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Litigating Freedom of Thought, Conscience and Religion

A Manual For Legal Practitioners

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LITIGATING FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

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Malaysian Centre for Constitutionalism and Human Rights

American Bar Association Rule of Law Initiative

Kuala Lumpur
2016

Litigating Freedom of Thought, Conscience and Religion – A Manual for Legal Practitioners

Published in Malaysia by the
Malaysian Centre for Constitutionalism
and Human Rights (MCCHR)

A corporate social responsibility component of
Liberal Banter Sdn. Bhd.
A-3A-8, Pantai Business Park
Jalan Pantai Baharu
59200 Kuala Lumpur

First published 2016

Printed in Malaysia by
Print Expert Sdn. Bhd.
A-1-8, Pantai Business Park
Jalan Pantai Baharu
59200 Kuala Lumpur

ISBN 978-967-0102-04-7

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INTRODUCTION

Different religions and races in Malaysia have lived for the most part of its young history without conflict. However, religion is now regrettably being abused for political ends and is more often the cause of conflict.

The politicisation of Islam, and growing extremist voices claiming to speak on behalf of Islam, are posing a threat to Malaysia's secular constitutional system and our constitutional safeguards for religious freedom.

Ostensibly in trying to "defend" the special position of the Malays and the position of Islam as "the religion of the Federation", a concerted movement now seeks to redefine Malaysia's secular constitution to a constitution with Islamic law as its *grundnorm*. Some lawyers and non-State actors pushing an agenda of Islamisation, aided by government agencies and many lawyers in government service, are seeking to alter the basic understanding of religious freedom in Malaysia, and advocate a system of law where the imposition of religious law on others is seen as a right or a freedom in itself.

The MCCHR has been assisting to advance the cause of religious freedom as understood in international human rights norms. It supports litigants and non-governmental organisations (NGOs) advising persons who have been attacked for expressing their religious freedom.

These modules (divided in five parts) cover the most frequently observed types of religious freedom disputes. This manual is intended as a guide for legal practitioners intending to undertake religious freedom cases in Malaysia; they serve as a basis and introduction to issues that have been made overly complex due to a judiciary who has been accused of abdicating their duty to protect and preserve the Constitution when it comes to religious freedom disputes.

We trust the handbook proves useful. Best efforts have been made to state the law as at 1st June 2016.

MCCHR

31 August 2016

MODULE 1

INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW ON FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Module 1 will provide a brief introduction to freedom of thought, conscience and religion within the international human rights law framework, with a focus on the jurisprudence developed on religious freedom under article 18 of the International Covenant on Civil and Political Rights (ICCPR). Relevant provisions within regional human rights conventions and the relevant cases will also be included to give a holistic view of religious freedom jurisprudence.

However, because the right to freedom of thought, conscience and religion covers wide-ranging issues, this module will only cover specific areas that are most relevant to the situation in Malaysia.

Lastly, cognisant of the fact that it is difficult to directly apply international human rights law in Malaysian courts, this module will provide information for legal practitioners on how to include international human rights law when litigating religious freedom cases.

1.1 International human rights law as an important tool in strategic litigation

Apart from domestic law, one of the most important tools for strategic litigation lawyers to utilise in their arguments is treaty obligations incumbent on the State and other persuasive judgements. The international human rights treaties that Malaysia is a party to and the reservations to each treaty are as follows:[1]

International Document	Year of Signature	Year of Ratification/ Accession	Reservations
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	**N/A**	**1995**	Articles 9 (2), and 16 (1) (a), (c), (f) and (g)
Convention on the Rights of the Child (CRC)	**N/A**	**1995**	Articles 2, 7, 14, 28 (1) (a) and 37
Convention on the Rights of Persons with Disabilities (CRPD)	**2008**	**2010**	Articles 15 and 18
Optional Protocol to the CRC on the involvement of children in armed conflict	**N/A**	**2012**	Malaysia declared that "pursuant to article 3 paragraph 2 of the said Optional Protocol, the Government of Malaysia declares that the minimum age for a person to voluntarily enlist in its armed forces is at the age of seventeen and a half years. This enlistment shall be realised on the basis of deliberative consent of parents or guardians, upon the provision of full information regarding the general conditions of the engagement to be entered, and the production of a certified copy of an entry in the register of births verifying the enlistee's age".
Optional Protocol to the CRC on the sale of children, child prostitution and child pornography	**N/A**	**2012**	Malaysia declared that, "1. The Government of Malaysia declares that the words 'any representation' in article 2 paragraph (c), shall be interpreted to mean 'any visual representation'. 2. The Government of Malaysia understands that article 3 paragraph (1)(a)(ii) of the said Optional Protocol is applicable only to States Parties to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at the Hague on 29 May 1993."

[1] Office of the High Commissioner for Human Rights, 'Ratification Status for Malaysia'.<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN> accessed 16 Feb 2016.

Briefly, a treaty is a legally binding agreement between States[2] and States consent to be bound by treaties through ratification, acceptance, approval or accession; by doing so, the State covenants to refrain from acts which would defeat the object and purpose of the treaty,[3] they must uphold their treaty obligations in good faith *(pacta sunt servanda)* and that the human rights treaty must be interpreted *telelogically*[4] *and holistically*, i.e. it respects the rights and interest of the individual and it is also logical in the context of the treaty as a whole.

1.2 International human rights framework

a) Basic documents and sources

At the international level, the primary treaties that guarantee freedom of thought, conscience and religion are the Universal Declaration of Human Rights (UDHR), the ICCPR, the Convention on the Rights of the Child (CRC), and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

Key provisions that contain the guarantee of freedom of thought, conscience and religion are reproduced below:

Article 18 of the Universal Declaration of Human Rights

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.

Article 18 of the International Covenant on Civil and Political Rights

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

2 Article 2(1)(a) Vienna Convention on the Law of Treaties.

3 Article 18(a) of the Vienna Convention on the Law of Treaties.

4 Doctrine that design and purpose are part of or are apparent in nature.

Article 14 of the Convention on the Rights of the Child

1. *States Parties shall respect the right of the child to freedom of thought, conscience and religion.*
2. *States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.*

Article 1 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*

Apart from the above, the guarantee of religious freedom can be found in regional human rights conventions such as the ASEAN Human Rights Declaration, the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights.

Article 22 of the ASEAN Human Rights Declaration

Every person has the right to freedom of thought, conscience and religion. All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.

Article 9 of the European Convention on Human Rights

1. *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 worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Article 10 of the Charter of Fundamental Rights of the European Union

1. *Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*
2. *The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.*

Article 8 of the African Charter on Human and Peoples' Rights

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 12 of the American Convention on Human Rights

1. *Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.*
2. *No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.*
3. *Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.*
4. *Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.*

b) Normative substance of article 18 of the ICCPR

The study of the international human rights framework on religious freedom is not complete without a thorough understanding of the normative substance of article 18 of the UDHR[5] and the ICCPR. This can be found in General Comment No. 22,[6] which is an interpretation of article 18 of the ICCPR. General Comment No. 22 is issued by the United Nations (UN) Human Rights Committee, the treaty monitoring body tasked with, inter alia, providing greater detail regarding the substantive provisions of the ICCPR, with the aim of assisting State parties to give effect to the ICCPR.[7]

Article 18 provides extensive protection of an individual's religious freedom - it is a non-derogable[8] right and it protects thought, conscience and religion or belief (theistic, non-theistic, atheistic and agnostic).

Thought - An idea or opinion produced by thinking, including a personal belief or judgment that is not founded on proof or certainty.

Conscience - A person's moral sense of right and wrong, viewed as acting as a guide to one's behaviour.

Religion - The belief in and worship of a superhuman controlling power, especially a personal God or gods.

Belief - Refers to theistic, non-theistic, atheistic and agnostic convictions.

Theistic - Belief in the existence of a God or gods.

Non-theistic - Not having or involving a belief in a God or gods.

Atheistic - Disbelieving or lacking belief in the existence of God.

Agnostic - A person who believes that nothing is known or can be known of the existence or nature of God.

~ Based on definitions in the Oxford Dictionary

5 At the time of adoption of the UDHR, member States of the United Nations agreed that the human rights provisions in the UDHR would be expanded into legally binding treaties. This resulted in the formulation of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

6 Human Rights Committee, 1247th meeting, 48th session, *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights – General Comment No. 22 (48) (art.18)*, CCPR/C/21 Rev.1/ Add.4, 27 September 1993.

7 Fact Sheet No.15 (Rev 1.), Civil and Political Rights: The Human Rights Committee, http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf <accessed 21 April 2016>.

8 States may make no derogation from the right to freedom of religion or belief, not even in times of public emergency.

There are two distinct freedoms protected by article 18 of the ICCPR:[9]

Freedom of thought conscience, religion or belief

- An absolute right i.e. no limitations can be placed upon this freedom;
- Covers thoughts on all matters, personal conviction and commitment to religion or belief;
- Includes freedom to have, adopt, maintain or change a religion or belief, including replacing one's current religion or belief with another or to adopt atheistic views;
- Protects the right not to profess any religion or belief;
- Not limited to traditional religions and beliefs with institutional characteristics or practices;
- Prohibits coercion that would impair a person's freedom to have or to adopt a religion or belief.

Freedom to manifest religion or belief

- May be limited provided it is in accordance with article 18(3).
- This freedom can be manifested alone or in community with others, in public or private;
- Religion or belief can be manifested through:
  - ~ Practice and teaching – acts integral to the conduct by religious groups of their basic affairs, such as:
    - freedom to choose religious leaders, priests and teachers;
    - freedom to establish seminaries or religious schools;
    - freedom to prepare and distribute religious texts and publications.
  - ~ Worship - includes ritual and ceremonial acts and practices integral to such acts, including building of places of worship; use of ritual formulae and objects; display of symbols; observance of holidays and days of rest.
  - ~ Observance and customs:
    - observance of dietary regulations;
    - wearing of distinctive clothing or head coverings;
    - participation in rituals associated with certain stages of life;
    - use of a particular language customarily spoken by a group.

[9] Human Rights Committee, 1247th meeting, 48th session, *General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights – General Comment No. 22 (48) (art.18)*, CCPR/C/21 Rev.1/ Add.4, 27 September 1993.

1.3 Specific areas of freedom of thought, conscience and religion

a) Freedom to adopt, change or renounce a religion or belief

The UN Human Rights Committee (in General Comment No. 22) has been unequivocal that freedom to adopt, change or renounce a religion or belief is a right that cannot be limited. The inviolability of this freedom is evident in article 18 itself - article 18(2) expressly prohibits coercion on the freedom to have or adopt a religion or belief and article 18(3) allows limitations to be imposed only on the freedom to manifest one's religion or belief.

The UN Special Rapporteur on Freedom of Religion or Belief has identified four common situations of infringement of the right to have or adopt a religion of one's choice:[10]

i. **Where State agents try to convert, re-convert or prevent the conversion of persons** – This is usually where State officials at different levels and institutions, try to convert members of religious groups or force them to renounce their beliefs. As observed by the UN Special Rapporteur on Freedom of Religion or Belief, methods used by the State or its agents include threats to kill, harassment, deprivation of liberty, torture, ill-treatment or threats to dismiss one from their jobs;

ii. **Where religious conversion is prohibited by law and punished accordingly** – The punishment can take the form of arrest and trial for apostasy, imprisonment, the imposition of the death penalty, suspension of contracts and inheritance rights, annulment of marriages, loss of property or removal of children. States have also imposed administrative requirements that make it difficult for a person to change one's religion or belief – for example, the inability to obtain identity cards after changing his/her religion;

iii. **Where members of majority religious groups seek to convert or re-convert members of religious minority** – This pertains to cases where local members of the clergy attempt to convert or attack members of minority religious groups or their places of worship, with the aim of converting them; and

iv. **"Unethical conversion"** – The UN Special Rapporteur refers "unethical" conversion to conversion by unethical means such as promise of material benefit or by taking advantage of a vulnerable situation.

[10] Rapporteur's digest on Freedom of Religion or Belief - Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, para. 51, <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> accessed 21 April 2016.

b) Freedom from coercion

What is "coercion"?

Article 18(2) of the ICCPR expressly prohibits coercion that would impair a person's right to have or adopt a religion or belief.

According to the UN Special Rapporteur, the word "coercion" should be interpreted broadly and should include pressure applied by a State aimed at facilitating religious conversion.[11] Coercion includes:

- The use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs, to recant their religion or belief, or to convert; or
- Policies or practices having the same intention or effect, such as those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the ICCPR.

Examples of coercion include physical persecution, imprisonment, fines, exclusion, provision of financial and other benefits, and discrimination in housing, education, employment, cultural and social situations.

[11] Rapporteur's Digest on Freedom of Religion or Belief - Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, para. 51, <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> accessed 21 April 2016.

Kang v Republic of Korea, 16 July 2003 (CCPR/C/78/D/878/1999)

Facts:

- The author (Mr. Kang), along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticising the regime and the use of security forces to harass him and others. At that time, he also made an unauthorised (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous political, historical, economic and social issues. He was detained and convicted.
- After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal" under the "ideology conversion system" - a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment.
- On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". In June 1998, the "idealogy conversion system" was replaced by the "oath of law-abidance system". This system requests an oath from prisoners that they will abide by the law.

The UN Human Rights Committee held:

- The "ideology conversion system" as well as the succeeding "oath of law-abiding system" are in violation of article 18(1) of the ICCPR;
- The succeeding 'oath of law-abidance system', which is applied in discriminatory fashion with a view to [altering] the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole, is coercive in nature;
- Such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18(1), 19(1) and article 26.

What are the State's obligations?

The State's obligations in article 18(2) of the ICCPR are twofold:

- The State must **respect** this right by ensuring that all persons within their territory (including religious minorities) can practise their religion or belief free from coercion and fear; and
- The State must **protect** this right – this is a positive obligation to ensure that if non-State actors interfere with this freedom, especially the freedom to change or to maintain one's religion, the State is obliged to take appropriate measures to investigate, bring the perpetrators to justice and compensate the victims.

c) Freedom to teach and disseminate materials, including missionary activities

Article 18(1) of the ICCPR explicitly provides for the right "in public or private, to manifest one's religion or belief in worship, observance, practice and teaching". The phrase "practice and teaching" was interpreted by the UN Human Rights Committee (in General Comment No. 22) to include the freedom to prepare and distribute religious texts and publications. This principle was reiterated in the Human Rights Committee's decision in Kang v Republic of Korea, where it was recognised that the distribution of communist leaflets was a manifestation of a belief within the meaning of article 18(1) of the ICCPR.

Are missionary activities protected by article 18(1) of the ICCPR?

The UN Human Rights Committee and the Special Rapporteur on Freedom of Religion or Belief have stated that missionary activity (which includes proselytisation) is accepted as a legitimate expression of religion or belief and therefore enjoys the protection afforded by article 18 of ICCPR and other relevant international instruments. This includes "proselytism that is not respectable because believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing."[12]

[12] Judge Pettiti in *Kokkinakis v Greece*, Case no. 3/1992/348/421.

To protect missionary activities and proselysation within article 18(1) of the ICCPR, the Special Rapporteur has prohibited States from:

- **Enacting generalised limitation of missionary activities** - The Special Rapporteur has been clear that any generalised State limitation of missionary activities (including proselytisation) (for example by law), which is predicated on the need to protect other citizen's freedom of religion or belief, should be avoided. For example, in the Special Rapporteur's country visit to Greece, the Special Rapporteur remarked that the Greek constitutional provisions prohibiting proselytism is inconsistent with the freedom to manifest one's religion or belief and strongly recommended the removal of the legal prohibition against proselytism;[13] and/or
- **Criminalising non-violent missionary activities** - The Special Rapporteur has advised against criminalising non-violent acts performed in the context of manifestation of one's religion as this may pave the way for persecution of religious minorities.

