

# *Asian Journal of Comparative Law*

---

*Volume 2, Issue 1*

2007

*Article 6*

---

## Law of Apostasy and Freedom of Religion in Malaysia

**Mohamed Azam Mohamed Adil**, *MARA University of  
Technology, Shah Alam, Malaysia*

**Recommended Citation:**

Mohamed Adil, Mohamed Azam (2007) "Law of Apostasy and Freedom of Religion in Malaysia," *Asian Journal of Comparative Law*: Vol. 2: Iss. 1, Article 6.

**DOI:** 10.2202/1932-0205.1060

# Law of Apostasy and Freedom of Religion in Malaysia

Mohamed Azam Mohamed Adil

## Abstract

The right to freedom of religion is one of the fundamental rights guaranteed in Islam. This is emphasised in verse 256 of Sura al-Baqara: "Let there be no compulsion in religion". However, the majority of classical Muslim jurists opine that the right to freedom of religion is not applicable to Muslims, that Muslims who intend to leave the Islamic faith or who have apostatised should be condemned to the death penalty. In reality, punishment for apostasy is not prescribed in the Qur'an and had not been practised by the Prophet (S.A.W.). Instead, the Prophet (S.A.W.) had imposed the death penalty upon apostates because their acts were contemptuous of, and hostile towards, Islam. Muslims who merely renounced the Islamic religion were only required to undergo a process of repentance (tawba). The right to freedom of religion is guaranteed in Article 11(1) of the Federal Constitution of Malaysia. However, as Islamic matters belong to the state jurisdictions, most provisions in relation to apostasy are under the exclusive jurisdiction of the Shari'a Courts. Apostates are subject to punishments such as fine, imprisonment and whipping. This article makes an in-depth study of the right to freedom of religion and the issue of apostasy from the Islamic law perspective, and argues that Muslims who intend to leave the Islamic faith are only required to undergo a process of repentance (tawba), and any punishment prescribed for apostasy is contrary to the right to freedom of religion.

**KEYWORDS:** apostasy, freedom of religion

**Author Notes:** This article is based on a paper presented at the 3rd. ASLI Conference, Organised by the East China University of Politics and Law, Shanghai, 25-26 May 2006.

## I. INTRODUCTION

While the right to freedom of religion is guaranteed in all religions, classical Muslim jurists argue for a restrictive scope of the right to freedom of religion in Islam. According to these classical Muslim jurists, Muslims who intend to leave the Islamic faith are subject to the death penalty. These classical Muslim jurists argue that the right to the freedom of religion only applies to those who wish to convert to Islam. Once an individual becomes a Muslim, he is prohibited from converting out of Islam.<sup>1</sup>

In Malaysia, although the Federal Constitution guarantees the right to freedom of religion, Muslims who intend to renounce Islam or who have apostatised, in reality, face considerable obstacles, among others, various punishments for apostasy.

## II. THE MEANING OF APOSTASY

Apostasy, in its ordinary meaning, denotes “abandonment of one’s religious faith, party, cause, etc”.<sup>2</sup> The Arabic equivalent term for apostasy is ‘*ridda*’ and ‘*irtidad*’. The former signifies turning back from Islam to another religion or to unbelief, while the latter has an additional meaning, i.e. one who forsakes Islam for unbelief or for another religion is called a ‘*murtadd*’.<sup>3</sup> The verb is ‘*radda*’, literally means, “turning back” i.e. to return from something and come back.<sup>4</sup> As such, ‘*radda-yaruddu*’ means “to retreat, to retire, to withdraw, or fall back from, to revoke, to resist, to oppose, to revert, to deny, to obey, to defect, to revolt, to desert, to run away, to return from it or to return to backward after one’s submission to the right or the true belief”.<sup>5</sup>

In Islamic jurisprudence, most classical and modern Muslim jurists attempt to define apostasy as a “disbelief or turning back from Islam through

---

<sup>1</sup> Mohamed S. El-Ewa, *Punishment in Islamic Law* (American Trust Publications, 1982) at 52.

<sup>2</sup> *Collin’s Dictionary of English Language* (London, 1979) at 67.

<sup>3</sup> Edward William Lane (Ed.), *Arabic English Lexicon*, Book I, Part 3, (Williams and Norgate, London, 1867) at 1061-1062; Mohamed S. El-Ewa, *Punishment in Islamic Law*, *supra* n. 1 at 49-50; Rudolph Peters & Gert J.J. De Vries, “Apostasy in Islam” in *Die Welt des Islams*, Vol. XVII, (1976-1977) pp. 2-3.

<sup>4</sup> *Lisan al-‘Arab*, Vol. 3, Dar Sadir, Beirut, 1374 AH/1955 AD, p.173; C.E. Bosworth, *et.al*, *The Encyclopaedia of Islam*, Vol. VII. (E.J. Brill, Leiden, 1993) at 635.

<sup>5</sup> Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh*, Vol. VII, (Dar al-Fikr, Syria) at 183; *al-Mawsu‘a al-Fiqhiyya*, Vol. 22, Wizara al-Auqaf wa Shu‘un al-Islamiyya (Kuwait, 1992 AD/1412AH) at 180; S.A. Rahman, *Punishment of Apostasy in Islam*, Kitab Bhavan, (New Delhi, 1996) at 9; ABM Mahbulul Islam, *Freedom of Religion in Shari‘a: A Comparative Analysis* (A.S. Nordeen, Kuala Lumpur, 2002) at 179.

belief, word or deed”.<sup>6</sup> Mahmoud Ayoub prefers to describe apostasy as “an act of rejection of faith committed by a Muslim whose Islam had been affirmed without any coercion by the two *shahadahs* that there is no god except God and that Muhammad S.A.W. is the messenger of God”.<sup>7</sup> It could also be defined as “disbelief or rejection of belief of a Muslim with explicit statement that he inflicts on himself or an action which holds him responsible”.<sup>8</sup> Thus, a Muslim who insults Islam by banishing the *Qur’an*, humiliating the Prophet,<sup>9</sup> and denying Islamic ritual obligations such as exclamation for praying and fasting, or neglecting forbidden acts such as drinking liquor, committing adultery and fornication could constitute apostasy.<sup>10</sup>

In most of the classical Muslim jurists’ writings, there are four broad aspects of the constitution of apostasy, i.e. a) Apostasy in Faith (*Ridda fi al-‘Aqida*), b) Apostasy in Actions (*Ridda fi al-Af’al*), c) Apostasy in Statement (*Ridda fi al-Aqwal*) and Apostasy in Abandoning of Obligation (*Ridda al-Tark*).

### III. THE MEANING OF THE RIGHT TO FREEDOM OF RELIGION IN ISLAM

The root source of this fundamental right is embodied in verse 256 of *Sura al-Baqara*: “Let there be no compulsion in religion”. Based on this command, many jurists and scholars postulate that among the rights that are manifested in personal liberty is the freedom of the individual to profess the religion of his or her choice without compulsion. A person also has a freedom to observe and to practise his or her faith without any fear of, or interference from, others.<sup>11</sup> Hence, every individual is given the absolute freedom to choose any religion he or she prefers. The *Qur’an* says: “The truth is from your Lord. Let him who will, believe, and let

<sup>6</sup> Al-Dusuqi, *Hashia al- Dusuqi*, Vol. 4, Dar al-Fikr, n.d. p. 301; al-Sharbini, al-Khatib, *Mughni al-Muhtaj*, Matba’a al-Halabi, 1957, p. 134; Ibn Qudama, *al-Mughni wa al-Sharh al-Kabir*, Vol. 10, Dar al-Fikr, Beirut, 1404 AH/1983 AD, p. 98.

<sup>7</sup> Mahmoud Ayoub, “Religious Freedom and the Law of Apostasy in Islam”, *Islamochristiana*, Vol. 20, 1994, p. 76.

<sup>8</sup> *Al-Mawsu’a al-Fiqhiyya*, *supra* n. 5, p. 180; S.A. Rahman, *Punishment of Apostasy in Islam*, *supra* n. 5, p. 9.

<sup>9</sup> However, a few modern scholars appear to label this act as blasphemy; see for example Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Text Society, Cambridge, Revised Edition, 1997) p. 213-215.

<sup>10</sup> Al-Sharbini, al-Khatib, *Mughni al-Muhtaj*, *supra* n. 6, pp. 134-136; al-Dusuqi, *Hashiyya al-Dusuqi*, *supra* n. 6, p. 303; *Duff’s Miscellaneous Works, Abolition of the Death-penalty for Musalmans Embracing Christianity in Turkey; Correspondence Between Sir Culling E. Eardley & Rev. Dr. Duff*, Vol. 5, p. 17; Mahfodz Mohamed, *Jenayah Dalam Islam: Satu Kajian Ilmiah Mengenai Hukum-hukum Hudud* (Nurin Enterprise, K.Lumpur, 1993) pp. 123-129; Paizah Ismail, *Undang-undang Jenayah Islam*, (ABIM, P.Jaya, 1991) p. 224.

<sup>11</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam*, *supra* n. 9, p. 87.

him who will, reject (it)".<sup>12</sup> The *Qur'an* also states that under no condition should anyone be forced to accept a religion or belief against his or her will.<sup>13</sup> As Fathi Uthman observes "No power of any kind in the Islamic state may be employed to compel people to embrace Islam. The basic function of the Islamic state, in this regard, is to monitor and prevent the forces which might seek to deny the people their freedom of belief".<sup>14</sup>

#### IV. THE SCOPE OF THE RIGHT TO FREEDOM OF RELIGION IN ISLAM

There are at least two different views over the issue of the right to freedom of religion in Islam. The first view echoed by the classical jurists suggests that freedom of religion in Islam is not absolute. Hence, Muslims are strictly forbidden to leave the Islamic faith. For those who infringe this rule, the punishment of death penalty is likely to be imposed.<sup>15</sup>

The modernists argued that the right to freedom of religion in Islam is absolute, as humankind is bestowed with a choice whether to accept or reject the Islamic faith. Furthermore, whether a person embraces Islam is closely connected to the '*hidaya*' (guidance) embodied in the *Qur'an*.<sup>16</sup> According to Abdulaziz A Sachedina, a human being may reject this guidance without giving any reason for it. If he rejects the guidance provided by the *Qur'an*, he will be led astray spiritually, and will suffer for the choice that he had made.<sup>17</sup>

To the modernists, absolute freedom of religion means that an Islamic state cannot force a person to embrace Islam, as each individual has a right to follow the religion of his choice.<sup>18</sup> In fact, history shows that the Prophet Muhammad S.A.W. did not compel non-Muslims to embrace Islam. As a messenger of Allah S.W.T., the Prophet merely asked his fellow beings to follow the right path. He invited non-Muslims to embrace Islam but did not use force to make them accept Islam. As such, the majority of Muslim jurists are of the view

---

<sup>12</sup> *Al-Qur'an, al-Kahf*, 18:29.

<sup>13</sup> Muhammad Abu Zahrah, *Tanzim al-Islami Li al-Mujtama'* (Matba'ah Mukhaymar, Cairo, N.D.) p. 190; see also al-'Ili, 'Abd al-Hakim Hassan, *al-Hurriyya al-'Ammh* (Dar al-Fikr, 1403 AH/1983 AD) p. 330.

<sup>14</sup> Muhammad Fathi Uthman, *Huquq al-Insan Baina al-Shari'a al-Islamiyyah Wa al-Fikr al-Qanun al-Gharbi* (Dar al-Shuruq, 1401AH/1982AD) p. 91.

<sup>15</sup> Al-Shafi'I, Muhammad Idris, *al-Umm*, Vol. V (al-Matba'a al-Amiriyya, Egypt, 1322 AH) p. 165; al-Samara'i, *Ahkam al-Murtad fi al-Shari'a al-Islamiyya* (Dar al-'Arabiyya, Beirut) p. 192.

<sup>16</sup> *Qur'an, al-Shams*, 91:7-10.

<sup>17</sup> Abdulaziz Sachedina, "Freedom of Conscience and Religion in the Qur'an" in David Little *et.al*, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty*, (University of South Carolina Press, 1988) p. 58.

