

NOTES & COMMENTS

Freedom of Religion and Apostasy under International Law: With Special Reference to Article 11 of the Malaysian Federal Constitution

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The right to freedom of religion is one of the fundamental rights guaranteed in many international and regional human rights instruments. Several international documents safeguard freedom of religion including the right to convert from one faith to another. In Malaysia, the safeguard of this fundamental right is provided under Article 11(1) of the Federal Constitution with some limitations. The right to convert out of one's faith is not mentioned explicitly. However, for the non-Muslims, this right to opt out of one's faith and choose another has been regarded as an implicit part of religious liberty guaranteed by Article 11. In relation to the Muslims, the issue of apostasy is regarded as a taboo as well as a politically explosive proposition. This paper aims to examine the concept of freedom of religion under international law focusing mainly on the issue of apostasy in the context of the Malaysian Federal Constitution. The paper concludes that the position of Muslims especially in the context of embracing a new religion remains unsettled.

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1. Introduction

The definition of religion has not been provided in international law. The Universal Declaration of Human Rights of 1948 (“UDHR”)¹ only provides for the “freedom of religion.”² This fundamental credo of human rights has been incorporated in the International Covenant on Civil and Political Rights of 1966 (“ICCPR”)³ and has been reaffirmed by the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 (hereinafter the Declaration on Religion).⁴ However, the Declaration on Religion is silent on the right to change religion, though it is arguable that this right is implicit in the freedom of religion.⁵

The phrase “religion or belief” is particularly important for our reflections. Both words are related to the notion of freedom of thought and freedom of conscience. Therefore, although international law does not define religion, it does identify religion with conscience. There are a number of manifestations of religion that are to be protected under international law.⁶ Religion may involve teaching, practice, worship, and observance.⁷ It also clearly states that the right to freedom of religion or belief is an individual right that may be exercised alone, as well as in community with others.

As mentioned earlier, under international law, freedom of religion may include the right to change one’s religion or belief. This approach, however, has been strongly contested by some Muslim countries in the UN, which asserts that no Muslim has the right to abandon Islam.⁸ Looking at the definitional aspects of the term ‘religion’

¹ G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., Supp. No. 13, at 74, U.N. Doc. A/810 (1948).

² UDHR art. 18.

³ Signed on Dec. 16, 1966. 6 I.L.M. 368, 374 (1967), 993 U.N.T.S. 14531:3, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (last visited on Oct. 30, 2013).

⁴ G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. 51, at 171, U.N. Doc. A/36/684 (Nov. 25, 1981). See R. Traer, *Religion and Human Rights: “Religion” in International Law*, Religion and Human Rights, available at <http://religionhumanrights.com/Research/religion.intlaw.htm> (last visited on Jul. 16, 2013).

⁵ SHAD FARUQI, DOCUMENT OF DESTINY- THE CONSTITUTION OF MALAYSIA 352 (2008).

⁶ Traer, *supra* note 4.

⁷ UDHR art. 18; ICCPR art 18.

⁸ Traer, *supra* note 4.

from a Malaysian perspective, perhaps one would have to ask the question of whether 'religion' refers only to established and ancient religions,⁹ or does it include cults and sects with distinct philosophies and rituals of their own?¹⁰ The issue is as yet untested in Malaysian courts. The practice up to the present time has been to prosecute any Muslim or non-Muslim who is involved in 'deviationist' teachings and practices.¹¹ It would appear that in countries like Malaysia, having an official religion and *Rukun Negara* (national tenet) which affirms the commitment to a belief in God, atheistic practices may not receive much sympathy in the courts although Western ideas and international law support a broad view of the term 'religion.'¹² Muslims tend to use the word 'religion' to mean "true devotion to God."¹³ Therefore, for many Muslims, religious freedom means the freedom to embrace what is true. It does not mean the freedom to turn away from the truth.¹⁴

This paper attempts to examine the freedom of religion and apostasy under international law by comparing it with Article 11 of the Malaysian Federal Constitution (hereinafter the Constitution), which deals with the "freedom of religion." The paper is divided into six parts including Introduction and Conclusion. Part two will focus on the position of freedom of religion under international law. In this part, we shall address the issue of apostasy in the context of religious freedom from an international law perspective. Part three will deal with the limitations that could be imposed on freedom of religion under international law, bearing in mind that freedom to manifest one's religion or belief is not absolute. The discussion in this part is indeed very important because some of the arguments presented here could be used to justify the Malaysian position on restricting Muslims, in particular, from denouncing Islam as their religion. Part three will turn attention to the position of freedom of religion as stipulated under Article 11 of the Constitution. This part will focus mainly on the practice of freedom of religion with regard to the positions of non-Muslims and Muslims, taking note of the fact that under international law, freedom of religion or belief includes the right to change one's belief. In this part, we shall also address the burning issue of apostasy with regard to the position of Muslims, as well as the punishment for apostasy in Malaysia. Here, a brief reference also will be made to the position of Muslim jurists regarding the punishment for

⁹ Shad Faruqi, *Support for Religious Liberty*, SUNDAY STAR, Feb. 25, 2001, at 22. See also SHAD FARUQI, THE HUMAN RIGHTS AND CONSTITUTIONAL PERSPECTIVE 9 (2001).

¹⁰ Shad Faruqi, *Support for Religious Liberty*, SUNDAY STAR, Feb. 25, 2001, at 22.

¹¹ *Id.*

¹² *Id.*

¹³ Traer, *supra* note 4.

¹⁴ *Id.*

apostasy. Part four will discuss the limitations on freedom of religion under the Malaysian Constitution.

2. Freedom of Religion under International Law

There are three major documents in international law concerning the fundamental human rights of freedom of thought, conscience, and religion. These are UDHR, ICCPR, and the Declaration on Religion. Among the three documents, “the standard-setting norm regulating freedom of religion or belief may be found in Article 18 of UDHR,¹⁵ which provides:

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.¹⁶

It would suffice to note that UDHR equates freedom of thought and conscience to freedom of belief, and subjects that freedom to the same norms which apply to freedom of religion. The substantive components of those norms entail: (a) the right to entertain a particular religious or other belief; (b) the right to change one’s religion or belief; and (c) the right to manifest one’s religion or belief through teaching or practicing the same, or in worship.¹⁷

As perceived internationally, freedom of religion or belief includes two closely related, but nevertheless clearly distinguishable, entitlements: freedom to adopt a religion or belief of one’s own choice and freedom to manifest that religion or belief in worship, observance, practice, and teaching.¹⁸ The first entitlement relates to the inner act of believing, while the latter relates to external acts giving expression to one’s faith.¹⁹ The entitlement to entertain the inner act of believing is absolute in nature and cannot be subjected to limitations or suspension.²⁰ Under international

¹⁵ J. VAN DER VYVER, *Limitations of Freedom of Religion or Belief: International Law Perspective*, 19 EMORY INT’L L. REV. 499 (2005).

