

FREEDOM OF RELIGION IN MALAYSIA: DEBATES ON NORMS AND POLITICO - LEGAL ISSUES *

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Malaysia takes great pride in being a melting pot of different cultures, races and religions, co-existing under the purportedly “moderate Islamic nation” model. Yet, populations remain divided along racial and religious lines. Race and religion are not only politically salient; they are also jealously guarded to protect inter-ethnic sensitivities. Nevertheless, the vibrant development of human rights awareness and advocacy introduced an additional element into the dynamics of pluralism in Malaysia. Human rights have become standard talking points even amongst those in the vanguard of cultural, political, and religious conservatism.

In Malaysia, cases invoking the right to religious freedom in the past decade have garnered widespread attention and caused considerable public uproar in the Muslim-majority nation. They involve (though not limited to) apostasy, child conversions, and persecution against non-mainstream religious doctrines. These cases raise pertinent questions about the parameters of religious freedom for Muslims and non-Muslims alike, especially when pitted against particular religious rules, societal norms, as well as the bigger idea of collective social responsibility and national stability.

This paper offers a critical insight into the fundamental right to religious freedom in Malaysia. It examines several controversial cases which tackle the essential question of whether the Malaysian conception and practice of religious freedom is consistent with international human rights standards and entrenched constitutional rights. This paper demonstrates that while religious freedom is constitutionally guaranteed in Malaysia, there are other significant political, legal, and social dimensions to its exercise. It is hoped that this piece will prompt further discourses in drawing an acceptable idea of religious freedom informed by universal views of human rights, whilst maintaining aspects of common cultural values.

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1. Introduction

Malaysia prides itself in its recognition as a “moderate Islamic country” (Darshni, 2005). Through inter-communal compromises in drafting the post-colonial Federal Constitution (hereinafter “Constitution”) in 1956, drafters agreed to establish Islam as the religion of the Federation (Fernando, 2006: 253). This was “part of a political settlement in return of which the non-Malays would obtain citizenship and the right to education in their mother tongue” (Harding, 2010: 499). The constitutional grounding of Islam however, does not affect the right of non-Muslims to practice and profess their own religions (Abdullah, 2003: 119). Indeed, this is the central feature of religious freedom in Malaysia as enshrined in Article 11 of the Constitution.

Almost five decades later, the rise of several high-profile cases invoking the right to religious liberty reveals serious problems regarding the parameters of that right (Barry, 2009: 409). In 2004, Lina Joy sought to change her religious status on her national identity card at the National Registry Department (NRD). Born a Muslim, Joy converted to Christianity and was baptized in 1998. The NRD refused her application in the absence of an order from a *Syariah* court affirming her conversion (Barry, 2009: 410). Joy did not resort to the religious courts, but applied to the civil courts on the grounds that the denial to remove “Islam” from her identity card interfered with her right to practice the religion of her choosing under the Constitution. Her appeals proceeded to the Federal Court - the highest court in the land - but Joy was unsuccessful (Barry, 2009: 409-410).

Needless to say, the *Lina Joy* case drew criticism from journalists, human rights lawyers, activists and organizations. But it was only one of the many cases questioning the extent of religious freedom in Malaysia. The landmark ruling was expected to permanently settle questions of whether Malaysia “will go down the line of secular constitutionalism or whether that constitution will now be read subject to religious requirements” (Prystay, 2006). Joy’s lawyer, Malik Imtiaz Sarwar – himself a Muslim – sees the Federal Court verdict as “a potential dismantling of Malaysia’s...multi-ethnic and multi-religious character” (Beech, 2007). Clearly, this case has many ramifications for the social, political and legal outlook in Malaysia. On the one hand, Joy’s case is seen as a grave violation of a fundamental right enunciated in the Universal Declaration of Human Rights (hereinafter “UDHR”) (1948). On the other, there is a fine distinction between freedom of religion as understood in the UDHR, and a more limited, carefully crafted religious liberty provision in the Constitution. Thus, the extent to which the constitutional recognition of freedom of religion is consistent with the universal idea of the same right is still a matter great of debate. This tension also demonstrates a broader theme: the tussle between universalist and relativist conceptions of human rights.

The UDHR has evolved from an aspirational statement to a body of norms accepted either as “part of customary international law, or as an authoritative interpretation of the UN Charter’s human rights provisions” (Steiner et al., 2008: 161).

Its professed “universality” attracts much hullabaloo, especially from those resistant to these supposedly “Western ideas.” With the rise of nationalism and claims of “culture as national essence” (Merry, 2007: 527), human rights are challenged as a product of the individualistic, liberal West. Therefore, they are seen as inconsistent with communal, conservative or non-liberal values. For others, the idea of a common standard of fundamental rights inherent to the virtue of being human – rights, which are inalienable and indivisible regardless of race, creed, and nationality – is a noble aspiration. Certainly today, the human rights movement has gone beyond mere idealism; it has transcended national boundaries, infiltrated international institutions, and embedded itself in the world’s modern consciousness (UN General Assembly, 2009).

In multicultural and multi-religious Malaysia, disputes on matters of religion and race are only expected. But the extent to which the constitutional recognition of freedom of religion is consistent with the universal idea of the same right is still a matter great of debate. With the rise of high-profile cases implicating religious freedom, this issue has been brought to the forefront of the social, legal and political systems. In an attempt to address these, this article will proceed in four parts. Part 2 explains the international human rights conception of the freedom of thought, conscience and religion, and the two competing perspectives on the issue, namely the universalist and relativist debate. Part 3 underlines related provisions of the Constitution and some historical background as to how Malaysia’s forefathers envisioned those crucial constitutional provisions. Part 4 examines recent cases with regard to the Malaysian experience in dealing with freedom of religion issues. Finally, Part 5 evaluates the issues shaping the extent of freedom of religion in Malaysia and attempts to propose a way forward, especially in context of the universalist-relativist arguments on that freedom. This paper will demonstrate that the parameters of freedom of religion in Malaysia are shaped by various political and legal forces, as well as the desire to maintain stability among the racially and religiously diverse population.