[13] General Assembly, 51st session, Human Rights Questions: Human Rights Questions, including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms - Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Note by the Secretary-General, 7 November 1996, A/51/542/Add.1 paras 11-21 and 134, < http://www.un.org/documents/ga/docs/51/plenary/a51-542add1.htm> accessed 22 April 2016.

What type of missionary activities can be limited?

However, certain limitations can be imposed on certain missionary activities but this can only be done in strict compliance with article 18(3) of the ICCPR and only in exceptional circumstances.[14] It is also important to note that whether certain missionary activities are contrary to international standards must be addressed on a case-by-case basis.

From the reports of the Special Rapporteur on Freedom of Religion or Belief and cases before the European Court of Human Rights, it is observed that a particular missionary activity or propagation of a religion or belief falls outside the ambit of "manifestation" of a religion or belief when:[15]

- **it is accompanied with material or social advantages** - In the case of *Kokkinakis v Greece*,[16] the European Court of Human Rights held that proselytisation is the essential mission and a responsibility of every Christian and every Church. Whereas coercion or improper proselytisation is a corruption or deformation of proselytisation which includes offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need. The Court went further to state that coercion could entail the use of violence or brainwashing and these actions are incompatible with the respect for the freedom of thought, conscience and religion of others;
- **it would disturb or deteriorate a culture of religious tolerance** – The Special Rapporteur has expressed concerns over proselytisation in certain circumstances, while not constituting a human rights violation, nevertheless raise serious concern because they disturb a culture of religious tolerance or contribute to the deterioration of situations where religious tolerance is already being challenged. This is in reference to a very specific circumstance, that is, where missionaries, religious groups and humanitarian NGOs have allegedly behaved in a very disrespectful manner towards the populations of the places where they were operating. The Special Rapporteur is of the opinion that this constitutes religious intolerance, and may even provoke further religious intolerance. She considers that religious groups, missionaries and humanitarian NGOs should carry out their activities in full respect of the culture and religion of the populations concerned and abide strictly by relevant codes of ethics; or
- **there is a relation of hierarchy or dependency between the missionary and the objects of the missionary activity** – According to the Special Rapporteur, missionary activity cannot be considered a violation of the freedom of religion and belief of others if all involved parties are adults able to reason on their own and if there is no relation of dependency or hierarchy between the missionaries and the objects of the missionary activities.

[14] Rapporteur's Digest on Freedom of Religion or Belief - Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, para. 62, <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> accessed 21 April 2016.

[15] Rapporteur's Digest on Freedom of Religion or Belief - Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, para. 62, <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> accessed 21 April 2016.

[16] Case no. 3/1992/348/421.

Larissis and Others v Greece, 140/1996/759/958–960

Facts:

- The three applicants were officers in the Greek air force and were followers of the Pentecostal Church. They were convicted of proselytising to airmen in their command. The airmen were involved in a large number of conversations with the applicants in which the latter encouraged the airmen to adopt their beliefs.
- The second and third applicants were additionally convicted of proselytising to a number of civilians - the second applicant had engaged in religious discussions with the B family and their neighbours on a single occasion.
- The second and third applicants had engaged in religious discussions with Mrs Z during the breakdown of her marriage.
- The applicants were sentenced to 13, 12 and 14 months' imprisonment respectively, suspended for three years, provided they did not re-offend. They complained of violations of their right to freedom of religion (Article 9 of the ECHR) as well as their right to freedom of expression.

The European Court of Human Rights held:

- The evidence pointed to the conclusion that the airmen felt obliged to take part in the discussions on religion because the applicants were superior officers. In the circumstances, the Greek authorities were in principle justified in taking some measures to protect lower ranking airmen from improper pressure applied to them by the applicants in their desire to promulgate their religious beliefs. There was no violation of article 9.
- With regard to family B and their neighbours, there was no evidence to suggest that they felt obliged to listen to the second applicant or that his behaviour was improper in any way.
- With regard to Mrs Z, it was clear that during the period in which she was in contact with the applicants, her marriage was breaking down. However, the Court did not find it established that her mental condition was such that she needed any special protection from the evangelical activities of the applicants or that they had applied improper pressure on her. Accordingly, the convictions of the second and third applicants with regard to the civilians were not justified. There was a violation of article 9.

Kokkinakis v Greece, Application no. 14307/88

Facts:

- Mr. Kokkinakis and his wife (Jehovah's Witnesses) called at the home of Mrs Kyriakaki in Sitia and engaged in a discussion with her on their religion. Mrs Kyriakaki's husband, who was the cantor at a local Orthodox church, informed the police, who arrested Mr and Mrs Kokkinakis and took them to the local police station, where they were detained.
- The Lasithi Criminal Court found both guilty of proselytism and sentenced each of them to four months' imprisonment. The Court of Appeal quashed Mrs Kokkinakis's conviction and upheld her husband's but reduced his prison sentence to three months and converted it into a pecuniary penalty of 400 drachmas per day.
- Article 13(2) of the Constitution of Greece prohibits proselytism.
- Mr. Kokkinakis alleged that his freedom of religion has been violated.

The European Court of Human Rights held:

- The Greek Courts established the applicant's liability by merely reproducing the wording of section 4 of Greek Law no. 1363/1938 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding.
- That being so, it has not been shown that the applicant's conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society ... for the protection of the rights and freedoms of others". In conclusion, there has been a breach of article 9 of the ECHR.

d) The right of a child to freedom of thought, conscience and religion vs the rights and duties of parents

A child's right to freedom of thought, conscience and religion is guaranteed in article 14 of the CRC. Article 14 of the CRC contains two fundamental and complementary components:

- The first is article 14(1) which states that, "State parties shall respect the right of the child to freedom of thought, conscience and religion"; and
- The second is found in article 14(2) of the CRC, which reaffirms the right of parents and legal guardians to "provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child".

The key concept here is "evolving capacities", which touches on questions such as, at what age is a child competent enough to adopt a religion or belief of his or her choice? What type and degree of direction should be given to a child in religious matters?

For the purposes of article 14 of the CRC, the notion of evolving capacities is complex but for the purposes of freedom of religion or belief, the Special Rapporteur on Freedom of Religion or Belief has recommended the following:[17]

- There should be no strict age limits as this may not fully take into account the maturity and evolving capacities of the child in the individual cases;
- Each situation should be looked at on a case-by-case basis according to the specific circumstances of each situation;
- Factors that should be taken into account include the maturity of the said child in that case; and
- Positive attitudes should be encouraged and parents should be supported to exercise their rights and fully play their role in education in the field of tolerance and non-discrimination.

[17] Rapporteur's Digest on Freedom of Religion or Belief - Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> accessed 21 April 2016.

What is "evolving capacities"?

Briefly, the concept of evolving capacities in article 14(2) of the CRC complements article 12(1) of the CRC, which guarantees the right of a child (who is capable of forming his or her own views) to express his or her views freely in all matters affecting the child; and that due weight (depending on the age and maturity of the child) should be given to the child's views.[18]

As such, in a situation where a child wishes to adopt a religion or belief of his or her choice, particularly if the religion is different from his or her parents', the concept of evolving capacities becomes central to the balance of the child's wishes and the protection relative to their immaturity.[19]

[18] Rapporteur's Digest on Freedom of Religion or Belief - Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf> accessed 21 April 2016.

[19] Gerison Lansdown, UNICEF & Save the Children: Innocenti Insight - The Evolving Capacities of the Child (2005), <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed 31 May 2016.

Whilst there is no assessment criteria developed for religious freedom, what could be valuable guidance when deciding a child's capacity to decide his or her own religion is the test developed to assess a child's capacity to give medical consent, published by UNICEF.[20] This assessment looks at four criteria:[21]

- Does the child have the ability to understand and communicate relevant information?
- Does the child think and choose with some degree of independence?
- Does the child have the ability to assess the potential for benefit, risk and harm?
- Has the child achieved a fairly stable set of values?

Lastly, it must be noted that Malaysia has entered a reservation to article 14 of the CRC but not article 12(1) of the CRC and as such, article 12(1) could be relied on to encourage the Court to take into consideration the views of the child in religious freedom matters.

However, disregarding the reservation to article 14 of the CRC, it is cautioned that because of the peculiarities of the laws in Malaysia, the recognition of the right of a child to freedom of religion or belief today could later lead to a violation of his or her freedom of religion or belief tomorrow – this is because of the current situation in Malaysia where a Muslim adult who wishes to convert out of Islam often faces numerous legal and social challenges. As such, the recognition of a child's right to choose his or her religion (if the religion chosen by the child is Islam) could lead to an undesirable situation where the child who later becomes an adult, may find that his or her freedom to change or renounce Islam is curtailed as he or she may not be able to convert out of Islam.

[20] Harrison, C. et al., Bio-ethics for clinicians: Involving children in medical decisions, Canadian Medical Association, Ottowa, 1997 in Gerison Lansdown, UNICEF & Save the Children: Innocenti Insight - The Evolving Capacities of the Child (2005), <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed 31 May 2016.

[21] Harrison, C. et al., Bio-ethics for clinicians: Involving children in medical decisions, Canadian Medical Association, Ottowa, 1997 in Gerison Lansdown, UNICEF & Save the Children: Innocenti Insight - The Evolving Capacities of the Child (2005), <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed 31 May 2016.

1.4 Permissible restrictions

Article 18(3) of the ICCPR states that restrictions to freedom to manifest one's religion or belief are only permitted if the restriction:[22]

- fulfils all of the following CONDITIONS;
- pursues one of the LEGITIMATE AIMS;[23]
- applies in a manner that does not vitiate the rights guaranteed in article 18 of the ICCPR; and
- applies in a non-discriminatory manner.

[22] Human Rights Committee, 1247th meeting, 48th session, General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights – General Comment No. 22 (48) (art.18), CCPR/C/21 Rev.1/ Add.4, 27 September 1993.

[23] United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

LEGITIMATE AIM

Public safety
- It means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.
- It cannot be used for imposing vague or arbitrary limitations.
- It may only be invoked when there are adequate safeguards and effective remedies against abuse.

Public order
- It means the sum of rules which ensure the functioning of society or the set of fundamental principles on which, society is founded. Respect for human rights is part of public order.
- Public order shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
- State organs or agents responsible for the maintenance of public order shall be subject to controls in the exercise of their power through the Parliament, Courts, or other competent independent bodies.

OR

Public morals
- The concept of morals derives from many social, philosophical and religious traditions and as such, limitations on freedom to manifest a religion or belief must be based on principles not deriving from a single tradition.

OR

Public health
- This ground may be invoked in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population.
- These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.
- Due regard shall be had to the international health regulations of the World Health Organization.

OR

Fundamental rights and freedoms of others
- The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognised in the Covenant.
- When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.
- A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.

CONDITIONS

Prescribed by Law:
- The law must be precise to enable individual to regulate his or her conduct accordingly;
- Law must be accessible to the public;
- Law cannot confer unfettered discretion on those charged with its execution; and
- Law must not violate non-discrimination provision.

AND

Necessary - It must be necessary for a legitimate purpose.

AND

Proportional - It must be appropriate to achieve their function. For example, a newspaper publishes an article, which poses a real threat to national security. The government may seize this issue of the newspaper or impose a fine. It may not close down the newspaper.

AND

Legitimate
- Must show precise nature of threat; and
- There must be direct and immediate connection between expression and the threat.

1.5 Application of international human rights law in Malaysian courts

Malaysia adopts a dualist approach to international law and requires an act of Parliament before international human rights treaties are directly applicable in Malaysia. The challenge in strategic litigation cases is that there is no provision in any domestic legislation that expressly incorporates any of the aforementioned international human rights treaties into domestic law. However, the Child Act 2001 incorporates some parts of the CRC, and some provisions of the CRPD are similarly reflected in the Persons with Disabilities Act 2008.[24]

As there is no legislation that specifically incorporates CEDAW, CRC, and CRPD into domestic law, the acceptance of these international treaties as a tool of interpretation has been inconsistent - the Malaysian courts have oscillated between a strict interpretation of the dualist system and a more nuanced use of these treaties as a legitimate source to interpret domestic law.[25]

In two landmark cases of *Noorfadilla binti Ahmad Saikin v. Chayed bin Basirun and 5 others,*[26] *and Indira Gandhi d/o Mutho v. Perak Registrar of Converts, Perak Islamic Religious Department, State Government of Perak, Ministry of Education, Government of Malaysia, & Patmanathan s/o Krishnan,*[27] the High Court, for the first time, held that even though CEDAW has not been incorporated into domestic law, the Court is compelled to interpret the principle of gender equality in article 8(2) of the Federal Constitution in light of Malaysia's international obligations under CEDAW. Further, in the *Indira Gandhi* case, the High Court held that ratification of CEDAW, public statements by government ministers, and the Bangalore principles meant that Malaysia is bound to give legal effect to the rights in CEDAW.[28] See also the case of *Mat Shuhaimi Shafiei v PP.*[29]

However, the Court of Appeal in *Air Asia Berhad v. Rafizah Shima Binti Mohamed Aris*[30] and *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals*[31] reverted to a more conservative approach with regard to the application of international norms and conventions, stating that international treaties do not form part of Malaysian law unless those provisions have been incorporated into domestic law.[32] In the case of *Mohd. Ezam bin Mohd Noor v Ketua Polis Negara and Anor Appeal,*[33] the Federal Court, in discussing section 4(4) of the Human Rights Commission of Malaysia Act 1999 (SUHAKAM Act 1999), held that the UDHR is not a convention subject to the usual ratification and ascension requirements for treaties and since the principles are only declaratory in nature, they do not have the force of law or binding on member States. See also the case of *Bato Bagi & Ors v Kerajaan Negeri Sarawak & Another Appeal.*[34]

Nevertheless, it is important to note here that however difficult it is to argue the direct application of international human rights treaties in domestic courts, it is still important to include international human rights standards into legal arguments to continue to develop critical reasoning of fundamental liberties in Malaysia. Maintaining the *status quo* (of a strict implementation of the dualist approach) would mean that many aggrieved Malaysians would not be able to seek adequate redress for human rights violations.[35]

[24] Seh Lih Long, 'The Path to Integration: Update on the Rule of Law for Human Rights in ASEAN'.

[25] Seh Lih Long, 'The Path to Integration: Update on the Rule of Law for Human Rights in ASEAN'.

[26] [2012] 1 MLJ 832.

[27] [2013] 7 CLJ 82 (HC).

[28] Seh Lih Long, 'The Path to Integration: Update on the Rule of Law for Human Rights in ASEAN'.

[29] [2014] 5 CLJ 22 (CA), at 86-88.

[30] Rayuan Sivil No/ B-02-2751-11/2012.

[31] [2016] 1 CLJ 911.

[32] Seh Lih Long, 'The Path to Integration: Update on the Rule of Law for Human Rights in ASEAN'.

[33] [2002] 4 MLJ 449, pg. 514.

[34] [2011] 8 CLJ 766, at 180.

[35] Seh Lih Long, 'The Path to Integration: Update on the Rule of Law for Human Rights in ASEAN'.

1.6 How to use international human rights law in Malaysian courts

There are six ways an argument can be made to urge the court to use international human rights law as a tool of judicial interpretation:[36]

a) The Federal Constitution includes common language of a human rights treaty

Some constitutions follow the text of a particular international human rights treaty. The use of common language enables lawyers to draw upon the jurisprudence of treaty-bodies. As such, legal practitioners should look at the Federal Constitution to see if there are common words and phrases used in the CEDAW, CRC and CRPD.