¹⁶ UDHR art. 18.

¹⁷ *Supra* note 15, at 500.

¹⁸ ICCPR art. 18(1); DECL. FROB. art. 1(1).

¹⁹ *Supra* note 15, at 500.

²⁰ *Id.*

law, the external act of manifesting one's religion or belief can be subjected to limitations only if the limitations: (1) are prescribed by law; and (2) are necessary to protect public safety, order, health, morals or the fundamental rights of others.²¹ Thus, it would appear that freedom to entertain a particular religious or even non-religious belief is afforded qualified protection by the relevant instruments of international law.

In addition to Article 18 of UDHR, reference could also be made to Article 18 of ICCPR. Under Article 18 of ICCPR, the right to freedom of religion includes: (a) the freedom to have or adopt a religion of one's choice; (b) the freedom to manifest religious beliefs in private or public, either individually or in community with others; and (c) the prohibition of coercion that would impair the right to hold a religious belief. ICCPR uses language identical to that used in UDHR, guaranteeing the "right to freedom of thought, conscience and religion." Furthermore, Article 1 of the Declaration on Religion echoes the same sentiment, stating that the right to freedom of thought, conscience and religion shall include the freedom to have a religion or whatever belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in worship, observance, practice and teaching.

As to the question of 'apostasy,' it is vital to note that the right to change one's religion or belief is accorded a full guarantee under international law. For example, the right to change one's religion was recorded in ICCPR as one's "freedom to have or adopt a religion or belief of his choice."²² ICCPR further guarantees that: "No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice."²³ Article 18 of UDHR also states that the right to freedom of religion or belief includes freedom to change his religion or belief. In addition, the Free Exercise Clause in the Declaration on Religion mimics the wording of ICCPR, except for its omission of the right to adopt a religion or belief of one's choice.²⁴ However, it is arguable that this right is implicit in the freedom of religion. There is no doubt that the right to change one's religion or belief is included in international law instruments as a particular component of the right to spread one's religion or belief. Islamic countries insisted on this omission, however, because they perceived this approach of adopting a religion or belief of one's own choice as

²¹ ICCPR art. 18(3).

²² *Id.* 18(1).

²³ *Id.* 18(2)

²⁴ DECL. FROB art 1.

incompatible with Islamic teachings.²⁵

3. Limitations on Freedom of Religion under International Law

The freedom to manifest one's religion is not absolute even under international law. The limitations imposed by law on a legally protected right fall into the following three categories of limitation: (a) those inherent in the concept of the right being protected; (b) those determined by the rights and freedoms of others; and (c) those dictated by the general interest.²⁶

A. Inherent Limitations

As noted above, defining religion is not an easy task. International law accepts that religion may involve teaching, practice, worship and observance. Hence, international law would support a broad view of 'religion,' including non-theistic creeds such as agnosticism, free thought, atheism and rationalism.²⁷

Given the conceptual difficulties, many jurisdictions seek to avoid the dilemma of having to scrutinize the exact meaning of 'religion.' In Malaysia, *e.g.*, being a traditional society with an official religion and a *Rukun Negara* (national tenet) which affirms a commitment to a belief in God, atheistic practices may not receive much sympathy in the courts.²⁸ Inherent limitations apply in the sense that the kind of beliefs that come within the protection of international law instruments tend to be religious or have something in common with religious belief.²⁹ Not every belief, therefore, is included in the protection afforded to religion and belief. Beliefs, in this context, are not merely confidence in the truth of what one knows through the medium of one's own faculties, or in what others testify, allege, guarantee, or promise.³⁰ Rather, it is the absence of sensorial or scientific verification that places religion and belief in the fold of *eiusdem generis*.³¹ The common denominator of

²⁵ B. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 167 (1996).

²⁶ *Supra* note 15, at 503.

²⁷ *Supra* note 5, at 337.

²⁸ *Id.*

²⁹ *Supra* note 15, at 506.

³⁰ *Id.*

³¹ *Id.*

religion and belief for the purposes of the international law provisions under consideration is, therefore, acceptance of the existence of something without the backing of sensorial observation, scientific demonstration, or rational proof, that is, convictions founded on metaphysical assumptions.³²

B. Protecting Rights and Freedoms of Others

All human rights are of equal importance and share equal status.³³ When conflicting rights are of equal importance, courts should attempt to strike a balance between them.³⁴ Many constitutional systems founded on a bill of rights proclaim the preeminence of certain constitutional rights.³⁵ It is likely that in every constitutional system there is, in fact, a certain basic fundamental norm determined by the historical circumstances and political structure of the country concerned that permeates the entire spectrum of rights protected.³⁶ In Malaysia, Part II of the Constitution deals with fundamental rights/liberties.³⁷ However, most of these rights are not absolute. Limitations are imposed for the purpose of protecting the rights and freedoms of others.

There are clear indications in international human rights instruments that preference is given to egalitarian, rather than libertarian, principles.³⁸ UDHR and ICCPR, both proclaim that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”³⁹ Furthermore, the very title of the Declaration on Religion indicates that its emphasis is on “all forms of intolerance and discrimination” based on religion or belief. According to its Preamble, the Declaration on Religion is founded on the basic principles of the Charter of the United Nations proclaiming “the dignity and equality inherent in all human beings.”⁴⁰

The norm derived from these directives is that freedom of religion would never be exercised in a manner that would violate human dignity. All forms of State-imposed discrimination based on religion or belief are thus unacceptable.⁴¹ Countries

³² *Id.*

³³ *Id.* at 507.

³⁴ *Id.*

³⁵ *Id.* at 508.

³⁶ *Id.*

³⁷ FEDERAL CONST. OF MALAYSIA arts. 5-13.

³⁸ *Supra* note 14, at 508.

³⁹ UDHR pmb. ¶ 1; ICCPR, pmb. ¶ 1.

⁴⁰ DECL. FROB pmb. ¶1.

⁴¹ *Supra* note 15, at 509.

founded on libertarian principles, which permit freedom of religion or belief to trump individual rights founded on human dignity and equality, are at odds with international standards of human rights protection.⁴² Thus, freedom of religion under international law is not absolute, i.e., one's freedom of religion can be limited for the sake of protecting the rights and freedoms of others.

