases, *Viran a/l Nagapan v Deepa a/p Subramaniam* ([2015] 3 MLJ 209) and *Indira Gandhi a/p Mutho v Inspector General Police* ([2018] MYFC 3, paras 42, 47), serve as examples of this issue.

The Court of Appeal's decision in *Muhammad Ridhuan Abdullah v Indira Gandhi* (2015) sparked a renewed debate on children's religious conversion and identification in Malaysia. As the civil and Syariah courts have overlapping jurisdictions, this issue continues to be a disagreement between Muslims and non-Muslims who initially registered their marriages under civil law (*OIRF* 2020, 7; Mohamed Adil and Ahmad Badri 2016, 1).

According to Articles 12(3) and 12(4) of the rights to education, minors have the right to their religion. Article 12(3) explicitly states that nobody can be forced to participate in religious practices outside their beliefs.⁵ Article 12(4) further explains that a person under 18 has their religion determined by their parent or guardian.

The Federal Constitution of Malaysia's Article 12(3) also confirms this. However, there are differing interpretations of the term "parent" in this context. Some legal and academic experts believe it should be interpreted as "both parents" due to Article 160 of the Federal Constitution, which refers to the word "parent" as a plural term, meaning "parents." (Nasohah, Abdel Wadoud and Mohd Izhar Ariff 2010, 434; Mohamed Adil and Rafeah Saidon 2017, 400). Shad Faruqi explains the implications of Article 12(3) of the constitution. Faruqi states that this paragraph prohibits coercion but does not prevent an individual from voluntarily participating in someone else's religious activity (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021). Furthermore, the term "religion" in the Constitution seems to refer to the formal religion that one is born into.⁶ This means that individuals born into a religion are compelled to follow the approved systems of belief of the official religious leaders, which can lead to consequences for deviants. The Constitution also protects individuals from being forced to receive religious education that is not their own (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021). However, there is no legal basis for refusing religious instruction. Finally, this rule prohibits compulsory teaching in a religion other than one's own for ceremonial worship (Mohd Naim Mokhtar, Online interview with author, August 2, 2021; Nik Ahmad Kamal, Online interview with Authors, June 29, 2021; Faridah Jalil, Online interview with Authors, July 2, 2021; Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021; Andrew Khoo, Online interview with Authors, July 21, 2021; Jerald Joseph, Online interview with Authors, July 28, 2021).

When deciding which parent should have custody of a child after a divorce, Islamic and civil law agree that the child's welfare is the most crucial factor; if one parent converts to Islam while the other remains non-Muslim, the child's religious status should not be the primary consideration if their well-being is not being adequately addressed (Shad Saleem Faruqi, Online interview with Authors, August 13, 2021). The child's basic needs, such as food, shelter, and clothing, must be met before any religious concerns are considered, even though the syariah values the protection of religion (Mohamed Adil and Rafeah Saidon 2017, 410). Ultimately, the child's welfare is paramount and should never be neglected (Wan Naim 2016a; 2016b).

In Islamic teachings, guardianship law (*Hadhanah*) covers the topic of minors' religion. Therefore, parental consent for minors' conversion is not addressed. Various schools of thought have proposed three approaches to deal with this issue (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021). The majority view is that if a parent converts to Islam, their minor child is also considered a Muslim after the conversion. As per the beliefs of As-Shafie, Abu Hanifah, and majority of other renounced Muslim classical scholars (Islamic jurisprudence), if one parent converts to Islam, the religion of the minor will follow that of the convert, regardless of whether it is the mother or the father (Al-Mawardi 2003, 406; Ibn Munzir 2003, 360).

