

Session 5

Conflict of Jurisdiction and Freedom of Religion in Malaysia – A Irreconcilable Right?

By

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ABSTRACT

FREEDOM OF RELIGION: Legislating Faith in Malaysia

Although the Federal Constitution is the supreme law of the land, the dual legal system in Malaysia basically means Muslims in the country are governed under the Islamic or Syariah law. The scope of applicable Islamic law can be discerned from the State List in the Ninth Schedule of the Federal Constitution. It includes the 'creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion'. The matter relating to conversion to and renouncement of Islam is not specifically stated in the List although it is acknowledged that it is not an exhaustive list.

The freedom of religion is declared in Article 11 of the Federal Constitution. With the exception of restriction on propagation of any religious doctrine or belief among Muslims, every person has the right to profess and practice his religion. The caveat on this freedom is any act contrary to any general law relating to public order, public health or morality. Over the years a number of cases have been presented to the civil courts on matters of faith or the lack of it, with differing results.

Challenges and difficulties faced by individuals in the predicament of conversion and/ or renouncement seemed insurmountable with the civil courts refusing to hear the matter on the ground that they lack jurisdiction to hear the matter. The difficulty is compounded by the perception that the Syariah courts and the relevant religious authorities are biased. The fact that there has been no Syariah court order sanctioning or confirming renouncement of Islam does little to assuage the fear and concern of the affected individuals and society at large.

It must be acknowledged that renouncement of Islam is a grave sin in the eyes of Muslims and has been made an offence in certain states in Malaysia. Unfortunately this unhappy state of affairs is made worse by the lack of provisions and uniformity in state legislation governing the administration of Islamic law. The current mindset of religious authorities concerning such cases is to assist in every way, to the extent of detaining the

person for the purpose of 'education', to ensure that the person does not stray from the true religion. There is also the fear that if such cases are allowed, the ummah or the Muslim community will be under the threat of its followers abandoning their faith. The current political climate and reality exacerbate the need to champion the cause of Islam.

An analysis of relevant cases reveals an increasing trend of reluctance on the part of civil court judges to 'interfere' on 'matters of Islamic law'. The question remains – is the pronouncement or renouncement of faith a constitutional right of the individual or is it a matter of Islamic law and therefore is within the exclusive jurisdiction of the Syariah courts? Are the various provisions in the state legislation governing matters of faith in conflict with freedom of religion? In the final analysis, an attempt is made to assess the viability and feasibility of legislating on faith in a multi-racial and multi-religious country like Malaysia.

Freedom of religion in Malaysia

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Current position

- The pronouncement or renouncement of faith is a matter within the jurisdiction of the Syariah courts.

BUT ...

- It is actually an exercise of the freedom of religion guaranteed under Article 11, Federal Constitution

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Cases

- Ng Wan Chan – 1991 HC
- Dalip Kaur – 1992 – SC
- Hun Mun Seng [1992] 2 MLJ 676
- Lim Chan Seng -1996 - HC
- Md Hakim Lee - 1997 - HC
- Soon Singh – 1999 – CA
- Daud bin Mamat – 2001 - HC
- Chang Ah Mee – 2003 – HC
- Priyathaseny – 2003 - HC
- Shamala -2004 –HC, CA waiting for FC’s decision in Lina Joy
- Nedunchelian Uthidaran – 2005 - HC
- Kaliasammal/ Moorthy – 2006 -HC
- Kamariah Ali – 2005 - FC
- Lina Joy – 2005 – CA, awaiting FC’s decision
- Nyonya Tahir – 2006
- Rayappan - 2006

Relevant provisions in Federal Constitution

- Article 4(1) & Article 162(6) – supremacy of the Federal Constitution
- Article 3(1) – religion of the Federation
- Article 8 – equality
- Article 11 – freedom of religion
- Article 12(4) – religion of minor to be decided by parent or guardian

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Article 11, Federal Constitution

- (1) **Every person** has the **right to profess** and **practise his religion** and, subject to clause (4), to propagate it.

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Article 11, Federal Constitution

- (4) restriction on propagation of any religious doctrine or belief among persons professing the religion of Islam

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Article 11, Federal Constitution

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

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Article 4(1), Federal Constitution

- This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

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Article 162(6), Federal Constitution

- Application by any court or tribunal of existing laws not modified on or after Merdeka Day to be with such modifications as may be necessary to bring it into accord with the provisions of this Constitution

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Article 3(1), Federal Constitution

- Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of this Federation

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Article 8, Federal Constitution

- (1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, gender or place of birth in any law ...