C. General Interest of the Society

UDHR authorizes States to subject freedom of religion and belief to legally sanctioned limitations designed to uphold morality, public order, and the general welfare in a democratic society.⁴³ ICCPR expanded those grounds to include public safety, order, health, or morals.⁴⁴ This means, in essence, that freedom to manifest one's religion or belief can be curtailed, where such curtailment is strictly required in the interest of public safety, order, health, or morals or the fundamental rights of others, but it can never be taken away entirely.⁴⁵ The principle is stated in UDHR: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."⁴⁶ Thus, the limitations imposed upon freedom of religion or belief, to protect public safety, order, health, or morals or the fundamental rights of others, must be proportional to the contingency that prompted the limitation.

4. Freedom of Religion under the Malaysian Federal Constitution

Freedom of religion as a fundamental right is guaranteed under the Constitution by virtue of Article 11(1). This provision shows a special regard for religious liberty. A proper understanding of the provision reveals that every person has the right to three things: to profess; to practice; and, subject to Article 11(4), to propagate his religion. These fundamental rights are available to citizens and as well as non-citizens. They also are not only available to individuals but to groups and

⁴² *Id.*

⁴³ UDHR art. 29(2). *See also supra* note 15, at 509.

⁴⁴ ICCPR art. 18(3). *See also supra* note 15, at 509.

⁴⁵ *Supra* note 15, at 511.

⁴⁶ UDHR art. 30.

associations.⁴⁷

In addition to Article 11(1), religious liberty is further guaranteed in few other provisions of the Constitution. There is no compulsion, *e.g.*, for anyone to support a religion other than his own and no person shall be compelled to pay any tax for which the proceeds are specially allocated to a religion other than his own.⁴⁸ Also, no person shall be required to receive instruction in or take part in any ceremony or act of worship of a religion other than his/her own.⁴⁹ The Constitution does not permit discrimination, either, on the grounds of religion against employees in the public sector; in the acquisition, holding or disposition of property; or in any trade, business or profession.⁵⁰ In *The Minister of Home Affairs v. Jamaluddin bin Othman* case,⁵¹ the Supreme Court of Malaysia upheld its decision to respect the constitutional clause on the freedom of religion in its fullest sense by dismissing a plea made by the Minister of Home Affairs that conversion to Christianity by a Muslim was a punishable offence. In dismissing the appeal, the Supreme Court added that the grounds for detention in this case, when read in the proper context, were insufficient; it held that the guarantee provided by Article 11 of the Constitution, namely, the right to freedom of religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practicing his or her faith.

This fundamental right cannot be restricted even in times of emergency by an emergency law.⁵² However, it should be noted that although this fundamental right is of paramount importance in a democratic environment and well-protected under the Constitution, it is by no means absolute. In the context of Malaysia, it is complicated by political, social, economic, historical and constitutional dimensions.⁵³

Malaysia has a population of just over 28 million. According to a government census in 2010, approximately 61.3% practiced Islam (Muslim), 19.8% practiced Buddhism, 9.2% Christianity, 6.3% Hinduism and 1.3% Confucianism, Taoism, and

⁴⁷ FEDERAL CONST. OF MALAYSIA arts. 11(3) & 12(2). See also S. Aziz, *Propagation of Religious Doctrines to Muslims: A Legal Perspective*, 2 MALAYAN L. J. cxi (2010).

⁴⁸ FEDERAL CONST. OF MALAYSIA art. 11(2).

⁴⁹ *Id.* art. 12(3).

⁵⁰ *Id.* art. 8(2).

⁵¹ See 1 MALAYN L. J. 368-370, 418-420 (1989). See also Li-Ann Thio, *Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation*, 2 MALAYAN L. J. i (2006).

⁵² FEDERAL CONST. OF MALAYSIA art. 150(6A). See also the decision of the Court in the case of *Jamaluddin bin Osman* [1989] 1 MALAYAN L. J. 369 (1989), in which the court held that a preventive detention order cannot be issued on the grounds that a convert out of Islam is involved in a program for the propagation of Christianity amongst Malays. Freedom of religion under art. 11 was held to override the power of preventive detention under the Internal Security Act 1960.

⁵³ *Supra* note 5, at 341. See also S. Aziz, *Apostasy and Religious Freedom: A Response to Thio Li-Ann*, 2 MALAYAN L. J. i (2007).

other traditional Chinese religions and 0.7% practiced no religion. The remaining percentages were attributed to other faiths, including Sikhism.⁵⁴

Hence, it is vital to make reference to its practice concerning non-Muslims and Muslims in Malaysia. Under international law, it is universally accepted that freedom of religion includes the right to convert to another faith. The Malaysian position, however, is not very clear. The right to convert from one's faith is not mentioned explicitly in the Malaysian Constitution.⁵⁵ However, it is taken for granted that a non-Muslim's right to opt out of his religion is an implicit part of his religious liberty. In other words, it is evident from the constitutional provisions mentioned above that a non-Muslim in Malaysia is free to profess and practice his religion, including a change of religion. It is through the mechanism of a change of religion that a non-Muslim in Malaysia is free to adopt any religion, including Islam. A non-Muslim also is free to propagate his religion to anyone except Muslims.⁵⁶ We all know that the constitutional guarantee relating to freedom of religion is accorded much significance in countries that are multi-religious. The minority religious groups in those countries are always apprehensive about the right to profess and practise their religion. Complete religious freedom for the 39% of the population that is non Muslim has been constitutionally granted in Malaysia and cannot be violated even in times of emergency.⁵⁷

For Muslims, however, the issue of conversion or apostasy raises significant religious and political considerations. The adoption of Islam as the religion of the Federation and the compulsory subjection of Muslims to the *syari'ah* in a number of matters are reasons why the conversion of a Muslim out of Islam arouses revulsion and anger among the Malays/Muslim citizens.⁵⁸ In Malaysia, Islam is the religion of the Federation and Malays are, by constitutional definition, required to be of the Islamic faith. All Muslims are liable to prosecution if their conduct is violating Islamic precepts.⁵⁹ No Muslim can lay a claim to opt out of *syari'ah* laws the constitutional guarantee of freedom of religion notwithstanding.⁶⁰ Hence, the notion

⁵⁴ See Jabatan Federal Malaysia, Population Distribution and Basic Demographic Characteristics, available at http://www.statistics.gov.my/portal/download_Population/files/census2010/Taburan_Penduduk_dan_Ciri-ciri_Asas_Demografi.pdf (last visited on Jul. 3, 2013).