2. International Standards on Religious Freedom: Theories and Perspectives

2.1 International Human Rights Instruments

The post-World War II promulgation of the UDHR seeks to establish a foundational document that would transcend national boundaries and protect rights that are fundamental to a human being (Flowers, 1998). Religion is one of those rights. Article 18 of the UDHR (1948) provides the right of every individual to freedom of thought, conscience and religion. This is a truly broad provision, one that envisions not only the right to manifest, practice and profess a religion, but also the right to change one's religion. Meanwhile, Article 29(2) of the UDHR (1948) permits limitations to the exercise of one's rights and freedoms “solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Armed with the promise of respect for pluralism, equality, and non-discrimination, successive documents built upon and cemented the UDHR’s provisions. For instance, Article 18(2) of the International Covenant on Civil and Political Rights (ICCPR) prohibits coercion that would impair people’s freedom to choose their religion or belief. This right, however, is not absolute. Article 18(3) of the ICCPR allows limitations on manifestations of religious beliefs that are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Thus, according to the Human Rights Committee (hereinafter “HRC”), Article 18 “does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice” (UN Human Rights Committee, 1993). The HRC also states that “limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated” (UN Human Rights Committee, 1993).

The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Beliefs (hereinafter “1981 Declaration”) also refines the parameters of religious freedom. One striking provision is Article 2’s prohibition on discrimination on the basis of religion or other beliefs. It also defines the right of parents or legal guardians of a child “to organize the life within the family in accordance with their religion or belief.”

2.2 The Universalist Position

The key feature of the UDHR (1948), or any of the subsequent human rights instruments, is their universal aspirations, both in nature and application. The UDHR preamble evidences this when it speaks of the “inherent dignity and of the equal and inalienable rights of all members of the human family” and proclaims “a common standard of achievement for all people and all nations.” Similarly, the 1981 Declaration proclaims the “universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”

It is obvious that the language of these human rights instruments does not contemplate any differences by way of background, creed, or geographical locations. They address all regions and states, regardless of the form of government, socio-economic situation or religious-cultural traditions (Steiner et al., 2008: 517). However, in terms of application, what ‘universal’ entails is a more complex question. Does this imply that all rights are to be conceived and implemented in the same manner everywhere? There are different schools of thought on what ‘universalism’ involves (Donnelly, 1984: 400), but the underlying belief of the universal movement is that the basic values and concepts underlying human rights are common to all people. It is certainly perplexing to imagine a situation where

rights are protected and afforded in one region and not another. As Higgins argues, “human rights are human rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned” (Higgins, 2008: 539).

But a deeper reflection of this idea may expose inherent dangers. For instance, Jack Donnelly flags the problem of moral imperialism, especially given radical universalists’ prioritizations of the “demands of the cosmopolitan moral community over all other (“lower”) moral communities” (Higgins, 2008: 539).

On the freedom of religion, universalists claim that it is and must be the same everywhere, just like rights to equal protection, physical security, fair trials, free speech, and free association (Glendon, 2008: 142). Universal laws of human rights apply to all regardless of their religion, and states cannot deny the duties of humanity on the mere basis of religious differences (Orakhelashvili, 2006: 316). The human rights movement insists on a non-theistic basis for the modern human rights regime, reflecting a “quest for universal acceptance and universal commitment to a common moral intuition articulated in specific agreed-upon terms” (Henkin, 1998: 234). For this reason, human rights are often dismissed as promoting highly individualistic and secular ideas which differ from prevailing religious and cultural norms and practices (Henkin, 1998: 233).

2.3 The Cultural Relativist Position

The relativist argument is based on the idea of autonomy and self-determination (Donnelly, 1984: 400), both of which are not unknown concepts to international law. Amongst the relativists, the Western Enlightenment foundations of the human rights ideals (An-Naim, 2000: 96) render its validity to other cultures and regions questionable (Danchin, 2009: 95). They argue that the UDHR says very little about collective rights and is more directed towards a post-war human rights regime focused on individual rights (Danchin, 2009: 105). Relativists also consider it hard, if not impossible, to translate human rights into cultures which emphasize the role of the family and community living, particularly in cultures where religion (or religions) play an important role (Danchin, 2009: 118). Donnelly identifies different types of cultural relativism, but argues that the relativists’ basic claim to human rights is grounded in respect for ethical and cultural diversity (Donnelly, 1984: 400-402). Rights and rules about morality depend on cultural contexts, and “culture” is used broadly to include not only indigenous traditions and customs, but also political and religious ideologies (Steiner et al., 2008: 518). For instance, Azizuddin Sani (2008: 2) argues that the Malaysian perspective of Asian Values, as propounded by former Prime Minister Mahathir Mohamad, is based on Malay-Islamic culture and the conviction that Western conception of rights can corrupt Malaysian culture and religious beliefs. Hence, on the basis that there are no trans-cultural ideas of rights that can be agreed upon (Steiner et al., 2008: 518), we witness the emergence of “Asian Values” and Islamic human rights.

Relativists find great difficulty in reconciling universal rights with the differing ideas of religious freedom (Henkin, 1998: 237). They also invoke the bigger idea of social responsibility and national stability to defend practices that arguably contradict such freedom (Robertson, 1995). It is argued that ideas and morality of religions differ from those of human rights, not only in their sources of authority, but also in their forms of expression and elements (Henkin, 1998: 230).

The secular human rights doctrine is deemed contradictory to the fundamental tenets of monotheistic religions because the former is based on individual autonomy and responsibility, as well as on systemic-rational principles, while the latter “is based on the subjection of the individual and the community to the will of God” (Raday, 2003: 668). Different religions also claim their respective moral codes as the basis of ethical, moral and social order, taking precedence over man-made laws and rights. The human rights corpus, underived from any holy texts or supreme higher order, is questioned by adherents who see themselves bound by the moral codes of their respective faiths (Henkin, 1998: 233).

Therefore, the UDHR is confronted with the question of “how the right mediates between its purportedly secular and objective position, and the subjectivity of particular religious norms” (Danchin, 2009: 96). The tension is evidenced by the concepts of religious duty and religious freedom, especially because in some religions there is a clear rejection of at least some religious choice, condemnation of apostasy, and resistance towards the proselytizing of their constituents by other religions (Henkin, 1998: 231).

