

FREEDOM TO CHOOSE RELIGIOUS FAITH IN MALAYSIA: JUDICIAL PERSPECTIVES

R. Ahmad¹, R. Halim², R. Abdul Rahman³, F. Romli⁴

^{1,2,3,4}School of Law, Universiti Utara Malaysia, 06010 Sintok, Kedah, Malaysia

E-mail: ¹rusniah@uum.edu.my, ²rohizan@uum.edu.my, ³hana@uum.edu.my, ⁴arfariza@uum.edu.my

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Abstract

Fundamental rights in Malaysia enjoys a constitutional protection and has been arguably well-guarded by an independent judiciary. Article 11(1) (a) of the Federal Constitution provides for freedom to choose one's own faith or religious believe even though not in absolute terms. Existing legal restrictions to the enjoyment of this right has never deterred the courts from its noble duty of scrutinizing executive and ministerial action which has impacted the fundamental rights of the people. The emergence of new technology inevitably demands more attention from the judiciary as fundamental rights widens and comfortably give citizens access to more information and expands their legal awareness to new frontiers. Generally, freedom to choose one's own religion is a right protected under freedom of religion clause constitutionally provided by countries to its citizen. Whether the right is absolute or qualified depend upon legal background and history of that country. In Malaysia, Article 11 of the Federal Constitution was given numerous interpretations by writers, scholars as well as the judiciary on whether the right is absolute or qualified. This paper analyzes decided cases by the Civil Courts and also the Syariah Court. By analyzing decided cases, the tendency of the courts in interpreting Article 11 and also the nature of rights given to Malaysian Citizens in choosing religious belief could be understood. The situation in Malaysia is different because our legal system comprises the civil law as well as Syariah law applicable only to Muslims. Hence, the hurdle in choosing religious affiliation only applies to Muslims and not for other religious adherence.

Keywords-- religion, freedom, rights, civil courts, Syariah courts

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INTRODUCTION

Malaysia is a country of 28.3 million populaces with a diverse ethnic background which includes Malay, Indian and Chinese. The majority group comprised the aborigines including the Malays forming 67.4%, Chinese 24.6% and Indian 7.3% (Malaysia, <http://www.statistics.gov.my/portal/index>, 2010). Religion is strongly attached with ethnicity and was proven by the faith of Islam having the majority followers comprising 61.3% of the total population. This conglomeration contributed to the phenomena of changing religious belief. Statistics have proved that the phenomenon is not remote in a country such as Malaysia (SUHAKAM, 2008). Changing one's religious belief in Malaysia is still a right by virtue of Article 11 of the Federal Constitution. However, when it comes to this right Muslims must adhere to procedures that are different subject to their personal law. They have to resort to the Syariah Court to get declaration on their religious status involving Islamic religion and follow the procedure stated in the relevant State Islamic Religious Enactments. Many have misconstrued this as limitation on a religious right. Since Syariah Court has its own jurisdiction and is only applicable to Muslims.

PROBLEM STATEMENT

Malaysian citizens rely on the constitution to understand about their fundamental rights. Among those basic rights is Freedom of Religion clause. Article 11 of the Federal Constitution provides that;

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

This provision has been interpreted by some writers as giving absolute rights to citizens to change their religious belief (Choon, 1999) while some interpret those rights are only available to non- Muslims (Aziz, 2007). The difference in interpreting the nature of rights is because of the nature of this country that was categorized as either theocratic, secular or hybrid (Choon, 1999) which has made Islam the official religion of the Federation by

virtue of Article 3(1) of the Federal Constitution. Therefore, Islam is given special position as compared to other religion practiced in the Federation. The Syariah Courts has been given exclusive jurisdiction in Islamic law matters with the given task to interpret the personal law of the Muslims provided in the State Enactments or Acts. Muslims are governed by their personal law in various matters specified under List 2 of the Ninth Schedule of the Federal Constitution which amongst it were the issue of changing religious beliefs.