⁵⁵ Shad Faruqi, *Spotlight on Religious Freedom*, THE SUN, Jun. 1, 2006, at E7. See also *supra* note 5, at 338.

⁵⁶ FEDERAL CONST. OF MALAYSIAART. art. 11(4).

⁵⁷ *Id.* art 150(6A). It prohibits any interference with regard to freedom of religion.

⁵⁸ Shad Faruqi, *Jurisdiction of State Authorities to Punish Offences against the Precepts of Islam: A Constitutional Perspective*, The Malaysian Bar, available at http://www.malaysianbar.org.my/constitutional_law/jurisdiction_of_state_authorities_to_punish_offences_against_the_precepts_of_islam_a_constitutional_perspective.html (last visited on Jul. 3, 2013).

⁵⁹ *Supra* note5, at 336.

⁶⁰ *Id.*

that freedom of belief includes the freedom not to believe is unlikely to be accepted in Malay society.

Regardless of these significant religious and political considerations involving the conversion of a Muslim out of Islam, some still view Article 11(1) of the Constitution broadly enough to permit a change of faith despite the fact that Article 11(4) restricts the propagation of any religion to Muslims; the law nowhere forbids the voluntary conversion of a Muslim to another faith.⁶¹ The controversy regarding the issue of apostasy, specifically in relation to the application the constitutional provisions for the freedom of religion to Muslims, remains unresolved. Legal and constitutional experts hold divergent views regarding whether the Constitution allows action to be taken against apostates.⁶² Some argue that the freedom of religion guaranteed by Article 11(1) is conditional on Article 3(1) of the Constitution, which states that Islam is granted special status as the country's official religion.⁶³ Thus, to take legal action against Muslims who choose to depart from Islam or convert to other religions does not contravene the provisions of the Constitution.⁶⁴ Those who advocate for this view also draw on Article 11(4) to support their argument.⁶⁵ However, detractors hold that the court should "adhere to the spirit of the Constitution." It is said that Article 11(1) is broad enough to permit a change of faith and though Article 11(4) restricts propagation of any religion to Muslims, the law nowhere forbids voluntary conversion of a Muslim to another faith.⁶⁶ Many State laws implicitly recognize conversions out of Islam by requiring a register to be kept of those who become *murtad*(infidels) and a similar register is kept of those who adopt the Islamic faith.⁶⁷ However, recently, there were some interesting decisions in both civil and *Syari'ah* courts regarding the issue of apostasy. *E.g.*, a former religious teacher and follower of the Sky Kingdom deviant sect, Kamariah Ali, was jailed for two years for apostasy.⁶⁸

Addressing the position of Muslims, perhaps it is also important to point out that although Islam is the official religion of the Federation, the practice of anything other than *Sunni* Islam is disallowed.⁶⁹ There are various laws at the State level that

⁶¹ *Supra* note 9, at 15.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Supra* note 5, at 346.

⁶⁷ *Supra* note 9, at 14.

⁶⁸ Staff Writer, *Sky Kingdom Member Gets Two Years for Apostasy*, THE STAR, Mar. 4, 2008, at N35.

⁶⁹ S. KOMMUNIKASI, MALAYSIA HUMAN RIGHTS REPORT 2005- CIVIL AND POLITICAL RIGHTS 95 (2006).

are meant to deal with deviationist teachings or activities. The Administration of Islamic Law Enactment 1989 for the Selangor province, *e.g.*, gives exclusive powers to the *mufti*⁷⁰ to issue, amend or revoke *fatwa* (religious decrees that are binding and enforceable once gazetted).⁷¹ The *syari'ah* criminal offences legislation also makes it an offence for anyone to have an opinion or even own books contrary to the *fatwa*.⁷²

It is submitted that deviationism *per se* cannot be punished under the Constitution. It is only when the deviationist practice has adverse implications for the public order, public health and morality, that Article 11(5) authorizes penalties. Although this argument sounds convincing from the perspective of constitutional law, the reality is that Muslims are being subjected to many religious restraints due to the power of the States to punish Muslims for offences against the precepts of Islam in accordance with the Malaysian Constitution.⁷³ The power of the States to punish Muslims for Islamic crimes was confirmed by the Court of Appeal in the case of *Kamariah bte Ali v. Kerajaan Kelantan*.⁷⁴ In this case, the court held that Article 11 of the Constitution (in relation to Islam) cannot be interpreted so widely as to revoke all legislation requiring a person of the Muslim faith to perform a requirement under Islam or to prohibit them from committing an act forbidden by Islam or that prescribes a system of committing an act related to Islam.⁷⁵ The implication of this adjudication is that a Muslim cannot escape the jurisdiction of the *syari'ah* court by a unilateral act of renunciation. The *syariah* court continues to have jurisdiction until the question of status is determined at law.⁷⁶

Considering the position of Muslims, it would appear that persons of the

⁷⁰ See definition of mufti, Hobson Jobson Dictionary, available at <http://dsal.uchicago.edu/cgi-bin/philologic/getobject.pl?c.1:1:593.hobson>; The Free Dictionary by Farlex, available at <http://www.thefreedictionary.com/mufti> (all last visited on Sept. 1, 2013).

⁷¹ *Id.*

⁷² *Syari'ah* Criminal Offences Act 1997 for the Federal Territories § 9. This provision makes it a criminal offence if any person "...acts in contempt of religious authority or defies, disobeys or disputes the orders or directions of the *Yang di-Pertuan Agong* (King) as Head of the religion of Islam, the *Majlis* or the *Mufti*, expressed or given by way of *fatwa*." See also the same Act §12, which makes it an offence for any person to give, propagate, or disseminate any opinion concerning Islamic teachings, Islamic law, or any issue contrary to any *fatwa* when it is in force.

⁷³ FEDERAL CONST. OF MALAYSIA Sched. 9, List II, Item 1. It provides for offences punishable by the States in order to protect the precepts of Islam. Some of these offences include; eating, drinking or smoking openly during the hours of fasting in the month of Ramadhan; failure to perform Friday prayer; Muslims involvement in gambling; beauty contests, etc.

⁷⁴ 3 MALAYAN L. J. 657 (2002).

⁷⁵ *Id.* at 660.

⁷⁶ See the *Lina Joy v. Majlis Agama Wilayah* case, 2 MALAYAN L. J. 119 (2004). Here, the Federal Court affirmed the view taken in *Kamariah bte Ali*, which held that the issue of whether or not an individual is an apostate was one of Islamic law and not civil law, and thus, in the absence of an inquiry by the *Syariah* court, the civil court must accept a Muslim to be still a Muslim until the *Syariah* court has made a pronouncement. The civil courts may not interfere with the decisions of the *Syariah* courts because of Article 121(1A) of the Malaysian Constitution.