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Article 12

- (3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.
- (4) For the purpose of Clause (3) the religion of a person under the age of 18 years shall be decided by his parent or guardian.

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Jurisdictional issue

- Article 3 – religion of the Federation
- Article 121(1A) – HC have no jurisdiction in respect of matters within the jurisdiction of Syariah courts
- Article 74(2)

Relevant provisions on jurisdiction

■ Federal Constitution:

- Article 121 (1A) – HC have no jurisdiction on matters within jurisdiction of Syariah courts [1998 amendment]
- Article 74 & 75 – federal & State laws
- Ninth Schedule – List II – State List, Item 1

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Article 121(1A), Federal Constitution

- the HC shall have no jurisdiction in respect of matters within the jurisdiction of the Syariah Courts

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Article 74, Federal Constitution

- (1) Parliament may make laws with respect to matters in the Federal List or Concurrent List
- (2) Legislature of the State may make laws with respect to matters in the State List or Concurrent List
- (3) the power to make laws ... is subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution

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Article 75, Federal Constitution

- If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void

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Ninth Schedule – List II – State List

- Islamic law and personal and family law of persons professing the religion of Islam ...
- Syariah Courts shall have jurisdiction only over persons professing the religion of Islam and in respect only of any matters included in this paragraph... ; the determination of matters of Islamic law and doctrine and Malay custom.

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Relevant statutory provisions

- Courts of Judicature Act 1964 – section 25(2), Schedule – paragraph 1

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Section 25, Courts of Judicature
Act 1964

- (1) Powers of the High Court – all the powers vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its jurisdiction
- (2) without prejudice to the generality of s.25(1), the HC shall have the additional powers set out in the Schedule

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Schedule, CJA

- 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, **for the enforcement of the rights conferred by Part II of the Constitution**, or any of them, or for any purpose.

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Cases on Article 11

- Soon Singh - CA
- Daud bin Mamat - CA
- Susie Teoh - SC
- Priyathaseny - HC
- Kamariah bte Ali -FC
- Lina Joy - CA [pending decision of the FC]

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Daud b. Mamat

- Renouncement of religion rejected by the Majlis Agama Kelantan. Action taken against them.
- Application for declaratory orders:
 - Article 11 – right on the freedom of religion
 - State & federal law contravening Art 11 & right to abandon Islam invalid

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Daud b. Mamat

- Suriyadi J - the act of exiting the religion could not be equated with the right to profess or practice religion.
- Appeal dismissed by CA – declaratory orders sought were 'too general'

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Kamariah Ali

- Convicted by Syariah Court in 1992. Bail – to present themselves every month before the Qadhi to profess repentance and seek forgiveness.
- 1998 – renounced Islam via statutory declarations. Charged in 2000 – failure to comply with the earlier order. Convicted and imprisoned 3 years.

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Kamariah Ali

- Application for writ of habeas corpus dismissed. Appeal to CA dismissed & affirmed by FC
- Issue – whether s.102 ultra vires Article 11?
 - Whether apostate? To be determined by Syariah court

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Kamariah Ali

- CA – s.102 does not prevent a Muslim from renouncing. It merely requires him to obtain the Syariah court's confirmation of that fact. This is to avoid confusion on whether a person is in law, still a Muslim.
- Submission on the doctrine of legitimate expectation and Article 11 rejected

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11 issue was not addressed. See comments
lawch, 11/9/2006

Case on Article 12(1A)

- Malay lady renounced Islam and became a Christian. Application to change name in IC and to delete 'Muslim'.
- IRD required her to produce an order from Syariah Ct.
- Case pending decision of the FC.

Case on Article 12(1A)

- Datin Kary
- Soon Singh
- Hadidullah
- Sukma Darmawan

Case on Article 12(1A)

- Both parties - the SC held that unless a woman is expressly converted to the Islamic faith, she is not a Muslim.
- The SC held that the woman in the case was not a Muslim.
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Lina Joy

- Malay lady renounced Islam and became a Christian. Applications to change name in IC and to delete 'Muslim'.
- NRD required her to produce an order from Syariah ct
- Case pending decision at the FC.

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Cases on Article 121(1A)

- Dalip Kaur
- Soon Singh
- Habibullah
- Sukma Darmawan

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Cases on Article 121(1A)

- **Dalip Kaur** – the SC held that unless a matter is expressly conferred to the Syariah Court to be within its jurisdiction, civil court has jurisdiction.
- There were no provisions in the Kedah Enactment on the conversions out of Islam but there were 3 provisions which dealt with conversion.