<sup>18</sup> Muhammad Fathi Uthman, *Huquq al-Insan*, *supra* n. 14, pp. 29-37.

that if a person is compelled to accept Islam, then such an act of conversion is not valid.<sup>19</sup>

### V. THE QUR'ANIC INTERPRETATION ON “LET THERE BE NO COMPULSION IN RELIGION”

The most common verse that deals with the right to freedom of religion is stated in *Sura al-Baqara* where Allah says: “Let there be no compulsion in religion: Truth stands out clear from error: whoever rejects evil and believes in Allah hath grasped the most trustworthy handhold that never breaks”.<sup>20</sup>

This is generally taken to mean that Islam promotes religious freedom and is against any compulsion in religion. According to the translation by Abdullah Yusuf Ali, Islam never imposes on an individual to accept its religion. He further says:

Compulsion is incompatible with religion. Because religion depends upon faith and will, and this would be meaningless if induced by force. Truth and error have been so clearly shown by the mercy of Allah that there should be no doubt in the minds of any persons of good will as to the fundamentals of faith. Allah's protection is continuous, and His plan is always to lead us from the depths of darkness into the clearest light.<sup>21</sup>

In many books of *Tafsir al-Qur'an* (Interpretation of The *Qur'an*), many commentators support the right to freedom of religion. However, some of them adopt a restrictive interpretation on this matter. Al-Qurtubi, al-Tabari and al-Tusi, for example, are among those that suggest that the verse: “Let there be no compulsion in religion” does not actually carry the literal meaning, i.e. a person is actually free from being compelled in religion. According to them, there are four views on this matter. First, the right to freedom of religion only applies to the people of the book (*ahl al-kitab*) from which the Islamic state received a poll-tax (*jizya*).<sup>22</sup> Second, that the verse “Let there be no compulsion in religion” was abrogated by the verse that ordained *jihad* (holy war) “Seize them and slay them wherever ye find them”,<sup>23</sup> since Allah had ordered a war against them.<sup>24</sup> It was

<sup>19</sup> Rashid Rida, *Tafsir al-Manar*, Vol. XI, p. 484.

<sup>20</sup> The *Qur'an*, *al-Baqara*, 2:256.

<sup>21</sup> Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (1411 AH/1991 AD) p. 106.

<sup>22</sup> See Taufiq al-Hakim, *Mukhtasar Tafsir al-Qurtubi al-Jami' Li Ahkam al-Qur'an*, al-Hai'ah al-Masriyya al-'Ammah Li al-Kitab (1977) pp. 191-192; see also Turath al-Islam, *Tafsir al-Tabari*, Vol. 5, (Dar al-Ma'arif, Egypt) pp. 412-413; see also al-Ta'fah Abi Ja'far Muhammad bin al-Hassan al-Tusi, *al-Tibyan fi Tafsir al-Qur'an*, Vol. 2, (Maktaba al-Amin, 1367 AH/1957 AD) p. 311.

<sup>23</sup> The *Qur'an*, *al-Nisa'*, 4:89.

also due to the compulsion carried out by the Prophet towards the Arab tribes to accept Islam, failing that they shall be killed.<sup>25</sup> Third, it was said that the people of *Ansar* (local community of Medina) intended to compel their children to convert to Islam, and Allah prohibited them from carrying this out.<sup>26</sup> There are numerous narrations with regard to whom this verse was revealed to. It is narrated by Ibn ‘Abbas that the *Banu Nadir* (a Jewish tribe) and their women used to adopt children for breast-feeding. The *Ansar*, however, protested against this custom, fearing that their children might convert to Judaism. The verse “Let there be no compulsion in religion” was revealed then, giving full freedom of choice to the children either to believe in Islam or not, because they had been exposed to Jewish orientation from their foster parents.<sup>27</sup> It is also said that Ibn ‘Abbas reported another story on the same matter, that two sons of ‘Abdul Hussain of the *Ansar* community had converted to Christianity by a Syrian entrepreneur without the consent of the father. The father had lodged a complaint to the Prophet hoping that he would issue an order forcing the Syrian man to return his children for the sake of religion. Then, the verse of “Let there be no compulsion in religion” was revealed granting a full consent to the Syrian businessman’s action.<sup>28</sup> It was also contended that a Muslim belonging to the tribe of Salim Bin ‘Awf of Medina, whose two sons had embraced Christianity, had asked them to convert to Islam but they were reluctant to do so. The father brought them before the Prophet and asked him to intervene in the controversy. It was on this occasion, according to al-Tabari, that the “Let there be no compulsion in religion” verse was revealed, and the father apparently on the advice of the Prophet, left his two sons alone.<sup>29</sup> Fourth, “Let there be no compulsion in religion” means people who have converted to Islam after being rebels should not be killed, and their conversion to Islam should be accepted even though there was an element of force.<sup>30</sup>

## VI. PUNISHMENT FOR APOSTASY IN THE ISLAMIC LAW

As far as punishment for apostasy is concerned, there appears to be no consensus among the Muslim jurists. There are at least three views: the first group, representing the classical Muslim jurists, opines that Muslims who apostatised

---

<sup>24</sup> Al-Tusi, *al-Tibyan fi Tafsir al-Qur’an*, *supra* n. 22, p. 311.

<sup>25</sup> Taufiq al-Hakim, *Mukhtasar Tafsir al-Qurtubi*, *supra* n. 22, p. 191; see also Turath al-Islam, *Tafsir al-Tabari*, *supra* n. 22, pp. 414-415.

<sup>26</sup> Turath al-Islam, *Tafsir al-Tabari*, *ibid*, p. 408; Al-Tusi, *al-Tibyan fi Tafsir al-Qur’an*, *supra* n. 22, p.311.

<sup>27</sup> Turath al-Islam, *Tafsir al-Tabari*, *ibid*, p. 408; Taufiq al-Hakim, *Mukhtasar Tafsir al-Qurtubi*, *supra* n. 22, p.192.

<sup>28</sup> Taufiq al-Hakim, *Mukhtasar Tafsir al-Qurtubi*, *ibid*, p. 192.

<sup>29</sup> Abduliaziz Sachedina, “Freedom of Conscience and Religion in the *Qur’an*”, *supra* n. 17, p. 68.

<sup>30</sup> Al-Tusi, *al-Tibyan fi Tafsir al-Qur’an*, *supra* n. 22, p. 311.

should be sentenced to death penalty after the lapse of the period of repentance, as this offence is categorised under the *hadd*<sup>31</sup> offences.<sup>32</sup>

The second group, comprising the modernists, suggests that the act of leaving the Islamic faith is a matter of the right to freedom of religion. A mere renunciation from the religion of Islam without contemptuous attack on the religion of Islam is free from worldly punishment as he will be punished in the hereafter.<sup>33</sup>

The third group of Muslim jurists argues that the type of punishment for apostasy is categorised under *ta'zir* on the ground that there is no single verse from the *Qur'an* mentioning such worldly punishment.<sup>34</sup>

It must be noted here that there is a conflict of *Hadith* on whether an apostate should be put to death. It has been pointed out by some Muslim jurists that the Prophet S.A.W. had sentenced a death penalty upon traitors (*baghy*) not as a result of apostasy.<sup>35</sup> According to Ibn Taimiyyah, the *Hadith* that states “the life of a Muslim can be taken if he commits adultery, murder or leaves his religion” is directed specifically against a traitor (*baghy*) and not against the apostates.<sup>36</sup> Furthermore, the principal *Hadith* that says “whoever changes his religion shall be killed” is considered weak (*daif*), and is conveyed in the form of a general provision (*'am*) which is in need of specification (*takhsis*). It is further said that instead of being specific, the said *Hadith* is too general in scope.<sup>37</sup>

A number of Muslim jurists argue that apostates should be sentenced to death penalty. AbdulHamid A. AbuSulayman tried to explain how the classical jurists could have gone wrong in their interpretation. According to him, there at least three confusions. First, there is a confusion in regard to the space-time factor where the issue of apostasy related to a conspiracy led by some of the Jewish communities to create chaos and confusion. The tactic used by this group was to convert to Islam and subsequently leave the religion as a group. This hypocritical conduct on the part of this group had resulted in the Prophet sentencing them to death based on that particular incident.<sup>38</sup> The second confusion occurred in the

<sup>31</sup> *Hadd* is the singular form of the word *hudud*. *Hadd* means an unalterable punishment fixed by the Qur'an or Prophet's Tradition as a right of Allah for a crime. *Hadd* cannot be increased, decreased, altered or remitted by anyone including the head of an Islamic State.

<sup>32</sup> See Mohamed Azam Mohamed Adil, “Kebebasan Beragama dan Hukuman Ke Atas Orang Murtad di Malaysia” in Ahmad Hidayat Buang (Ed.), *Mahkamah Syariah di Malaysia Pencapaian dan Cabaran* (Penerbit Universiti Malaya, 2005) p. 179.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Mohamed S. El-Ewa, *Punishment in Islamic Law*, *supra* n. 3, pp. 51-53.

<sup>36</sup> *Ibid.*

<sup>37</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam*, *supra* n. 9, p. 93.

<sup>38</sup> AbdulHamid A. AbuSulayman, *Towards an Islamic Theory of International Relations: New Directions For Methodology and Thought* (The International Institute of Islamic Thought (IIIT), Hendon, 1993) pp. 108-109.

early period of Islam, when the classical Muslim jurists took the act for what it appeared to be and not for what it was meant to be. They mistook political conspiracy for eliminating the exercise of the right to freedom of religion. The classical Muslim jurists seemed to exercise little analysis concerning the whole question, as the word ‘apostasy’ alone determined their position. Hence, the position taken by the classical Muslim jurists pertaining to the issue of apostasy was not against the right to freedom of religion, but rather to enforce the Islamisation policy on the warring Bedouin tribes and towards checking conspiracy.<sup>39</sup> The third confusion arises in regard to the action taken by the first Caliph, Abu Bakar, against those who were reluctant to pay *zakat*, which the classical Muslim jurists would regard as acts of apostasy. In reality, the action taken by Abu Bakar was merely a political measure against subversive activity, and had nothing to do with the exercise of the right to freedom of religion.<sup>40</sup>

A contemporary scholar, ‘Abd al-Muta’ali al-Sa’idi agrees with the modernists. According to him, an apostate is no different from a person born as a non-believer; just as the non-believer is allowed to profess his religion, the apostate is allowed to leave Islam. For support, he cites the views of the Muslim jurists of the past such as Ibrahim al-Nakha’i, Hassan al-Basri, Sufyan al-Thawri, ‘Abd Wahab al-Shar’rani and Shams al-Din al-Sharakshi.<sup>41</sup> It is to be noted however, that Al Sa’idi’s views are not free from controversy. When (both editions) of his book<sup>42</sup> were published, he was vehemently criticised by scholars of the highly prestigious al-Azhar University in Egypt. In another book, al-Saidi has suggested that there were other factors that led the Prophet S.A.W. to pronounce the sentence of death on the apostates.<sup>43</sup> According to him, at that time, those who had apostatised were engaged in a rebellion against Islam, and the punishment of death was imposed on them not for their act of apostasy but for the act of rebellion against Islam.<sup>44</sup> Another factor cited by this scholar was, although the *munafik* (hypocrites) had left Islam, the Prophet S.A.W. did not pronounce the sentence of death on them as they had not killed anyone. Al-Sa’idi uses this analogy to conclude that if apostates do not rebel against Islam, they will not be

---

<sup>39</sup> *Ibid*, p. 112.

<sup>40</sup> *Ibid*, p. 113-114.

<sup>41</sup> See Mahmoud Ayoub, *Religious Freedom and the Law of Apostasy in Islam, Islamchristiana*, vol. 20 (1994) p. 89; Mohammad Hashim Kamali, *Freedom of Expression in Islam, supra* n. 9, p. 93. See also Mohammad Hashim Kamali, *Punishment in Islamic Law an Enquiry into the Hudud Bill of Kelantan* (Kuala Lumpur: Institut Kajian Dasar, 1995) p. 35.