Islamic faith are subject to severe restraints in relation to what are deemed to be 'deviationist activities.'⁷⁷ States in Malaysia, *e.g.*, have penalized Muslims who have renounced the Islamic faith. Although there is no death penalty for apostasy in Malaysia, apostates are subject to punishments like fines, imprisonment and, to a certain extent, whipping. In certain States, apostates are detained at the rehabilitation center for up to 36 months.⁷⁸ These penalties have brought concern to human rights activists because such punishments and detention may seem contrary to the freedom of religion as enshrined in Article 11(1), as well as in Article 5(1) of the Constitution, which guarantees individual liberty under international law. It is, therefore, important to note that from a viewpoint of constitutional law, laws that punish 'deviationist activities' may raise difficult legal issues. Section 69 of the (Perlis) State Islamic and Malay Customs Enactment, *e.g.*, criminalizes 'deviationist activities.' This section may be constitutionally permissible under Schedule 9, List II, Item 1. However, anyone punished under it may assert a vigorous challenge that the law goes beyond the permissible restrictions of Article 11(5) of the Constitution, as mentioned earlier.

In addition to the above example, a number of states in Malaysia have, in the last few years, enacted 'rehabilitation laws' that permit detention and re-education of converts out of Islam. These enactments, variously referred to as Restoration of *Aqidah* (faith) or apostasy or *murtad* laws, shake constitutional ground to its roots.⁷⁹ These laws also show no mercy to the spirit of the Constitution, which guarantees religious liberty and as well as fundamental human rights under international law.⁸⁰ Hence, it has to be admitted that these laws place Article 11 of the Constitution in conflict with the conservative interpretation of religious freedom in Islam. It is, therefore, vital to note that from a constitutional law perspective, apostasy laws raise difficult constitutional issues under Articles 3, 5, 10, 11 and 12. Forced rehabilitation will be an interference with the personal liberty guaranteed by Article 5(1).

Although Muslim jurists are divided over the issue of apostasy and the right to mete out punishment for it, it is still considered as a sin and should be thus condemned. Muslim jurists cite the Holy *Qur'an*, in which Allah declares to the

⁷⁷ Perak Crimes (*Syariah*) Enactment 3/1992 §§8-11; Kelantan *Syariah* Criminal Code II Enactment 1993 §23.

⁷⁸ The States of Kelantan and Sabah appear to fix a period of detention of up to three years. Melaka seems to provide for a shorter period that is up to six months. *See generally* S. Aziz, *Propagation of Religious Doctrines to Muslims: A Legal Perspective*, 2 MALAYAN L. J. cxi (2010).

⁷⁹ *See* Perak Crimes *Syariah* Enactment 3/1992, §§ 12-13; *Syariah* Criminal Code II Enactment 1993 (Kelantan) § 4(f). *See also supra* note 5, at 345.

⁸⁰ FEDERAL CONST. OF MALAYSIA art. 11(1); UDHR art. 18; ICCPR art. 18.

effect: "There shall be no compulsion in religion."⁸¹ This verse is corroborated by another verse revealed to the Holy Prophet (Pbuh) to the effect, "Had Allah willed, everyone on the face of the earth would have professed the faith. Are you then forcing people to become believers?"⁸² Notwithstanding the clarity of the *Qur'anic* proclamations, the subject of freedom of religion, especially concerning apostasy, remains controversial. Regardless of the following facts:(1) there has been no consensus on such matters; (2) the noted Maliki jurist al-Baji also observed that apostasy is a sin which carries nothing prescribed or has no penalty; (3) such a sin may be punished under the discretionary punishment of *tazir* (which is lesser than *hudud*); and (4) the renowned Hanbali jurist, IbnTaymiyyah, many Islamic countries have agreed categorically that the punishment for apostasy is *tazir*.⁸³

Taking into account the punishment for apostasy according to the practice of various States in Malaysia, as well as the position of Islam on the issue, we are of the opinion that the questions to be asked are: Is it acceptable under Islamic law? Should there be a punishment for it in this world? Or should the apostate be left alone because no punishment for apostasy was assigned in the *Qur'an*? In response to these questions, it inevitably must be pointed out that there seems to be no consensus among Muslim jurists regarding the form of punishment for apostasy. We would like to submit that, in the context of Malaysia, in regard to the laws on apostasy in particular, the "Perlis Apostasy Law" as well as many others could raise important constitutional issues.

5. Limitations on Freedom of Religion under the Malaysian Constitution

There are several constitutional limits on religious liberty or freedom under the Constitution. The restrictions could be in the form of: permissible restraints; propagation of religion to Muslims; religion of minors; or non-mandatory practices, as well as many more.

⁸¹ *Surah al-Baqarah*, ch. 2:256.

⁸² *Surah Yumus*, ch. 10: 99.

⁸³ M. KAMALI FREEDOM OF EXPRESSION IN ISLAM 94 (1998).

A. Permissible Restraints

Article 11(1) of the Constitution, which guarantees freedom of religion, cannot be read in isolation. This provision must be read together with Article 3(1), which states that the practice of religion must not disturb peace and harmony. In other words, one is allowed to exercise his freedom of religion on the condition that it will not disturb peace and harmony in any part of the Federation.

Another permissible restraint is provided under Article 11(5), which states that the provision does not authorize any act contrary to any general law relating to public order, public health or morality. Thus, the implication of the regulation is that all religious conduct is subject to the power of Parliament to restrict it on the grounds stated above. Hence, if speech, conduct, practice or institution is grounded in religious doctrine, and if it threatens any of the three forbidden grounds listed above, it can be exterminated by a parliamentary law.⁸⁴

In addition to the permissible restraints provided under Article 11(5), additional restraints are possible in the case of Muslims. This is by virtue of Schedule 9, List II, Item 1, which grants power to State Assemblies to punish Muslims for offences against the precepts of Islam. According to Shad Faruqi, this power is used frequently to punish a wide variety of un-Islamic conduct like *khalwat* (close proximity), *zina* (adultery), gambling, drinking, beauty contests and deviationist activities.⁸⁵

B. Propagation of Religion to Muslims

It has been argued that a person's right to propagate religion among people professing Islam pursuant to Article 11(4) can be restricted by Federal law (in Federal Territory) or state law.⁸⁶ It is important to note that laws controlling propagation are meant to prevent Muslims from being exposed to heretical religious doctrines, whether they are of Islamic or non-Islamic origin, and irrespective of whether the propagators are Muslims or non-Muslims. Some scholars argue that the purpose of Article 11(4) is to insulate Malays against internationally funded and powerful proselytising forces that became entrenched in the country due to official support from the colonial government.⁸⁷ According to Andrew Harding, Article 11(4) was

⁸⁴ Shad Faruqi, *Constitutional Limits on Religious Liberty*, THE SUN, May 25, 2006, at E6. See also *supra* note 9, at 12.