There are different perspectives on how a minor's religion is determined. According to the Maliki school of thought (jurisprudence), if the father converts to Islam, the minor is expected to follow and adopt the father's faith. However, if the mother converts, the minor's religious status is unaffected. This perspective emphasizes paternal control. On the other hand, another perspective holds that the minor's faith should follow that of the mother. If the mother converts, the minor automatically becomes a Muslim. However, if only the father converts, the minor's faith remains unchanged and will be the same as the mother's (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

The National Muzakarah Council (NMMC) has stated that in Islam, a minor's religious

status is determined by their parent's conversion (JAKIM 2009). Therefore, whether one or both parents must consent to a minor's conversion is irrelevant, as the ruling has already been established. However, in Malaysia, which is not Islamic, both parents must approve a minor's conversion to Islam. The Federal court confirmed this (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

In the legal case of *Muhammad Ridhuan Abdullah vs Indira Gandhi* [2016] 1 CLJ 911), the father converted to Islam and unilaterally converted his children without the mother's consent. Indira Gandhi, the mother and former wife, was dissatisfied and challenged the father to revert their children's religious status. This case has set new precedents and perspectives on the religious status of children who have been converted. According to the ground-breaking judgement, both parents' permissions are required before initiating a conversion into Islam. Failing to comply with this provision violates Article 12(4) of the Federal Constitution and Sections 5 and 11 of the Guardianship of Infants Act 1961 (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).⁷ A recent case involving divorced parents in deciding their children's religious status followed the judgement of the principal case of Indira Gandhi, where the children would maintain their initial religion (Buddhism) before the mother converted to Islam.

It was decided during a cabinet meeting in April 2009 that both parents must consent to the Islamization of children under 18 years old (Mohamed Adil and Ahmad Badri 2016, 4). If a consensus cannot be reached, the non-Muslim party will determine the child's religion since the marriage was initially bound by non-Islamic laws (*OIRF* 2020, 25). This decision has garnered widespread media attention and sparked various public reactions, both positive and negative. For instance, a Christian family from Sarawak state filed a lawsuit against authorities in January 2020 after their minor son was converted to Islam by an Ustaz (religious teacher) without their permission.

Recent interfaith cases have revealed that current laws and frameworks are inadequate for resolving this problem. Harmonizing civil and Syariah legal systems may be a potential solution to determining children's religion in Malaysia.

Proselytism

According to Article 11 (1) of the Federal Constitution, individuals have the right to freely practice and propagate their religion, with certain limitations outlined in Article 11 (4). However, the language used in Article 11 (1) does not explicitly allow the freedom to convert to a different religion. Article 11 (4) also permits federal and state laws to restrict the spreading of religious beliefs among those who practice Islam. This has led to implementation of laws in many Malaysian states that prohibit the spread of non-Islamic religions to Muslims.

Non-Muslims have expressed dissatisfaction with these restrictions on preaching to Muslims, as Muslims can share their beliefs with non-Muslims (Jerald Joseph, Online interview with Authors, July 28, 2021). However, there are several reasons why non-Muslims are not permitted to spread their religion to Muslims, including the fact that Islam is recognised as the religion of the Federation, the responsibility of Malay rulers to preserve the status of Islamic teachings, and the religious law that considers apostasy a crime under Schedule 9, List 11, item 1 of the Federal Constitution (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

Rules against spreading one's religion are not solely targeted at non-Muslims. Even

Muslims can be subject to restrictions on missionary activity.⁸ The state's law may limit the promotion of any religious beliefs among Muslims under Article 11(4). It has been found that nine out of thirteen states have passed similar laws.⁹ The meaning of Article 11(4) includes any attempts to convert Muslims, whether by non-Muslims or unauthorised Muslims. Similar regulations prevent Muslims from preaching Islam outside their household and family without a permit (*tauliah*) issued by state officials.

Shad Saleem Faruqi explains that the constitutional provision prohibiting the conversion of Muslims (Article 11(4)) is based on the historical need to safeguard Malay Muslims from being placed in an inferior and disadvantaged position in the face of well-funded foreign missions from "merchants, the military, and missionaries of colonial countries" (Faruqi 2008, 138-139).

Harding (1986, 201) differentiates between the freedom to "practice" and "propagate" and suggests that limiting the latter is more about maintaining public order than prioritising religion. This is partly due to concerns about potential threats to Malay dominance, closely linked to Islam.