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12 constitutional issues were abandoned and the case was heard on the agreed issue of administrative law
lawclh, 11/9/2006

Dalip Kaur

- "... clear provisions should be incorporated in all state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of [Article 121(1A)]... That clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law." ...per Hashim Yeop Sani CJ(Mal)

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Dalip Kaur

- Dictum of Mohamed Yusof SCJ – a person who renounce Islam by deed poll or baptism ceremony remain in Islam until a declaration had been made in the Syariah court that he was a 'murtad'. The question required consideration of the Islamic law by eminent jurists qualified to do so. The only forum qualified to do so is the Syariah court.
- Soon Singh – CA adopted this position.

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Dalip Kaur

- Fatwa of the Fatwa Committee of the Majlis Agama Islam Negeri Kedah actually stated in effect that if a Muslim executed a deed poll renouncing Islam, he becomes a 'murtad'. This was however qualified by a subsequent s/m that the Syariah court is to confirm the status

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Soon Singh

- HC [Wan Adnan J] – the applicant should go to the Syariah court for the declaration that he has renounced Islam. Civil courts have no jurisdiction.
- CA noted earlier cases required express provisions to confer jurisdiction to the Syariah Ct before Art 121(1A) can be invoked BUT ruled otherwise.

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Soon Singh

- CA [Mohamed Dzaiddin J] held: regardless whether it is expressly or exclusively conferred, matters of conversion and apostasy are within the **implied jurisdiction** of the Syariah Court

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...in all state departments to avoid difficulties of communication by the courts. This is particularly important in view of Article 121(1)(a). That does not say that the jurisdiction of the court is to be determined by any written law, but that it is to be determined by the law of the state. (Cf. also the provisions of the law of the state of New York, Art. 121(1)(a) and (b).)

Boon Singh

...the law of the state of New York, Art. 121(1)(a) and (b). That does not say that the jurisdiction of the court is to be determined by any written law, but that it is to be determined by the law of the state. (Cf. also the provisions of the law of the state of New York, Art. 121(1)(a) and (b).)

CA noted that the court had not found it necessary to go to the Syrian court for the determination of the law of the state of New York, Art. 121(1)(a) and (b). That does not say that the jurisdiction of the court is to be determined by any written law, but that it is to be determined by the law of the state. (Cf. also the provisions of the law of the state of New York, Art. 121(1)(a) and (b).)

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Boon Singh

CA (Mohamed Durrani, J.) held that the court had not found it necessary to go to the Syrian court for the determination of the law of the state of New York, Art. 121(1)(a) and (b). That does not say that the jurisdiction of the court is to be determined by any written law, but that it is to be determined by the law of the state. (Cf. also the provisions of the law of the state of New York, Art. 121(1)(a) and (b).)

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...in all state departments to avoid difficulties of communication by the courts. This is particularly important in view of Article 121(1)(a). That does not say that the jurisdiction of the court is to be determined by any written law, but that it is to be determined by the law of the state. (Cf. also the provisions of the law of the state of New York, Art. 121(1)(a) and (b).)

Effect of Soon Singh

- Nedunchelian – the father applied for an order to declare invalid the conversion of his four minor children by his wife. The preliminary objection on jurisdiction was allowed. Soon Singh followed.

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Effect of Soon Singh

- **Priyathaseny** - Malay lady renounced Islam and married a Hindu. 2 children. Arrested, charged and convicted for apostasy. Husband alleged his subsequent conversion was under duress.
- Applied for various declarations in the HC
- Preliminary objection regarding jurisdiction allowed. Application dismissed. Soon Singh followed.

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Earlier cases

- **Ng Wan Chan** – Widow applied to the HC for a declaration that her deceased husband was a Buddhist at the time of death.
- Preliminary objection on jurisdiction was dismissed.

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Ng Wan Chan

- Held – after considering s.45(2) & (3), S'gor Adm. Of Muslim Law Enact 1952, it was held that if the state law did not confer on the Syariah Ct any jurisdiction to deal with any matter in the State List, the Syariah Ct was precluded from dealing with the matter. Jurisdiction could not be derived by implication.

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Lim Chan Seng

- In the light of the Penang Administration of Muslim Law Enactment 1993 [no provisions on renouncement], the Syariah court had not been given jurisdiction over the matter.
- Therefore, there is no impediment for the civil court to hear and dispose of the matter.

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Lim Chan Seng

- The dictum of Mohamed Yusof SCJ in Dalip Kaur did not give rise to a binding pronouncement.
- To determine the question of jurisdiction, the relevant State Enactment ought of necessity to be examined and looked into.