SAMPLE ARGUMENT 1

The Malaysian Government's commitment to CEDAW can be seen when article 8(2) of the Federal Constitution was amended in 2001 to include non-discrimination based on gender. Also Malaysia is a party to the Beijing Statement and the Fourth World Conference on Women in Beijing. Additionally, more commitments were made by Malaysia in the Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement, where the Government recognised the need for full and accelerated implementation of the CEDAW, in particular gender mainstreaming in all legislation, policies and programmes.

As such, all the CEDAW cases, jurisprudence and principles are applicable through article 8(2) of the Federal Constitution. There is no impediment for the Courts to refer to CEDAW in interpreting articles 5 and 8 of the Federal Constitution.

SAMPLE ARGUMENT 2

International conventions and human rights instruments can be used for construing the constitutional rights expressly guaranteed by the Federal Constitution (*Muhammad Hilman bin Idham & Ora v Kerajaan Malaysia & Ors* [2011] 6 MJ 507, at para. 55).

[36] Professional Training Series No. 9 - Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights, 2003, <http://www.ohchr.org/Documents/Publications/training9Titleen.pdf> accessed 26 April 2016.

b) The text of human rights treaty can be found in national legislation

Some States adopt legislation that refer to human rights treaties or formulate specific legislation to clarify or elaborate a particular human rights treaty and the same terms could be used as latitude for lawyers to draw inspiration from international jurisprudence.

SAMPLE ARGUMENT 3

The Preamble of the Child Act 2001 contains the same words that appear in the preamble and article 2 of the CRC. In particular, the preamble to the Child Act 2001 can be said to endorse the principle that a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, after birth, to enable him to participate in and contribute positively towards the attainment of the ideals of a civil Malaysian society.

The Child Act 2001 also incorporates the principle of non-discrimination in children's rights as expounded by the CRC where the preamble (of the Child Act 2001) states that, "recognising every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status."

As such, although the CRC may not bind Malaysian Courts, the consistent use of the language of the CRC in the Child Act 2001 indicates that Malaysia has accepted the principles of the CRC and it follows that the Courts should use the CRC as a persuasive tool of interpretation.

SAMPLE ARGUMENT 4

The Court, in exercise of its interpretative jurisdiction, shall have regard to the Universal Declaration of Human Rights as an aid to interpreting Part II of the Federal Constitution (Section 4(4) and (2) of the SUHAKAM Act 1999, which reads, "For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution"). As such, it would not be incorrect to say that we have given the principles of the UDHR statutory status and a primal place in our legal landscape.

SAMPLE ARGUMENT 5

In seeking to interpret article 10(1)(a) of the Federal Constitution, regard must be had to Principle 19 of the Yogyakarta Principles and article 19 of the Universal Declaration of Human Rights, where section 4(4) of the SUHAKAM Act 1999 will be relied on.

c) Where there is a legal vacuum

Where there is absence of national legislation, lawyers may be able to apply international human rights law.

SAMPLE ARGUMENT 6

It is an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law (*Vishaka & Ors v State of Rajasthan & Ors*[1997] 6 SCC 241 at paras. 14 and 15.

d) There is a legitimate expectation that the actions of the government would be conducted in a manner which adhered to the principles of the human rights treaty

The Australian case of *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh*[37] exemplified the principle of legitimate expectation – the Federal Court of Australia held that whilst the CRC has not been incorporated into Australian law, it was held that its "ratification provided parents and children, whose interests could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention."

SAMPLE ARGUMENT 7

The Plaintiff has a legitimate expectation that CEDAW will be applied by the Government of Malaysia. The pledges and commitments made by Malaysia to the United Nations Human Rights Council in March 2010 in its bid to be elected again into the Human Rights Council is instructive:

> "The Government continues to ensure that Malaysian practices are compatible with the provisions and principles of the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women."

SAMPLE ARGUMENT 8

The Plaintiff's rights are enshrined in the Federal Constitution read with the CEDAW. It follows that the Plaintiff has a legitimate expectation that her rights will be upheld and protected pursuant to the Government's commitments to CEDAW.

The act of the Malaysian Government in ratifying the CEDAW shows that the Government confirms the significance of CEDAW's principles and the rights of women in our society. Malaysians have a legitimate expectation created by the Government by her act of ratifying the CEDAW that the Government will respect and uphold the CEDAW principles and law. The Defendants have breached the Plaintiff's legitimate expectation that the Government would uphold gender non-discrimination pursuant to the CEDAW.

[37] [1995] HCA 20.

e) Courts should interpret Malaysian law consistent with international human rights law wherever possible.

Malaysia acceded to the Vienna Convention on the Law of Treaties on 27 July 1994, without any reservation or declaration.[38] Once a government becomes a party to a treaty, it is "binding upon the parties to it and must be performed by them in good faith" and a government "may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[39]

SAMPLE ARGUMENT 9

CEDAW is a treaty in force, and so the Government of Malaysia must respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The Plaintiff submits that the obligation is on all three branches of government: the Executive, the Legislature and the Judiciary.

SAMPLE ARGUMENT 10

Malaysia's candidature to the UN Human Rights Council – *Aide Memoire* – 'Consistent with the UDHR, successive Malaysian governments have made the guarantee of the individual's fundamental rights and liberties, as enshrined in the Constitution…"

SAMPLE ARGUMENT 11

As a member of the international community, Malaysia cannot ignore our commitments to the various conventions that we have adopted and indeed we have amended our laws to more clearly reflect our commitments.

SAMPLE ARGUMENT 12

Where there are two possible interpretations of any provision in the Federal Constitution, the interpretation that best promotes our commitment to international norms and enhance basic human rights and human dignity is to be preferred.

38 <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 26 April 2016.

39 Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

f) International law adds value to judicial interpretation of fundamental liberties in Part II of the Federal Constitution

SAMPLE ARGUMENT 13

Article 19 of the International Covenant on Civil and Political Rights, article 12 of the American Convention on Human Rights, article 10 of the European Convention on Human Rights and article 9 of the African Charter on Human and Peoples' Rights will be relied on as aids to construction to show the universal understanding of this legal provision which is a foundational human right that commands universal respect, so that article 10(1)(a) of the Federal Constitution is properly construed to enable the benefit of the said fundamental liberty to be enjoyed by, and interpreted purposively to give full protection to, all citizens in Malaysia.

SAMPLE ARGUMENT 14

The principles propounded in international human rights conventions (CEDAW and CRC) that Malaysia is a party to, are highly persuasive and should provide guiding light to help interpret the fundamental liberties enshrined in the Federal Constitution. These conventions set out accepted international norms that have been widely accepted and ratified by countries across the world. To date, 189 countries are party to CEDAW and 196 countries are party to the CRC.

MODULE 2

MALAYSIAN LAW – THE PROBLEM OF APOSTASY FROM ISLAM OR PERSONS WRONGLY CONSIDERED MUSLIMS DESPITE PROFESSING ANOTHER RELIGION

2.1 Factual scenarios

There are three recurring situations in which the issue of "apostasy" from Islam arises:

i. **Persons who say they were never Muslims to begin with** - It is important to understand that not all people seeking recognition from the courts that they are not Muslims are in fact "apostates" - many say they were never Muslims to begin with, but are in fact being treated as Muslims unlawfully. This first category of cases usually involves persons born of a marriage between a Muslim and non-Muslim, where the non-Muslim spouse had converted to Islam purely as a formality. The child was either raised by the family in the original religion of the converted spouse (usually the father)[40] or would have been given to a family member to be raised and who would have been raised as a non-Muslim;

ii. **Persons who want to convert out of Islam out of conviction or because of love or marriage** - Although it would seem that the norm is for the non-Muslim person to convert to Islam in a marriage where one partner is a Muslim, there are a small minority of Muslims who decide to convert out of Islam instead[41]. Sometimes the latter converts out of Islam because they are not particularly religious and because their intended spouse refuses to convert to Islam. As for the former, there are many who convert to Islam because of incentives or promises given to them by the Islamic authorities, such as food, provisions and money. Finally, there are also many people who convert to or out of Islam, as a matter of conviction;[42]and

iii. **Persons who converted in the expectation of a marriage that did not work out** - There are a number of persons (many of them young women) who converted to Islam due to a promise by Muslim men (often from another country) to marry them. They do not convert to Islam out of genuine conviction, nor do they understand the implications of converting. They are then either abandoned, or suffer abuse when they travel to the home country of their husbands and escape to return to their families. Some have already registered their marriages and have children while there are others who converted in order to get married but were subsequently abandoned by their intended husbands.

[40] See *Zaina Abiden bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [2009] 6 MLJ 863, CA. For more on this, see "Is the definition of a 'Muslim' unconstitutional?", available at http://www.loyarburok.com/2012/02/02/definition-muslim-unconstitutional/

[41] See *Lina Joy* (reported at [2004] 2 MLJ 119, HC; [2005] 6 MLJ 193, CA ; [2007] 4 MLJ 585, FC) and *Priyathaseny* (reported at [2003] 2 MLJ 302, HC – the Court of Appeal in an unreported decision in Civil Appeal No. remitted the case for full trial, but the case was never heard substantively.)

[42] *Minister for Home Affairs v Jamaluddin bin Othman (Joshua Jamaluddin)* [1989] 1 CLJ(Rep) 105

2.2 The Law

a) The Federal Constitution

Article 3(1) of the Federal Constitution ("the Federal Constitution" or "the Constitution") provides that *"Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation"*. However, article 3(4) goes on to say that nothing in article 3 *"derogates from any other provision of"* the Constitution. The rest of article 3 deals principally with the position of the Rulers of the various States, and the *Yang di-Pertuan Agong* for the States without hereditary Rulers, as heads of the religion of Islam.

Article 4(1) then provides that the Constitution is *"the supreme law of the Federation"* and that post-Merdeka laws which are inconsistent with the Constitution are *"void"*. Article 162 also maintains the continuity of previous laws made before Merdeka Day until they are superseded, and if a court has to deal with a law made before Merdeka Day, it should apply it with *"such modifications as may be necessary to bring it into accord"* with the provisions of the Constitution.

This can be distinguished with the provisions in the 1973 Constitution of the Islamic Republic of Pakistan which specifically requires that all existing laws be brought *"in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, ... , and no law shall be enacted which is repugnant to such Injunctions."* [43]

The heading of article 11 of the Federal Constitution is Freedom of Religion and states as follows:

Article 11 of the Federal Constitution

Freedom of religion

11. (1) Every person has the right to profess and practise 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 a 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.

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

Article 11(1) guarantees "every person" in Malaysia (and not merely citizens or non-Muslims) three distinct rights; the right to profess[44], practise[45] and propagate[46] his or her religion.[47]

The right to practise is subject to general laws relating to public order, public health or morality[48], and the Constitution permits the States to control or restrict, by law, "the propagation of any religious doctrine or belief" among Muslims.[49]

[43] Article 227, available at http://www.pakistani.org/pakistan/constitution/part9.html

[44] To openly and freely declare his religion. See: *Black's Law Dictionary*, 8th Ed., p. 1246, "profess" means "[t]o declare openly and freely; to confess"; *In Re Allen, Decd. Faith v Allen.* [1953] 2 All ER 898 at 905, CA (England); *Sri Lakshmindra Theertha Swamiar of Sri Srirur Mutt v The Commissioner, Hindu Religion Endowments, Madras* AIR 1952 Mad 613 at 637, HC (India); *Punjab Rao v D. P. Meshram & Ors* [1965] 1 SCR 849 at 859, SC (India); *John Vallamattom v Union of India* (2003) 6 SCC 611 at [40], SC (India).

[45] The practical expression of a person's belief in the particular form of private or public worship. See: *Sri Lakshmindra Theertha Swamiar of Sri Srirur Mutt v The Commissioner, Hindu Religion Endowments, Madras* AIR 1952 Mad 613 at 637, HC (India).

[46] The transmission or spreading of one's religion by an exposition of its tenets. See: *Rev Stainislaus v State of Madhya Pradesh* (1977) 1 SCC 677 at 682, SC (India).

[47] Aston Paiva, 'Religious Cases in The Malaysian Courts' (2015), Penang Institute, <http://penanginstitute.org/v3/files/research_papers/Religious-Cases-in-the%20Malaysian-Courts.pdf> accessed 29 August 2016.

[48] Article 11(5).

[49] Article 11(4).

However, there is no constitutionally permitted ground to restrict or prohibit the mere profession of one's religion.[50] Thus, the right to profess one's religion is an absolute right.[51] This would also be consistent with the constitutional position in the United States of America[52], Canada[53] and the United Kingdom.[54]

Article 11(3) guarantees three distinct rights to "every religious group"; the right to manage its own religious affairs, the right to establish and maintain institutions for religious or charitable purposes and the right to acquire and own property and hold and administer it in accordance with the law.

Thus, article 11(1) protects the rights of individuals; and article 11(3) protects the rights of *groups*[55].

Lastly, article 11(2) confirms that no person shall be compelled to pay any tax, the proceeds of which, are specially allocated for the purposes of a religion other than his or her own. Thus, a non-Muslim cannot be compelled to pay to the funds of *Zakat, Fitrah and Baitulmal*[56].

[50] Aston Paiva, 'Religious Cases in The Malaysian Courts' (2015), *Penang Institute*, <http://penanginstitute.org/v3/files/research_papers/Religious-Cases-in-the%20Malaysian-Courts.pdf> accessed 29 August 2016.

[51] *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513 at 526C – E, HC.

[52] *United States v Ballard* (1944) 322 US 78 at 86 – 87, SC: "…the [First] Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be…Freedom of thought, which includes freedom of religious belief, is basic in a society of free men…Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. …If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."

[53] *R. v Big M Drug Mart Ltd.* (1985) 18 D.L.R. (4th) 321 at 353 – 354, SC: "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" and "…no one is to be forced to act in a way contrary to his beliefs or his conscience."

[54] *Regina (Williamson and others) v Secretary of State for Education and Employment* [2005] 2 WLR 590 at [16] & [17], HL: "…freedom of religion…is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs…The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified. This is to be expected, because the way a belief is expressed in practice may impact on others."

[55] *Acharya Jagadishwarananda Avadhuta and Anor v Commissioner of Police, Calcutta and Ors* AIR [1990] Cal 336 at 349, HC (India) (on the equipollent freedom of religion constitutional provisions i.e. articles 25 and 26 of the Constitution of India).

[56] 9th Schedule, List II, Item 1 of the Constitution: "Zakat, Fitrah and Baitulmal or similar Islamic religious revenue".

Article 8(1) of the Federal Constitution is also an important provision, and has been judicially described as the *"humanising and all pervading"* [57] provision of the Federal Constitution, and provides that *"all persons are equal before the law and entitled to the equal protection of the law"*.

Article 8(2) specifically prohibits *"discrimination against citizens on the ground only of religion, race, descent, place of birth or gender"* except as expressly authorised by the Constitution.

However, note that article 8(5)(a) specifically provides that article 8 does not apply to "any provision regulating personal law", which raises the question as to whether personal law means laws that are not enacted by statute and are customary in nature, or laws that affect the person such as marriage, divorce and inheritance. (See *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain-lain*[58] and *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal*[59].

[57] *Lee Kwan Woh v PP* [2009] 5 CLJ 631, [2009] 5 MLJ 301, FC @ Para 12, citing and applying *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521, which in turn quoted with approval statements in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213.

[58] [2007] 4 MLJ 585, at 64.

[59] [2016] 2 MLJ 309, at 134.