3. The Malaysian Constitutional Law Framework

To conceptualize freedom of religion in Malaysia, it is important to understand several provisions of the Constitution. First, although the Malaysian legal system models the Westminster system, it is often taken for granted that there is a written constitution in place. The Constitution, according to Article 4, is the supreme law of the land. It is at the apex of the legal hierarchy, so any acts of parliament to the contrary may be deemed unconstitutional. Former Federal Judge Raja Azlan Shah’s account on constitutional supremacy in *Loh Kooi Choon v. Gov’t of Malaysia* (1977) 2 MIJ 187 is particularly telling:

“The Constitution . . . is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach . . . no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of the government’.

3.1 Islam as Religion of the Federation

Article 3(1) states that Islam shall be the religion of the Federation, but other religions may be practiced in peace and harmony in the Federation. This provision is a product of inter-communal compromises reached in a pre-independence memorandum (hereinafter “Alliance memorandum”) constructed by the three main political parties in 1956 to safeguard the rights and interests of all communities (Thomas, 2006: 17).

Scholars have advanced various interpretations on Article 3, primarily connected to its ceremonial, historical and traditional significance (Thomas, 2006: 17; Fernando, 2006: 249). For instance, L.A. Sheridan and Harry E. Groves (1987) argue that Article 3 entails the use of Muslim rites in religious parts of federal ceremonies (Sheridan and Groves, 1987: 31; Thomas, 2006: 29).

Thomas suggests that Article 3 gives due regard to the elements and traditions of the Malay states long before the colonial period, i.e., the Sultanate, Islamic religion, Malay language, and Malay privilege (Thomas, 2006: 31). The constitutional ideas of the Malay states stem from the Melaka Sultanate in the fifteenth century, where Buddhist, Hindu and Islamic influences permeated through the systems of law and governance (Harding, 1996: 5-6). Shad Saleem Faruqi (2006a: 1) stressed that “the implication of adopting Islam as the religion of the Federation is that Islamic education and way of life can be promoted for Muslims. Islamic institutions can be established. Islamic courts can be set up. Muslims can be subjected to Syariah laws in certain areas provided by the Constitution.”

Historical evidence suggests that although the Alliance memorandum discussed Islam as a religion for Malaysia, it emphasized that this should not affect non-Muslims’ right to profess and practice their religion, and there is no implication that the State is not a secular State (Thomas, 2006: 18-19). Andrew Harding (2010: 506) suggests that despite the establishment of Islam as the religion of the Federation, it has always been agreed that this does not create an Islamic state, but simply allows for the religious nature of state ceremonies. Chief Justice Abdul Hamid, the Reid Commission member from Pakistan, also opined that the provision on Islam as the religion of the State is innocuous (Thomas, 2006: 19). However, “secular,” as intended by the founding fathers, does not connote an anti-religious or anti-Islamic state of governance (Sarwar, 2007a). The Constitution envisages that Syariah laws would govern the personal law requirements of Muslims, but it recognizes that the Syariah would not be made the supreme law.

These views were espoused by the Supreme Court in the landmark case of *Che Omar bin Che Soh v. Public Prosecutor* (1988) 2 MLJ 55, 55-56. In this case, the accused was faced with a mandatory death sentence for drug trafficking. He challenged the sentence on the basis that the imposition of death penalty for the offence is contrary to Islamic injunction and therefore, unconstitutional and void. The Court reiterated the secular character

of the law and governance system, which resulted from colonial Anglo/Malay treaties. It also emphasized that the British establishment of secular institutions separated Islam into the public and private aspect. Islamic law “was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only”. Despite the foregoing arguments, it is notable that the establishment of a particular religion over the State is not unique to Malaysia. In Norway, for instance, primacy on Christianity means that the king and a majority of the cabinet are required to be members of the state church (Shelton and Kiss, 2007: 575). In England, the Anglican Church remains at the center of public policy and has substantial support from the state (Shelton and Kiss, 2007: 576).

3.2 Freedom of Religion

Article 11 guarantees freedom of religion, which – on its literal wording – seems comprehensive enough to safeguard this fundamental right for Malaysia’s plural society. A citizen has the right to profess, practice and – subject to Article 11(4) – to propagate his religion.

Religious groups have the right to manage their own religious affairs or any matters relating to the properties and the establishment of religious institutions. On its face, Article 11 does not expressly prohibit the conversion of a Muslim, though at the same time it does not explicitly include the right to change one’s religion. However, it is suggested that Article 11 can be construed broadly to include one’s freedom to relinquish or change a religious belief (albeit with limitations for Muslims under specific religious laws), and even to not be religious (Thomas, 2006: 34).

The religious freedom clause is reinforced by other constitutional provisions. First, to combat subversion Article 149 permits the enactment of laws which would otherwise be inconsistent with certain fundamental rights such as freedom of speech or personal liberty, but it prohibits any encroachments on religious freedom. Second, under Article 150 (6A), even in a state of emergency, any emergency laws enacted thereafter cannot curtail freedom of religion. Third, Article 8 prohibits discrimination on the grounds of religion against public sector employees, in the acquisition or holding of property, and in any trade, business or profession. It is also important to note that freedom of religion is not affected by Article 3’s establishment of Islam as religion of the Federation. Article 3(4) clearly states that nothing in article 3 derogates from any other provision in the Constitution.

Even so, there are several restraints against freedom of religion. Article 11(5) limits this freedom on grounds of public order, public health or morality. Thus, any religious act deemed contrary to general laws relating to these grounds is unsustainable under Article 11. In the case of Muslim citizens, there may be additional restraints to religious freedom by virtue of Schedule 9, List II, Item I of the Constitution. This grants power to State

Assemblies to enact laws to punish Muslims for offences against the precepts of Islam, such as khalwat, adultery, apostasy, gambling, drinking and deviationist activities (Masum, 2009: iii).

A more controversial provision is subsection 4's limitation on the propagation of religion among Muslims. At first glance, it appears that this contradicts the idea of religious freedom especially for those religions that regard proselytizing as a crucial part of worship (Sheridan and Groves, 1987: 31). There are some important arguments against this view. First, laws controlling propagation are meant "to prevent Muslims from being exposed to heretical religious doctrines, be they of Islamic or non-Islamic origin, and irrespective of whether the propagators are Muslims or non-Muslims" (Masum, 2009: iii-iv). Shad Saleem Faruqi (2001) adds that such restrictions are meant to protect Muslims against organized international missionary activities and to preserve social harmony, rather than prioritizing any particular religion. Second, subsection 4 does not, in and of itself, restrict propagation. Sheridan and Groves argue that it merely renders it constitutional for state law (or federal law in the case of the Federal Territories) to control or restrict propagation (Sheridan and Groves, 1987: 76).