<sup>42</sup> ‘Abd al-Muta’ali al-Sa’idi, *al-Hurriyyah al-Diniyyah fi al-Islam*, (Dar al-Fikr, 1955 & 2000)

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

<sup>44</sup> ‘Abd al-Muta’ali al-Sa’idi, *Hurriyyat al-Fikr fi al-Islam*, p. 85.

subject to the punishment of death, but will be given time to repent.<sup>45</sup> The views of al-Sa'idi are shared by many modernist jurists such as Rashid Rida<sup>46</sup> (and his mentor) Muhammad 'Abduh, Mohammad Hashim Kamali,<sup>47</sup> Abdullahi An-Naim,<sup>48</sup> Muhammad Saleem el-Ewa,<sup>49</sup> Mahmoud Ayoub,<sup>50</sup> Mahmud Shaltut,<sup>51</sup> Rashid Ghanoushi,<sup>52</sup> Yusof al-Qardhawi<sup>53</sup> and many others. The modernists adopt the view that those who leave Islam without committing acts of sabotage or betrayal against Islam or without insulting, degrading, reviling or ridiculing Islam will not suffer any punishment in this world as such punishment is postponed to the hereafter.<sup>54</sup>

It is said that the stand of the classical Muslim jurists that an apostate should be sentenced to death is due to a failure on their part to appreciate the difference between an act of apostasy and an act of blasphemy.<sup>55</sup> It has been argued that by virtue of the difficulty of differentiating these two acts, it is quite understandable that the classical Muslim jurists would have regarded an act of blasphemy as a category of apostasy, and that those who commit the two offences would suffer the death punishment. In reality, apostasy may occur without the presence of elements constituting acts of rebellion or insult against Islam; on the other hand, acts of insulting Islam may lead to acts that ridicule Islam or are hostile to Islam.<sup>56</sup> As there is a difference between the two offences under the law, the punishment must necessarily be different.<sup>57</sup>

---

<sup>45</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam*, *supra* n. 9, pp. 92-107; see also his book, 1995, pp. 33-37 and another book, *Islamic Law Issues and Development*, (Ilmiah Publishers, K Lumpur, 2000) pp. 207-209 and 214-219.

<sup>46</sup> Rashid Rida, *Tafsir al-Manar*, vol XI, p. 484.

<sup>47</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam*, *supra* n. 9, pp. 92-107; see also his books 1995, pp. 33-37 and 2000 *supra* n. 45, pp. 207-209 and 214-219.

<sup>48</sup> Abdullahi An-Naim, "The Islamic Law of Apostasy and its Modern Applicability: a Case from the Sudan" in *Religion*, vol. 16, pp. 210-217.

<sup>49</sup> Muhammad Saleem el-Ewa, *Punishment in Islamic Law*, *supra* n. 3, pp. 50-56 and 61-64.

<sup>50</sup> Mahmoud Ayoub, "Religious Freedom and Law Apostasy in Islam", *supra* n. 7, pp. 77-91.

<sup>51</sup> Mahmud Shaltut, *al-Islam Aqida wa Sharia* (Maktabah al-Shuruq, 1992) pp. 280-281.

<sup>52</sup> Rashid Ghanoushi, *al-Hurriyyat al-Am fi al-Daula al-islamiyya*, Markaz Dirasat al-Wahda al-'Arabiyya, 1993, pp. 48-51.

<sup>53</sup> Yusof al-Qardhawi, *Jenayah Murtad dan Hukumannya Menurut Perspektif al-Quran dan al-Sunnah*, (Transl: Zaharan Mohamed & Mohd Akhir Yaacob) (Rmi Multimedia Publishing, Shah Alam, 2000) pp. 52, 56-57.

<sup>54</sup> Muhammad Saleem el-Ewa, *Punishment in Islamic Law*, *supra* n. 3, p. 50.

<sup>55</sup> For further discussion on this topic, see Mohammad Hashim Kamali, *Freedom of Expression in Islam*, *supra* n. 9, p. 213.

<sup>56</sup> Mohammad Hashim Kamali, *ibid*, pp. 213-215.

<sup>57</sup> *Al-Mawsu'ah al-Fiqhiyyah*, *supra* n. 5, pp. 184-186; see also al-Samara'i, *Ahkam al-Murtad Fi al-Shari'ah al-Islamiyyah*: Dar al'Arabiyyah (Beirut), pp. 92-110.

## VII. THE SPECIAL POSITION OF ISLAM IN THE FEDERAL CONSTITUTION

The Report of the Reid Commission was silent on the provision on Islam as a State Religion. It was only Justice Abdul Hamid of Pakistan who made a note of dissent with regard to this matter.<sup>58</sup> The Alliance party had recommended that a provision on Islam as the religion of the Federation should not effect non-Muslims who would not be imposed with any disability in professing, propagating and practising their religions, and indeed, it would not prevent the State from being a secular State.<sup>59</sup> As emphasised by Justice Hamid, since it was a unanimous stand by the Alliance, the recommendation to include this position should be accepted and be inserted in the Constitution.<sup>60</sup> It was understood that in the early stage of the meetings, the Rulers were reluctant to accept this proposal as they were doubtful whether the provision might have taken away their powers on Islam. Since Islam and Malay customs were the only powers left to the Rulers, and indeed were put under the jurisdiction of the respective states, they would not want to lose more power to the popularly-elected government. But the Alliance had made it clear that this would not jeopardise the prerogative and rights of the Rulers.<sup>61</sup>

In the end, the final version of such provision was inserted in the Federal Constitution, which provided that:

Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.<sup>62</sup>

Such provision has been re-emphasised in another article. Article 11(1) of the Federal Constitution provided:

Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.<sup>63</sup>

---

<sup>58</sup> See *Report of the Federation of Malaya Constitutional Commission 1957* (notably known as *The Reid Commission*), Her Majesty's Stationery Office, 1957, p.99.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> But in *Meor Atiqulrahman bin Ishak dan lain-lain v Fatimah bte Sihi dan lain-lain*, the learned judge said that it was the Rulers that demanded such provision on Islam to be inserted and included in the Constitution in recognising the supremacy of Islam; See Abdul Aziz Bari, "Islam in the Federal Constitution: A Commentary on the Decision of *Meor Atiqulrahman*" [2000] 2 MLJ at p. cxxxvi; see also *Meor Atiqulrahman bin Ishak dan lain-lain lwn Fatimah bte Sihi dan lain-lain* [2000] 5 MLJ at p. 385.

<sup>62</sup> See *The White Paper*, Article 3(1), p. 33; See also Article 3(1) of the Federal Constitution.

<sup>63</sup> This provision had also been proposed in the White Paper.

However, clause (4) provided:

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.<sup>64</sup>

Thus it would be constitutional for a law to be enacted to restrict the propagation of non-Muslim religions among Muslims.<sup>65</sup>

Article 3(1) appears, to some extent, to reiterate the rights protected under Article 11(1) and also to reaffirm the supremacy of the position of Islam under the Federal Constitution. Furthermore, the interpretation on the position of Islam is very crucial. Islam seems to be placed beyond other religions in the Federation.<sup>66</sup> Even though some legal commentators agree to the higher position given to Islam, it was otherwise decided in *Che Omar bin Che Soh v Public Prosecutor*.<sup>67</sup> The Supreme Court held that “although there can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial”, the provision of Article 3(1) merely provided for a ritualistic and ceremonial role of Islam.<sup>68</sup> Sheridan also seems to agree with the *Che Omar* decision. He posits that Article 3(1) does not mean anything except that it imposes an obligation on the participants in any federal ceremonial to regulate any religious parts of the ceremony according to Muslim rites.<sup>69</sup> However, according to Abdul Aziz Bari, this case does not elaborate the

---

<sup>64</sup> In the White Paper, Article 11(4) provided that “State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion.”

<sup>65</sup> Ahmad Ibrahim, “Islam and the Constitution”, Paper presented in *Conference on The Malaysian Constitution After 30 Years*, Faculty of Law, University of Malaya, Kuala Lumpur, 22-23 August 1987, p. 8.

<sup>66</sup> See judgement in *Meor Atiqulrahman bin Ishak & Anor. v Fatimah Bte Sihi & Anor*, [2000] 5 MLJ 382; In this case, the learned judge, Dato’ Mohd Noor Abdullah interpreted Article 3(1) that states “Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation” which means that Islam is the supreme religion and its position is not in par with other religions such as Christianity, Buddhism, Hinduism and others. It is placed beyond other religions in the Federation; see also Abdul Aziz Bari “Islam in The Federal Constitution: A Commentary on The Decision of *Meor Atiqulrahman*” [2000] 2 MLJ at cxxxv-cxxxix; see also Abdul Aziz Bari, “Murtad Dalam Konteks Kebebasan Beragama di Malaysia” *Malaysian Journal of Law and Society (MJS)* 3(1999) pp. 54-57; Abdul Aziz Bari, “Negara Islam Dalam Kerangka Perlembagaan Malaysia” *Dewan Masyarakat*, Dewan Bahasa dan Pustaka, November 2001, p. 22.

<sup>67</sup> [1988] 2 MLJ 55.

<sup>68</sup> *Ibid.*

<sup>69</sup> Sheridan, L.A., *The Federation of Malaya Constitution – Text, Annotations and Commentary*, University of Malaya Law Review, Singapore, 1961, p.4

clear picture of the position of Islam as stated in the Reid Commission Report and the White Paper.<sup>70</sup> Thus, he further argues that the *Che Omar* decision merely ruled that Article 3(1) should not become the basis to challenge the legality of statutes. In other words, it merely limits the operation of Islam as stated in the provision. It must also be noted that the extent and implementation of Islam in the Constitution should not be assessed or interpreted solely from the context or point of view of Article 3(1).<sup>71</sup> But, it is also contended that the *Che Omar* decision merely differentiated the position of Islamic law as prescribed by Article 3(1) of the Federal Constitution. It is argued that since Islam is the religion of the Federation,<sup>72</sup> and since the Constitution is the supreme law of the Federation,<sup>73</sup> the imposition of the death penalty upon drug traffickers, not being an Islamic law *per se*, i.e., not in accordance with *hudud* or *qisas* laws, is contrary to Islamic injunction and is therefore unconstitutional.<sup>74</sup> The Supreme Court (as it then was) rejected this argument, saying that the provision in Article 3(1) does not actually give a meaning that Malaysia is an Islamic state, where in reality Islamic law only applies to Muslims on matters that related to personal laws. And since the Constitution makes a clear distinction between private law and public law,<sup>75</sup> offences like drug trafficking are under the Federal List, and therefore constitutional.<sup>76</sup>

Is it vital to discuss the position of Islam, as provided in Article 3(1) of the Federal Constitution in relation to the question whether Malaysia is an Islamic state or a secular state? Even though there is no such conclusive word in the Federal Constitution, historical evidence shows that the country was meant to be a secular state. In the early stage of the drafting of the Constitution, the Reid Commission had proposed inserting a provision stating the country is a secular state. However, in the final stage, they agreed to accept a provision that made

---

<sup>70</sup> See Abdul Aziz Bari, *Islam Dalam Perlembagaan Persekutuan* (Intel Multimedia and Publication, Petaling Jaya, 2005) pp. 21-23, 80-81; see also Abdul Aziz Bari, "Murtad Dalam Konteks Kebebasan Beragama", MJLS 3 (1999) p. 55; see also Abdul Aziz Bari, "Islam in The Federal Constitution: A Commentary on The Decision of *Meor Atiquerahman*" [2000] 2 MLJ at cxxxviii; see also Abdul Aziz Bari, "Negara Islam dan Kerangka Perlembagaan Malaysia", *Dewan Masyarakat*, Dewan Bahasa dan Pustaka, November, 2001, p. 22.

<sup>71</sup> See Abdul Aziz Bari, "Islam in The Federal Constitution: A Commentary on The Decision of *Meor Atiquerahman*" *ibid* at cxxxix.

<sup>72</sup> Article 3(1) of the Federal Constitution.

<sup>73</sup> Article 4(1) of the Federal Constitution.

<sup>74</sup> See *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55; see also Kevin Tan *et al.*, *Constitutional Law in Malaysia and Singapore*, (Malayan Law Journal Sdn. Bhd, 1996) p. 691.

<sup>75</sup> Ninth Schedule, List 1, Federal List; List 2, State List, and List 3, Concurrent List.

<sup>76</sup> *Ibid*; see also Andrew Harding, "The *Keris*, The Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia", 6 *Singapore Journal of International and Comparative Law* 154 at 166-167 (2002).