Article 8 of the Federal Constitution

Equality

8. (1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit—

(a) any provision regulating personal law;

(b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

Aside from Part II of the Constitution which protects fundamental liberties, the Constitution also limits the type of Islamic laws which can be enacted. Articles 73 to 75 of the Constitution deal with the legislative powers of Parliament and the Legislative Assemblies of the various States.

Article 74 provides that the matters stated in List I of the 9th Schedule are to be legislated by Parliament whilst the matters listed in List II to be legislated by the State Assemblies. List III contains the Concurrent List where either Parliament or States can make laws on the subject matters listed there.

Importantly, article 75 provides that where federal law and State law are inconsistent with each other, federal law prevails and the State law is void to the extent of the inconsistency.

The most relevant item in the State List on the question of religious freedom is Item 1, dealing with the powers of State Legislatures to make Islamic law and the personal and family law of "persons professing the religion of Islam".

Item 1, List II (State List), 9th Schedule of the Federal Constitution

1. 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, dower, 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, organisation 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.

b) State Islamic Law

In almost every State in Malaysia, there is a basic set of Islamic statute laws which are broadly similar. They are:

- Administrative law: creates the various Islamic State bodies, has a section defining the jurisdiction of the Syariah courts and a section on converting into Islam;
- Family law: sets out the law on marriage, divorce and children;
- State Islamic offences law: sets out State Islamic offences, and must be read subject to the federal Syariah courts (Criminal Jurisdiction) Act 1965 which determines the maximum punishment that can be imposed;
- Civil Procedure law: broadly similar to the Rules of the High Court 1980;
- Criminal Procedure law: broadly similar to the Criminal Procedure Code; and
- Evidence law: sets out the basis of evidentiary requirements in the Syariah courts for State Islamic offences and civil cases.

The Administration of Islamic Law (Federal Territories) Act 1993 (and similar Administration laws in the various States) has a definition of a 'Muslim' which goes beyond the simple statement in the Constitution of a "person professing Islam". Constitutional litigation on this issue typically has been focused on whether the definition is inconsistent with the Constitution.

Section 2, the Administration of Islamic Law (Federal Territories) Act 1993

'Muslim' means:-

(a) a person who professes the religion of Islam;

(b) a person either or both of whose parents were, at the time of the person's birth, Muslims;

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who has converted to Islam in accordance with the requirements of section 85;

(e) a person who is commonly reputed to be a Muslim; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim whether the statement be verbal or written.

In many cases, there is also a provision that says that once you convert to Islam, you shall be considered a Muslim "for all time".[60]

Certain States have amended their Administration Enactment, which typically has sections that set out the boundaries of the Syariah courts' jurisdiction, to enable the Syariah courts to determine the question of whether or not a person is no longer a Muslim or whether or not a deceased person was a Muslim, expressly conferring jurisdiction on the Syariah High Court to decide this.[61] Although there are other States that have not made the same amendment, various decisions made by the highest Court have held that such jurisdiction to determine whether or not someone is "Muslim" was in any event impliedly within the jurisdiction of the Syariah courts.[62] Thus, a civil court will most likely rule that such a determination can only be made by the Syariah courts.

From anecdotal evidence and news reports[63], it appears that certain courts in certain States will allow conversions out of Islam for those who had converted in, and able to show that they never practised the faith. However, those with Muslim children will have problems, and may lose custody of their children if they express that they have abandoned the Islamic faith.[64] Whilst many States have included the determination of a person's religion to fall within the jurisdiction of the Syariah courts, only Negeri Sembilan has a specific procedure for those who wish to convert out of Islam, though it is understood that the court will only entertain applications from those who converted within that State.

[60] See s.91 of the Administration of Islamic Law (Federal Territories) Act 1993.

[61] See s.61(3)(b)(x) and (xi) of the Administration of the Religion of Islam (Selangor) Enactment 2003.

[62] See the discussion below on the cases of *Soon Singh, Lina Joy and Haji Raimi.*

[63] "Path to leave Islam simple, but far from easy" by Ida Lim, the Malay Mail Online, published on July 12, 2014, available at http://www.themalaymailonline.com/malaysia/article/path-to-leave-islam-simple-but-far-from-easy; "Ab Kadir Ismail – Syariah lawyer who helps those who want out of Islam" by Zakiah Koya, FZ.com, published on May 26, 2014, available at http://www.fz.com/content/ab-kadir-ismail-%E2%80%93-syariah-lawyer-who-helps-those-who-want-out-islam.

[64] See s. 83(d) of the Islamic Family Law (Federal Territories) Act 1984, which provides that a woman loses her right to custody of her children if she is an apostate.

Section 119, Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 Renunciation of the Religion of Islam.

(1) A Muslim shall not renounce the Religion of Islam or be deemed to have renounced the Religion of Islam until and unless he has obtained a declaration to that effect from the Syariah High Court.

(2) An application for a declaration under subsection (1) shall be made *ex parte* to the Syariah High Court Judge in open court by the person intending to renounce the Religion of Islam.

(3) An application under subsection (2) shall specify the grounds on which the applicant intends to renounce the Religion of Islam and shall be supported by an affidavit specifying all facts supporting the grounds for the application.

(4) After receiving an application under subsection (2), the Syariah High Court Judge hearing the application shall -

(a) advise the person to repent, and if the Judge is satisfied that the person has repented in accordance with Hukum Syarak, shall record the repentance of the person; or

(b) if the person refuses to repent, before making any order against the person, adjourn the hearing of the application for a period of 90 days and at the same time require the applicant to undergo a counselling session for the purpose of advising him to reconsider the Religion of Islam as his religion.

(5) If at any time the person required to undergo counselling has repented, the officer who is responsible for him shall prepare a report as soon as possible and bring him before the Syariah High Court.

(6) If the Judge is satisfied that the person brought before him in accordance with subsection (5) has repented according to *Hukum Syarak*, the Judge shall record the person's repentance.

(7) If after the expiry of the period of 90 days specified in paragraph (4)(b), the person still refuses to repent, the officer who is responsible for him shall prepare a report as soon as possible and bring him before the Syariah High Court.

(8) If, after receiving a report under subsection (7), the Court is of the opinion that there is still hope that the person may repent, the Court may adjourn the hearing of the application under subsection (2) and at the same time order the person to undergo further counselling session for a period not exceeding one year.

(9) If after an order under subsection (8) has been made the person repents, subsections (5) and (6) shall apply.

(10) If after the expiry of the period ordered under subsection (8) the person still refuses to repent, the person who is responsible for him shall prepare a report as soon as possible and bring him before the Syariah High Court and the Court may make a decision to declare that the person has renounced the Religion of Islam.

(11) Before the Court declares that the person has renounced the Religion of Islam, the Court shall make an order relating to the following matters:

(a) the dissolution of marriage;
(b) the division of *harta sepencarian;*
(c) right of *perwalian;*
(d) right to property; and
(e) *hadhanah.*

It is interesting and important to note the now repealed provisions mandatorily requiring the Syariah/*Kadi* courts to make a declaration that a person is no longer a Muslim.

Administration of Muslim Law Enactment 1965 (Perak)

Section 146. Report of Conversion

"(2) This Enactment is binding on all Muslims and if any Muslim converts himself to other religion he shall inform court of his decision and the court shall publicise such conversion."

Administration of Islamic Law Enactment 1978 (Johore)

Section 141. Statement of a person converted into or out of Islamic Religion

"(2) Whoever is aware of a Muslim person has converted out of the Islamic Religion shall forthwith report the matter to the Kadi by giving all necessary particulars and the Kadi shall announce that such person has been converted out of the Islamic Religion and shall register accordingly."

c) Argument in favour of religious freedom

The Constitution only permits the application of Islamic law on "persons professing the religion of Islam". That phrase is consistently used throughout the Federal Constitution to refer to persons who we commonly refer to as "Muslims". Nowhere in the Federal Constitution, as it stands today, is the word "Muslim" used. The word "Muslim" appears to only have been used in relation to article 161(c) regarding "Muslim education" in the Borneo States, a provision included in 1963 when Sabah and Sarawak joined Malaysia and was repealed in 1976.[65] Even in the substance of that provision, the word "Muslim" is used in relation to "institutions" or to the "Muslim religion" and not to people, with the phrase "persons professing [the Muslim] religion" used instead.

In *Re Mohamed Said Nabi, deceased*[66], the Singapore High Court (at a time when Singapore was still part of Malaysia) applied the Shorter Oxford English Dictionary definition of 'profess' which means 'to affirm one's faith in or allegiance to (a religion, principle, God or Saint, etc)'. The Court therefore dismissed an attempt by a next-of-kin of a deceased Muslim man to argue that the deceased was not Muslim by reason of his behaviour, but relied instead on what religion the deceased himself said he followed throughout his life.

In the decision of *Punjab Rao v D.P. Meshram & Ors* [1965] 1 SCR 849, SC (India), it was held as follows:

> "Therefore, if **a public declaration is made** by a person that he has ceased to belong to his old religion and has accepted another religion **he will be taken as professing the other religion**. In the face of such an open declaration it would be **idle to enquire** further as to **whether the conversion** to another religion **was efficacious**." [Emphasis supplied]

[65] Inserted by Act 26/1963, s. 64 in force from 16 September 1963, and repealed by Act A354, s 46 in force from 27 August 1976.

[66] [1965] 1 MLJ 121, at 122.

In a decision where several questions of law were asked to the Federal Court under section 84 of the Courts of Judicature Act 1964, the High Court in *Zaina Abdin bin Hamid @ S. Maniam & Ors v Government of Malaysia & Ors* [unreported, *per* Nurchaya Arsad J, Shah Alam High Court, 2nd August 2011] said the following:

> "Article 11(1) of the Federal Constitution provides that every person has the right to profess and practice his religion, and subject to Clause (4), to propagate it.
>
> One of the declarations sought by the plaintiff is that the word "his religion" in Article 11(1) means the religion which a person chooses to profess and practice as his religion.
>
> The right "to profess and practice his religion" is provided under that part of the Constitution entitled 'Fundamental Liberties' and under that Article bearing the heading 'Freedom of Religion'.
>
> *Prima facie*, I would give that provision of the Constitution the broadest meaning feasible, unless in so far as the Constitution itself restricts the meaning, or a logical conclusion flowing therefrom prevents or negates such a meaning.
>
> The disputed [sic] here lies in what "his religion" means. Is the phrase "his religion" restricted to mean that single religion which a person now has, and no other? Or does the phrase 'his religion' mean any religion a person may choose to profess or practice? Does Article 11(1) give no more right to a person other than to 'profess and practice' his pre-existing religion and no other.
>
> The word 'to profess' by it [sic] plain dictionary meaning denotes to declare openly, to announce, affirm, to avow, acknowledge, to lay claim to, amongst others. The roots of the word 'profess' may be traced to Latin. The word 'profess' is derived from the Latin 'professes' having the meaning of taken religious vows, and 'profiteri' having the meaning of to declare publicly, to make a public statement, to declare oneself, to acknowledge, confess, offer, promise.
>
> *I am satisfied that right to 'profess' his religion entitled a person with full liberty to declare his religion as he chooses, and that unfettered personal freedom is a fundamental right guaranteed by our constitution.*" [Emphasis added]

Unfortunately, the Federal Court in that reference remitted the case to the High Court without answering the questions posed. When it came back to the High Court, a different Judge had then heard the case and dismissed the application.

Prior to 1999, the courts frequently accepted jurisdiction to determine whether or not a person has validly converted to Islam, or whether or not a person was a Muslim, and made decisions as to whether or not a person professed the religion of Islam at the time of his death.[67] No reported decision can be found of a living person's religion being challenged by the government, as those reported seem to revolve around the religion of a deceased person.

d) Argument against freedom of religion

In 1994, a Supreme Court judge in *Dalip Kaur*[68] made a comment to the effect that the determination of whether a person had converted out of Islam was a matter of Islamic law that required the expertise of those well versed in such law. The other judges in the case did not agree with that statement, but agreed instead to the parties to the dispute's acceptance that the finding on the religion of the deceased in question by the Islamic authorities as binding. They also did not decline to hear the matter on the basis of lack of jurisdiction.

It was in *Soon Singh*[69] that the Court first held that only the Syariah courts can determine whether a person has renounced Islam or not, on grounds that the civil courts have no jurisdiction to determine the issue because of article 121(1A) of the Federal Constitution. However, it has been argued that *Soon Singh* was decided based on an erroneous finding of law – firstly, the High Court had relied on the *obiter* passage in *Dalip Kaur* to dismiss the application on the ground that the subject matter was within the jurisdiction of the Syariah courts.[70] Secondly, the Federal Court's finding (in *Soon Singh*) that all State enactments and the Administration of Islamic Law (Federal Territories) Act 1993 expressly vest the Syariah courts with jurisdiction on matters relating to conversion to Islam, was flawed, as none of the State Islamic Enactments referred to by the Federal Court[71] contains provisions that expressly vest the Syariah courts jurisdiction to deal with matters relating to conversion to Islam; rather, the said sections show that conversion to Islam remains within the administrative purview of the Registrar of *Muallaf*.[72]

Even applications couched on constitutional terms have met with little success, with the Federal Court in *Lina Joy*[73] holding that definitions of a Muslim were constitutional, but with little reasoning. There, the Federal Court faced with the argument on the Constitutional liberty to freedom of religion, and the case of *Re Said Nabi* and the dictionary definition, dismissed the argument by summarily stating that the Court preferred the argument of the religious authorities which was couched in this way (as summarised by the Court at [13]):

> *"(a) Perkara 11 Perlembagaan Persekutuan menggunakan perkataan-perkataan "profess and practice". Justeru itu perkara keluar dari agama Islam hendaklah mengikut perundangan berkaitan dengannya. Seseorang boleh keluar dari agama Islam tetapi hendaklah ikut tatacaranya. Kalau ikut kehendak atau sesuka hati seseorang maka akan huru haralah keadaan umat dan agama Islam. Oleh demikian penentuan oleh mahkamah syariah adalah mengikut kehendak perundangan syariah dan justeru itu tidaklah berlawanan dengan Perkara 11;*
>
> *"(b) Mengenai hak sama rata (equal rights) di bawah Perkara 8 Perlembagaan Persekutuan, Perkara 8 itu adalah tertakluk kepada peruntukan-peruntukan yang kawal selia (regulate) undang-undang keluarga (personal law)."*

[67] *See Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor*. [1991] 3 CLJ Rep. 328, HC, *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yg Lain* [1996] 3 CLJ 231, HC and *Re Syed Nabi*, above.

[68] *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, SC at 9H-10B.

[69] *Soon Singh Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 2 CLJ 5.

[70] Aston Paiva, 'Religious Cases in The Malaysian Courts' (2015), *Penang Institute*, <http://penanginstitute.org/v3/files/research_papers/Religious-Cases-in-the%20Malaysian-Courts.pdf> accessed 29 August 2016.

[71] The Federal Court referred to sections 139-141 of the Kedah Administration of Muslim Law Enactment 1962; Part IX of the Administration of Islamic Law (Federal Territories) Act 1993 and Part VIII of the Penang Administration of Muslim Law Enactment 1993.

[72] Aston Paiva, 'Religious Cases in The Malaysian Courts' (2015), *Penang Institute*, <http://penanginstitute.org/v3/files/research_papers/Religious-Cases-in-the%20Malaysian-Courts.pdf> accessed 29 August 2016.

[73] *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557, FC.