Case law has, to some extent, been instrumental in developing restraints on religious freedom. This is particularly true of the word 'practice' in Article 11, culminating in the non-mandatory practices doctrine. In essence, this means that freedom of religion extends only to those practices and rituals that are essential and mandatory (Masum, 2009: 4).

In *Hjb Halimatussaadiyah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Another* (1994) 3 MLJ 61 the court rejected a woman's appeal to wear a purdah (a headdress covering a woman's entire face except the eyes) to work because the government was entitled to forbid non-essential and optional religious traditions in the interests of the public service. Similarly, in *Meor Atiqubrahim bin Ishak & Others v Fatimah Sibi & Others* (2006) 4 MLJ 605, 616 the court rejected demands by Muslim boys to be allowed to wear turbans to school.

4. The Malaysian Experience on Religious Freedom

Despite the constitutional grounding of religious freedom, the exercise of this right remains complicated in practice. The parameters of freedom of religion are not always clear, and it is often obscured by political, social and racial elements. The problem not only affects relations between Muslim and non-Muslim citizens; it raises many issues within the Muslim community itself. This strikes a chord between those intent upon a modern liberal interpretation of universal human rights principles, and those insistent on communally-based, constitutional-contract politics in Malaysia (Mohamad, 2008: 155).

4.1 Religious Conversions and Inter-faith Conflicts

In Malaysia, religious conversion cases raise multifaceted constitutional questions and human rights issues, primarily on the extent of a citizen's assertion of the right to religious freedom. These cases also involve questions on the role of Islam as religion of the Federation, specific Islamic rules on apostasy and the role of Syariah courts, as well as one's ethnic status. The most pertinent issue is whether the exercise of this freedom includes the freedom of Muslims to renounce the Islamic faith. The Malaysian courts have dealt with conversions and apostasy many times over the years, and the results are quite varied. For one, there is the notable case of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) & Anor.* (1999) 1 MLJ 489, 489-502. Soon Singh was brought up as a Sikh but converted to Islam. He later renounced Islam and sought a declaration that he was no longer a Muslim in the Kuala Lumpur High Court. The court dismissed his application on the grounds that the subject matter in the application fell within the jurisdiction of the Syariah Courts. In *Kamariah bte Ali v. Kelantan Government* (2002) 3 MLJ 657, a cult member was sentenced to two years in jail for apostasy. There is also the case of *Siti Fatimah Tan Abdullah v. Majlis Agama Islam Pulau Pinang* (2006) Case. 07100-043-0191-2006 (Syariah High Court of Pulau Pinang), which saw the courts exercising some degree of leniency in allowing the appellant, who converted to Islam to marry an Iranian, to later renounce the religion.

However, it was *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Another*, (2007) 4 MLJ 585, that has gained international attention and widespread local debate (Evans, 2009: 460). Joy argued that the National Registry Department's (NRD's) requirement of a Syariah court's confirmation of her conversion violated her constitutional right to freedom of religion. The Federal Court, however, upheld the NRD's requirement before Joy could officially change her religious status on her identity card. The majority opinion also held that one can renounce Islam but still must follow Islam's procedure to do so, and agreed with submissions of various Muslim Non-Governmental Organizations (NGOs) that willful and whimsical conversions could cause chaos to Islam and its adherents (Evans, 2009: 463-464). Although this case was largely an administrative law matter, it became rife with important constitutional and human rights questions.

First, if rights provisions are indeed a mechanism for preventing State interference with a citizen's fundamental liberties, Joy's argument is plausible. Civil and political rights, such as religious freedom, are of a negative nature, that is, the State simply must not encroach upon a citizen's exercise of those rights. Second, the fact that the majority required adherence to particular procedures for renouncing Islam (namely, a Syariah court confirmation), suggests that Article 11 is read in light of Article 3 (Evans, 2009: 464). Harding (2010: 511) argues that the ruling essentially "elevated article 3 to a higher status than article 11." Perhaps one could entertain the idea that Islam as the religion of the Federation means that it should be given precedence, and that any exercise of religious

freedom by Muslims is conditional on Article 3. However, this approach is sorely lacking of any constitutional basis because Article 3(4) clearly states that the establishment of Islam does not affect other provisions of the Constitution. The majority holding in *Lina Joy* also appears to betray the constitutional guarantee of equality regardless of race or religion.

Perhaps the most problematic aspect of the decision is the apparent side-stepping of constitutional issues and deference to the Syariah court in matters implicating freedom of religion. It reveals a lacuna in the legal system due to overlapping of civil and *Syariah* jurisdictions. On the one hand, constitutional rights and interpretation fall squarely within the purview of the civil courts. Harding argues that matters within the Islamic jurisdiction are personal rather than constitutional, and that the “constitutional law requires that jurisdiction of the ordinary courts to rule finally on matters of legality should be preserved” (Harding, 1996: 138). On the other hand, conversions out of Islam are perceived as a matter for the *Syariah* courts due to the separation of the civil-*Syariah* jurisdiction in 1988. The problem is that state-enacted Islamic laws regulating conversions are not always consistent with religious freedom. Moreover, barring a few states, there is no clear legislative enactment on how to deal with apostates or those who seek to convert (Hasan, 2008). It is also unlikely that individuals would voluntarily go to the Syariah courts to convert because these efforts may either be futile, or they will be subjected to punishment or counseling sessions. For instance, Articles 119(1) and 119(8) of the Administration of Islam Enactment (Negeri Sembilan) 2003 require an individual to first to apply to a *Syariah* court for a declaration that he or she is no longer a Muslim, attend counseling for a year, and if his or her position does not change, the court may grant the application. Constitutional arguments aside, it is worth mentioning that from an Islamic perspective, apostasy (for instance by pronouncing oneself to have or intend to renounce Islam) is considered valid regardless of its official endorsement by any particular authority (Abidin, 2007).