For non- Muslims, their rights to change religion under the constitution is absolute because they are not governed by personal law as the Muslims. Muslims' right to change their religion is not absolute because they are governed by the Syariah law administered by State government in Malaysia (Faruqi, 2008). If a Muslim wanted to exercise their right to adopt other religion than Islam, they have to exercise those rights under the State Enactment because this is not a constitutional issue (Chik, 2009). If it involved the interpretation of the Federal Constitution only can the case be brought before the High Court. Many have misunderstood that renouncing Islam is their constitutional right under Article 11 hence there are cases that went to the Civil Court in which the court interpret the nature of rights under Article 11 for Muslims (Lina Joy vs Majlis Agama Islam Wilayah Persekutuan & Ors, 2005 and 2007).

METHODOLOGY

The method used in this study is socio-legal by applying two approaches. The first approach is doctrinal and second is qualitative. The doctrinal approach involved the research on legal documents and cases decided at the Civil Court and Syariah Court. The qualitative approach involved the conduct of interview sessions with Respondents who are officers from the relevant government departments namely the Department of National Unity and integrity, academicians who are experts in Constitutional Law and judges that have been identified at state Syariah Courts and officers from the Islamic State Council Office.

RIGHTS OF MUSLIMS TO RENOUNCE ISLAM

For Muslims, the first hurdle in enforcing their attempt to renounce Islam is the issue of court jurisdiction. The question of which court could hear those cases and declare the status of individuals involved. Until now, the issue has not been settled and has an enormous effect on individual rights (Mohd Ismail bin Abd Ghani (Saravanan a/l Balakrishnan) vs Ketua Pengarah Pendaftaran Negara, 2012). Usually when there is an application in the Civil or the Syariah court, it has to determine first and foremost which court has jurisdiction by referring to previous decided cases over and over again (Rosliza Hashim vs Kerajaan Negeri Selangor & Anor, 2019). These problems keep on arising because the average Muslim generally do not have adequate knowledge on issues with regard to changing their religious faith whether it involve their basic rights under the constitution or their personal law. Thus with some efforts in understanding the nature of such rights, only then Muslims will resort straight to the Syariah Courts for a declaration of their religious status (Michiel UR David & Yang Lain vs Majlis Ugama Islam & Adat Resam Melayu Pahang, 2018).

INTERPRETATION OF ARTICLE 11 BY THE CIVIL COURT

A study into court decisions will give an insight into the nature of rights for Muslims in their attempts to renounce Islam through legal means;

Re Mohamed Said Nabi, Decd [1965] 1 MLJ 121

This case was decided by the Singapore High Court in 1965. The issue before the court was the religion of the deceased at the time of his death. Even though it involved Singapore law, the court interpreted the word 'profess' which also exists in Article 11 of the Malaysian Federal Constitution. The deceased Mohamed Said Nabi was born a Muslim. Evidence was tendered by the wife to prove that before his death, he had changed his name to Micheal Sidney Nabi and had informed friends and relatives that he is a Christian. The deceased also ignored lifestyle as a Muslims and seldom perform religious activities. He also consumed alcohol and pork.

The judge in this case define the word 'profess' as 'to affirm or declare one's faith in or allegiance to a religion, principle, god, saint etc.'. Court decided that the deceased was still a Muslim. Being a Muslims at birth was strong evidence that cannot be denied by showing that the deceased does not follow Islamic teachings. By not following Islamic teaching will only made the person bad Muslims but not enough to support that the deceased had changed his religion.

By the court decision, we can conclude that it is every individual rights to adopt any religion because of the definition of the word 'profess'. So, Article 11 of the Federal Constitution could be interpreted as giving rights to every citizen to adopt religion of their choice.

Teoh Eng Huat v Kadi Pasir Mas and Another (Re Susie Teoh) [1986] 2 MLJ 228; [1990] 2 MLJ 301

The issue in this case is the religion of a child (person who has not attained the age of 18 years old). A child aged 17 years and 8 months had convert to Islam willfully without the consent of her parents. Her father opposed to that and made an application to the Court for a declaration that he as a father has a right to determine the religion of his child. He failed in the High Court and appealed to the Supreme Court.

On appeal, the Supreme Court reversed the High Court decision and decided in favor of the father. According to the Court, a minor does not have a right to change religion under the Federal Constitution even if it was done voluntarily. However, a minor in question has reached 18 years old at the time the decision was given. Therefore, the conversion was valid and the father has no

right to determine his child's religion because she is an adult and has converted to Islam voluntarily.