The Court went on to state (at [14]) as follows:

> *"Di dalam rayuan di hadapan mahkamah sekarang, tiada ketentuan muktamad bahawa perayu tidak lagi menganuti agama Islam. Maka, kenyataan bahawa perayu tidak boleh lagi berada di bawah bidangkuasa Mahkamah Syariah kerana Mahkamah Syariah hanya ada bidangkuasa terhadap seseorang yang menganuti agama Islam (profess) tidak boleh/wajar ditekankan. Cara seseorang keluar dari sesuatu agama adalah semestinya mengikut kaedah atau undang-undang atau amalan (practice) yang ditentukan atau ditetapkan oleh agama itu sendiri. Perayu tidak dihalang dari berkahwin. Kebebasan beragama di bawah Perkara 11 PP memerlukan perayu mematuhi amalan-amalan atau undang-undang agama Islam khususnya mengenai keluar dari agama itu. Apabila ketentuan-ketentuan agama Islam dipatuhi dan pihak berkuasa agama Islam memperakukan kemurtadannya barulah perayu dapat menganuti agama Kristian. Dengan lain perkataan seseorang tidak boleh sesuka hatinya keluar dan masuk agama. Apabila ia menganuti sesuatu agama, akal budi (common sense) sendiri memerlukan dia mematuhi amalan-amalan dan undang-undang dalam agama itu."*

In the *Zaina Abidin* case mentioned above, when the matter was remitted back to the High Court, the Plaintiffs' claim was dismissed. Justice Hadhariah in the High Court[74] first relied on the following statement by Faiza Thamby Chik J in the case of Lina Joy at first instance:

> "The purpose of s. 2 of the 1993 Act is merely to define a Muslim since the Constitution did not provide any definition. This is important because Syariah laws are applicable only to Muslim [*sic*]. Without a definition provision, there would be confusion in relation to the application of the Syariah laws. Without a definition section (s. 2 of the 1993 Act), only then could the 1993 Act be said to be ultra vires art. 11(1) since it imposes Syariah law on everyone regardless of religion. Therefore s.2 of the 1993 Act complements Article11(1) by limiting the application of the Syariah law to Muslims only."

After quoting from that judgment, Hadhariah J stated as follows:

> "[A] similar issue arose in the case of *Lim Yoke Khoon lwn Pendaftar Muallaf, Majlis Agama Islam Selangor & Yang Lain* [2006] 4 CLJ 513.[75] In that case, Abdul Hamid Mohamad J [*sic*: the Judge was actually Rosnaini Saub J] held the definition of "a Muslim" in section 2 of the Selangor Enactment 2003 is not inconsistent with the Federal Constitution. I choose to adopt and follow the decision in both the cases cited above."

The learned Judge went on to say that to adopt the meaning of Muslim as restricted only to "persons professing the religion of Islam" would lead to "chaos" and "havoc" amongst the "Muslim community" in Malaysia stating:

> "Islam is not about whether one say [sic] he or she is a Muslim. It goes beyond that. It involves "*akidah*", "*iktikad*" and way of life. 99.99% of the Malay Muslim in this country are Muslim because their parents are Muslim. We called them "Islam keturunan". A true Muslim will never ever say he is not a Muslim. Muslim takes religion of Islam seriously."

[74] *Zaina Abiden bin Hamid @ S Maniam & Ors v Kerajaan Malaysia & Ors* [unreported, *per* Hadhariah binti Syed Ismail J, Shah Alam High Court, 11th January 2013].

[75] This case eventually found its way to the Federal Court. At the suggestion of the panel of the Federal Court, the two litigants agreed to go for counselling with the Syariah authorities and seek relief through the Syariah courts. One was successful; the other was not, but chose not to pursue the litigation.

An appeal to the Court of Appeal was subsequently withdrawn by the Plaintiffs in the *Zaina Abidin* case, who had been fighting for 10 years in the civil courts to no avail.

Curiously, in Sabah, there is a contrarian decision which appears to be more consistent with the Federal Constitution where a Sabah Syariah High Court refused to hear an application for conversion out of Islam on the grounds that it was beyond its jurisdiction, as matters of constitutionality were for the civil courts.[76] More recently, the civil High Court in Sarawak[77] allowed a judicial review by a Sarawakian man who had Muslim as an official identity but professed Christianity. However, the facts of this case are unique in that the Sarawakian Islamic authorities supported the applicant because the only party disputing his professed religion was the federal National Registration Department who had refused to correct his identity card by removing "Islam" unless he provided a Syariah court order to that effect.

The current civil courts' position on the issue of apostasy and whether a person is a Muslim or not is that any person wishing for any judicial order to revoke the application of Islamic law on themselves must first seek the permission of the State Islamic authorities (and more specifically, the Syariah courts). It is our view that these Court decisions are in error and are contrary to the clear words of the Federal Constitution. Enlarging the scope of the words "profess" to encompass some of the situations envisaged in Section 2 of the Administration of Islamic Law (Federal Territories) Act 1993 is clearly inconsistent with the Constitution. Nevertheless, it would appear that any constitutional challenge may be an uphill task and should be approached only with informed consent of the client and a clear idea of the intended tactical strategy.

2.3 Practical matters - initial meeting and preliminary advice

At the initial meeting with the potential client, establish where the conversion was formalised and whether any registration of marriage has taken place (i.e. if in Malaysia, which State; if out of the country, where and which State the couple are from or live in). If there are children, where they were born may also be important. Try and identify which factual scenario given above applies, or if this is something unique.

[76] *Roslinda Mohd Rafi v Ketua Pendaftar Muallaf, Sabah* [2009] 1 CLJ (SYA) 485 @ 490, 491.

[77] *Rooney Rebit's case*, as reported in the Borneo Post of March 24, 2016 "High Court allows Muslim convert to renounce religion", available at http://www.theborneopost.com/2016/03/24/high-court-allows-muslim-convert-to-renounce-religion/.

Typically, the client has four options which ought to be explained to them:

i. **Do nothing** -The client will have to live as a Muslim, and will be subjected to Islamic personal and family law. Although State Islamic offences will apply to the person, it is unlikely that he or she will be prosecuted unless he or she commits an offence openly or has family members or a jilted ex-lover of the client's intended spouse who will complain to the authorities. His or her children may also be able to enjoy financial benefits as a *bumiputera* in due course;

ii. **Leave the country** - Depending on the client's personal circumstances, he or she may qualify for permanent residency or be able to seek asylum in certain Western countries. Whilst it is very rare for a person seeking to leave Islam in Malaysia is given asylum, there are cases where this has happened but typically involve cases where there are threats of violence, or a long standing relationship between the Muslim and non-Muslim couple and evidence of discrimination because of religion;

iii. **Seek relief in the Syariah courts** - This is what the civil courts have said must be done by persons who wish to leave Islam[78], although it is incorrect under the Federal Constitution. Different considerations and court procedures will apply depending on which State the client lives in, which State the conversion took place and whether or not the client was born a Muslim. The client will have to first find a Syariah lawyer to argue his or her case, or appear in person (which is typically not encouraged by the courts themselves, and may result in the case being struck out on the basis of technicalities). Wherever the case is filed, the client will inevitably face a long battle; having to appear in court and attend counselling sessions numerous times. In one instance, there is a report of an Applicant being detained in a rehabilitation centre for six months.[79] In the end, there is no guarantee that the client will be allowed to leave. If the application is refused, there is a right of appeal to the Syariah Court of Appeal but if that does not succeed, the client will have no further legal recourse and will have to live as a Muslim; or

iv. **Seek relief in the civil courts** - The laws that treat persons as "Muslims" despite their own personal beliefs are clearly unconstitutional. However, the courts have not accepted this and have appeared to determine[80] that the laws are constitutional despite its clear inconsistency with the Constitution, as explained above. However, more recently, a High Court has allowed an application although the facts of the case are unique.[81] Thus, at the present time, a challenge in the civil courts may not be successful, lengthy and expose the client to adverse costs. However, if unsuccessful, the client may still apply to the Syariah courts for relief.

[78] *Soon Singh*, applied in *Hj Raimi Abdullah v Siti Hasnah Vangarama Abdullah & Another Appeal* [2014] 4 CLJ 253, though decided *per incuriam* the decision in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253.

[79] *Siti Fatimah binti Ab. Karim v Majlis Agama Islam Melaka* (Revathi Masoosai), Melaka Syariah High Court Case No.04200-043-0005-2006.

[80] *Lina Joy, Zaina Abidin* case in HC, unreported.

[81] Sarawak case: the Sarawak Islamic department agreed the applicant was not a Muslim but the Federal registration department insisted on a Syariah court ruling, no doubt on the basis of Soon Singh and Haji Raimi.

After explaining those options, you should then obtain the client's informed consent on which option he or she wants to pursue.

Sample reliefs that could be sought from the courts include:

SAMPLE RELIEF 1

A declaration that the fundamental liberty of every person to "profess ... his religion" in article 11(1) of the Federal Constitution includes the freedom of that person to change his or her religion.

SAMPLE RELIEF 2

A declaration that any requirement for the Applicant to first get permission from the Syariah court or other authority before State enacted Islamic law ceases to apply to him or her is inconsistent with article 11 of the Federal Constitution.

SAMPLE RELIEF 3

A declaration that the Applicant who resides in the [State] is not a person professing the religion of Islam, and:-

i. all laws made by the Legislature of the [State] under the Ninth Schedule List II Item 1 of the Federal Constitution are of no effect on, and are not applicable to, the Applicant; and

ii. all Syariah courts within the [State] do not have jurisdiction over the Applicant.

SAMPLE RELIEF 4

A declaration that provisions (b) to (f) of the interpretation of "Muslim" in section 2 of the [Administration of Islamic Law Enactment] are inconsistent with article 11(1) of the Federal Constitution, and are therefore void. A declaration that the following provisions are inconsistent with article 11(1) and 8(2), respectively of the Federal Constitution and is void:-

i. The phrase "other than a conversion of religion" in Regulation 14(2)(b) of the National Registration Regulations 1990 P.U.(A) 472/90; and

ii. The particular "Religion (only for Muslims)" to be contained in an identity card as stipulated by the First Schedule of the National Registration Regulations 1990 P.U.(A) 472/90.

SAMPLE RELIEF 5

An order in the nature of *mandamus* directed to the Director General of National Registration to compel the same:-

i. to change the Applicant's current name in his or her identity card to [preferred name]; and

ii. to remove the word "Islam" from the Applicant's identity card.

SAMPLE RELIEF 6

A declaration that the Legislature of the [State] has no power to make provisions (b) to (f) of the interpretation of "Muslim" in section 2 of the [Administration of Islamic Law Enactment].

MODULE 3

MALAYSIAN LAW - UNILATERAL CONVERSION OF MINOR CHILDREN TO ISLAM

One aspect of freedom of thought, conscience and religion that Malaysia has been grappling with for the past two decades is the unilateral conversion of children to Islam by one parent. This typically involves a parent who has converted to Islam and proceeds to convert his or her child to Islam without the knowledge or consent of the non-converting parent. A number of such cases have emerged with the notable ones reported being *Genga Devi a/p Chelliah lwn Santanam a/l Damodaram*[82], *Shamala Sathyaseelan,*[83] *Neduchelian,*[84] *Subashini a/p Rajasingam v Saravanan a/l Thangathoray (and 2 other appeals),*[85], *Viran a/l Nagapan v Deepa a/p Subramaniam*[86] and *Indira Gandhi d/o Mutho v Patmanathan s/o Krishnan and 5 Ors.*[87]

Cases of unilateral conversion to Islam of minor children often result in custody battles and the non-convert parent being left without a remedy or the right to be heard in the conversion of the children in question. It should be noted that this module will not touch on the issue of custody; rather, focus will only be on the constitutional aspects of a unilateral conversion case.

3.1 Human rights and constitutional elements

There are four main human rights and constitutional elements in a case of conversion to Islam of minor children by one parent:

- Principle of equality between parents;
- Parents' rights in respect of religious education;
- Principles of natural justice; and
- Rights of the child to freedom of religion or belief.

a) Principle of equality between parents

Where a unilateral conversion of children is concerned, one of the main questions to be addressed is whether allowing one parent to convert the child without the knowledge or consent of the other parent, amounts to discrimination, in contravention of the principle of equality between parents in the upbringing and development of the child.

The principle of equality between parents requires that, in the best interest of the child, both parents have equal parental rights and duties towards their minor children, with no discrimination made on the grounds of religion, race, descent, place of birth or gender. This principle is embodied in the Guardianship of Infants Act 1961, taken alone, or in conjunction with article 8 of the Federal Constitution.

82 [2001] 1MLJ 526.

83 *Shamala a/p Sathyaseelan v Dr Jeyaganesh a/l C Mogarajah* [2004] 2MLJ 241 (HC);[2004] 2MLJ 648 (HC).

84 *Neduchelian a/l V uthiradam v Nurshafiqah binti Mah Singai Annal @ Valarmathy a/p Mah Singai Annal & 9 Ors* [2005] 2AMR711(HC).

85 *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2007] 2MLJ 798 (HC); *Saravanan v Subashini* [2007] 2MLJ 205, 2AMR 540, 2 CLJ 451 (CA); *Subashini v Saravanan* (No. 2)[2007] 3AMR370, 3 CLJ 209, 4MLJ 97 (CA), [2008] 1AMR561 (FC).

86 Civil Appeal No: 02(f)-5-01-2015 & 02(f)-6-01-2015.

87 [2013] 7 CLJ 82 (HC).

Sections 5 and 11 of the 1961 Act read as follows:

> *Section 5 of the Guardianship of Infants Act 1961:*
>
> *(1) the custody or upbringing of an infant or the administration of any property belonging to or held in trust of an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.*
>
> *(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.*
>
> *Section 11 of the Guardianship of Infants Act 1961:*
>
> *The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them.*

It is clear that sections 5 and 11 of the Guardianship of Infants Act 1961 guarantees equal parental rights to both the father and the mother in a civil marriage; parental rights in this instance includes matters regarding the child's religious upbringing and education. As such, in comparing the guardianship rights of the converted parent against those of the non-converting parent, the unilateral conversion violates sections 5 and 11 of the Guardianship of Infants Act 1961.

To supplement the above argument, the provisions of the 1961 Act could also be read with article 8 of the Federal Constitution. Article 8 of the Federal Constitution states:

> *(1) All persons are equal before the law and entitled to the equal protection of the law.*
>
> *(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*

Article 8 taken in conjunction with sections 5 and 11 of the 1961 Act requires the government to ensure that all persons are treated equally before the law and that any law should not create a difference in treatment between a non-converting parent and the converting parent based on any one of the identifiable characteristics prescribed in article 8(2) of the Federal Constitution. As the Court's role is to ensure that domestic law is in accordance with the Federal Constitution, sections 5 and 11 of the 1961 Act should be interpreted in line with article 8 of the Federal Constitution. To do otherwise would amount to discrimination based on gender or religion in variance with article 8 of the Federal Constitution.

b) Parents' right in respect of religious education

Much of the contention in a unilateral conversion case focuses on whether one parent has the exclusive right to determine the religious education of their children, particularly that article 12(4) of the Federal Constitution refers only to "parent" and some State Islamic enactments provide that a person under the age of 18 can be converted if *"ibu atau bapa **atau** penjaganya mengizinkan secara bertulis pemelukan agama Islam olehnya"* (emphasis added).

The principal basis of the right of both parents to ensure the religious and moral education of their children is enumerated in article 12 of the Federal Constitution, in particular subsection (4), which states:

> *Rights in respect of education*
>
> *12. (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).*
>
> *(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.*
>
> *(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.*
>
> *(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.*

As can be seen from the structure of article 12 above, the right of a parent in article 12(4) is an adjunct of the right to education of children - as parents are primarily responsible for the education of their children, in the same vein, parents (as part for their right to religious freedom) have the right to bring their own child to a place of worship (in accordance with the parent's religion) and to teach his or her child the tenets of his or her faith.