Islam the official religion of the Federation,<sup>77</sup> but it shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State”.<sup>78</sup>

The debate on whether Malaysia is an Islamic state or a secular state was again raised in 2001, when Tun Dr. Mahathir Mohamad, the then Prime Minister of Malaysia, declared that Malaysia is an Islamic state. This announcement was not followed by any amendment to the Federal Constitution. It is a continuing argument between the ruling party, *Barisan Nasional*, led by UMNO, which exercises a moderate Islamic law and its opposition Islamic party, *Parti Islam Se-Malaysia* (PAS), which promotes a theocratic state.<sup>79</sup> According to Tan Sri Dr. Abdul Hamid Othman, the religious adviser to the Prime Minister, “Malaysia has fulfilled the requirements of an Islamic State”.<sup>80</sup> He refers to a book written by Wan Zahidi Wan Teh entitled *Malaysia Adalah Sebuah Negara Islam* (Malaysia is an Islamic State). In this book, the author attempts to ascertain whether or not Malaysia is an Islamic state, and argues that reference must be made to the opinion of Muslim scholars about the definition of an Islamic state. First, the nation has to be under Muslim governance, its defence in the hands of Muslims, and it must be the responsibility of every Muslim to defend it. Second, the nation is controlled by Muslims, in which they attain peace within it. Third, the laws of an Islamic ruler are enforced, and finally, Islamic law must be adhered to.<sup>81</sup>

Some legal commentators suggest that these criteria will not change the status of Malaysia being a secular state.<sup>82</sup> Sheridan, for example, advocates that Article 3(1) does not deny the capacity of the Federation to remain a secular state.<sup>83</sup> However, Aziz Bari seems to suggest that compared to the Indian

---

<sup>77</sup> Shad Saleem, Faruqi, “Facing A Problem of Semantics”, *Sunday Star*, 28 October 2001, p. 22.

<sup>78</sup> See *The Reid Commission Report*, *supra* n. 58, paragraph 169; However, according to Abdul Rashid Moten, the Reid Commission rejected the proposal when it finally agreed that the religion of the State shall be Islam, refrained from entering the word ‘secular’ in the Constitution. Given the fact the provision in Article 3(1) of the Federal Constitution, Rashid Moten believes that Malaysia is an Islamic State; for further reading see Abdul Rashid Moten, “Malaysia As An Islamic State: A Political Analysis”, *IKIM Journal of Islam and International Affairs*, Vol. 1 No.2, 2003, pp. 28-42.

<sup>79</sup> Patricia A. Martinez, “The Islamic State or the State of Islam in Malaysia”, *Contemporary Southeast Asia*, Vol. 23, No. 3 (December 2001), p. 490; see also Andrew Harding, “The Keris, The Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia”, *supra* n. 76, pp. 166-173.

<sup>80</sup> Patricia A. Martinez, *ibid*, p. 491.

<sup>81</sup> *Ibid*, p. 492.

<sup>82</sup> Vidhu Verma, *Malaysia – State and Civil Society in Transition* (Lynne Rienner Publishers, London, 2002) p. 96.

<sup>83</sup> L.A. Sheridan, *The British Commonwealth – The Development of Its Laws and Constitution* (Stevens & Sons Ltd., London, 1961) p. 49.

Constitution which clearly states that the country is a secular state,<sup>84</sup> the Federal Constitution is silent on this matter. Thus, Malaysia is not a secular state *per se*.<sup>85</sup> Unlike the Indian Constitution, the Federal Constitution does provide a special position for Islam, which is superior to any other religions in the Federation.<sup>86</sup> Another provision that indicates Malaysia is not a secular state is the special position of Islam in relation to the right to freedom of religion.<sup>87</sup> The provision in Article 12(2), that allows the use of official funding to promote and facilitate Islamic institutions, also proves that Malaysia is not a secular state.<sup>88</sup>

Perhaps the position taken by Shad Faruqi, Aziz Bari, Lee Min Choon and Hassan Bahrom that categorised Malaysia somewhere between the secular state and the Islamic state could be the answer to the ambiguity of the position of Islam in Malaysia.<sup>89</sup> Thus, according to Shad Faruqi, “Malaysia is neither a full-fledged Islamic state nor wholly secular”, but that “in view of the fact that Muslims constitute the majority population, and Islamisation is being vigorously enforced,

---

<sup>84</sup> For further reading on this, see Alexandrowicz, C.H., “The Secular State in India and the United States” [1960] 2 JILI 271.

<sup>85</sup> Abdul Aziz Bari, “Murtad Dalam Konteks Kebebasan Beragama”, *MJLS* 3 (1999), pp. 55-56; see also Abdul Aziz Bari, “Perlaksanaan Islam Melalui Kerangka Perlembagaan dan Perundangan Malaysia”, *IKIM Law Journal*, Vol.3 No.2 July-December 1999, pp.88-94; see also Abdul Aziz Bari, “Islam in the Federal Constitution: A Commentary on the Decision of Meor Attiqulrahman”, [2000] 2 MLJ cxxxix; see also Abdul Aziz Bari, “Halangan-halangan Pelaksanaan Undang-undang Jenayah Islam di Dalam Perlembagaan Malaysia”, *Shari'a Journal*, Vol. 10, No.2, July 2002, pp. 32-34; see also Ruzian Markom, “Peranan Syariah Islamiah Dalam Menangani Kecenderungan-kecenderungan Globalisasi Dalam Konteks Sistem Pemerintahan di Malaysia”, *IKIM Law Journal*, Vol.7 No.1 January-June 2003, pp.96-98.

<sup>86</sup> Abdul Aziz Bari, “Murtad Dalam Konteks Kebebasan Beragama”, *ibid*, pp. 55-56; see also Abdul Aziz Bari, “Islam in the Federal Constitution: A Commentary on the Decision of Meor Attiqulrahman”, [2000] 2 MLJ cxlii; see *Meor Attiqulrahman bin Ishak & Anor v Fatimah bte Sihan & Anor* [2000] 5 MLJ 381-382.

<sup>87</sup> Article 11(4) provides that the Federal and State governments can introduce laws prohibit non-Muslims to proselytise Muslims.

<sup>88</sup> Abdul Aziz Bari, “Negara Islam Dalam Kerangka Perlembagaan Malaysia”, *Dewan Masyarakat*, Dewan Bahasa dan Pustaka, November 2001, p. 23.

<sup>89</sup> Shad Saleem Faruqi, “Secularism or Theocracy: A Study of the Malaysian Constitution”, Unpublished paper, UiTM, 2001, p. 49; see also Shad Saleem Faruqi, “Constitutional Perspectives on Freedom of Religion, Secularism and Theocracy”, Paper distributed at the MCA forum on the Islamic state, K. Lumpur, 20 October 2001, p.11, cited in Patricia A. Martinez, “The Islamic State or the State of Islam in Malaysia”, *supra* n. 79, p. 494; see also Shad Saleem Faruqi, “Constitutional Perspectives on Freedom of Religion, Secularism and Theocracy” in Ibrahim Abu Shah (Ed.) *Islam, Democracy and Good Governance – The Malaysian Experience* (Pusat Penerbitan Universiti (UPENA), Universiti Teknologi MARA, Shah Alam, 2004) pp. 88-89; see also Lee Min Choon, *Freedom of Religion in Malaysia* (Kairos Research Centre, 1991) p. 24; see also Abdul Aziz Bari, “Halangan-halangan Pelaksanaan Undang-undang Jenayah Islam”, *supra* n. 85, pp. 33-34; see also Hassan Bahrom, “Perlembagaan: Isu Pelaksanaan Undang-undang Islam”, *Shari'a Journal*, 7:1 [1999] pp. 80-84.

Malaysia can indeed be described as an Islamic or Muslim country”.<sup>90</sup> In addition, Shad Faruqi adds that “in a secular constitution, there is no prescribed official religion and no state aid is given to any religion or for any religious activities, but the word religion does occur at least twenty four times in the Federal Constitution”.<sup>91</sup> It must be emphasised that despite the policy on Islamisation that has taken place for at least two decades, there was no attempt by the present government to amend the Federal Constitution to declare Malaysia an Islamic state.<sup>92</sup>

However, the recent approach taken by a High Court judge seems to elucidate that Islam is a superior religion in the Federation. Dato’ Mohd Noor Abdullah in *Meor Atiqulrahman bin Ishak & Anor. v Fatimah Bte Sihi & Anor*,<sup>93</sup> asserted that “Islam in the constitution means *ad-deen*, a complete way of life and not just a mere set of rituals which is concerned with the relationship between man and his creator”.<sup>94</sup> The learned judge also held that “Islam is the primary religion which takes precedence over other religions in Malaysia, and this is the implication of the stipulation of Islam as the religion of the Federation”.<sup>95</sup>

#### VIII. THE SCOPE OF THE ISLAMIC LAW AND THE JURISDICTION OF THE *SHARI’A* COURTS IN MALAYSIA

The word ‘law’ in Article 160 of the Federal Constitution does not mention Islamic law.<sup>96</sup> Similarly, no provision is made in the Federal Constitution on the jurisdiction and powers of the *Shari’a* Courts. The only provision where the Federal Constitution does state ‘*Shari’a* Courts’ is Article 121(1A), where it takes away the jurisdiction of the Civil Courts on matters that are within the jurisdiction of the *Shari’a* Courts.<sup>97</sup>

---

<sup>90</sup> Shad Saleem Faruqi, “Constitutional Perspectives on Freedom of Religion, Secularism and Theocracy”, *ibid.*

<sup>91</sup> For instance, Articles 3(1), 3(2), 3(3), 3(5), 11(4), 12(2), 34(1), 150(6A), 160(2), Fourth Schedule, and Ninth Schedule, List II, Item 1; see Shad Saleem Faruqi, “Secularism or Theocracy: A Study of the Malaysian Constitution”, *supra* n. 89, pp. 52-53.

<sup>92</sup> Shad Saleem Faruqi, *ibid.*

<sup>93</sup> [2000] 5 MLJ 375.

<sup>94</sup> Cited in Abdul Aziz Bari, “Islam in the Federal Constitution: A Commentary on the Decision of Meor Attiqulrahman”, [2000] 2 MLJ cxxxii.

<sup>95</sup> *Ibid.*

<sup>96</sup> Harding suggests that “there is no provision for the *Shari’a* to be a source, or the basic source, of legislation”, see Andrew Harding, “Keris, Islam and the Blind Goddess”, *supra* n. 76, p. 167.

<sup>97</sup> Andrew Harding, *Law, Government and the Constitution in Malaysia* (Kluwer Law International, London, 1996) pp. 136-137.

The jurisdiction of Islamic law is specifically provided in the Ninth Schedule, List II – State List,<sup>98</sup> which among other things, covers only persons professing the religion of Islam. Matters that are provided under this jurisdiction are strictly confined to personal laws such as marriage, divorce, and all ancillary matters related to them and succession. With regard to criminal laws, jurisdiction relates only to offences by persons professing the religion of Islam against precepts of that religion such as the offences of eating and drinking in public during the month of *Ramadhan*, neglecting from performing the Friday prayer, committing *zina* and *khalwat* and other matters that are strictly provided in various States' Islamic Criminal Laws.<sup>99</sup>

As the question of Islamic law is under the jurisdiction of the respective states except in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, the Parliament cannot make laws with respect to any matters of Islamic law or the custom of the Malays. No Bill for such a law is to be introduced into either House of Parliament until the Government of any State concerned has been consulted.<sup>100</sup> This includes the purpose of promoting uniformity of the laws of two or more States.<sup>101</sup> Although the Yang di-Pertuan Agong is the supreme Head in the Federation, there is no paramount head of Islam in the entire Federation. Apart from being the Head of Islam in his own state, he is the Head of religion in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, and also the states of Malacca, Penang, Sabah and Sarawak.<sup>102</sup>

Since the subject of Islam is under the jurisdiction of the respective states, the administration of Islamic law and Muslim matters is under the authority of the Ruler of each state. Consequently, “the power to legislate on matters related to

---

<sup>98</sup> It says that ‘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 trust; *Wakafs* and the definition and regulation of charitable and religious trusts, the appointment of trustees and 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*, *Fitra* and *Bait al-Mal* 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 *Shari'a* 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 concerned 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’.

<sup>99</sup> Ninth Schedule, List II – State List.

<sup>100</sup> Article 76(2).

<sup>101</sup> Article 76(1)(b).

<sup>102</sup> Article 3(2) of the Federal Constitution.

Muslim law lies with the State legislature”.<sup>103</sup> Thus, it is the State Legislative Assembly that has the power to enact any law that is related to Muslim law, but it cannot pass any law that is contrary to the Federal law. This is because where any state law is inconsistent with that of the Federal law, the Federal law shall prevail, and the State law shall, to the extent of the inconsistency, be void.<sup>104</sup>

It must be noted that Parliament has no power to legislate any law under the Ninth Schedule, State List – II. In *Mamat bin Daud & Ors. v Government of Malaysia*,<sup>105</sup> Section 298A of the Penal Code was declared null and void as being *ultra vires* the Federal Constitution, in respect of the Federal and States’ jurisdictions. The Supreme Court (as it then was) held that it was the power of the respective State Legislative Assemblies, not the Parliament, to pass such law as being legislation on the Islamic religion according to Article 11(4) and item 1 of List II, Ninth Schedule of the Federal Constitution. The appellant was convicted by the High Court of being an unauthorised *bilal* (a person who calls for prayers), whose act could cause disharmony and disunity among the local Muslim community. The Supreme Court held that there must be a declaration that Section 298A of the Penal Code is a law with respect to which Parliament has no power to make and such section was invalid and therefore null and void and of no effect. The ruling, however, shall not apply to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.