⁸⁵ See *Kamariah bte Ali v. Kelantan Government* case, 3 CURRENT L. J. 766 (2002). See also *supra* note 5, at 335.

⁸⁶ KEVIN YL TAN & LI-ANN THIO, CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE 941 (1997).

⁸⁷ *Supra* note 9, at 22.

inserted primarily as a result of public order considerations.⁸⁸ However, Shad Faruqi goes further, saying that in the context of Malaysia, renunciation of Islam by a Malay would automatically mean abandoning the Malay community, adding to Harding's rationale the element of ethnicity and political factors;⁸⁹ Islam is one of the defining features of a 'Malay' in Article 160(2) of the Constitution.⁹⁰

Addressing the issue of the propagation of religion to Muslims, it would be safe to suggest that any preaching of religious doctrine to Muslims (whether by non-Muslims or unauthorized Muslims) can be regulated by state law.⁹¹ This is due to the fact that state enactments also make it an offence to convert Muslims. In recent days, this limitation or restriction has been generating a heated debate in Malaysia. The issue of conversion is an acute example of the issues underlying this heated debate.

Although we admit that the restriction of the propagation of non-Islamic religions among Muslims and State control over the propagation of Islamic doctrine may serve the purpose of maintaining social stability,⁹² the problem with these principles is that they are contrary to the spirit of freedom of religion and place the adherents of other religions (and Muslims who hold to unorthodox religious tenets) at a disadvantage compared with Muslims (or orthodox Muslims).⁹³ In the long term, the maintenance of these restrictions may have the effect of undermining the overarching principle of religious freedom.

C. Religion of Minors

Although Article 11(1) uses the word 'person' as having freedom of religion in the context of professing and practising a religion, and it is subject to Clause (4) when it comes to propagation, it becomes critical to read this provision together with Article 12(4) when the 'person' we are dealing with happens to be under 18. Thus,

⁸⁸ A. HARDING, *LAW, GOVERNMENT AND THE CONSTITUTION* 202 (1996).

⁸⁹ *Supra* note 5, at 333.

⁹⁰ Faruqi, *supra* note 84, at E6.

⁹¹ See the Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1992 §124. It reads: "Any person who helps or causes a person who professes the religion of Islam to leave his religion is guilty of an offence and shall, on conviction, be liable to a fine not exceeding four thousand ringgit or to imprisonment for a term not exceeding two years or both." See also Non-Islamic Religions (Control of Propagation Amongst Muslims) Selangor Enactment 1 of 1988 § 4; the similarly worded Enactment for Malacca No 1 of 1988 and Kedah No. 11 of 1988) § 4. These statutes make it an offence to persuade a Muslim to change his faith, to approach a Muslim to subject him to speech concerning a non-Islamic religion or to send him materials on non-Islamic religions, and to distribute such publications to Muslims in a public place.

⁹² *Supra* note 88, at 202.

⁹³ *Id.*

in *Teoh Eng Huat*,⁹⁴ the court held that in matters of religion, a child below the age of 18 must conform to the wishes of his/her parents. Based on this line of reasoning, the court ruled that the conversion of a 17-year old Buddhist girl to Islam without her parents' consent was of no effect.⁹⁵ It would appear that the decision of the then Supreme Court (now Federal Court) diffused a potentially divisive issue, given that there are serious political overtones in the religious exploitation of minors. Hence, the Supreme Court was right to overrule the decision of the High Court, although within the context of a multi-religious society, Abdul Malek J in the High Court was not right in importing Islamic law in his construction of Article 11(1).⁹⁶

Regarding the religion of minors, a controversial Administration of the Religion of Islam (Federal Territories) Bill 2013 in Parliament was recently withdrawn.⁹⁷ The Cabinet decided to withdraw the Bill in order to have an in-depth discussion regarding the issue of the status of a child's religion when his/her mother or father converts to Islam. Section 107(b) of the Bill allows for a child to be converted with the consent of only one parent.⁹⁸ This Bill was tabled in Parliament on June 26, 2013, and was to have been debated, but because of the controversy, the Government decided to withdraw the Bill. Currently, the law regarding the religion of a minor is found in Article 12(4), which cannot be read in isolation; reference has to be made to Article 160 and the Eleventh Schedule of the Constitution, which "expressly provides that all words appearing in the Federal Constitution which are stated in one gender also include the other gender, and all words in the singular also include the plural."

D. Non-Mandatory Practices

The contentious issue here is whether religious freedom would cover all aspects of religious practice. This is due to the fact that regarding religion, every person has three rights: to profess; to practice; and, subject to Clause 4, to propagate his religion. Practice means "to put into practice, to perform, to carry out, to do habitually."⁹⁹ Although this is how the word 'practice' is understood, it is important to note that in Malaysia, it has been held by the courts that freedom of religion extends

⁹⁴ 2 MALAYAN L. J. 301 (1990).

⁹⁵ Faruqi, *supra* note 84.

⁹⁶ Abdul Hamid cited Articles 12(4) and 16(4) of the Constitution in support of his decision. In applying the Islamic age of consent (according to the *Shari'ah*, this is fifteen for boys and at the onset of *baligh* or menstruation for girls), he held that the age of majority under Article 12 (eighteen years) did not apply to Article 11.

⁹⁷ F. Samy, *Deputy Prime Minister: Controversial Bill Withdrawn for Now*, THE STAR, Jul. 6, 2013, at 2.

⁹⁸ *Id.*

⁹⁹ See Chambers English Dictionary, available at <http://www.chambers.co.uk/search.php?query=Practise&title=21st> (last visited on Jul. 3, 2013)

only to those practices and rituals that are essential and mandatory. In the *Hjh Halimatussaadiah bte Hj Kamaruddin v. Public Service Commission* case,¹⁰⁰ the question was whether a female Muslim public servant could wear *purdah* to work. The apex court was of the view that the government was entitled, “in the interest of the public service,” to forbid a religious tradition that was non-essential and optional in the workplace. The same reasoning was applied in the *Fatimah Sihan & Ors v. Meor Atiqulrahman bin Ishak & Ors* case,¹⁰¹ in which Muslim schoolboys failed to get court endorsement of their demand to wear *serban*(turban) to school.