Additionally, the equal right of both the father and the mother in determining the religion of their children or child can also be inferred when article 12(4) is read with articles 8, 11 and the 11th Schedule of the Federal Constitution. Both article 8 and the principle of best interests of the child requires that the State and the Courts use their best efforts to ensure that both parents have equal responsibilities in the education of their children, and by extension the religious education of their children. As such, it follows that the word "parent" (in article 12(4)) and the word "or" (in the State Islamic enactments) should be interpreted as "parents" and "and", respectively. Such an interpretation is consistent with article 8 of the Federal Constitution and the Guardianship of Infants Act 1961 and would ensure that the rights of both parents are respected. Also, to interpret otherwise would lead to an "undesirable situation of repeated conversions of one parent against the conversion of the other parent".[88]

[88] *Indira Gandhi d/o Mutho v Perak Registrar of Converts, Perak Islamic Religious Department, State Government of Perak, Ministry of Education, Government of Malaysia, & Patmanathan s/o Krishnan* [2013] 7 CLJ 82 (HC).

c) Principle of natural justice

One of the main tenets of the principle of natural justice is the right to be heard. This has been affirmed by the Federal Court case of *Ketua Pengarah Kastam v Ho Kwan Seng* where the court held that "the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "quasi judicial", or "administrative" or whether or not the enabling statute makes provision for a hearing".

In a case of unilateral conversion of children, the following situations impinge upon the right to be heard:

i. **Avoidance of civil marriage obligations through mere conversion** - The legal obligations under the Law Reform (Marriage and Divorce) Act 1976 (LRA 1976) of the converting spouse should not be avoided by mere conversion to Islam; conversion to Islam does not dissolve the civil marriage and does not deprive the non-converting spouse of rights available under the LRA 1976. This was affirmed in the cases of *Tan Sung Mooi v Too Miew Kim*[89] and *Tey Siew Choo v Teo Eng Hua*.[90] As it is possible for the converting spouse to go to the High Court to petition for a divorce, seek custody of the children of the civil marriage and solve other matrimonial disputes, the non-converting spouse should resolve all such matters existing in the civil marriage under the LRA 1976. This includes matters relating to the custody of the children and the decision (if any) regarding the religion of the children. This would provide an opportunity for the Courts to hear from all affected parties – both parents and the children; and

ii. **Adversely affects one parent's right** - Unilateral conversion of the children by one parent places the non-converting parent at a disadvantage as it deprives the non-converting parent of his/her guardianship rights and his/her right to be heard on matters of custody in a Syariah court as the Syariah court (exercising its civil jurisdiction) has jurisdiction to hear and determine only actions and proceedings in which ***all parties*** are Muslims (emphasis added).

d) Rights of the child to freedom of religion or belief

International law

Much has been said about the rights of parents in a unilateral conversion case. It should not be forgotten that at the centre of such cases, is a child or children, whose well-being are almost always affected by the conflict between the parents. In this regard, depending on the age of the children or child in question, the lack of consent or consultation with the child in question about the conversion could violate the child's right to freedom of religion or belief. According to the UN Special Rapporteur on Freedom of Religion or Belief, children have the right to freedom of religion or belief and this right must be protected.[91]

International human rights law, which recognises the right of a child to determine his or her religion subject to the child's evolving capacities is at odds with Malaysian case law. In the case of *Teoh Eng Huat v The Kadhi of Pasir Mas, Kelantan & Anor*,[92] in interpreting article 12(4) of the Federal Constitution, the Court held that a person below 18 years of age lacks capacity to choose his or her own religion and that the child's right of religious practice belongs to the guardian until the child reaches 18 years. The fact that the minor in question in *Teoh Eng Huat* case was 17 years and eight months old at the material time was not considered. This judgement was followed by the High Court in the recent case of *Indira Gandhi.*

[89] [1994] 3 MLJ 117.

[90] [1999] 6 CLH 308.

[91] 'Children also have the right to freedom of religion or belief, and that must be protected', 23 October 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16647&LangID=E#sthash.q3zW6aJQ.dpuf> accessed 7 June 2016

[92] [1990] 1 CLJ 277 (SC).

Despite the fact that case law and Malaysia's reservation to article 14 of the CRC could make this line of argument challenging, unilateral conversion cases provide a valuable opportunity for the courts to begin to recognise a child's right. If the child or children in question is able to exercise his or her right to freedom of religion or belief, then the Court could be invited to assess whether a child is competent to decide his or her religion. This assessment could look at four criteria[93]:

- Does the child have the ability to understand and communicate relevant information?
- Does the child think and choose with some degree of independence?
- Does the child have the ability to assess the potential for benefit, risk and harm?
- Has the child achieved a fairly stable set of values?

Additionally, although Malaysia has entered a reservation to article 14 of the CRC, it has not made a reservation to article 12(1) of the CRC, which protects the child's right to express his or her views freely in matters affecting the child and that due weight should be given in accordance with the age and maturity of the child. Further, article 12(2) of the CRC requires the Court to provide the child an opportunity to be heard, in matters affecting the child.

Similarly, in the case of children from minority religions in Malaysia who have been converted to Islam, article 30 of the CRC (which protects the rights of children from ethnic, religious or linguistic minorities or those of indigenous origin to "enjoy his or her own culture", "profess and practise his or her own religion" or "use his or her own language". On the other side of the equation, article 5 of the CRC recognises the "responsibilities, rights and duties" of parents or guardians to provide "appropriate direction and guidance" in the exercise of any of the child's rights recognised by the CRC.

[93] Harrison, C. et al., Bio-ethics for clinicians: Involving children in medical decisions, Canadian Medical Association, Ottowa, 1997 in Gerison Lansdown, UNICEF & Save the Children: Innocenti Insight - The Evolving Capacities of the Child (2005), <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed 31 May 2016.

However, caution must be exercised in pursuing an argument recognising a child's rights to religious freedom. Malaysia still imposes substantial obstacles on the right of persons with an official Muslim identity converting out of that religion – such a person who wishes to convert out of Islam is often faced with numerous legal and social challenges. Thus, pursuing this argument could lead to a paradoxical situation where recognition of the human right of a child to religious freedom could later lead to a violation of that child's human right to change his or her religion. As such, the recognition of a child's right to choose his or her religion (if the religion chosen by the child is Islam) could lead to an undesirable situation where the child who later becomes an adult, may find that his or her freedom to change or renounce Islam is curtailed as he or she may not be able to convert out of Islam. Given also the prevalence of Islamic proselytisation, the presence of Islamic religious teachers in schools or vocational institutions where non-Muslims are studying, and the Islamisation of the civil service and educational syllabus, there are instances where parents have complained that their children were tricked or duped into converting to Islam. Any argument regarding recognising a child's rights to religious freedom to embrace Islam, therefore, must also include sufficient safeguards to recognise the child's rights to leave Islam, and the ability of the child or his or her parents to go to the civil courts to declare the conversion to Islam void.

Statutory interpretation

Whilst not expressly set out as a manifestation of a right of a child to religious freedom, most of the relevant State statutory laws that regulate the registration of conversions to Islam requires that a person must:

a) be of sound mind;
b) freely utter the "Two Clauses of the Affirmation of Faith" (or the *Dua Khalimah Shahadah*, which essentially state that there is no other God but Allah, and that Muhammad was his Prophet) in reasonably intelligible Arabic, and
c) understand the meaning and significance of this utterance.[94]

[94] See for example section 96(1) of the Administration of the Religion of Islam (Perak) Enactment 2004.

A separate provision[95] also states that a person must either be above 18, or if under 18, must have the written consent of the parent or guardian. Much of the controversy revolves around whether "parent" means both parents or whether the consent of one parent is enough.

However, in the *Indira Gandhi* case, referred to above, the High Court also held that in addition to obtaining parental consent, a child must also comply with the other requirements for a valid registration of his or her conversion, i.e. that the child be of sound mind, and must freely utter the Two Clause of the Affirmation of Faith and understand the meaning and significance of that utterance.[96] The High Court held that on the evidence in that case, all the children were not even present at the time their purported conversion to Islam was registered and in addition the 11 month old infant was not capable of such an utterance at all, what more understand what was being uttered.

3.2 Practical matters - initial meeting and preliminary advice

At the initial meeting with the potential clients, obtain information on the following matters:

a) Details regarding the civil marriage and the children from that marriage, e.g. when was it registered, has the marriage been dissolved, the age of the children, any civil court orders relating to custody or guardianship, etc.;

b) Evidence of registration of conversion to Islam and details relating to the purported conversion, e.g. whereabouts of children during the purported conversion, the children's ability to express an independent opinion, their understanding of the conversion process, etc.; and

c) Any orders from the Syariah court affecting the non-converting parent or the children of the civil marriage.

[95] See for example section 106(b) of the same Enactment.

[96] See *Indira Gandhi* case above.

The client has the following option which ought to be explained to them:

- **Seek relief in the civil courts** - A judicial review action should be instituted contending that the registration of the conversion was in breach of the law; i.e. Law Reform (Marriage and Divorce) Act 1976, Guardianship of Infants Act 1961, the relevant Administration of the Religion of Islam Enactment and the Federal Constitution, is procedurally improper (no opportunity of being heard), inconsistent with the non-converting spouse's legitimate expectation *vis-à-vis* Malaysia's international treaty obligations and unreasonable in the circumstance.

Sample reliefs that could be sought from the courts include:

SAMPLE RELIEF 1

A declaration that [registration certificate] is null and void and of no effect.

An order of *certiorari* to remove the [registration certificate] made by [public authority] on [date] into the High Court to be quashed forthwith.

SAMPLE RELIEF 2

An order in the nature of prohibition directed to the [public authority] prohibiting the same from [registering the purported conversion] of [the children].

MODULE 4

MALAYSIAN LAW – ISSUES RELATING TO PROPAGATION OF RELIGION AMONG PERSONS PROFESSING ISLAM

Article 11(1) and (4) of the Federal Constitution

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

4.1 The Law

An essential element of freedom of religion or belief is the right to manifest one's religion in public. The right to convince and discuss with non-believers through proselytisation and propagation, about one's faith or belief is thus not only a manifestation of the right to exercise free speech but also a facet of religious freedom. This right is recognised in article 11(1) of the Federal Constitution, which guarantees the right of every person in Malaysia to "profess and practice his religion and ... to propagate it".

In any democratic society, the right to propagate and carry out missionary activities may be restricted but only in very specific circumstances and only in exceptional instances (see Module 1 for permissible restrictions under international human rights law).

In Malaysia, the right to propagate, as articulated in article 11(4) of the Federal Constitution, can be controlled or restricted by State law (or in the case of the Federal Territories, by Federal law) in respect of the propagation of "any religious doctrine or belief among persons professing the religion of Islam." As evident from article 11(4) the restriction on propagation applies only if the object of the proselytising activities is persons professing Islam and the Constitution preserves restrictions for the right of propagation of religion among non-Muslims.

All the States which have a Ruler, whose position as the Head of Islam in that State is constitutionally protected, have enacted State laws with similar provisions purporting to "control or restrict" the propagation of religious doctrine by "non-Muslims" amongst "Muslims". No such law has been enacted in Perlis, Perak,[97] and Sabah.

The laws that restrict propagation among persons professing Islam mainly affect the Christian community, whose religion, amongst the major religions in Malaysia, requires its adherents to proselytise as an article of faith. The Christian community argues that the control of propagation laws are actually *ultra vires* as the intention of the Constitution is to permit controls and restrictions which fall short of an absolute prohibition. The Islamic authorities and the government take the position that the words "control" and "restrict" encompass prohibitions, and an absolute prohibition is necessary for the preservation of public order.

The tension between these two interpretations and the tension between Muslims and Christian propagation activities, form the backdrop of most of the litigation in this area in Malaysia.

[97] The Restriction of the Propagation of Non-Islamic Religions Enactment 1988 (En. 10/88) of Perak is, however, not yet in force.

In this instance, an examination of the definitions of key words in article 11(4) of the Federal Constitution in leading dictionaries could be helpful:

> 'Control' is defined by the Cambridge dictionary as 'to order, limit or rule something…' The Oxford Dictionary defines it as 'the restriction of an activity, tendency, or phenomenon.'
>
> 'Restrict' according to the Cambridge Dictionary is 'to limit the movements or actions of someone, or to limit something and reduce its size or prevent it from increasing'. The Oxford Dictionary defines it as 'to put a limit on; keep under control'.

The definition of the words 'restrict' and 'control' strongly suggest that nullification is not an element of 'control' or 'restrict'. Some have argued that article 11(4) merely empowers the relevant legislatures to enact laws to control or restrict the propagation of any "religious doctrine or belief" among persons professing the religion of Islam, and not 'religion' *per se*.[98]

It has also been contended that the law must specify the specific "religious doctrine or belief" that is subject to control and restriction, for example, the Holy Trinity, the Resurrection of Jesus Christ or the identity of *Imam Mahdi*, and that article 11(4) does not envisage laws restricting the exposition of general information or ideas regarding a particular religion or the use of words like "Allah" as these words do not constitute a "religious doctrine or belief" (see the case of *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur below*).[99] Should article 11(4) be construed that widely, no public discussion on 'religions' can ever take place in Malaysia among its multi-religious population without a risk of committing an offence and, arguably, there will be an irreconcilable conflict with article 10(1)(a) which guarantees all citizens the right to express information and ideas.[100]

[98] Art Harun, 'Total Prohibition Oo Use of "Allah" Unconstitutional' (8 January 2014), Loyarburok, <http://www.loyarburok.com/2014/01/08/total-prohibition-allah-unconstitutional/> accessed 29 August 2016.

[99] Aston Paiva, discussion with Seh Lih Long, 28 August 2016, E-mail communication.

[100] Aston Paiva, discussion with Seh Lih Long, 28 August 2016, E-mail communication.

Having said that, generally, the laws on restriction of propagation (as it stands) apply in two broad situations:

- Direct propagation of religion in that there is an absolute prohibition of "persuading, influencing, coercing or inciting" a Muslim towards a non-Islamic religion, and sending publications regarding a non-Islamic religion to a Muslim; and
- The absolute prohibition of selected words being used in relation to non-Muslim religions, even where there is no direct propagation to a Muslim.

a) Prohibition on direct propagation to Muslims

The State enactments controlling propagation prohibit non-Muslims from "persuading, influencing, coercing or inciting" a Muslim to become a follower or member of a non-Islamic religion. The legislation also imposes an absolute prohibition on sending, delivering or distributing publications concerning any non-Islamic religion to a Muslim.[101]

The activities that are criminalised include, amongst others:

i. Persuading, influencing, coercing or inciting a Muslim to become a follower or member of a non-Islamic religion;
ii. Subjecting a Muslim under the age of 18 years to influences of non-Islamic religion;
iii. Approaching a Muslim to subject him to any speech on or display of any matter concerning a non-Islamic religion;
iv. Sending or delivering publications concerning any non-Islamic religion to a Muslim; or
v. Distributing any publication or publicity material concerning non-Islamic religion to a Muslim.

If found guilty, the punishment ranges between RM1,000 and RM10,000 or imprisonment of a term ranging from three to five years, depending on the offence and the State concerned. The State of Kelantan also imposes a punishment of whipping upon conviction.