The jurisdiction of the *Shari’a* Criminal law is also confined to persons professing the religion of Islam. The *Shari’a* Courts Act 1965 (Criminal Jurisdiction) gives jurisdiction to the *Shari’a* Courts to punish with up to 6 months of imprisonment, or fine up to RM1,000.00, or a combination of both. The *Shari’a* Courts’ jurisdiction pertaining to criminal matters was amended in 1984 which gave the *Shari’a* Courts the power to sentence up to 3 years of imprisonment, to fine up to RM5,000.00, to order up to 6 strokes of the cane, or any combination of these punishments.<sup>106</sup>

---

<sup>103</sup> Article 74(2); see also Hamid Jusoh, *The Position of Islamic Law in the Malaysian Constitution With Special Reference to the Conversion Case in Family Law* (Dewan Bahasa dan Pustaka, K. Lumpur, 1991), p. 35.

<sup>104</sup> Article 75 of the Federal Constitution.

<sup>105</sup> [1988] 1 MLJ 119.

<sup>106</sup> The *Shari’a* Courts Act (Criminal Jurisdiction) of 1965 (Amended in 1984).

## IX. THE SCOPE OF THE RIGHT TO FREEDOM OF RELIGION IN MALAYSIA

Article 11 of the Federal Constitution, which guarantees the right to freedom of religion, provides:

- (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 its own property and hold and administer it in accordance with the law.
- (4) State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, Federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
- (5) This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

It must be noted that Article 11(1) contains two important expressions, namely ‘to profess’ and ‘to practise’. However, the terms ‘profess’ and ‘practise’ are not defined. Constitutionally, a person can profess a religion “without having to prove the worthiness of his religious profession”.<sup>107</sup> The most important thing is that accepting a particular religion indicates that one professes such a religion. The extent of knowledge of that particular religion is also irrelevant when the question of the right to profess a religion arises. In the eyes of the law, a person could be said to be professing a particular religion by simply adhering to such religion although he does not attend a specific place of worship at all.<sup>108</sup>

In *Re Mohamed Nabi, Deceased*,<sup>109</sup> Chua J adopted the term ‘profess’ from the Shorter English Dictionary to mean ‘to affirm or declare one’s faith in or allegiance to (a religion, principle, God or saint etc)’.<sup>110</sup> The Little Oxford Dictionary defines ‘profess’ as ‘claim openly to have, pretend, declare, affirm

---

<sup>107</sup> Lee Min Choon, *Freedom of Religion in Malaysia*, *supra* n. 89, pp. 33-34.

<sup>108</sup> *Ibid.*

<sup>109</sup> [1965] 31 MLJ 121

<sup>110</sup> *Ibid.*; see also Mohammed Imam, “Freedom of Religion Under Federal Constitution of Malaysia – A Reappraisal”, [1994] 2 CLJ at p. lxxiii-lxxiv.

one's faith in or allegiance to'.<sup>111</sup> In this case, the Court held that in order to maintain the status as Muslim one does not need to observe the ritual obligations but "a person who was born in the Muslim faith and has never been proved to have adopted any other religion must be held to be a Muslim".<sup>112</sup> The Court decided that a person is considered Muslim as long as he professed the religion of Islam.

Since there is a distinction between the profession of religion and its practice, one could argue that practising a religion is not a prerequisite element to be regarded as a follower of a particular religion. Such a distinction was lost in *Ng Wan Chan v Majlis Ugama Islam, Wilayah Persekutuan & Anor*.<sup>113</sup> In this case, there was a dispute whether the husband (the deceased) of the plaintiff was a Muslim or Buddhist at the time of his death. The plaintiff claimed that her husband was a Buddhist at the time of his death, while *Majlis Agama Islam* (Council of Islamic Religion) claimed otherwise. She led evidence to show that her husband had renounced Islam and had converted back to Buddhism when he died. The Court ruled in her favour since it was clear that her husband was a Buddhist at the time of his demise.

However, the Court in *Dalip Kaur v Pegawai Polis Daerah Mertajam & Anor*<sup>114</sup> took a different stand. Although the widow (appellant) claimed that her late husband was no longer a Muslim at the time of his demise, the High Court (as it was then) held that the deceased was a Muslim at the time of his death and had not reconverted back to Sikhism. In her appeal, the Supreme Court (as it was then) requested that the case be returned to the High Court when several questions regarding Islamic law were raised. The Kedah *Fatwa* Committee had dismissed the argument that acts such as consuming pork and praying at Sikh temple by the deceased, clearly indicated that he was no longer a Muslim. However, the determination of whether a person is *murtad* (apostate) should be decided by the *Shari'a* Court. Since there was no such ruling, the deceased was considered a Muslim at the time of his death. The Supreme Court dismissed the appeal.

One of the most vital issues surrounding the question of profession is the position of a Muslim who leaves the Islamic religion. Given that Article 160(2) stipulates that a Malay must professes the religion of Islam, habitually speak the Malay language and conform to the Malay customs, the issue of conversion out of Islam remains controversial and ambiguous. While non-Muslims could profess any religion they wish, including changing from one religion to another, Muslims particularly from the Malay ethnicity are prohibited from doing so. It seems that the right to profess a religion in Malaysia is not an absolute right. Of course a

---

<sup>111</sup> *The Little Oxford Dictionary*, 6<sup>th</sup> Ed., 1986, p. 429.

<sup>112</sup> *Ibid.*, at p. 122.

<sup>113</sup> [1991] 3 MLJ 174.

<sup>114</sup> [1992] 1 MLJ 1.

person who frequently changes his religion will not win the respect of others<sup>115</sup> but what is the position in the case where a person changes his religion once in his lifetime? One would not be concerned if the parties are non-Muslims. But if a Malay leaves his Islamic religion, then the question of the freedom of right of profession arises. Lee Min Choon, for example, postulates that the right of profession of a religion is an unrestricted right. In other words, a person has the right to choose and embrace any religion at any particular time. This does not mean that a person can only choose one religion for his whole life.<sup>116</sup> He therefore argues that the expression “his religion” in Article 11(1) of the Federal Constitution must necessarily mean that the religion adopted by a person should be one free of choice.<sup>117</sup> As a result, a person who changes his religion freely, without deception, coercion or undue influence, is exercising his right to freedom of religion.<sup>118</sup> However in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor*,<sup>119</sup> Faiza Tamby Chik J did not accept such arguments. Freedom of religion under Article 11(1), the learned Judge elucidated, must be read with Article 3(1) of the Federal Constitution, which places Islam in a special position as the main and dominant religion of the Federation. It is the Federation’s duty to protect, defend and promote Islam.<sup>120</sup> Because the plaintiff was still a Muslim at the time of the application to change her religious status on her national identity card, by virtue of Article 160(2) of the Federal Constitution, she cannot leave the Islamic religion at all.<sup>121</sup> However, the learned judge did not make any decision pertaining to the plaintiff’s decision to leave the Islamic faith, since only the *Shari’a* Court is competent to determine the matter.<sup>122</sup> In her appeal to the Court of Appeal, the Court turned down her appeal on the ground that she must first get a declaration that she is no longer a Muslim from the *Shar’ia* Court.<sup>123</sup> The case is now pending at the Federal Court.<sup>124</sup>

---

<sup>115</sup> Lee Min Choon, *Freedom of Religion*, *supra* n. 89, pp. 38.

<sup>116</sup> *Ibid*, p. 37.

<sup>117</sup> *Ibid*, p. 38.

<sup>118</sup> *Ibid*, p. 39.

<sup>119</sup> [2004] 2 MLJ 119.

<sup>120</sup> *Ibid* at p. 139.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors*. [2005] 6 MLJ 193.

<sup>124</sup> See “Deletion of Word Islam in IC: Lina Joy Gets Green Light To Appeal” in *www.bernama.com* (13 April 2006); see also “Ruling on Renunciation Cases Soon” in *New Straits Times*, 14 April 2006, p. 4.

## X. THE NON-ABSOLUTE NATURE OF THE RIGHT TO FREEDOM OF RELIGION UNDER THE CONSTITUTION

The non-absolute nature of the right to freedom of religion in Malaysia, at least insofar as Islam is concerned, was given judicial recognition by Heliliah Mohd Yusoff J in the case of *Ahmad Yani b Ismail & Anor v Ketua Polis Negara & 3 Ors.*<sup>125</sup> The appellants challenged the validity of their detention under the Internal Security Act (ISA) and argued that the exercise by the Minister of his powers under the ISA had the effect of curtailing their rights that were guaranteed under Article 11 of the Federal Constitution. The appellants argued that in the face of Article 11, Article 149 (under which the ISA was passed) could not legitimise actions taken under the ISA to curb their constitutional rights under Article 11. The learned judge further said she found this argument fallacious because the Minister must have formed the opinion that the activities of the appellants did not fall within the limits of “professing and practising the religion.” She further found that clause (4) of Article 11, in permitting the Federal law to control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam, clearly evinced the intention that the right accorded under Article 11 was not absolute.

The refusal of the Supreme Court to allow the ISA to be used against the accused in the *Jamaluddin* case does not mean that accused cannot be charged under other laws restricting the propagation of any religious doctrine or belief among Muslims. Article 11(4) of the Constitution provides that State law and, in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Pursuant to the powers granted under article 11(4) of the Constitution, nine State Legislatures have passed laws on the control and restriction on the propagation of non-Islamic religions to Muslims.<sup>126</sup>

---

<sup>125</sup> [2004] 5 AMR 571

<sup>126</sup> See Control and Restriction of the Propagation of Non-Islamic Religions (Johore) Enactment 1991 (Enactment 12/1991); Control and Restriction of the Propagation of Non-Islamic Religions (Kedah) Enactment 1988 (Enactment 11/1988); Control and Restriction of the Propagation of Non-Islamic Religions (Kelantan) Enactment 1981 (Enactment 11/1981); Control and Restriction of the Propagation of Non-Islamic Religions to Muslims (Malacca) Enactment 1988 (Enactment 1/1988); Control and Restriction (Propagation of Non-Islamic Religions Among Muslims)(Negeri Sembilan) Enactment 1991 (Enactment 9/1991); Control and Restriction of the Propagation of Non-Islamic Religions (Pahang) Enactment 1989 (Enactment 5/1989); Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1988 (Enactment 10/1988); Non-Islamic Religions (Control of Propagations Among Muslims) (Selangor) Enactment 1988 (Enactment 1/1988); Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1980 (Enactment 1/1980).

There has been at least one criminal prosecution against an offender - a non-Muslim - in the State of Pahang. In *PP v Krishnan a/l Muthu*<sup>127</sup> the complainant, one Maziah Jusoh had known and was in love with the accused, a married man, for seven years. As the complainant did not have a place to stay, she asked permission from the accused and his wife to live with them. The accused and the complainant had a series of arguments which resulted in physical fights. There was an instance where the accused issued threats against the complainant to leave Islam and embrace Hinduism. The complainant was also asked to make an oath at a Hindu temple and was prevented from praying as a Muslim. Two charges were filed against the accused in the Magistrate's Court. The accused was convicted and fined RM 2,000 under section 325 of the Penal Code. The accused was also convicted under section 4(2)(i) of the Control and Restriction of the Propagation of Non-Islamic Religions (Pahang) Enactment 1989, fined RM 1,500 and imprisoned for a period of 20 days. Articles 11(1) and 11(4) of the Constitution indicate that the provisions on Islam as a faith and Islam as a law are intertwined; one cannot look at one provision in the Constitution without looking at the other provisions. This is how Article 11(1) should be construed. It becomes evident therefore that the issue of a Muslim attempting to apostate is not merely an issue of faith but one of law i.e Islamic law, which applies to all Muslims in the States of the Federation.