Tun Salleh Abas explains that the Article aims to safeguard the Sunni school of law that Malaysia's Muslim community follows from being exposed to any beliefs or ideologies that contradict genuine Islamic teachings, regardless of whether they are spread among Muslims or non-Muslims (Salleh Abas 1986, 7).

Two relevant cases are *Mamat bin Daud & Ors v. Malaysian Government* and *Rev Stanislaus v. State of Madhya Pradesh AIR 1977 SC 908* (see *Mamat bin Daud & Ors v. Malaysian Government* [1988] 1MLJ 119; *Rev Stainislaus v. State of Madhya Pradesh AIR 1977 SC 908*). The Federal Court ruled in the case of *Mamat bin Daud* that Article 11(4) of the Federal Constitution gives the states the power to pass laws that protect Islam from the influence of other religions, specific schools, and opinions within Islam (see *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1MLJ 119). The court also stated that allowing Muslims or groups of Muslims to practice divergent beliefs or entertain conflicting ideas about Islam may lead to discord among Muslims, which could threaten public order.¹⁰ The *Jamaluddin Othman v Menteri Hal Ehwal Dalam Negeri* ([1989] 1 MLJ 368) judgment has allowed states to pass legislation under Article 11(4) that prohibits or regulates propagation to Muslims (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021). Therefore, the state has the right to regulate or prohibit such behaviour, and it is a crime to encourage, influence, coerce, or incite a Muslim to accept or join another faith.

Non-Muslims are allowed to preach their religion throughout the country, except to Muslims (Nik Ahmad Kamal, Online interview with Authors, June 29, 2021; Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021). Zawawi suggests that federal and state laws justify giving Islam a higher status than other religions, citing historical factors related to Islamic law in Malaya, the recognition of Islam as the Federation's religion (Article 3), the dual nature of the legal system, civil and Syariah, and the political influence of the Muslim majority (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021). Paragraph 2(c) of the Fourth Schedule of the Federal Constitution states that the Seri Paduka Baginda Yang Dipertuan Agong takes the throne by swearing to Allah that His Majesty will always protect Islam. Under the Eighth Schedule of the Federal Constitution, Sultans have discretion in carrying out any functions as heads of Islam's religions or relating to Malay customs. *Malays* are defined under Article 160 of the Federal Constitution as organically compatible with Islam and adhering to Malay culture.¹¹ Unrestricted propagation to Muslims may lead to their

conversion from Islam, which means they would no longer be considered part of the Malay community, according to the legal definition of Malays stipulated in the constitution (see *Law of Malaysia 2009*).

Changing laws related to promoting religion has many obstacles to overcome. This is due to several factors, such as Islam being the religion of the Federation, the Malay Rulers' responsibility to safeguard the special status of Islamic teachings, a constitutional clause that permits regulating the spread of religion, and apostasy being considered a violation of Islamic law (Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021).

Appraisals and Recommendations

After considering the points discussed above, it is evident that the complications regarding religious freedom are mainly linked to the disagreements between the Syariah court and the civil court. In addition, other factors like politics, economy, society, and ethnicity worsen the situation. To tackle this issue, the two courts must work together harmoniously and minimize jurisdictional conflict. Here are some suggestions that can help Malaysia address the problem of religious freedom and jurisdictional conflict:

Civil and Syariah Legal Frameworks Must be Clarified and Harmonised

In Malaysia, it is essential to acknowledge the conflicts between the civil and Syariah courts. It is recommended that an extraordinary tribunal with a mixed jurisdiction is established to address this issue. This tribunal would consist of judges from both the civil and Syariah courts who would work together to resolve disputes involving jurisdictional conflicts. The civil court would identify which cases should be referred to the tribunal for adjudication. Legal remedies must be equitable and balance the competing interests of both courts.

Adopting a Mediation Approach

Under the amended provisions of the Law Reform (Marriage & Divorce) 1976 Act 164 (2017), a mediation committee can facilitate negotiations between parties without requiring legal amendments. The panel should consist of Muslim and non-Muslim representatives to ensure fair representation. The aim is to reach an agreement prioritising the child's well-being, as it is unfair for them to be separated from their family due to religious differences.