The decision in this case shows that if an individual has attained the age of 18 years old, they can convert to other religion provided that it was done voluntarily. Their rights will then be covered under Article 11(1) of the Federal Constitution (Harding, 1993).

Lina Joy Iwn Majlis Agama Islam Wilayah Persekutuan & Anor [2005] 4 CLJ 666; [2007] 3 CLJ 557

The Plaintiff in this case was asking for a declaration in the High Court for the National Registration Department to remove the word 'Islam' in her identity card. According to her, she has a right under Article 11 of the Federal Constitution to choose any religion that she wanted to adopt. In this case, the Plaintiff affirmed that she had left Islam for Christianity and was baptized on 11 Mei 1998.

The High Court has decided that the Syariah Court is the one having jurisdiction to decide upon the religious status of the Plaintiff. The learned judge also agreed with one author that suggest Malaysia as a hybrid country where Islam has a special position and Islamic Law being administered to Muslims through State Enactments. With regard to the rights to choose religious belief under Article 11(1), according to the judge the Plaintiff was Malay and born as a Muslims and because of the interpretation of Malay in Article 160, the Plaintiff will remain a Muslims until her dying days and she cannot renounce the Islamic faith. Furthermore, Article 11(1) of the Constitution grants every person the freedom to profess and practice his religion but in respect of an act of conversion out of Islam, the same must be subject to the relevant Syariah laws to be determined by the Syariah Courts.

Freedom of religion under Article 11(1) must be read with Article 3(1) which places Islam in a special position as the main and official religion of the Federation. However the provision also recognizes the existence of other religious faith to be practiced in harmony with each other, whereby the Federal Government is entrusted to protect, defend and promote the religion of Islam. The special position of Islam in Article 3(1) is further reinforced by Article 74(2) which enables the Federal and State Government to enact Syariah laws to be implemented by a separate judicial system, namely the Syariah Courts under Article 121(1A). Therefore, the Constitution allows Syariah laws on matters relating to conversion out of Islam to be determined by the Syariah Court. Hence, Article 11(1) gives a person the freedom to profess a religion of his choice, but on the issue of conversion out of Islam by a Muslim, only the Syariah Court is competent to determine the matter.

This decision had clearly defined the nature of rights in choosing a religion under Article 11(1) of the Federal Constitution. For Muslims, these rights are subject to getting a declaration of status from the Syariah Court. A Muslim who wished to renounce Islam should only go the Syariah Court and not the Civil Court and fulfill all the requirements imposed by the Court in order to succeed in renouncing Islam.

Mohd Ismail bin Abd Ghani (Saravanan a/l Balakrishnan) v Ketua Pengarah Pendaftaran Negara [2012] 1 MLJ 707

This case is about the application for judicial review over the decision of a public authority. The Plaintiff in this case was asking for a review over decision of Director General of National Registration Department not to omit the word Islam in his identity card. The Plaintiff who is born from an Indian Muslim father affirmed that he is not a Muslim.

Based on its decision, the High Court also decided that the Plaintiff must have obtained a certificate from the Syariah Court that confirmed his status as not being a Muslim. Failure in getting the Syariah Court certificate among other things has made him fail in his prayer.

By analyzing cases in Civil Court, conclusion can be made that Article 11(1) of the Federal Constitution cannot be used by Muslims in enforcing their rights to choose religious affiliation. Instead, Muslims are governed by the State Syariah laws and in order to succeed they must bring their case to the Syariah Court to get a certificate from the Syariah Court declaring their religious status. Only then can they go to the National Registration Department to get the word 'Islam' omitted from their identity card. However, this is not an easy task and many have failed in getting the Syariah Court to declare them as not being a Muslim or had become an apostate. Burden of proof is very hard. No evidence can be regarded as a conclusive proof (Jalil & Halim, 2011). It depends upon the facts of each individual case. Therefore, as far as Civil Court is concerned, the nature of rights under Article 11(1) with regard to renouncing Islam is considered as qualified rights. For non-Muslims, the right to renouncing their religion for another belief seems to be absolute as they could easily change into other faiths without having to go through certain procedures in accordance with the law.