## XI. LAW OF APOSTASY IN MALAYSIA

As far as the law of apostasy is concerned, there are three approaches taken by the states. First, states have enacted laws whereby apostates are subject to punishment. This can be seen in Perak, Pahang, Terengganu, Malacca and Sabah. All these five states laid down provisions whereby any Muslim who renounced Islam shall be punished with fine, imprisonment or whipping (in Pahang). In a decisive provision on apostasy, Pahang made apostasy an offence in its Administration of the Religion of Islam and the Malay Custom Enactment of 1982 (Amended 1989). Section 185 provides, "Any Muslim who states that he has ceased to be a Muslim, whether orally, in writing or in any other manner whatsoever, with any intent whatsoever, commits an offence, and on conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and to whipping of not more than six strokes".

---

<sup>127</sup> Magistrate's Court Case No MA-83-146-2002 (Unreported). See Mohamed Azam Mohamed Adil, "Kebebasan Beragama dan Hukuman Ke Atas Orang Murtad di Malaysia" in Ahmad Hidayat Buang (ed.) *Mahkamah Syariah Di Malaysia: Pencapaian Dan Cabaran*, supra n. 32, p. 165.

In Perak for example, it is provided in Section 13 of the Perak Islamic Criminal Law Enactment of 1992 that “Any Muslim who by his word or conduct whatsoever intentionally claims to cease to profess the religion of Islam or declares himself to be non-Muslim, shall be considered as insulting the religion of Islam, and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or both”<sup>128</sup>.

Melaka also incorporated the punishment of apostasy in its enactment. Section 209(1) of the Melaka Administration of Islamic Law Enactment of 1986 provides that insulting the religion of Islam is an offence. Any Muslim convicted of this offence shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both. Under section 209(2), the Enactment reiterates that a Muslim who declares himself to be out of the religion of Islam, shall also be regarded as insulting the religion of Islam, and upon conviction is subject to a fine and imprisonment as provided under clause (1).

Unlike Sarawak, Sabah declares apostasy an offence under its Islamic Criminal Law Enactment of 1995. Section 55(1) states “whoever by words spoken or written or by visible representation or in any other manner which insults or brings into contempt or ridicule the religion of Islam or the tenets of any lawful school or any lawfully appointed religious officer, religious teacher, Imam, any lawfully issued *fatwa* by the *Majlis* or the *Mufti* under the provisions of any law or this Enactment shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or both”. Section 55(2) reiterates “A Muslim who claims that he is not a Muslim shall be guilty of an offence under subsection (1) and shall, on conviction, be liable to the punishment thereof provided”.

Terengganu also introduces the punishment on apostasy. Section 29 of the Terengganu Administration of Islamic Law Enactment of 1996 provides: “Any Muslim who attempts to renounce the religion of Islam or declares himself to be non-Muslim, shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both”.

In other states, those who leave Islam are not regarded as offenders (apostates) but are detained and given counselling in a “faith” rehabilitation centre. At least three states adopt this practice. In Sabah and Kelantan, for example, if a person leaves Islam or intends to leave Islam, he can be detained at a

---

<sup>128</sup> Section 13 of the Perak Islamic Criminal Law Enactment of 1992 deals with merely blasphemy. However, since there is no distinction made between blasphemy and apostasy, section 13 has been regarded as an offence of apostasy.

faith rehabilitation centre for a period not exceeding 36 months.<sup>129</sup> In Malacca he can be detained for a period of 6 months.<sup>130</sup>

In Negeri Sembilan, the law does not provide for detention. In fact, it provides a remedy to any Muslim who intends to renounce the Islamic faith, although the applicant is subject to certain procedural conditions that are consistent with the requirements of the *Shari'a*. The Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003 provides that a Muslim shall not renounce or be deemed to have renounced the Religion of Islam until and unless he has obtained a declaration to that effect from the *Shari'a* High Court of that State.<sup>131</sup> The procedure is laid down in Section 119(2) of the Enactment, which provides that an application for such a declaration shall be made *ex-parte* to the *Shari'a* High Court Judge in open court by the person intending to leave Islam. The applicant must specify the grounds on which he intends to renounce the religion with an affidavit specifying all facts supporting the grounds of the application.<sup>132</sup> After receiving the application, the judge hearing it will advise the applicant to repent, and if the judge is satisfied that the applicant has repented in accordance with *Hukum Shara'*, he will record the repentance.<sup>133</sup> Alternatively, if the applicant refuses to repent, the judge shall, before making any order against the applicant, 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 Islam as his religion.<sup>134</sup>

If at any time the person undergoing counselling has repented, the officer who is responsible for him shall prepare a report as soon as possible and bring him to the *Shari'a* High Court.<sup>135</sup> If the judge is satisfied that the person brought before him has repented according to *Hukum Shara'*, the judge will record the person's repentance.<sup>136</sup> If after the expiry of 90 days, the person still refuses to repent, the officer shall prepare a report as soon as possible and bring him before the *Shari'a* High Court, and if after receiving the report, the Court is of the opinion that there is still hope the person may repent, the Court may adjourn the hearing of the application, and at the same time order the person to undergo further counselling session for a period not exceeding one year.<sup>137</sup> If after the

---

<sup>129</sup> Sabah Islamic Criminal Offences Enactment 1995, s 63(1); Kelantan Council for Muslim Religion and Malay Custom Enactment 1994, s 102.

<sup>130</sup> Malacca Administration of Islamic Law Enactment 1991, s 66.

<sup>131</sup> Enactment No 10 of 2003, s 119(1).

<sup>132</sup> Enactment No 10 of 2003, s 119(3).

<sup>133</sup> Enactment No 10 of 2003, s 119(4)(a).

<sup>134</sup> Enactment No 10 of 2003, s 119(4)(b).

<sup>135</sup> Enactment No 10 of 2003, s 119(5).

<sup>136</sup> Enactment No 10 of 2003, s 119(6).

<sup>137</sup> Enactment No 10 of 2003, s 119(7)(8).

issuance of such an order, the person repents, the earlier procedure applies (i.e. a report is made to the *Shari'a* Court whose judge, if satisfied that the person brought before him has repented according to *Hukum Shara'*, will record the person's repentance).<sup>138</sup>

If after expiry of the extended period for repentance under Section 119(8), the person still refuses to repent, the officer who is responsible for him shall prepare a report as soon as possible and bring him to the *Shari'a* High Court.<sup>139</sup> This time, the Court declares that the person has renounced Islam.<sup>140</sup> It is to be noted that before the Court declares that the person has renounced Islam, it shall make an order in relation to the dissolution of marriage, the division of *harta sepencarian* (joint property of spouses), the right of *perwalian* (the right of guardianship over an unmarried girl), the right to property and *hadhanah* (custody).<sup>141</sup> No mandatory punishment for apostasy is provided in this Enactment.<sup>142</sup>

## **XII. APPLICATION TO RENOUNCE ISLAM: NO PROVISION IN STATE ENACTMENTS**

States such as Perlis, Kedah, Penang, Selangor, Federal Territories, Johor and Sarawak do not make any provision on the punishment for apostasy, nor do they provide any facilitation for apostasy. Since these States' Enactments are silent on this matter, Muslims particularly by conversion who wish to leave the Islamic religion are in a legal quandary. Such experience could be seen in the Federal Territory of Kuala Lumpur, where until August 2004, twelve applications to renounce Islam at the *Shari'a* Court were rejected due to there being no provision in the Administration of Islamic Law (Federal Territories) Act of 1998 to deal with such applications.<sup>143</sup> In one case, *Rashidah bt Mohamad Myodin*,<sup>144</sup> the

---

<sup>138</sup> Enactment No 10 of 2003, s 119(9).

<sup>139</sup> Enactment No 10 of 2003, s 119(10).

<sup>140</sup> *Ibid.*

<sup>141</sup> Enactment No 10 of 2003, s 119(11).

<sup>142</sup> Negeri Sembilan has recorded the highest number of applications to leave Islam, even under the old law - the Administration of Islamic Law (Negeri Sembilan) Enactment 1991. Of the 84 applications made between 1994 and 2003, 16 applications were allowed, 29 were applications were dismissed, and 39 postponed. This information is based on an interview of YAA Dato' Hussin bin Harun, Chief *Shari'a* Judge, *Shari'a* Justice Department, Negeri Sembilan on 22 August 2003.

<sup>143</sup> I would like to thank both Ms Noor Halina Ahmad Zabidi, the then Chief Registrar, Department of Islamic Judiciary of Federal Territory (Kuala Lumpur) and Ms. Maimun Mohd, the present Chief Registrar, Department of Islamic Judiciary of Federal Territory (Kuala Lumpur) for giving assistance in obtaining such information. According to Ms. Noor Halina, prior to 2001, application to register for apostasy was totally rejected *ab initio* because there was no such provision. However, through Practical Order (*Arahan Amalan*) from the Department of Islamic

applicant was a Muslim by birth. At the age of three, she was adopted by a Hindu foster parent. She was brought up as a Hindu and practiced Hinduism her entire life. She filed an application to renounce Islam at the Federal Territories of Kuala Lumpur *Shari'a* Court. On 21 August 2003, the *Shari'a* Court rejected her application on the ground that the Court had no such power and jurisdiction to do so since the Administration of Islamic Law (Federal Territories) Act of 1998 was silent on this. The Court also ruled that the applicant had never practiced the religion of Islam since she was adopted by her Hindu parent and therefore adhered to the religion of Hinduism. By virtue of Section 2(1) of the Administration of Islamic Law (Federal Territories) Act of 1998, she cannot be classified as a Muslim.

The problem faced by the applicant is that her birth certificate indicated her Muslim name. She also had difficulties in her attempt to change her Muslim name to a non-Muslim name as the Registration Department of Malaysia had introduced a new rule, namely the National Registration Rules (Amendment) of 2001, that any application to change a name must not be in connection with changing a religion. A new requirement was introduced, that an application to change a Muslim name to a non-Muslim name must be supported by the Religious Department approval or any *Shari'a* Court decree.<sup>145</sup> With such new rule introduced by the Registration Department of Malaysia, Ms. Rashidah will not have a chance to change her name to non-Muslim name although she never practiced the religion of Islam. The Federal Territory of Kuala Lumpur *Shari'a* Court cannot issue any decree on conversion out of Islam since it has no power and jurisdiction to do so. Further questions arise from the consequences of this case. By virtue of Article 121(1A) of the Federal Constitution, an application in the Civil Court will bear no fruit as such jurisdiction is given to the *Shari'a* Courts.<sup>146</sup> Since the *Shari'a* Court has turned down her application, she has no other channel to enforce her religious right.

In Kedah, there have been at least two applications for apostasy. The first was an oral application and no proper application was made to the *Shari'a* Court. In the written application, a Muslim by conversion had renounced and abandoned the Islamic religion.<sup>147</sup> He made a deed poll and statutory declaration before an

---

Judiciary, Malaysia, a new code was introduced for apostasy application; Interview on 23 July 2003. Until August 2004, there are 12 such applications, which were rejected by the *Shari'a* Court due to no provision in the Administration of Islamic Law of Federal Territories Act of 1998.

<sup>144</sup> Application No. 14200-043-002-2003.

<sup>145</sup> The writer would like to thank Mr Leonard Teoh, Advocate & Solicitor, who gave him a copy of letter from the Registration Department of Malaysia to the Chairman of Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS) dated 4 Jun 2003, which indicates the new rule.

<sup>146</sup> See also *Soon Singh v PERKIM* [1999] 1 MLJ 489; [1999] 2 AMR 1211.

<sup>147</sup> Abdul Rahman Sigamani Bin Abdullah. He was also known as Sigamani a/l Ramalingam.