The outcome of *Lina Joy* restricts freedom of religion and, to a certain extent, puts it in a state of flux. There is no clear answer to whether the Federal Court would be willing to fight tooth and nail to uphold Article 11 and permit conversions among Muslims. The trend of side-stepping issues of constitutional importance and obscuring the boundaries of religious freedom in Malaysia continued in a recent child conversion case, *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Another* (2004) 2 MLJ 648. There, the consent of a single parent is deemed enough to validate the conversion of a child. There, a Hindu woman appealed against a High Court decision affirming the validity of her children's conversion to Islam without her consent. Shamala and her husband were both Hindus at the time of their marriage and her husband later converted to Islam and also converted both their minor children. The High Court also ruled that Shamala's application to invalidate the conversion is not within its jurisdiction because the children are now Muslims and as such, they are subject to the *Syariah* jurisdiction. The High Court

accepted that Shamala, being a non-Muslim, was without remedy as she is not within the *Syariah* jurisdiction. The Court only suggested that Shamala seek assistance from the Islamic Council of the Federal Territories.

One of the crucial questions on appeal is whether the *Syariah* court has exclusive jurisdiction to determine the validity of minors' conversion to Islam once they have been registered as Muslims (Harun, 2010). The Federal Court was also called upon to determine the appropriate forum for a non-Muslim parent to assert his or her rights and remedies in cases of unilateral conversion of children. In November 2010, the Federal Court rejected Shamala's referral application on the basis that Shamala was in contempt of a High Court order requiring her to bring her children to Malaysia. Shamala had apparently left the country with her children in 2004 (The Star, 2010). Commentators criticized the Federal Court's apparent 'hands-off' approach as a mere 'skirting of technicalities' (Harun, 2010). It appears that the Court had failed to appreciate the gravity of the constitutional issues presented before it, and that it missed the opportunity to clarify those issues, especially as there are other similar cases pending (Tan, 2010).

4.2 Minority Religious Doctrines

The extent of religious freedom in Malaysia is also challenged by restrictions on religious doctrines. As the preceding section demonstrates, states reserve the right to restrict or control propagation of any religious doctrines among Muslims. These limitations affect both Muslim and non-Muslim communities alike.

The first implication of this restriction is that non-Muslims' freedom to practice their religion may be severely curtailed with respect to propagation of their religion to Muslims. There are some State Laws and Federal laws restricting the right to propagate any religious doctrine or belief among Muslims except for Sunni Islam. One example is Terengganu's 'The Control and Restriction of the Propagation of Non-Islamic Religious Enactment' of 1980 (Adil, 2007). In the Federal Territories, Article 5 of *Syariah Criminal Offence Act 1997* states:

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

As a matter of constitutional law, these legislations are rightly constitutional by virtue of Article 11(4) (Harding, 2002: 167).

Restrictions on propagation may be connected to concerns of widespread proselytism, conversions, and also non-Sunni religious Sects among Sunni Muslims (Harding, 2002:

168). While such restrictions interfere with the right to practice a religion, it is often taken for granted that proselytism itself may be deemed a serious encroachment of religious freedom. If this right is to be meaningful, individuals should be free from any compulsion or undue influence to adopt a particular belief. Thus, conversion resulting from compulsion or undue influence is more problematic than conversion out of one's free will. In a multiethnic society like Malaysia, the former is potentially divisive and may threaten social order. An instructive case is *Minister of Home Affairs & Another v Jamaluddin bin Othman* (1989) 1 MLJ 418, where an individual was detained under Internal Security Act 1960 ("ISA") for allegedly disseminating Christianity among Malays and converted six Malays to Christianity. It was suggested that this could ignite tensions between the Christian and Muslim communities and pose a threat to national security. However, the Supreme Court (as it then was) held that such detention was unlawful as it was contrary to the religious right conferred by Article 11(1). The Minister could not utilize the ISA to restrict an individual's right to profess and practice his religion. The Court also ruled that mere participation in meetings and seminars on Christianity, and conversion of Malays could not be regarded as a national security threat.

The second implication from the Article 11(4) restriction is that state laws may prohibit the propagation of other sects or doctrines within Islam itself. Mohamed Salleh Abas (1984: 45) argues that:

"This limitation is logical as it is necessary consequence that follows naturally from the fact that Islam is the religion of the Federation. Muslims in this country belong to the Sunni Sect which recognizes only the teachings of four specified schools of thought and regards others school of thought as being contrary to true Islamic religion. It is with a view to confining the practice of Islamic religion in this country within the Sunni Sect that State Legislative Assemblies and Parliament as respects the Federal Territory are empowered to pass laws to protect Muslims".

Thus, state laws may prohibit 'deviations' from the Sunni sect. Since Muslims in Malaysia officially adhere to *Sunni* teachings, non-Sunni schools of thought are outlawed (Adil, 2007: 10-11). Although there is no constitutional provision entrenching the position of *Sunni* teachings among Muslims in Malaysia, certain state enactments such as that of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, provides that Muslims must conform with *Sunni* teachings, with emphasis on the *Shafi'I* school of thought (Adil, 2007: 10).

The executive and state religious departments have also been fairly active in crackdowns against adherents of other sects. For example, in the 1990s the *Argam* Islamic group, formed in the 1960s to promote an 'Islamic' way of life based on self-sufficiency and strict adherence to Islamic teachings, faced persecution by the government (Adil, 2007: 11). In 1994, this group was labeled by the National Fatwa Council as 'deviant' and unlawful. The Ministry of Home Affairs also delegitimized *Argam* under the Societies Act of 1966 (Adil, 2007: 11).

Between October 2000 and January 2001, the Federal government detained six *Shia* followers under the ISA. Although they were not charged either in civil or *Syariah* courts, *Fatwa* committees in the country, including the one at the federal level, issued a fatwa labeling the group as “deviant” (Adil, 2007: 10). More recently, authorities detained more than 200 Muslim Shiites in Selangor on grounds that the *Shia* doctrine is a threat to national security (Associate Press, 2010). The government claimed that *Shia* doctrine allows for the killing of Muslims considered as being infidels – i.e., non-Shiite Muslims. However, it is not clear if these threats are true or if they are in fact serious and imminent at all.