[101] Seh Lih, Long, 'Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN' (Jakarta: Human Rights Resource Centre, 2015).

b) Prohibition of the use of certain words by non-Muslims

Non-Muslims are also prohibited from using certain words in relation to religions other than Islam. This prohibition applies only if the following four elements are fulfilled:

i. The word(s) used must be one of words (or its derivatives or variations) prohibited by the relevant State enactment. Examples of words that are prohibited include, amongst others, *Allah, Illahi, Rasul, Fatwa, Firman Allah, Wahyu, Iman, Imam, Ulama, Mubaligh, Dakwah, Nabi, Hadith, Syariah, Injil, Sheikh, Ibadah, Qiblat, Salat, Kaabah, Haj, Khalifah, Kadi;*[102];

ii. The word used expresses or describes any fact, belief, idea, concept, act, activity, matter, or thing of or pertaining to any non-Islamic religion;

iii. The word was published in writing; uttered in a public speech or statement; used in a speech or statement addressed to any gathering of persons; or used in any speech or statement which is published or broadcast; and

iv. At the time of its making, the person making it knew or ought reasonably to have known that it would be published or broadcast.

One of the main cases in this area is the case of *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur*.[103] The Catholic Archbishop was the publisher of 'Herald – the Catholic Weekly'. The Home Ministry had granted them a permit to do so. However, between May 1998 and September 2007, the Home Minister issued eight letters to the Catholic Archbishop requesting them to cease using the word 'Allah' in its publication. On 28 December 2007, the Home Ministry approved its publication permit. In February 2008, the Home Ministry sent the Catholic Archbishop its publication permits, which was subject to the permit conditions; the permits were also subject to the "Garis Panduan Penerbitan" dated 1 March 2007 which prohibits the applicant from using the word "Allah" in the "Herald - The Catholic Weekly."

The decision to prohibit the Catholic church from using the word "Allah" was challenged. The High Court upheld the challenge. Justice Lau Bee Lan found the use of 'Allah' to be an essential part of worship and instruction of the faith in Bahasa Malaysia speaking community of the Malaysian Catholic Church. Her Ladyship also decided that the prohibition was unconstitutional and infringed article 3(1), 11(1) and (3) of the Federal Constitution. It was also unfair and in breach of article 8(1). Finally, it was an unreasonable restriction of freedom of speech under article 10(1)(c).

The Home Ministry appealed against the decision. The Court of Appeal overturned the High Court's decision and allowed the Minister's ban on the Herald, holding that:

- The usage of the word "Allah" in the Malay version of the Herald will have an adverse effect upon the sanctity of Islam as envisaged under article 3(1) of the Federal Constitution and the right for other religions to be practiced in peace and harmony in any part of the Federation;
- Any such disruption of the even tempo of society is contrary to the hope and desire of peaceful and harmonious co-existence of other religions other than Islam in the country, particularly when the majority population in this country are Malay and whose religions are Islam. The Court of Appeal went further to state that the usage of the word "Allah" in this context would cause unnecessary confusion within the Islamic community;
- The prohibition of the use of the word "Allah" in the Herald does not inhibit the respondent's right to practice their religion; and
- The word "Allah" is not an essential or integral part of the religion of Christianity and does not attract the constitutional guarantee of article 11(1) of the Federal Constitution.

The Catholic Archbishop applied for leave to appeal to the Federal Court. Seven Federal Court Judges heard the application, which was ultimately denied by an unusually divisive 4-3 decision. What was also notable about the decision was that all the judges wrote extensive grounds, which is highly unusual, in Malaysia at least.

[102] Schedule 1 of the Selangor Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988.

[103] [2013] 8 CLJ 890 (CA).

4.2 Powers of State religious departments

To enforce the State enactments with regard to the control of propagation to Muslims, the various laws allow the State government to appoint authorised officers. It appears that in Selangor at least, the State government has appointed State religious department officials as the authorised officer. Those authorised officers have the power to:

i. investigate the commission of any offence;
ii. arrest without warrant any person suspected of having committed any such offence;
iii. order in writing the attendance before himself of any person who appears to the officer to be acquainted with the circumstances of the case;
iv. examine orally any person supposed to be acquainted with the facts and circumstances of the case and to reduce into writing any statement made by the person so examined; and
v. report the failure of any person to attend to an order, to a Magistrate, who may thereupon issue a warrant to secure the attendance of the person as required by the order.

There is an arguable case that the appointment of State officials, employed purely to administer State Syariah enactments amongst persons professing the religion of Islam, is unconstitutional, and that the authorised officers under the Control of Propagation enactments ought to be police officers or other enforcement officials who do not owe their original authority from State law meant only to regulate persons professing Islam.

By gazetting Islamic department officials as the authorised officers, the State may well be transgressing on the constitutional protection in article 3 and 11(1) that allows religious minorities to practise their faith in peace and harmony.

This aspect of the law has not been challenged as yet.

4.3 Rights and obligations of witnesses

If a person is requested to attend before an authorised officer within the meaning of a State Syariah enactment, that person is obliged to:

i. answer all questions relating to the case put to him by the authorised office provided that person may refuse to answer any question that would have a tendency to expose him or her to a criminal charge or penalty or forfeiture; and
ii. state the truth, whether or not the statement is made wholly or partly in answer to questions.

A witness ordered to appear before an authorised officer has the right to:

i. be informed that he or she is required to tell the truth provided that it will not incriminate himself or herself;
ii. ensure that the statement given to the authorised officer shall, whenever possible, be taken down in writing and signed (or affixed with thumbprint);
iii. have the statement read to him or her in the language in which he or she made it;
iv. be given the opportunity to make any corrections to the statement; and
v. be paid the reasonable travelling and subsistence expenses incurred by him or her as a result of his or her attendance.

As stated above, the position where the authorised officers under the non-propagation enactment are also officers appointed under State Syariah enactments is far from satisfactory. An arguable case can be made out, as in 4.2 above, that this position is an infringement of the right under articles 3 and 11 for persons who do not profess Islam to practise their own religion in peace and harmony.

4.4 Practical Matters - initial meeting and preliminary advice

What to ask when your client has been asked to appear before a State religious department:

a) The legal provision enabling the "*Notis Arahan*" to be issued;
b) The legal provision enabling the 'undertaking' to be imposed in the "*Notis Arahan*" (clients were asked to sign acknowledgement of receipt which imposed an undertaking to attend pre-counselling sessions);
c) Details and particulars of the offence being investigated on by the State religious department;
d) Request the investigating authority to specify the offender being investigated, and whether your client is being summoned as a suspect or witness;
e) The Religious Affairs Department may summon Muslims to attend 'pre-counselling session' (if any) at State religious department. The relevant law under which this is done must be ascertained; and
f) The legal provision and factual basis for the State religious department to require your clients to attend as either witnesses or suspects/offenders.

Samples reliefs that could be sought from the Courts include:

i. In cases where the client has been prohibited to use certain words (in a publication) by the Minister of Home Affairs under the Printing Presses and Publications Act 1984:

SAMPLE RELIEF 1

An order of *certiorari* to remove the [decision to prohibit] made by [public authority] on [date] into the High Court to be quashed forthwith.

SAMPLE RELIEF 2

An order in the nature of *mandamus* directed to the [public authority] to compel the same to [return all seized materials, etc.]

SAMPLE RELIEF 3

A declaration that article 10(1)(a) of the Federal Constitution entitles the Applicant to use the [prohibited words] in the [publication], and the [prohibition] is *ultra vires* section 7 of the Printing Presses and Publications Act 1984.

SAMPLE RELIEF 4

A declaration that article 11(3)(a) of the Federal Constitution entitles the [religious group] to use the [prohibited words] in the [publication], and the [prohibition] is *ultra vires* section 7 of the Printing Presses and Publications Act 1984.

ii. In cases where the client has been charged under State Law enacted under article 11(4) of the Constitution for using certain words (in a publication):

SAMPLE RELIEF (FOR FEDERAL COURT PROCEEDINGS UNDER ARTICLE 4(3) OF THE FEDERAL CONSTITUTION)

A declaration that the Legislature of the [State] has no power to make section 9 of the [Non Islamic Religions (Control of Propagation Amongst Muslims) Enactment].

MALAYSIAN LAW – ISSUES RELATING TO THE CONFLICT WITHIN PERSONS PROFESSING ISLAM INCLUDING STATE ACTION AGAINST PERSONS CONSIDERED DEVIANTS

Before Merdeka, the Administration of Muslim Law Enactment 1952 created a Legal Committee in Selangor under the *Majlis Agama Islam* to issue *fatwa* or rulings on any point of "Muslim law or doctrine or Malay customary law" when requested to do so by any person or a civil court.[104] This Legal Committee would be chaired by the *Mufti* for the State. Similar laws existed even before 1952 in the Muhammadan Law and Malay Custom (Determination) Enactment 1930 (cap. 196, Federated Malay States).

Since Merdeka, our Federal Constitution specifically confirms the State's power to enact such laws in the Ninth Schedule List II (State List) Item 1, i.e., "the determination of matters of Islamic law and doctrine and Malay custom". Item 1 also confirms that the States have the power to enact laws relating to "the control of propagating doctrines and beliefs among persons professing the religion of Islam". Item 9 of the State List confirms that the States can enact offences in respect of these matters.

Laws like this can, conceivably, be enacted in the States in Malaysia as each has a State religion, and whose Rulers are Heads of that Religion in the States. However, regard must be paid to the language used in the Constitution. "Islamic law and doctrine and Malay custom" and "propagating doctrines and beliefs" are specific matters; matters that are purely *religious* in nature. Thus, these matters do not, and cannot, include restrictions on general political speech and expression, for example, criticism of government authorities and laws, supporting constitutional rights and human rights efforts or advocating respect for the *Rukunegara* whose preamble states Malaysia's ambitions of "guaranteeing a liberal approach" and "building a progressive society".

Neither does it or should it, include matters in the Federal List (List I), for example, labour, medicine and health, communications or scientific research. These are *secular matters* that are beyond the jurisdiction and competence of religious authorities.

Since then, the 1952 enactment has been repealed by the Administration of Islamic Law (Federal Territories) Act 1993 which confers similar *fatwa* making powers on the *Mufti* for the Federal Territories. A majority of the States have also enacted similar laws and created a *Mufti* for the State.

It must be remembered that Islam is a matter for the States. Thus, any *fatwa* issued by the National Fatwa Council has no legal effect.

[104] Administration of Muslim Law Enactment 1952: section 40 and 41.

5.1 Factual Scenarios

The only religious denomination recognised and endorsed by the States and the Federal Territories in Malaysia as being the religion of the State(s) is orthodox Sunni Islam, whose followers are referred to in Arabic as *Ahl al-Sunnah wa al-Jama'ah* (translated in English as 'people of the tradition of Muhammad and the consensus of the *Ummah*') or orthodox Sunni Muslims. *Fatwas* determining whether a particular doctrine, belief or teaching is consistent with Islamic law, doctrine and Malay custom have been gazetted by the States over the decades. These *fatwas* usually stipulate the effect of professing such a doctrine or belief; either (a) that its followers should recant or renounce the said doctrine or belief, or (b) that they are considered "*kafir*" (unbelievers) or "*murtad*" (apostates).

i. **Intra-Religious Disputes** - Intra-religious disputes are disputes between religious groups within an established religion. In Malaysia, this is usually between orthodox Sunni Muslims (the State religion) and other religious denominations (for example Shia Muslims) or sects (for example Ahmadiyya Muslim Jama'at). Disputes of this nature have a large impact on an individual's rights to profess, practise and propagate the doctrines and beliefs of his or her religious group and the group's rights to the management of its religious affairs, the establishment and maintenance of its religious and charitable institutions and the ownership of property by it. Many other aspects of the personal lives of followers may be affected, e.g. their previously recognised Muslim marriages may be dissolved, fathers cannot be *wali* to their daughters' marriage solemnisation, they would be deprived of their right to succession or inheritance and they would not be entitled to the special economic privileges granted by the Constitution to Malays. In most States, the establishment and maintenance of mosques and the collection of money for charitable purposes relating to Islam are under jurisdiction of the *Majlis Agama Islam*; and

ii. **Control of Propagating Doctrines and Beliefs** - Laws relating to the control of propagating doctrines and beliefs seek to deal with heresy. Religious authorities would consider certain doctrines and beliefs 'deviant', or religious publications "contrary to Islamic law", after a *fatwa* is issued on the same. Over the years however, *fatwas* gazetted with respect to this matter seem to go beyond mere doctrine or belief and directly affect the expression of information and ideas of a secular nature, e.g. pluralism and liberalism. This would adversely affect Muslims who express such information and ideas given that, in many States and the Federal Territories, any person who "defies, disobeys or disputes"[105] a *fatwa* or "disseminates any opinion…contrary to any *fatwa*"[106] can be prosecuted for an offence. There can also be instances where these laws are abused by the religious authorities; i.e. a Muslim person is charged for publishing a publication "contrary to Islamic law"[107] even before any *fatwa* is issued on the same[108], or when the publication is not even "religious" is nature[109] or when the publication is published by a private limited company (and thus not subject to the jurisdiction of the Syariah court)[110]. Besides the above, it is also an offence to teach "any matter relating to the religion of Islam without a *tauliah* (accredition)"[111] by the *Majlis Agama Islam*[112]. It should however be noted that all provisions mentioned above were already in existence in the pre-Merdeka Administration of Muslim Law Enactment 1952[113].

[105] Section 9 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[106] Section 12 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[107] Section 13 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[108] *Berjaya Books Sdn Bhd & Ors v Jabatan Agama Islam Wilayah Persekutuan & Ors* [2014] 1 MLJ 138 at [35] – [36], HC.

[109] *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153, FC.

[110] *Jabatan Agama Islam Wilayah Persekutuan & Ors v Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65 at [31](f), CA.

[111] Section 11 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[112] *Fathul Bari Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 CLJ 717, FC.

[113] Sections 171, 168, 169 and 166 of the Administration of Muslim Law Enactment 1952, respectively.

5.2 The Law

What is Religion?

Case laws defining what 'religion' is are few. Judges are generally cautious about attempting to define what constitutes 'religion' given the innumerable permutations that make up the characteristics of the respective religions of the world, e.g. theistic or non-theistic, organisational structure and founding history.

The Indian Supreme Court case of *S.P. Mittal vs Union of India and Others* 1983[114] and the Pakistan Supreme Court case of *SMC No. 1 of 2014*[115] are high authorities in dealing with the issue of whether a particular group constitutes a 'religion' and thus guaranteed freedom of religion under the respective State constitutions. The freedom of religion provisions in India and Pakistan are similarly worded to article 11 of the Federal Constitution.

In Malaysia, the Court of Appeal's decision in *Fatimah bte Sihi & Ors v Meor Atiqulrahman bin Ishak*[116] also provides guidance on this issue.

The Indian Supreme Court in *S.P. Mittal* states the following propositions concerning 'religion':

i. Religion means "a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well- being";
ii. A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well;
iii. Religion need not be theistic;
iv. "Religious denomination" means a religious sect or body having a common faith and organisation and designated by a distinctive name; and
v. A law which takes away the rights of administration from the hands of a religious denomination altogether and vests in another authority would amount to violation of the right guaranteed under clause (d) of article 26 of the Indian Constitution.

In giving colour to the expression "religious denomination" in article 26 of the Constitution of India, the Supreme Court held that the expression "religious denomination" must satisfy three conditions:

i. It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;
ii. Common organisation; and
iii. Designation by a distinctive name.

[114] (1) SCC 51.

[115] [2015] 2 LRC 583.

[116] [2005] 2 MLJ 25 at paras. 3-9.