Oath Commissioner in Penang dated 10 August 2002. The applicant, through his counsel had sent an application for conversion out of Islam to the Registrar of *Shari'a* Court in Alor Setar on 18 August 2002, for the *Shari'a* Court to take further steps over the application; because there is no provision for Muslims to convert out of Islam in the State's Enactment, the matter was not brought forward. His attempt to renounce Islam and return to his original religion, Hinduism, could not be proceeded with even though he never practiced the religion of Islam.<sup>148</sup>

Muslims in Sabah who wish to renounce Islam may face either punishment or mandatory detention at rehabilitation centre. In addition, there is no provision on conversion out of Islam. As the State's Enactment provides punishment for apostasy and mandatory detention at the rehabilitation centre, Muslims who intend to renounce the religion of Islam may abandon their attempt. There are at least seven cases with regard to apostasy but only two were filed at the Sabah *Shari'a* Court.<sup>149</sup> The two cases were about the charge under Section 63 of the Sabah *Shari'a* Criminal Offences Enactment of 1995, which allows the Court to detain, at the rehabilitation centre for a term not exceeding 36 months, a Muslim who intentionally claims to cease to profess the religion of Islam or declares himself to be non-Muslim. According to Sakaria Samela, the Sabah *Shari'a* Public Prosecutor, the main reason why he did not charge the apostates under Section 55(1) and (2) was to give them a chance to repent. Section 55(1) and (2) provides a punishment of imprisonment for a term not exceeding one year or a fine not exceeding RM2000 or both. Moreover, the two cases were not preceded with mainly because the Islamic Rehabilitation Centre had not been gazetted.<sup>150</sup>

Penang also does not have any provision on conversion out of Islam in its Enactment. As a result, Muslims (mainly by conversion) have made an attempt to do so in the Civil High Court. The Federal Court, however, has in many cases ruled that the Civil Court has no such jurisdiction when matters concerning Islamic law arise. Since apostasy cases are strictly under the jurisdiction of the *Shari'a* Court, the Civil High Court must distance itself from making any judgement on that matter.<sup>151</sup> The battle of jurisdiction in apostasy cases between the Civil High Court and the *Shari'a* Court has brought about a jurisdictional conflict, when the former argues that it has jurisdiction on matters over Islamic

---

<sup>148</sup> Interview with Mr. Abdul Rahman Abdullah, Registrar of the Kedah *Shari'a* High Court, 19 August 2003.

<sup>149</sup> This information was revealed to the writer by Mr. Sakaria Samela, the Sabah *Shari'a* Public Prosecutor.

<sup>150</sup> Interview with Mr. Sakaria Samela, the Sabah *Shari'a* Public Prosecutor, 12 August 2003.

<sup>151</sup> *Soon Singh v PERKIM* [1999] 1 MLJ 489, [1999] 2 AMR 1211; *Mohamed Habibullah v Faridah Talib* [1992] 2 MLJ 793.

law, including apostasy, in the event where there is no express provision in the State List.

As there is no provision on conversion out of Islam in Penang, application for apostasy will normally be channelled to the *Shari'a* judges or *Mufti* for counselling sessions and repentance purposes only. Both the *Shari'a* judges and *Mufti* seem reluctant to make any declaration where there is no jurisdictional provision in the State Enactment. Application to renounce Islam may also be made at the Religious Department but until now no approval has been made.<sup>152</sup>

Sarawak seems lenient in approving applications to renounce Islam. As the majority of the applicants are Muslims by conversion, the Chief Minister appears to have compromised on the matter. Though the *Shari'a* Court seems reluctant to declare a person has apostatised, such approval could be obtained from the Religious Department. The procedure seems very straightforward. Muslims who wish to convert out of Islam may apply for approval from the Religious Department. The officer-in-charge will ask the applicant the reason why he intends to renounce Islam. In most cases, the applicant will undergo a series of counselling for the purpose of repentance. If such process fails, the officer will issue a letter confirming that such person is no longer professing the religion of Islam. By this document, the person can apply to change his Muslim name to a non-Muslim name at the Department of Registration, which in this case faces no obstacle. It is believed that Sarawak has one of the highest numbers of such applications to renounce Islam in Malaysia.<sup>153</sup>

### XIII. APPLICATION TO CHANGE MUSLIM NAME TO NON-MUSLIM NAME

The new regulation by the Department of Registration makes it impossible for Muslims to change their Muslim names to non-Muslim names unless the applicants have successfully been declared as non-Muslims by any *Shari'a* Court or Religious Department. The new rule, namely National Registration Rules (Amendment 2001), states that application to change name shall not be related to the changing of religion. However, if there is an application to change a Muslim name to a non-Muslim name, the applicant must attach a supporting document either by the Religious Department or the *Shari'a* Court that indicates that he has been declared apostate. Based on statistics issued by the Registration Department from 1999 till July 2003, there were 750 applications to change from a Muslim name to a non-Muslim name. Out of this number, only 220 applications were granted where there were supporting documents either from the *Shari'a* Courts or

---

<sup>152</sup> Interview with YAA Dato' Che Yusof Puteh, Chief Justice, Department of *Shari'a* Judiciary of Penang, 16 August 2003.

<sup>153</sup> Interview with YAA Tuan Haji Sham Haji Obeh, Chief Justice, Department of *Shari'a* Judiciary of Sarawak, 5 August 2003.

Religious Departments, which indicates that the applicants officially renounced the religion of Islam. For the year of 2003 (until July), there were 81 applicants. There are also certain cases whereby, the applicants applied to use the original non-Muslim name as issued in the birth certificate.

Most cases of approvals involved Muslims by conversion.<sup>154</sup> If there were cases involving Muslims by birth, it is likely that either one of their parents or both of them are Muslims by conversion.<sup>155</sup> This indicates that there is only a small number of applications to apostatise by born Muslims.

In one particular case, *Lina Joy v Majlis Agama Islam Wilayah Persekutuan*,<sup>156</sup> the plaintiff was born and brought up as a Muslim. Both her parents were Muslims. She had applied to the National Registration Department (NRD) *inter alia* to change her Muslim name to a non-Muslim name, and to change her religious status. In her affidavit, she claimed that she no longer practiced the religion of Islam, and had converted into Christianity. She had been baptised and had made a deed poll declaration that she was no longer a Muslim. However, the NRD declined her application on the ground that she did not support her application with documents either from the *Shari'a* Courts or the Religious Departments indicating that she was no longer a Muslim. The High Court held that by virtue of Article 160(2) of the Federal Constitution, the plaintiff cannot change her religion as a Malay must be a Muslim until the end of his/her life.

She then appealed to the Court of Appeal arguing that her right was denied. The Court of Appeal held that she was not denied her right to do so; the only restriction was that she must first get the declaration from the *Shari'a* Courts.<sup>157</sup> This has been decided in the landmark case, *Soon Singh v PERKIM*<sup>158</sup>. In that case, the Federal Court ruled that matters relating to conversion from Islam lie strictly with the *Shari'a* Courts, and to the extent by implication.

Lina Joy appealed to the Federal Court, where the case is now pending.

#### **XIV. JURISDICTION IN APOSTASY CASES: CIVIL COURTS VERSUS *SHARI'A* COURTS**

Despite the apparent jurisdictions awarded to the Civil and *Shari'a* Courts, conflicts between the two court systems have never been considered. One

---

<sup>154</sup> Information given by Ms. Rosminah Mohd Yusoff, Registration Department, Malaysia.

<sup>155</sup> In the State of Perak, there are 23 Muslims applied to change their Muslims name to non-Muslims name. Out of this number, only one involves Malay (Muslim by birth). Interview with YB Dato' Abdul Rahim Uda, Perak Legal Advisor (as he then was), 25 Jun 2003.

<sup>156</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119.

<sup>157</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2005] 5 AMR 663.

<sup>158</sup> [1999] 1 MLJ 489; [1999] 2 AMR 1211.

particular area of conflict in recent years has been the issue of jurisdiction in matters concerning apostasy cases. One of the main reasons that contributes to this dichotomy is that, some of the state legislatures, despite being conferred the power and jurisdiction of the *Shari'a* Courts, have failed to take substantial steps to confer an explicit jurisdiction on *Shari'a* Courts over the jurisdiction of apostasy. The question which arises here is whether the *Shari'a* Courts have jurisdiction over those matters listed in paragraph 1 of the State List even in the absence of an express state law conferring such jurisdiction on the *Shari'a* Courts?<sup>159</sup>

In addition, because the word 'jurisdiction' in Article 121(1A) of the Federal Constitution seems ambiguous, there is a need for a proper construction of its interpretation by the Federal Court. As such, it has led to conflicting judicial decisions on the question of which court has jurisdiction when apostasy cases arise.<sup>160</sup>

There are two approaches taken by the courts in deciding whether the *Shari'a* Courts have jurisdiction in matters concerning apostasy.<sup>161</sup>

The first approach suggests that the *Shari'a* Courts have no jurisdiction whatsoever in matters relating to apostasy in a case where there is no express jurisdiction conferred in the State laws. This approach is taken even though the Federal Constitution provides that the State has jurisdiction over matters relating to Islamic law.<sup>162</sup> The view that postulates that State Legislatures need to expressly confer jurisdiction on the *Shari'a* Courts was affirmed in *Ng Wan Chan v Majlis Ugama Agama Islam Wilayah Persekutuan & Anor*.<sup>163</sup> In this case, the plaintiff was the widow of Lee Siew Kee who died on 2 May 1991. One of the orders sought was a declaration that her late husband was a Buddhist during his lifetime and at the end of his death on 2 May 1991. The first defendant later filed an application to set aside the writ and claim of the plaintiff. However, after discussion, the first defendant decided not to proceed with this, and instead raised the issue of preliminary objection challenging the jurisdiction of the High Court to

---

<sup>159</sup> Abdullah Saeed & Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Ashgate Publishing Ltd, Aldershot, 2004) p. 150.

<sup>160</sup> Pawancheek Marican, "Murtad (Apostasy) and Art 121(1A) of the Federal Constitution", [1998] 2 MLJ lxxviii.

<sup>161</sup> *Ibid*; Abdullah Saeed & Hassan Saeed, *Freedom of Religion, Apostasy and Islam*, *supra* n. 168, pp. 150-159; For further reading, see Farid Sufian Shuaib, *Powers and Jurisdiction of Shari'a Courts in Malaysia*, Malayan Law Journal Sdn Bhd, Kuala Lumpur, 2003, p.51; Shahriman Mahmud, *Perbincangan Isu Murtad di Malaysia*, Project Paper, Postgraduate Diploma in Administration and Islamic Judiciary, International Islamic University, Malaysia, 1999, pp.38-40; Siti Zubaidah Ismail, "Pertindihan Bidang Kuasa Mahkamah *Shari'ah*: Sorotan Terhadap Kes-kes Murtad", *IKIM Law Journal*, Vol.4, No.2, July-December 2000, pp. 67-82.

<sup>162</sup> Ninth Schedule, List II – State List.

<sup>163</sup> [1991] 3 MLJ 487.

entertain the plaintiff's claim. The defendant claimed that the Civil High Court had no jurisdiction on matters pertaining to Islamic law as stated in the State List, and this includes matter relating to the determination of the faith of a person. Since the jurisdiction of the *Shari'a* Court over matters enumerated under section 45(2) and (3) of the Selangor Administration of Muslim Law Enactment of 1952 did not include the jurisdiction to determine if a person professes and practises the Muslim religion, the Civil High Court was not precluded from determining the issue. In the words of Eusoff Chin J (as he then was):

If State law does not confer on the *Shari'a* Court any jurisdiction to deal with matter stated in the State List, the *Shari'a* Court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.<sup>164</sup>

A similar approach was also taken in *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & Anor*.<sup>165</sup> In this case, the High Court admitted that the question of the determination of Muslim faith existed under Item 1 of the State List of the Ninth Schedule of the Federal Constitution. However, the judge ruled that the Civil Court was the competent court to hear an application for apostasy since there was no explicit provision in the State Enactment of Penang that empowered the *Shari'a* Court to do so.

In *Shaik Zolkaffly Shaik Natar & Ors v Majlis Agama Islam Pulau Pinang*,<sup>166</sup> the High Court of Penang echoed a similar view. The judge held:

When there is a challenge to the jurisdiction of the High Court, the key is not whether the High Court had jurisdiction, but whether jurisdiction of the matter at hand is with the *Shari'a* Court.....Jurisdiction to *Shari'a* Court is given by state laws but if state law did not confer on the *Shari'a* Court any jurisdiction to deal with any matter in the State List, the *Shari'a* Court is precluded from dealing with the matter and the jurisdiction cannot be derived by implication.<sup>167</sup>

The High Court found that, because there was no express jurisdiction conferred on the *Shari'a* Court, the sole jurisdiction rested with the Civil Courts.

The final example is the case of *Mohamed Habibullah v Faridah Talib*.<sup>168</sup> This is an important case involving Article 121(1A) although it does not directly

---

<sup>164</sup> *Ibid* at p. 489.

<sup>165</sup> [1996] 3 CLJ 231. This case was quoted with disapproval in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1998] 1 MLJ 681.

<sup>166</sup> [1997] 3 MLJ 281.

<sup>167</sup> [1997] 3 MLJ at 293.