5. Analysis: Challenges to Freedom of Religion in Malaysia

5.1 The Dual Civil-Syariah Jurisdiction: A Legal Loophole?

A 1988 constitutional amendment separated the civil and Islamic justice systems through Article 121(1A). This provision simply states that the civil courts were to have no jurisdiction in matters within the *Syariah* court’s jurisdiction. Thus, Muslims are subjected to *Syariah* laws in certain matters (as listed in the Ninth Schedule, List II, Item I of the Constitution), and any conduct contrary to Islamic precepts is liable to prosecution. The amendment seems fueled with the best intentions, but it now raises serious jurisdictional conflicts, as well as tensions within the plural Malaysian community.

While the amendment is justified, because *Syariah* is a distinct field that requires expertise in Islamic jurisprudence (Faruqi, 2006a), one problem with the separation of jurisdiction is that it did not create an authoritative mechanism to resolve a jurisdictional overlap. The *Lina Joy* case, like other cases implicating Islam and the freedom of religion, exposes a legal lacuna on jurisdictional propriety. Joy’s case for instance, involves the tension between one’s constitutional right to religious freedom and separate proceedings under the *Syariah* court to renounce Islam. Which court has the authority to definitively rule on the matter? In *Lina Joy*, dissenting judge Richard Malanjum demonstrates greater fidelity to constitutional supremacy, arguing that “civil superior courts should not decline jurisdiction by merely citing article 121(1A)”. He also added that Article 121 (1A) “only protects the *Syariah* Court in matters within their jurisdiction, which does not include the interpretation of the provisions of the Constitution”.

Another key question is whether the *Syariah* courts have jurisdiction over matters of apostasy, even without legislation granting them the power to do so. It bears reiteration that religion is a state matter and List II of Schedule 9 provides matters – such as the administration of Islamic law – in which states may legislate. In *Lina Joy*, no Federal Territories laws mention how to deal with apostates. Section 46(2)(a) of the Administration of Islamic Law (Fed. Territories) Act provides that a *Syariah* High Court in the Federal

Territories shall only have criminal jurisdiction to try any offence committed by a Muslim and punishable under the Enactment or the Islamic Family Law (Federal Territories) Act 1984 or under any other written law prescribing offences against precepts of Islam.

The Syariah Criminal Offences (Federal Territories) Act 1997 Part III (Offenses Relating to the Sanctity of the Religion of Islam and Its Institution) is silent on apostasy. Furthermore, the fact that Joy was no longer a Muslim raises the question of whether she could properly be adjudicated under a *Syariah* court.

There are two competing views on the jurisdiction of *Syariah* courts. The first is that not all *Syariah* laws apply per se (Sarwar, 2007b). For example, Sarwar (2007b) criticizes the “erroneous assumption that ‘unwritten’ (or un-enacted) *Syariah* law . . . can be applied in the *Syariah* courts.” Put differently, whether a matter falls under the jurisdiction of *Syariah* courts is essentially up to the laws enacted by State Assemblies (or Parliament in the case of the Federal Territories) (Sarwar, 2007c). This proposition – that state laws must expressly confer jurisdiction to the *Syariah* courts – has found favor in earlier decisions. For instance, in *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor.* (No 2) (1991) 3 MLJ 487, 489, the court held that “if State law does not confer on the *Syariah* court any jurisdiction to deal with any matter in the State List, the *Syariah* court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.” Thus, in *Lina Joy*, the absence of laws governing apostasy in the Federal Territories renders the deference to the *Syariah* court debatable.

The other view, one that the majority in *Lina Joy* has adopted, is that *Syariah* courts possess jurisdiction by implication – that their power is inherent in State List of Schedule 9. In other words, just because State laws do not confer jurisdiction to the *Syariah* courts to adjudicate on apostasy issues, this “does not mean that such issues are to be adjudicated automatically by a civil court” (Rahman 1998: 1). Indeed, this approach is evident in a series of cases before *Lina Joy*, such as *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* (1998) 1 MLJ. 681, 688-689 (where the court held that “the jurisdiction lies with the *Syariah* court on its wider jurisdiction over a person professing the religion of Islam even if no express provisions are provided in the Administration of Islamic Law (Federal Territories) Act 1993.”) and *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) & Anor.* (1999) (where the court held that “since matters on conversion to Islam come under the jurisdiction of the *Syariah* courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.”) Against this, Judge Malanjum argues in *Lina Joy* that where fundamental rights are implicated, “there must be as far as possible be express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted.”

The first view seems more persuasive, especially in a constitutional democracy like Malaysia. It is quite absurd that un-enacted State laws that are merely implied from the state legislative list can thwart a Constitution, which is the supreme law of the nation. On this point, Judge Malanjum argued – and perhaps rightly so – that the State legislative lists of power is subordinate to fundamental rights of the Constitution. The continuous side-stepping by the civil courts in an area as important as the constitutional right to religious freedom renders the issue uncertain. It is also frustrating for citizens who resort to the highest court in the land to uphold their rights, only to see their appeals being turned down on technicalities.

5.2 International Standards and The ‘Asian Values’ Debate

The international human rights standard on freedom of thought, conscience and religion provision includes one’s right to change his or her religion. Furthermore, “any coercion that would impair the right to have or to adopt a religion or belief” is prohibited, “including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs” (UN Human Rights Committee, 1993). This is the position of the Human Rights Committee (HRC) in its general comments to Article 18(2) of the International Covenant on Civil and Political Rights. Although these comments are not specifically directed at the UDHR, we can extrapolate these formulations to understand what is envisaged by the universal human rights regime in construing the meaning of religious freedom. After all, the ICCPR is a manifestation of the UDHR in its binding form (although the former is stated in considerably greater detail).

On its face, the Malaysian constitutional provisions on religious freedom compare favorably to international standards (Stahnke and Blitt, 2005: 964-966). But the Constitution’s careful omission of the freedom of a person to renounce or change his religion or belief without punishment (although some argue that this freedom can be implied) raises questions on the true extent religious freedom in Malaysia. Moreover, in practice, conversion does not seem to be an option – at least to Muslims – due to certain state laws imposing punishment for apostasy (Masum, 2009: vii-viii). While capital punishments are never imposed on apostates in Malaysia, those who convert may be required, by state law, to attend counseling sessions (Hussain, 1999: 132). Even where there is no state law on point, such as in *Lina Joy*, it seems that the exercise of that right is virtually impossible because of uncertainties within the legal system.