Reconstruction of Religious Thought

It is vital to comprehend the religious philosophy to prevent unnecessary actions that may compromise the sanctity of the faith. For those who follow Islam, having a comprehensive awareness of Islamic doctrines can prevent them from committing apostasy or engaging in behaviours that violate the commandments of their religion.

Transparency on Apostacy

For the sake of transparency, it is recommended that all conversions should be registered. Additionally, it is suggested that punishments for apostasy in Islamic criminal laws should not be applied if a Muslim applies for renunciation at the Syariah court.

No Minor May Be Converted Without the Consent of Both Parent

For a minor's conversion, both parents should agree as per Article 12(4) of the Constitution. Before filing for any conversion, it is necessary to have a prior judicially sanctioned resolution regarding the status of the marriage, property division, custody, and care of the children.

Conditional Proselytism for Non-Muslims

Those who do not practice Islam may be permitted to share and promote their religious beliefs with those who do not follow Islam. The prohibition of spreading Islam among Muslims aims to safeguard the purity of Islam as the official religion of the state, avoid conflicts within society, and maintain public harmony in a diverse community. Any rising anxiety or distrust regarding Muslim conversion could significantly affect societal stability in a nation where ethnicity and religion are closely linked.

Establish Avenues and Remedies for Clerical Error

It is suggested that government departments, such as the National Registration Department, provide appropriate channels for rectifying any clerical errors related to faith designation on identity cards. Individuals wrongly registered as Muslims should be allowed to correct their information.

Conclusion

Malaysia is committed to addressing the concerns regarding religious freedom raised by the UPR proposal, as the ultimate aim of the UPR is to promote human rights and address any violations of them. Malaysia still needs to ratify the two international conventions but prioritises protecting religious freedom and rights. However, any suggestions from international laws must be examined to ensure they align with local circumstances and comply with the Federal Constitution, as the Malaysia's highest law.

Most of the recommendations from the previous UPR cannot be entirely implemented. Upholding the constitution is critical to strengthening a country's sovereignty, and Malaysia has a responsibility to do so as long as peace and order are maintained. This does not mean Malaysian religious freedom is disregarded, but our approach may differ from international standards set by organisations like the UN.

Acknowledgement and Declaration

The authors would like to show their gratitude to SINERGI's anonymous reviewers and their constructive feedback in improving the quality of the manuscript. This paper is part of the research project funded by the Centre for Human Rights Research & Advocacy (CENTHRA), Putrajaya, Malaysia.

Notes

¹ See the list of Interviews.

² See Article 11 (4) of the Federal Constitution of Malaysia.

³ See Schedule 9 List II State List of the Federal Constitution.

⁴ Section 13 of the Enactment of Syariah Criminal Law of Perak, 1992 and section 55. of the Enactment of Syariah Criminal Law of Sabah, 1995.

⁵ See Article 12(3) of the Federal Constitution.

⁶ See *Norliyana Yasira Mohd Noor lwn Menteri Pendidikan Malaysia* [2007] 5 MLJ 65.

⁷ Refer to Constitution's Article 12(4) and the Guardianship of Infants Act 1961's Sections 5 and 11.

⁸ The management of all mosques are centralised under the State. The official appointed Imam is authorised to deliver sermons.

⁹ See *Fathul Bari Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] CLJ JT(2).

¹⁰ See Article 11 (5) of the Federal Constitution.

List of interviews

1. Shad Saleem Faruqi, Online interview with Authors, August 13, 2021.
2. Mohd Zawawi Salleh, Online interview with Authors, August 9, 2021.
3. Nik Ahmad Kamal, Online interview with Authors, June 29, 2021.
4. Mohd Naim Mokhtar, Online interview with author, August 2, 2021.
5. Faridah Jalil, Online interview with Authors, July 2, 2021.
6. Andrew Khoo, Online interview with Authors, July 21, 2021.
7. Jerald Joseph, Online interview with Authors, July 28, 2021.

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