<sup>168</sup> [1992] 2 MLJ 793.

involve the issue of apostasy. In this case, the respondent had renounced Islam after being dissatisfied with the manipulation made by the Federal Territory *Shari'a* Court in seeking a *fasakh* (dissolution of marriage by court order). She later filed a writ of summons in the High Court of Kuala Lumpur and claimed, among others, damages and/or aggravated damages for acts of assault and battery committed by the defendant against the plaintiff and the members of their family. The defendant/appellant had questioned the issue of jurisdiction at the Supreme Court (as it then was) since the parties concerned were Muslims, and the matter arising was within the matter of Islamic law, and therefore the case should be decided by the *Shari'a* Court in respect to the 1988 Amendment of Article 121(1A) of the Federal Constitution. Harun Hashim, the then Supreme Court Judge opined that “when there is a challenge to jurisdiction, the correct approach is to first see whether the *Shari'a* Court has jurisdiction and not whether the State legislature has power to enact the law conferring jurisdiction of the *Shari'a* Court”.<sup>169</sup> In the end, the Supreme Court held that the provision of Article 121 (1A) was to give the *Shari'a* Courts an exclusive jurisdiction over matters related to Islamic law among persons professing the religion of Islam. Hence, the Civil High Court is precluded from having any jurisdiction over such matters.

The second approach, however, postulates that the *Shari'a* Courts do have jurisdiction over matters concerning apostasy even where there is no express provision in the State statutes. The main reason for this approach is that the word ‘jurisdiction’ in Article 121(1A) of the Federal Constitution “refers to the wider jurisdiction stipulated in Item 1 of the State List”. Under this category, such jurisdiction is awarded to the *Shari'a* Courts by Item 1 of the State List, though such provision is not implicitly provided.<sup>170</sup>

This second approach, taken by the learned judges in *Md. Hakim Lee v MAIWP*<sup>171</sup> was originally based on that taken in *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam & Anor.*<sup>172</sup> In the case of *Md. Hakim Lee*, the plaintiff was a Buddhist by birth. He later converted into Islam under the name of Md Hakim Lee Abdullah. Subsequently, he made a deed poll and a statutory declaration that he had renounced Islam and showed an intention of re-converting back to Buddhism under the name Lee Leong Kim. He further claimed that his action was guaranteed by Article 11(1) of the Federal Constitutions that maintains religious freedom. The defendant raised a preliminary issue whether the High Court has such jurisdiction. Dismissing the application, the learned judge, Justice Abdul Kadir Sulaiman ruled that the question of apostasy was not within the

---

<sup>169</sup> *Ibid* at p. 800.

<sup>170</sup> Pawancheek Marican, “*Murtad* (Apostasy) and Art 121(1A) of the Federal Constitution”, [1998] 2 MLJ lxxviii.

<sup>171</sup> [1998] 1 AMR 74; [1998] 1 MLJ 681.

<sup>172</sup> [1992] 1 MLJ 1.

jurisdiction of High Court and only the *Shari'a* Court can deal with this matter even though there was no provision with regard to apostasy in the State Enactment. The learned judge said:

The fact that the State legislature is given the power to legislate on these matters but it does not yet do so, will not detract from the fact that those matters are within the jurisdiction of the *Shari'a* Court within the contemplation of paragraph 1 of the State List and which jurisdiction is ousted from the courts mentioned in Article 121(1).<sup>173</sup>

The learned judge ruled that the issue of apostasy is under the state jurisdiction, even though the state legislation is silent on this matter. He emphasised further:

When these matters (as in State List) are in issue, the jurisdiction is clothed in the *Shari'a* Court and not in the court mentioned in Article 121(1), notwithstanding the absence of express provisions in the state enactments at the time the issue arises.<sup>174</sup>

In his judgement, the learned judge, Abdul Kadir Sulaiman J ruled that matters pertaining to conversion out of Islam should be determined and decided by *Shari'a* Court. In his words:

...the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of *Shari'a* law...<sup>175</sup>

The learned judge also emphasised that the best forum in settling the matter is confined to *Shari'a* Court. In his words:

.....the question in issue requires substantial consideration of the Islamic law by relevant juries qualified to do so. The only forum qualified to do so is the *Shari'a* Court.<sup>176</sup>

In *Dalip Kaur*,<sup>177</sup> the Supreme Court (as it then was) dismissed an appeal by the deceased's mother. In this case, the deceased's mother appealed to the Supreme

---

<sup>173</sup> [1998] 1 MLJ at 685; see also Zubaidah Ismail, "Pertindihan Bidang Kuasa Mahkamah *Shari'ah*: Sorotan Terhadap Kes-kes Murtad", *supra* n. 161, pp. 68- 70.

<sup>174</sup> [1998] 1 MLJ at 685; see also Siti Zubaidah, *supra* n 161.

<sup>175</sup> [1992] 1 MLJ at 9; see also Siti Zubaidah, *supra* n 161.

<sup>176</sup> *Ibid.*

<sup>177</sup> [1992] 1 MLJ 1.

Court that her late son was no longer a Muslim when he passed away. The deceased was scheduled to marry a Malay Muslim girl but he died before the marriage could take place. The appellant also argued that the deceased after converting to Islam had renounced it, and reconverted back to Sikhism by having a deed poll. Justice Abdul Hamid ruled that the deceased was a Muslim at the time of his death and had not reconverted back to Sikhism. On appeal, the Supreme Court requested that the case should be returned to the High Court where several questions regarding Islamic law were raised. The determination whether a person was *murtad* (apostate) should be made by the *Shari'a* Court. Since there was no such ruling, the deceased was considered a Muslim at the time of his death. The learned judicial commissioner confirmed his earlier findings and decision. The appellant appealed.

In dismissing the appeal, Hashim Yeap Sani CJ (Malaya) held that the learned judicial commissioner had not misdirected himself in law or in fact in deciding that the deed poll was not of the deceased, and that the deceased was a Muslim at the time of his death.

Mohamed Yusoff SCJ - while agreeing with the majority that the appeal be dismissed - took a different approach. He argued that the foremost question to be asked is whether the deceased had renounced Islam during his lifetime. And the only forum qualified to answer such question would be the *Shari'a* Court. He held that:

[C]lear provision should be incorporated in all the state Enactments to avoid difficulties of interpretation by the Civil Courts. This is particularly important in view of the amendment to Article 121 of the Federal Constitution made by Act A704 of 1988. The new clause 1A of Article 121 of the Federal Constitution effective from 10 June 1988 has taken away the jurisdiction of the Civil Courts in respect matters within the jurisdiction of the *Shari'a* Courts.<sup>178</sup>

He further said:

The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to Civil Law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. On this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic

---

<sup>178</sup> Ibid at p.7

Law by relevant jurists qualified to do so. The only forum qualified to do so is the *Shari'a* Court.<sup>179</sup>

Poh-Ling Tan argues that Justice Mohamed Yusof's words with regard to jurisdiction of *Shari'a* Court when matters pertaining to making a declaration or making a finding that a Muslim had renounced Islam, were wrongly taken out of context and given a meaning that were not intended. In supporting her argument, she quotes Lee Min Choon's suggestion that the intended meaning is that "while a civil judge was competent to rule, it must not be without the assistance of Islamic jurists after consideration of Islamic law".<sup>180</sup>

In *Soon Singh v PERKIM*,<sup>181</sup> the Federal Court ruled that Civil Courts had no jurisdiction to hear an application for an apostasy declaration. It was the *Shari'a* Court's power to determine whether a Muslim has apostatised or not. In the High Court, the plaintiff/appellant applied for a declaration that he was no longer a Muslim. It was also contended that he raised an issue of jurisdictions of courts. He argued that there was no express provision in the Kedah Islamic Administration Enactment of 1962 that conferred such jurisdiction on the *Shari'a* Court. He postulated that the High Court was the competent court to decide this matter. The Federal Court, in its judgement, ruled that it was within the *Shari'a* Court's jurisdiction even though there was no provision in the State Enactment. Thus, the *Shari'a* Court has a jurisdiction by implication: ".....it does not seem inevitable that since matters on conversion to Islam come under the jurisdiction of the *Shari'a* Courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts".<sup>182</sup>

Yet the judgement of *Soon Singh* could not solve the problem of jurisdiction. The subject matter would be within the jurisdiction of *Shari'a* Courts, but what would be the position if one of the parties is not a Muslim? Since the *Shari'a* Courts have no jurisdiction over non-Muslims, under which courts shall they go, if not to the Civil Courts? The situation could be seen in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor*<sup>183</sup> and *Ng Wan Chan v Majlis Agama Islam Wilayah Persekutuan & Anor*,<sup>184</sup> *Moorthy and A Rayapan*, where the parties involved were non-Muslims.

---

<sup>179</sup> *Ibid* at p.9-10.

<sup>180</sup> Poh-Ling Tan, "Paying the Price for Religious Freedom – A Non-Muslim Perspective" in Wu Min Aun (Ed.) *Public Law in Contemporary Malaysia*, Longman, 1999, pp. 158-159; see also Lee Min Choon, "Error of Jurisdiction: Dalip Kaur Revisited", *Insaf*, Vol. Xxcii, No. 2 June 1998, p. 91.

<sup>181</sup> [1999] 1 MLJ 489; [1999] 2 AMR 1211.

<sup>182</sup> [1999] 2 AMR at p. 1233.

<sup>183</sup> [1992] 1 MLJ 7.

<sup>184</sup> [1991] 3 MLJ 487.

It is also contended that the judgement of *Soon Singh* gives rise to two problems: first, in certain states in Malaysia, for instance, in Terengganu<sup>185</sup> and Perak,<sup>186</sup> it is an offence for a Muslim to declare that he has converted out of Islam. An admission by the convert that he has renounced Islam would promptly expose him to criminal charges and consequently to punishment. Second, because of the teachings of Islam, Muslim judges may find themselves violating the Islamic rule and thus would be reluctant to grant any declaration that enable Muslims to renounce Islam.<sup>187</sup>

The recent decision in *Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors*<sup>188</sup> also indicated that the *Shari'a* Court was the competent court to adjudicate matters concerning the determination of renunciation of Islam, though such provisions were not expressly provided in the Administration of Islamic Law Enactment of Johore of 1978 (the Johore Enactment). The Court held that:

The Johore Enactment contains provisions regarding conversion into Islam. When jurisdiction is expressly conferred on the *Shari'a* Courts to adjudicate on matters relating to conversion to Islam, it is logical that matters concerning conversion out of Islam could be read as necessarily implied and falling within the jurisdiction of the *Shari'a* Courts..... Thus, if it was true that the Johore Enactment contained no provisions regarding conversion out of Islam, the *Shari'a* Court would still have jurisdiction, although implied, to hear an application concerning conversion out of Islam.<sup>189</sup>

Indeed, by virtue of Article 121(1A) of the Federal Constitution, the Civil Court has no jurisdiction to hear such application and to determine an application concerning renunciation of Islam, as such power and jurisdiction are in the hands of the *Shari'a* Courts.<sup>190</sup>

## XV. CONCLUSION

Although Article 11(1) of the Federal Constitution guarantees the right to freedom of religion, it seems that some states have penalised Muslims who renounced Islam. This can be seen in the states of Pahang, Perak, Terengganu, Melaka and Sabah. In the states of Sabah, Kelantan and Malacca, Muslims who intend to renounce Islam are detained at the Islamic rehabilitation centre for counselling

---

<sup>185</sup> Section 29 of the Terengganu Administration of Islamic Affairs Enactment of 1996 provides that whoever attempts to renounce Islam or declaring that he is no longer a Muslim shall be fined up to RM 3,000.00 or not less than one year imprisonment or both.

<sup>186</sup> Section 13 of the Perak Syari'ah Criminal Law Enactment of 1992 provides a fine up to RM 3,000.00 or not less than two years' imprisonment or both for Muslims who renounced Islam.

<sup>187</sup> See Lee Min Choon, *Freedom of Religion in Malaysia*, *supra* n. 89, p. 45.

<sup>188</sup> [2004] 5 MLJ 40.

<sup>189</sup> [2004] 5 MLJ at pp. 41-42.

<sup>190</sup> *Ibid.*

purposes to keep their Islamic faith. Other states are silent on the provision of apostasy.

Given the provisions of Articles 11(1) and 3(1) of the Federal Constitution, the writer is of the view that the law of apostasy must be standardised and uniformed. Provisions on punishment and mandatory detention at the Islamic rehabilitation centre for apostasy should be reviewed. It seems that the Negeri Sembilan's law will be a good model for adoption, whereby Muslims who intend to leave the Islamic faith must undergo a counselling process for repentance purposes.