Considering the decisions of the courts above, it would appear safe to conclude that in Malaysia, freedom of religion in the context of ‘practice’ extends only to those practices and rituals that are essential and mandatory. However, such rulings may create problems in other areas, as some practices, although not mandatory, are considered part and parcel of certain religions.¹⁰² One example is polygamy; it is not mandatory for male Muslims, but denying it may be said to be a denial of religious freedom.

Based on the aforementioned limitations which are imposed on freedom of religion in Malaysia, the crux of the issue is that, although some of these limitations are in line with the spirit of international law, one could still argue that Article 11(4) of the Constitution, which limits propagation of religion to Muslims, is a violation of one’s freedom of religion under Article 18 of UDHR.¹⁰³ Proselytism itself is inherent in religion. International law stresses the need for greater respect for internationally recognized human rights norms, including the freedom to convert and the freedom to manifest one’s religion or belief, either individually or in community with others, and in public or private.¹⁰⁴ Despite these contentions, we argued that the limitation imposed on freedom of religion under Article 11(4) could be justified and said to be in line with international law. As discussed earlier, freedom of religion or belief under international law is not absolute, *e.g.*, limitations can be imposed on the basis of upholding morality, public safety, order, health and the general welfare in a democratic society.

¹⁰⁰ 3 MALAYAN L. J. 61 (1994).

¹⁰¹ 4 CURRENT L. J. 1 (2006).

¹⁰² A. BARI & F. SHUAIB, CONSTITUTION OF MALAYSIA-TEXT & COMMENTARY 40 (2004).

¹⁰³ Article 11(4) of the Malaysian Constitution reads: “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.”

¹⁰⁴ UDHR art. 18; ICCPR art. 18.

6. Conclusion

It may safely be concluded that freedom of religion or belief includes the right to change one's religion. This means that, under international law, religion is something that one can change. In Malaysia, the position taken is quite different, particularly in the context of Muslims. Thus, comparing Article 18 of UDHR with Article 11(1) of the Constitution, there is no doubt that Article 11(1) is not in line with the spirit of UDHR. First, Article 18 of UDHR allows a change of religion. Second, the term 'religion' is given a broad meaning. However, there is no case law on the definition or scope of the right to religious freedom under Article 11. One may argue that such a right includes the narrow rights mentioned by Article 11(1), namely, the rights to profess and practice one's religion.¹⁰⁵ In any case, the rights include the right to propagate one's religion; however, that right is subject to laws which control or restrict the propagation of religions other than Islam to Muslims as specified by Article 11(4). In a Malaysian context, particularly in relation to Muslims, the issue of apostasy or the right to convert out of one's faith is regarded as a taboo, as absolutely abhorrent, and as a politically explosive proposition.¹⁰⁶ In the *Daud Mamat v. Majlis Agama/Adat Istiadat Melayu, Kelantan & Kerajaan Negeri Kelantan* case, Suriyadi Halim J held that freedom of religion under Article 11 does not include the right to apostasy.¹⁰⁷ He observed that "the act of exiting from a religion is certainly not a religion, or could be equated with the right to profess and practise their religion."¹⁰⁸ His lordship added that to include the right to renounce the religion of Islam would "stretch the scope of Article 11(1) to a ridiculous height."¹⁰⁹

Article 11(4) of the Constitution is viewed as posing a great challenge to Muslims in Malaysia regarding the exercise of their religious freedom in the context of the right to convert out of Islam. By virtue of Article 11(4), the propagation of missionary activity among Muslims may be regulated by State and Federal laws. It is important to note that the Constitution does not provide similar provisions for non-Muslims.¹¹⁰ Some have argued that the restriction on proselytism has more to do with the

¹⁰⁵ *Supra* note 102, at 39.

¹⁰⁶ *Supra* note 5, at 338.

¹⁰⁷ 2 CURRENT L. J. 161(2001).

¹⁰⁸ *Id.* at 172 A-B.

¹⁰⁹ *Id.* at 172 B.

¹¹⁰ A. BARI, MALAYSIAN CONSTITUTION: A CRITICAL INTRODUCTION 157(2003).

preservation of public order and social harmony than with religious priority.¹¹¹ However, the point of contention here is whether the restriction imposed on the right of Muslims to convert to other religions is contrary to the spirit of UDHR. Article 18 of UDHR stipulates that freedom of religion includes the right to convert to another faith. But UDHR also authorizes States to subject freedom of religion and belief to legally sanctioned limitations designed to uphold morality, public order, and the general welfare in a democratic society. Nevertheless, we must take note of the fact that in Malaysia, UDHR has been given partial recognition by Section 4(4) of the Malaysia's Human Rights Commission Act 1999.¹¹² This section allows the Human Rights Commission to have regard "to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution." Keeping that in mind, in order to overcome this problem, the courts should consider adopting a rule of interpretation that municipal law should be construed as far as possible in a way that harmonizes it with international law; Parliament is presumed not to have the intention of violating Malaysia's international obligations.¹¹³

If the recommendation above cannot be implemented, the other alternative would be to consider justifying the limitations imposed on freedom of religion under Article 11(4) under international law. For this recommendation to be effective, however, Malaysia would have to ratify ICCPR. Currently, Malaysia is not a signatory to ICCPR because, under the Convention, restrictions could be imposed on 'religious rights.'¹¹⁴ Hence, taking into consideration Malays who are deeply attached to their religion, it could be argued that any attempt to weaken a Malay's faith by allowing conversion out of Islam would automatically mean a desertion of the Malay community.¹¹⁵ In the end, this would culminate in public disorder. Thus, the limitation imposed by Article 11(4) could be viewed as a case of safeguarding public order rather than that of religious priority, and thus, could be viewed as justified and proportionate to the contingency that prompted the limitation. In other words, one way of justifying this limitation would be by arguing its necessity for public order on the basis that Article 160(2) of the Constitution defines a 'Malay'¹¹⁶ as a person who practices Islam, habitually follows the Malaya customs and speaks the

¹¹¹ *Supra* note 9, at 22.

¹¹² *Supra* note 5, at 338.

¹¹³ Shad Faruqi, *Human Rights, International Law and Municipal Courts*, SUHAKAM-The Human Rights Commission of Malaysia, available at http://www.suhakam.org.my/c/document_library/get_file?p_1_id=10408&folderId=69478&name=DLFE-6202.pdf (last visited on Sept. 1, 2013).