Another potential friction between Malaysia’s conceptions of religious freedom with the international regime concerns the prohibition against propagation of any religious doctrines among Muslims. This challenges the conventional idea of religious freedom, at least in the view of the international human rights doctrine. Although the restriction is defended on the basis of protecting social stability (Masum, 2009: iv), it implies some form of discrimination in the practice of religion, and places other religions at a disadvantage vis-à-vis Islam. Moreover, restrictions on propagation of other Islamic doctrines

may be seen as an over-regulation by state authorities seeking to impose their particular understanding of Islam on others. The controls may curtail religionists for whom proselytizing is an integral part of worship (Masum, 2009: iv).

In turn, this may affect the freedom to teach and practice one's religious beliefs. On the flip side, the concern with proselytism is that such practices may themselves exceed the bounds of religious freedom, especially when they amount to some form of coercion and undue influence on another to adopt another religion. It is worth mentioning that proselytizing is not only an issue in Malaysia; it has also been highlighted as something that "could eventually lead to the collapse of social norms and cultural identities in Africa" (Steiner et al., 2008: 607).

Nevertheless, the problem with an international checks and balances mechanism in Malaysia is the absence of any legally binding commitment to international human rights obligations. The standing of UDHR continues to be a matter of great debate. Although, as mentioned above, writers have argued that the UDHR has matured into customary international law, it is also not incorrect to insist on the declaratory nature of UDHR which imposes no obligation on states. Malaysia's reluctance to progress towards a concrete international human rights obligation is hardly surprising. During the Mahathir administration, there was an obsession with the 'Asian Values' doctrine circling within the politico-legal atmosphere in Southeast Asia (Freeman, 1996: 354). This doctrine, perhaps characteristic of the universalist-relativist tension in the human rights discourse, challenges the universal human rights scheme based on Asia's unique cultural traditions (Freeman, 1996: 353). The underlying idea is that preserving social harmony and collective welfare is more important than upholding a 'western,' individualistic notion of human rights (Freeman, 1996: 353-355).

However, even among the political elites, there is a lack of consensus not only on what the doctrine means, but also whether it is tenable at all (Freeman, 1996: 353). Indonesia's Foreign Minister, for instance, rejected the idea of an existing clash between the supposedly 'western' universal human rights concept and distinctively 'Asian' point of view (Freeman, 1996: 353). On the other hand Donnelly argues that leaders such as Singapore's Lee Kwan Yew and Malaysia's Mahathir claim that if a substantial deviation from the common international human rights standard is based on culture, it is legitimately allowed (Donnelly, 2003: 107). The Mahathir model of 'Asian Values' include the elements of strong authority, priority of community over the individual, and a strong family based society (Sani, 2008: 4).

These concepts are important because they shape the way the government (and to some extent, the courts) views the parameters of religious freedom. The underlying idea is that restrictions on religious freedom may be justified in exchange for maintaining social order not only among Malaysia's multi-religious society, but also within the Muslim community itself. It is worth emphasizing that the basic responsibility of a State is to safeguard

and prevent encroachments on the freedom of religion for all citizens. The problem in Malaysia, however, is the over-regulation by the State of private matters. For Muslims, it seems very odd that ‘personal sins’ such as apostasy become matters between an individual and the state. Prominent Islamic scholars such as Mohammad Hashim Kamali have spoken out against this, arguing that it is not for the state to legislate punishments for personal sins (Shah, 2009).

5.3 The Politics of Race, Religion, and Social Order

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

Generally, many Malays are strongly attached to their religion. Hence, any attempt to weaken a Malay’s faith may be perceived as an indirect attempt to erode Malay identity as well as political power (Faruqi, 2001). Within the Malay community, renouncing Islam is perceived as deserting the community because Article 160(2) of the Constitution defines a Malay as one who professes the religion of Islam (Faruqi, 2001). Furthermore, cases of apostasy strike immediate correlations with proselytism and impressions of an attack against the sanctity of Islam as the religion of the Federation. Faruqi (2006b) suggested that wide-spread conversion of Malay-Muslims to other religions will have grave implications for the delicate racial balance between the Malay and non-Malay communities and may well jeopardize the stability of the nation.

In *Lina Joy*, it is evident that social order considerations played a role in the majority opinion. The majority alluded to several Muslim NGOs’ assertions that conversion at will could cause chaos among Muslims and Islam. However, the *Lina Joy* decision gave no clear guidance on when a ‘public order’ justification would ever be tenable. The majority did not explore this issue in great depth and it almost seems as if the threat to ‘public order’ argument is a mere assumption. It is duly accepted that the Constitution provides that the freedom of religion does not authorize any acts contrary to any general law relating to public order, public health or morality. Even from an international human rights perspective, there is no doubt that the freedom of religion is not absolute. However, where derogations are permitted on the basis of public order, this affects only manifestations of belief and not the freedom to adopt or profess a belief (UN Human Rights Committee, 1993).

To some, though indirect, extent, the rise of political Islam has some bearing on how most Malay-Muslims view religion and the expectations on the status of Islam in the

country (Harding, 2010: 502-503). Although Islam's role was initially thought as merely ceremonial, the resurgence of Islam in Malaysia's political landscape in the 1970s and 1980s arguably changed this. The Islamic Party, PAS, who vowed to establish an Islamic state where only Muslims would hold political power, subsequently took over the state of Kelantan (Harding, 2010: 502). In response to the change in political climate, the ruling *Barisan Nasional* ("BN") multiethnic coalition launched various Islamization initiatives in the legal and institutional sectors, as well as in education (Harding, 2010: 503). Although government policies leaned towards Islamic values, PAS gained noteworthy electoral successes which then put the federal government under pressure (Harding, 2010: 504-506). These events helped shape the emergence of the "Islamic State" rhetoric. As Harding (2010: 506) observes:

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

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

5.4 Bridging Universalist-Relativist Debate

Malaysia's experience with freedom of religion is demonstrative the tension between the universal ideals of human rights and the relativity of cultural and religious norms. The former resists religious traditions that are arguably at odds with the modern liberal interpretation of universal human rights principles (Mohamad, 2008: 155), while the latter is often advanced on the basis of 'social order' and the desire to maintain distinct 'Asian Values.' But the exposé on the Malaysian practices suggests that there are also other unresolved questions. Any firm reconciliation with international human rights standards remains problematic, and local institutional and political obstacles to the exercise of religious freedom complicate this.