The Pakistan Supreme Court in *SMC No. 1 of 2014* when interpreting article 20 of the Constitution of Pakistan, held:

> "[13] …By freedom of religion and belief is meant the right of a person to follow a doctrine or belief system which, in the view of those who profess it, provides spiritual satisfaction. However, it is impossible to define the term 'religion' in rigid terms. The freedom of religion must then be construed liberally to include freedom of conscience, thought, expression, belief and faith. Freedom, individual autonomy and rationality characterise liberal democracies and the individual freedoms thus flowing from the freedom of religion must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as a community-based freedom.
>
> …
>
> [15]…(c)…The right to profess and practise is conferred not only on religious communities but also on every citizen. What this means is that every citizen can exercise this right to profess, practise and propagate his religious views, even against the prevailing or dominant views of its own religious denomination or sect. In other words, neither the majority religious denominations or sect nor the minority religious denomination or sect can impose its religious will on the citizen. Therefore, not only does it protect religious denominations and sects against each other but protect every citizen against the imposition of religious views by its own fellow co-believers.
>
> …
>
> (d) As far as every religious denomination is concerned, even sects within these religious denominations have been conferred the additional right to establish, maintain and manage their religious institutions. Therefore, even sects within these religious denominations have been protected against their own co-religious denominations."

In Malaysia, the Federal Constitution uses the expression "religious group" in article 11(3), which it submitted is general in nature and must therefore include religious denominations and sects. In that regard, religious denominations like Shia Muslims or sects like the Ahmadiyya Muslim Jama'at, who have *fatwas* made against them declaring them "*kafir*" or "*murtad*", are to be treated as a distinct religious group equally entitled to the rights under article 11 of the Federal Constitution and are not subject to State Islamic law made under Item 1 of the State List.

An illustrative case would be *Abdul Rahim Bin Haji Bahaudin v Chief Kadi, Kedah*.[117] In that case, Abdul Rahim applied for judicial review to prohibit the Chief *Kadi* of Kedah from hearing four Muslim offence cases against him in the Syariah court. The offences concern Abdul Rahim's distribution of religious pamphlets and documents relating to the Ahmadiyya Muslim Jema'at[118]; an offence under the now repealed section 163(1) of the Administration of Muslim Law Enactment 1962 of Kedah[119].

Abdul Rahim had publicly declared and embraced the Ahmadiyya sect in 1970. In 1981, a *fatwa* issued by the *Majlis Agama Islam* of Kedah was gazetted. The said *fatwa* says that whosoever believes in the teachings of the Ahmadiyya sect is an apostate. Abdul Rahim's only ground for the judicial review was that as he is a follower of the Ahmadiyya sect and the *Majlis* says that he is not a Muslim, therefore the *Majlis Agama Islam* and the Syariah courts have no jurisdiction to try him.

The High Court held:

> "This Application is made to the High Court under section 25(2) of the Courts of Judicature Act 1964 where the High Court in its exercise of the powers of issuing prerogative writs can, in suitable cases and in particular for the protection of fundamental liberties enshrined in Part II of the Federal Constitution, issue orders against any person or authority.
>
> The Kedah State Administration of Muslim Law Enactment 9 of 1962, section 41(3)(a) and (b) conferred a jurisdiction to the *Kadi's* or the Syariah court only to Muslims. This means that non-Muslims, (and the Applicant is a non-Muslim as declared by the *Majlis* itself,) are outside the jurisdiction of the *Majlis* and its Syariah courts.
>
> This being so, the Application is therefore allowed."[120]

It is observed that the Judge recognised that to impose Muslim law on a person declared not to be a Muslim would directly affect that person's constitutional rights; he would not be able to profess, practise and propagate his religion, guaranteed by article 11(1) of the Federal Constitution.

The binding effect of fatwas

A *fatwa*, once gazetted, is binding on every Muslim resident in the State or Federal Territories as a dictate of his religion and it shall be his religious duty to abide by and uphold the *fatwa*, unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief or opinion[121].

The Federal Court in *Sulaiman Takrib*[122] held that State Islamic laws, which penalise defiance or disobedience of a *fatwa* are offences regarding the 'precepts of Islam', and the States Legislatures have the power to make such laws. It is submitted that this cannot be correct given that under Islamic legal tradition a *fatwa* is a non-binding opinion. However, in fairness to the Federal Court, the legislative history of such a penal provision may not have been referred to it during argument. Had it been, the Federal Court should have concluded that the law was in pith and substance an offence with respect to "the determination of matters of Islamic law and doctrine and Malay custom", and the State Legislatures have been conferred with power to make such laws. While the decision in *Sulaiman Takrib* is correct, it would still be necessary for the Federal Court to revisit its erroneous legal reasoning and correct it given its potential to misdirect Judges in similar cases.

117 [1983] 2 MLJ 370.

118 A reformist sect of Islam founded in 1889 by Mirza Ghulam Ahmad in Qadian, Punjab, India (https://www.alislam.org/introduction/index.html); The Rules and Regulations of Tahrik Jadid Anjuman Ahmadiyya defines 'an Ahmadi' as "…a Muslim who believes in all the principles and tenets of Islam as pronounced by the Holy Qur'an and the Holy Prophet Muhammad, peace and blessings of Allah be upon him, and who believes Hadrat Mirza Ghulam Ahmad (peace be upon him) of Qadian to be the Promised Messiah and Mahdi as prophesied by the Founder of Islam Hadrat Muhammad, and who in all controversial issues accepts his interpretation of Islam as the only true interpretation and believes in the institution of Khilafat and owes allegiance to the current Hadrat Khalifatul Masih, Supreme Head of the Worldwide Ahmadiyya Muslim Community."

119 (1) Whoever shall print, publish or distribute for sale or otherwise, or whoever shall have in his possession any book or document giving or purporting to give instruction or rulings on any matter under the Muslim Law shall, if such book or document contains any matter contrary or repugnant to the belief of Ahli Sunnah Waljama'ah or to the tenets of Shafie, Hanafi, Maliki or Hambali sects or to any lawfully issued Fetua, shall be guilty of an offence punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars.

120 [1983] 2 MLJ 370, at pg. 371.

121 Section 34 of the Administration of Islamic Law (Federal Territories) Act 1993.

122 *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener)* [2009] 2 CLJ 54 at 65.

For example, adopting the erroneous legal reasoning in *Sulaiman Takrib*, the Federal Court in *Fathul Bari*[123] and *ZI Publications*[124] went on to hold that the offence of teaching religious matters without a *tauliah* (accredition) and publishing a publication contrary to Islamic law respectively are also offences against the precepts of Islam. Once again, it will be submitted that this cannot be correct given that these are not religious precepts. These laws are in pith and substance offences with respect to "the control of propagating doctrines and beliefs among persons professing the religion of Islam". In both cases, the Federal Court did not seem to have been appraised of the legislative history of the relevant provisions.

Freedom of speech and expression

Freedom of speech and expression is guaranteed by article 10(1)(a) of the Federal Constitution. Article 10(2)(a) confirms that only Parliament may by law restrict the said freedom. Thus, the State Legislative Assemblies cannot make laws to restrict freedom of speech and expression and neither can State authorities do the same. There are a number of laws enacted by Parliament to restrict freedom of speech and expression. The Printing Presses and Publications Act 1984 is an example. The said law empowers the Minister of Home Affairs to prohibit publications which in his opinion is prejudicial to public, morality or security.

Freedom of speech and expression includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers[125]. Freedom of speech and expression is intrinsic to the functioning of a modern democracy.

In this regard, it will be submitted that *fatwas* cannot determine matters beyond Item 1 of the State List. Religious authorities are jurisdictionally incompetent to deal with matters in the Federal List. *Fatwas* dealing with matters in the Federal List directly affect federal democratic deliberation and adversely affects Muslims who may be expressing information and ideas of a secular nature that is deemed "deviant" by religious authorities.

Given that *fatwas* are made pursuant to the law by a public authority created by law (the *Mufti*), it must follow that the legality of these *fatwas* can be subject to judicial review pursuant to paragraph 1 of the Schedule to the Courts of Judicature Act 1964, i.e. is the subject matter of the *fatwa* envisaged by the State law and the Federal Constitution and thus within the jurisdiction of the *Mufti*, and does it purport to restrict freedom of speech and expression.

Guidance on the level of judicial enquiry expected in such a judicial review can be obtained by analogy from the Court of Appeal's decision in *Majlis Agama Islam Dan Adat Melayu Perak Darul Ridzuan v. Mohamed Suffian Ahmad Syazali & Anor*[126] on the jurisdiction of another creature of statute, the Syariah courts.

Further, any attempt by the State Legislature to confer "judicial review" powers on the Syariah court would arguably be unconstitutional given that the Syariah courts can only have jurisdiction over person's professing the religion of Islam. These must be natural persons and not public authorities who cannot profess a religion. A constitutional challenge under article 4(3) of the Constitution would, arguably, be sustainable, i.e. that the State Legislature has no power to make such laws.

123 *Fathul Bari Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 CLJ 717 at paras. 24 – 25, FC.

124 *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener)* [2016] 1 MLJ 153 at [27], FC.

125 Universal Declaration of Human Rights, article 19

126 [2014] 2 CLJ 940, at 30.

5.3 Practical matters - initial meeting and preliminary advice

a) Intra-religious disputes

At the initial meeting with the potential clients, obtain information on the following matters:

i. Any relevant *fatwa* either by the States or the National Fatwa Council on the religious group in question;
ii. Materials and resources by the relevant religious group on its history, doctrines and beliefs and organisational structure; and
iii. Evidence of a decision made by the State religious authority under State laws which affect the rights of individual members or the religious group.

The clients have the following options which ought to be explained to them:

i. **Seek relief in the civil courts** - Should a particular group be declared to be "*kafir*" or "*murtad*" in a gazetted *fatwa*, reliance can be placed on the decision in *Abdul Rahim (supra)* to contend that the relevant religious authorities have no jurisdiction over the followers of the said religious group, and that the said religious group and its followers are entitled to all rights under article 11 of the Federal Constitution. A judicial review action should be instituted for this contention to be raised; or

SAMPLE RELIEF

A declaration that all persons (whether citizens or non-citizens of Malaysia) professing the doctrines and beliefs of the [religious group] are entitled to profess and practise their religion in the [State], and all laws enacted pursuant to the Ninth Schedule List II Item 1 of the Federal Constitution in the [State] are not applicable and of no effect to such persons.

ii. **Seek relief in the Syariah courts** - This option would be relevant should the *fatwa* merely stipulate that its followers should recant or renounce the "deviant" doctrine or belief. If no prosecution has been instituted against the followers under any State Islamic law and the followers have no intention of recanting or renouncing their beliefs, they may seek a declaration in the Syariah court that they are "no longer a Muslim". The Federal Court confirms in *Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan dan satu lagi*[127] that a person cannot absolve himself from State Islamic law offences committed while he was professing the religion of Islam by subsequently renouncing the said religion. Should prosecution already be instituted, they would have to instruct a *Peguam Syarie* to raise the relevant defence in the Syariah court.

[127] [2005] 1 MLJ 197, at 30 and 37.

b) Control of Propagating Doctrines and Beliefs

At the initial meeting with the potential clients, obtain information on the following matters:

i. Any relevant *fatwa* either by the States or the National Fatwa Council on the subject matter in question;
ii. Any evidence of bad faith, meetings with the religious authorities or representations made by the clients; and
iii. Evidence of a decision made by the State religious authority under State laws which affect the rights of the clients.

The clients have the following options in the civil courts, which ought to be explained to them:

i. **In cases of *fatwas* exceeding jurisdiction** - A judicial review action should be instituted contending that the subject matter of the *fatwa* is beyond that envisaged by the State law and the Federal Constitution and thus outside the jurisdiction of the *Mufti*, or that it purports to restrict freedom of speech and expression. Should an argument be raised that the matter ought to be heard in the Syariah court (purportedly exercising some "judicial review" powers conferred by law), the constitutionality of the said provision of law should be challenged in the Federal Court pursuant to article 4(3) of the Constitution;

SAMPLE RELIEF 1

A declaration that [*fatwa*] is *ultra vires* section [x] of the [Enactment] and Item 1 of List II of the Ninth Schedule of the Federal Constitution, and has no legal effect.

An order of *certiorari* to remove the [*fatwa*] made by [public authority] on [date] into the High Court to be quashed forthwith.

SAMPLE RELIEF 2

A declaration that the [public authority] has no jurisdiction to determine matters in [Item X of the Federal List] namely [Heading of Item].

ii. **In cases of investigation or prosecution for religious publications "contrary to Islamic law"** - A judicial review action should be instituted contending that a *fatwa* is a precondition to prosecution under the said law or the publication is not "religious" in nature or that the publication is published by an artificial person; and

SAMPLE RELIEF 1

An order in the nature of prohibition directed to the [public authority] prohibiting the said [public authority] from [investigating/prosecuting].

An order in the nature of *mandamus* directed to the [public authority] to compel the same to [cease investigations/discontinue prosecutions].

SAMPLE RELIEF 2

An order of *certiorari* to remove the [decision to investigate, prosecute or compelling of attendance to the Syariah court] made by [public authority] on [date] into the High Court to be quashed forthwith.

SAMPLE RELIEF 3

A declaration that the [decision to investigate, prosecute or compelling of attendance to the Syariah court] made by [public authority] on [date] is void.

iii. **In cases where prosecution has been instituted in the Syariah court for an offence with respect to "the determination of matters of Islamic law and doctrine and Malay custom" or "the control of propagating doctrines and beliefs among persons professing the religion of Islam"** - A judicial review action should be instituted contending that, as these laws are not offences against the precepts of Islam and Parliament has not conferred the Syariah courts with jurisdiction to impose punishments for offences otherwise than precept offences[128], the Syariah courts have no jurisdiction to hear such cases. Such offences should be heard in the civil criminal courts with prosecution being at the discretion of the Attorney General. Owing to the binding effect of the Federal Court's decision in *Sulaiman Takrib*, a reference to the Federal Court under section 84 of the Courts of Judicature Act 1964 would be necessary for the contentions to be fully ventilated.

SAMPLE RELIEF

A declaration that the Syariah courts in the [State] does not have the jurisdiction to impose punishments for the offence under section [x] of the [Enactment].

After explaining the options above to the clients, you should then obtain the client's informed consent on which option he or she wants to pursue.

[128] Section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965.

ACKNOWLEDGEMENT

This manual is a collaborative work by the volunteers of the Malaysian Centre for Constitutionalism and Human Rights (MCCHR). Principal writing was done by Aston Paiva, Long Seh Lih and K. Shanmuga, with editing by Lim Ka Ea. The MCCHR also wishes to acknowledge the contributions, thoughts, ideas or research provided over the years by many others (there are too many to name) the fruits of much of which are contained in this book. All errors remain those of the MCCHR. Last but not least, this manual will not be possible without the support of the American Bar Association Rule of Law Initiative.

The Malaysian Centre for Constitutionalism and Human Rights (the "Centre") is the corporate social responsibility component of Liberal Banter Sdn. Bhd. The Centre or more fondly known as *Pusat Rakyat LoyarBurok*, implements two programmes – strategic litigation and UndiMsia! a civic education initiative. Within its strategic litigation component, the Centre undertakes test cases and carries out training for lawyers.

Since 2012, the Centre has been providing strategic litigation training to lawyers, with the aim of raising awareness amongst young lawyers of the value of strategic litigation as a tool for protecting human rights – every year, at least three young lawyers who after attending these trainings, have taken up strategic litigation cases undertaken by the Centre, including religious freedom cases. The Centre believes that continued and specific training to lawyers will equip these lawyers with knowledge and skills, particularly, using human rights arguments and international law in their legal arguments. This, in turn, would enhance the capacity of lawyers to advocate for court decisions that uphold the right to freedom of religion.

This manual is a synthesis of contributions, thoughts, ideas or research of volunteers of the Centre who have been working on religious freedom cases. It complements the training and forms part of the Centre's existing strategic litigation manuals (published in January 2014).

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