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Lim Chan Seng

- By itself, Article 121(1A) did not automatically confer jurisdiction on the Syariah Ct, even in respect of matters that fell within the State List. The State Legislature must first act upon the power given it by Articles 74 & 77 and the State List to enact laws conferring jurisdiction.

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Sukma Darmawan

- CA held that the matter must be within the exclusive jurisdiction of the Syariah Court to oust the jurisdiction of the HC

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M.A.I.NS v Hun Mun Seng

- 18 yr old Chinese girl embraced Islam. 2 mths later at a press conference she announced her wish to leave Islam.
- Provisions on 'murtad' cases incorporated in the NS Adm Of Muslim Law Enact 1991

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- 16 MAI actually applied for a writ of habeas corpus against the father at the HC. It was held that she was not detained against her will. Her renouncement however need to be in accordance with the provisions in the Enactment.
lawclh, 11/10/2006

Tan Sung Mooi

- SC – both parties were non-Muslims who contracted a non-Muslim marriage... the HC would have jurisdiction to hear and determine ancillary proceedings despite the fact that the respondent had converted to Islam after the divorce but before the hearing of the ancillary application.

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Habibullah

- Both H & W Muslims. Assault & battery – within s.127, Islamic Family Act 1984. s. 107 – power of the Syariah Ct to grant injunction. Thus Syariah Ct has been conferred jurisdiction on the matter.
- SC – intention of Article 121(1A) is to confer exclusive jurisdiction on the Syariah Ct to adjudicate on **any matter which has been lawfully vested by law within the jurisdiction of the Syariah Ct**

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Md Hakim Lee

- Abdul Kadir Sulaiman J - The jurisdiction of the Syariah Ct need not necessarily be expressed in the State Enactments. Such jurisdiction can be assumed as being inherent in the Syariah Ct itself as provided in Paragraph 1 of the State List

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Md Hakim Lee

- Even if no express provisions, under Art 74, it is 'within the competency' of the legislature to legislate on the matter.
- The issue is not whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate.

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Kaliammal

- HC held that it has no jurisdiction to hear the application of Moorthy's widow as the matter was within the jurisdiction of the Syariah Court

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Conversion of minors

- Chang Ah Mee
- In re Susie Teoh
- Soon Singh
- Shamala
- Nedunchelian

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Conversion of minors

- Chang Ah Mee – P applied to the HC in Sabah for a declaration that her daughter's conversion by her husband was null and void. Preliminary objection on the jurisdiction of the HC was dismissed

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Conversion of minors

- Chang Ah Mee – HC
 - The HC examined s.68 of the Administration of Islamic Law Enactment 1992 – consent of parents or guardian needed for the conversion of minors.
 - Other sections concerning conversion were examined

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Chang Ah Mee

- S.5, GIA Ordinance of Sabah 1999 – father and mother have equal rights over the child
- Held – conversion of the minor was null & void. Declaration granted.

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Shamala

- H converted in Nov 2002 and shortly after converted his two children aged 4 and 2, without the knowledge of his wife.
- Dec 2002 – W left with children to Alor Setar and applied to the HC for the custody, control and care of the children

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Shamala

- Jan 2003 – at the hearing, H sought for adjournment. In the meantime, H made an ex-parte application to the Selangor Syariah Ct for the custody of the children
- Feb 2003 – the Syariah Ct's custody order was served on the W

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Shamala

- Issues before the HC
 - Effect of the said custody order
 - Custody of the children
- Held:
 - Joint custody but care and control awarded to the mother
 - Actual custody subject to conditions

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Shamala

- Observations by the HC:
 - The father's obligations are not extinguished by his conversion. Section 5 of the GIA noted – equal rights of parents
 - The custody order by the Syariah Ct was made per incuriam
 - Overriding principle in custody matter is the welfare of the children

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Access to justice - cases

- **Isa Abdul Rahman** [1992] – the SC applied a remedy-based approach in interpreting Article 121(1A)
 - Where remedy is not available at the Syariah Ct although the subject matter may be clearly within its jurisdiction, the HC can hear the matter. The person cannot be left without a remedy

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Access to justice - cases

- **Shaik Zolkaffily** [2003] – FC took the subject-matter approach in interpreting Article 121(1A).
- The fact that the P may not have his remedy in the Syariah Ct would not make the jurisdiction exercisable by the civil court

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Points to ponder

- Application of Article 8 [equality clause]
- Constitutionality of provisions contravening Article 11
- Additional power of HC to enforce fundamental liberties