In attempting to bridge the universalist-relativist gap, one should first note that the two polar assumptions of human rights "would have been foreign to the framers of the Declaration" (Glendon, 2008: 142). Moreover, the final Vienna Document that all UN members have

accepted stresses that it is the participating States' duty to implement human rights while bearing in mind that countries have different religious and cultural traditions (Glendon, 2008: 142). Nevertheless the challenge to resolve the gap in the context of religious freedom lies not only in the tension between religious and secular spheres, but also in the relationship of religion to other rights (Danchin, 2009: 102) as well as of one religion vis-a-vis another (An-Naim, 2000: 95).

Another problem plaguing the human rights discourse is the failure to appreciate the human rights canon as a whole. Hence, there lies an obstacle in properly conceiving morality of human rights when construing the freedom of religion. In resolving this problem one should look at the UDHR's call for everyone to "act in the spirit of brotherhood" as a starting point for refuting claims that the human rights regime is inherently individualistic and discriminatory against non-Western cultures. One must remember that the human rights corpus, in its quest for a truly universal acceptance, accommodates varying circumstances through its limitation clause.

The freedom of thought, conscience, and religion must also be considered together with Article 29, which emphasizes that "everyone has duties to the community." Quite interestingly, the UDHR is silent on the meaning, origin and enumeration of such duties (Khalil, 2010: 8), so much so that this is open to interpretation and incorporation according to varying culture and religious norms. Steiner et al. (2008: 347-8) argue that "the ambit of human duties is wide; encompassing all dimensions of man's life, be they physical, spiritual and mental."

If one pays attention to the UDHR as a whole, then human duties should not be blatantly ignored when one speaks of human rights. Indeed, religious beliefs and human rights are deemed complementary expressions of similar ideas, although religion invokes the language of duties rather than rights (Steiner et al., 2008: 569). One problem, however, is that some religious duties may impinge on rights, and religious authorities routinely assert primacy of those traditions over certain rights (Steiner et al., 2008: 569). This is more challenging when that assertion is grounded upon highly conservative, counter-progressive conceptions of religion. Furthermore, religions are chiefly concerned with the rights of their constituents, including in exercising the right to freedom of thought, conscience, and religion (Henkin, 1998: 234). So the question becomes: do rights come first, or duties? It is problematic for human rights to be strictly defined by duties, or vice versa. Religious duties, in the Islamic context for example, offer different opinions on the extent of religious freedom, especially in cases of conversions and apostasy. More problematic is the differing implementation of religious laws in various countries, and respective claims of superiority by different religions. The human rights canon, as general secular construct, did not provide for these intricate contingencies.

Perhaps the ultimate resolution lies in focusing on the human rights morality, which is grounded upon the notion of human dignity – that all human beings are born free and

equal. This not only means that one's fundamental rights must be respected in spirit and essence, but it also denotes respect for the exercise of rights by others. It is indeed moral to respect individual rights, the exercise of which is essential not only for one to develop as a person, but also to contribute to collective development because individuals are in fact, part and parcel of a community. Thus, human duties to the community must be carried out concurrently with assertions of human rights as far as those duties are compatible with human dignity and the human rights ideal of respecting individual beliefs. This ideal exists "where the government does not prescribe orthodoxy or prohibit particular religions or beliefs" (Shelton and Kiss, 2007: 575). In the religious freedom context, it is consistent with human rights morality to respect one's independent choice of belief. Human duties to community should be allowed to run their course by providing room for discussion and resolution. But if such a process is ultimately futile, then the dignity of individual choice should be respected without unnecessary, State-imposed hurdles.

6. Conclusion

Religion is an important feature of the nation by reason of tradition and history, and it will continue to be important in the social, political and legal discourse. The relationship between law and religion is a complex, albeit evolving issue.

The foregoing sections demonstrate that not only is the Malaysian practice complicated from a constitutional perspective, but that it also raises serious questions in light of the human rights regime on religious freedom. If, as previously suggested, the *Lina Joy* outcome will "define the nation's character" (Prystay, 2006: 11), then the plural Malaysian society has a lot to cringe about.

It seems that discussions on Islam as the religion of the Federation and religious freedom fail to consider the Constitution in its entirety, much less pay attention to the intention of our forefathers in engineering the Constitution. The resolution of cases implicating freedom of religion does not seem to be conducive to maintaining religious harmony and pluralism in a divided society. The constitutional promise of religious freedom and equality, rosy as they may seem, are being eroded. Various political and social concerns, and unyielding insistence on 'Asian values' further complicate increase this issue.

The arguments above also have one thing in common – foregrounding the interests in morality, humanity, and social stability. While we remain cognizant of local conditions and allow society to evolve its human rights consciousness through education and advocacy, courts also bear an important responsibility in defining the parameters of citizens' rights. Furthermore, although human rights are secular and Western in origin, the UDHR is a document of persuasive moral authority. The morality stemming from respect for individual rights is important as the exercise of those rights will bear significant impact on community living and social order. It is also notable that duties to the community can be arbitrary or an exclusive matter for domestic law and politics (Opsahl, 1992: 457-

458). We should be mindful of this because authorities have an interest in imposing rules that arguably violate individual rights to buttress their position and maintain the status quo. For that reason, there must be solid recognition of human rights as a mechanism of checks and balances against the state. In the context of freedom of religion, the responsibility of a State to safeguard and prevent encroachments on this fundamental right is paramount.

A strong grounding on values, through both human rights and duties to the community, is the key to tolerance and social stability. There is an urgent need for a more receptive approach towards common morality that can be derived from both Universalist and Relativist conceptions of human rights. Instead of getting bogged down in ideological antagonisms and arrogant dismissals, freedom of religion has to be understood in the proper context in order to promote progressive reconciliation with religious precepts. For one to believe that the other has the right to practice their faith freely, the conviction must begin from the firm morality of respecting human dignity and beliefs. Religious issues in a plural society such as Malaysia must also be open to debates by all sections of the community. Sensitivities can only be resolved through civilized deliberation and decisions motivated by consensus and compromise. While concerns of social stability are understandable, actions must not compromise human dignity.

With the increasing human rights consciousness and growing number of progressives among both the Malay-Muslim majority and other minorities, we can hope for a shift in mentality and a more civilized rights discourse in Malaysia.

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