¹¹⁴ ICCPRart. 18(3).

¹¹⁵ *Supra* note 5, at 333.

¹¹⁶ FEDERAL CONST. OF MALAYSIA art. 160.

Malay language. The impact of this clause is that Malay and Islam are interwoven together and cannot be separated. If renunciation of Islam by a Malay is allowed, it means s/he not only becomes a non-Muslim, but also becomes non-Malay; s/he would automatically be excluded from the Malay community. Thus, conversion out of Islam would disturb the demographics, as well as the political and social equilibrium of the country, and would be perceived as a threat to public order. In fact, UDHR provides: "In the exercise of his rights and freedoms, everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹¹⁷

In drafting Article 29(2), the UN recognized that for every right granted to an individual either as 'fundamental liberties' or 'human rights,' there would be competing rights of others, including the society or State in which the individual exists. Article 29 requires States to balance these competing rights, favoring the human rights of the individual in all circumstances, "subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society."¹¹⁸

Moreover, this conflict often has arisen when international legal instruments have sought to impose human rights norms on local cultures. Thus, Malaysia emphasizes stability and enforced social cohesion as an important aspect of the fundamental core of Malay values.¹¹⁹ While the concepts of human rights are universal, the application of these rights within each society and culture will vary. This position is acknowledged in the Vienna Declaration and Program of Action of the UN World Conference on Human Rights.¹²⁰ While the significance of different cultural backgrounds is to be borne in mind,¹²¹ these safeguards are required in order for a nation to maintain public order and political stability. Social, cultural, and developmental rights all have been considered by Malaysia to have greater

¹¹⁷ UDHRart. 29(2).

¹¹⁸ Dato' Muhammad Shafee Abdullah, Representative of Malaysia, The Meaning and Effect of Article 29(2) of the Universal Declaration of Human Rights 1948, Address before the ASEAN Inter-governmental Commission on Human Rights for the Asia Pacific Forum of National Human Rights Institutions (Jul. 28-31, 2008).

¹¹⁹ R. Nordin, *Malaysian Perspective on Human Rights*, JOURNAL UNDANG-UNDANG UNIVERSITI KEBANGSAAN, available at <http://www.ukm.my/juum/JUUM%202010/Malaysian%20Perspective%20on%20Human%20Rights.pdf> (last visited on Jun. 16, 2013).

¹²⁰ See *Vienna Declaration and Program of Action of the UN World Conference on Human Rights*, 32 I.L.M. 1661 (1993).

¹²¹ *Id.*

significance.

There is also an urgent need to address the issue of conversion and laws on apostasy in Malaysia. The focus here is on the question of whether a Muslim can convert out of Islam. If so, can s/he be punished for apostasy? Will such a punishment infringe his/her rights under Article 11? It is submitted that the legal scenario is complicated. However, recently, we have witnessed several cases in which Muslims have been charged in the *syari'ah* courts for apostasy and judgment has been passed.¹²² It must be pointed out that in the context of this paper, laws on apostasy and other *aqidah* (faith) laws may raise important constitutional issues,¹²³ e.g., that Article 11(1) of the Constitution is broad enough to permit a change of faith irrespective of Article 11(4). Hence, a law that violates Article 11(1) may be challenged as unconstitutional. In addition, forced rehabilitation could be viewed as an interference with personal liberty, which is guaranteed by Article 5(1) of the Constitution. This is due to the fact that the term 'law' under Article 160(2) of the Constitution does not include '*syari'ah* law.' So, are these apostasy or *aqidah* (faith) laws considered *syari'ah* laws? If the answer is 'affirmative,' then such laws could be challenged as unconstitutional by virtue of Article 160(2). Thus, someone who converts out of Islam could still invoke the violation of one's constitutional rights under Article 5(1) as a result of forced rehabilitation. Despite this contention, those who are skeptical that the mischievous design against Islam and also the harmony among the multiracial society of Malaysia would still argue that such laws are not unconstitutional on the basis of Article 11(4).¹²⁴ It is likely that what is needed is a fair balancing of interests producing the least friction and accompanied by an understanding of the constitutional provisions from a historical perspective.

In addition to the issue of apostasy, when it comes to apostasy law or a public policy to govern faith, it is likely that society must engage in an open and rational debate to determine what is in the best interest of the people.¹²⁵ All citizens should have the right to engage in dialogue on religious issues. We should not avoid discussing racial and religious issues just because they are deemed to be 'sensitive.' Thus, some have argued that apostasy should be addressed by persuasion rather

¹²² See the recent decision of *Syari'ah* High Court judge Muhammad Abdullah in Kuala Terengganu regarding a follower of the Sky Kingdom known as Kamariah Ali who was jailed for two years for apostasy. See *Kamariah Ali & Ors v. Kerajaan Negeri Kelantan & Anor*, 3 CURRENT L. J. 409 (2004).

¹²³ *Supra* note 61, at 15.

¹²⁴ FEDERAL CONST. OF MALAYSIA art. 11(4). It reads that state or federal law "may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."

¹²⁵ C. Tham, *God's Words and Man's Laws-Lawyers, NGOs Call for Statutory Council to Preserve Religious Freedom and Tolerance*, THE SUN, Dec. 10, 2000, at 17.

than criminalization.¹²⁶ It could be argued that apostasy law is a cause for concern on the basis that Islam is a religion of persuasion, not of force. Viewed from this perspective, the idea or notion of detaining apostates runs counter to the spirit of Islam, which is one of tolerance for the unbeliever. We ought to bear in mind that the *Qur'an* nowhere prescribes a worldly punishment for apostates.¹²⁷

Regarding the conversion of a non-Muslim to Islam, although implicitly, Article 11(1) seems to suggest that a non-Muslim can change his/her religion, i.e., from Hinduism or Buddhism to Islam, it is submitted that there is also a need to develop some guidelines following international law to address some of the thorny problems or issues caused by the exercise of this liberty. It should be made a requirement that the family of the aspiring convert must be informed and must be heard.¹²⁸ Also, no conversion certificate should be issued until the issues of divorce, distribution of property, guardianship and custody of children have been resolved in accordance with the law under which a marriage took place.

¹²⁶ *Id.* This view is shared by academics like Shad Faruqi. See Faruqi, *supra* note 5, at 352.

¹²⁷ See *Surah al-Imran* 3:86-89; *al-Baqarah* 2:217; and *Surah al-Nahl* 16:106.

¹²⁸ *Supra* note 55, at E7.