CASES IN SYARIAH COURT

When Muslims who wish to renounce Islam bring a case to the Syariah Court, the focused will not be on Article 11(1) of the Federal Constitution. Indirectly it shows that Article 11(1) does not deny the rights of Muslims in this country to choose their religion. However, these rights are not absolute rather they are qualified rights because they are still bound by selective principles of Syariah Law that is applicable to them. Each state in Malaysia has its own Syariah law Enactments hence the provisions varies from one state to another.

If the question asked in the Civil Court is which court has jurisdiction, the question which will be asked in the Syariah Court is different. Normally, the Syariah Court will either assume jurisdiction or discuss previous cases to show that they do have jurisdiction, so the discussion will not be as extensive as the Civil Court over matters having to do with the issue of jurisdiction. The Syariah Court will proceed to the determination of the disputing parties' religious status. None of these cases that came before the Syariah Court involved any constitutional discussion of Article 11 of the Federal Constitution. The determination of status will look at the relevant State Enactments. This is clearly illustrated in the case of Michiel UR David & Yang Lain lwn Majlis Ugama Islam & Adat Resam Melayu Pahang, Mahkamah Tinggi Syariah, Kuantan Salehuddin Abd Manaf HMTS [2018] 10 CLJ 111

It is up to the Plaintiff to bring in all the evidence in order to succeed in their claim. The cases discussed below will depict the hurdles faced by those who attempted in renouncing Islam using judicial means.

Dalam Perkara Permohonan Perisytiharan Status Agama Si Mati Nyonya binti Tahir JHXXI/II (1427H) 221

The deceased in this case were born a Malay but raised by a Buddhist grandfather. She married a Chinese man according to Chinese rites and led her life as a Buddhist. She remained Malay in her identity card. She did apply to change her identity card during her lifetime but was rejected. When she died, her children apply to have her remains dealt with according to Buddhist rites. They applied to the Syariah Court and the Court decided that she was not a Muslim. The Court took into account her practice throughout her lifetime and decided that evidence of practice outweighed documentary evidence which is her identity card.

This case showed that it is possible for a Muslim at birth to change religion and there is no denial to such rights for Muslims. The evidence must be strong enough for the Court to decide that the individual has never believe in the faith of Islam.

Re Declaration on Religious Status of Mohd Shah @ Gilbert Freeman [2009] 4 ShLR 90

This case has been decided by the Seremban Syariah High Court. The applicant's father was a Muslim and his mother was a Christian. He was born in 1948 and was baptized in a church in 1951 at the age of three years. He was raised by the mother as a Christian and married to a non-Muslim. He has a Malay name and was registered as a Muslim in his identity card. He applied to the Court for him to be declared as a non-Muslim and that he has never practice the religion of Islam. He contested that he was never a Muslim and did not practice Islam throughout his life. In making its decision, the Syariah High Court decided that it has the jurisdiction to hear the case. The jurisdiction of the Syariah Court is based on the subject matter to be decided and not the applicant's religion. The subject matter is to decide the applicant's religious status in which actual jurisdiction had been given by Section 61(3)(b)(x) Administration of The Religion of Islam (Negeri Sembilan) Enactment 2003 (Amended 2009).

Based on the evidence tendered, the Court decided that the applicant was not a Muslim. The Court was of the view that the Enactment clearly gave the Court jurisdiction to determine the status of an individual and not to give approval or to allow for anyone to become an apostate which is against the teachings of Islam.

Siti Fatimah Tan [2009] 1 CLJ (Sya) 162

The applicant was born as a Chinese Buddhist. She converted to Islam in 1998 and married a Muslim man in 1999. She applied to change her status back to Buddhist in 2006 when her husband disappeared. Her reason was she had not practice the teachings of Islam and still continued to live as a Buddhist after her conversion. She brought her sister as a witness to testify her religious practice. This case was tried at the Syariah High Court in Pulau Pinang. At the High Court, the application made by the applicant was not contested by the Majlis Agama Islam Negeri Pulau Pinang (MAIPP). Therefore, the Court grant the application because the court is satisfied with the evidence tendered and action of MAIPP showed that they do not contest towards the application. The Court decided that she was an apostate and not a Muslim.

However, when the case came before Syariah Appeal Court judges took a different approach. Judges decided that the Court had no jurisdiction to declare the applicant as being an apostate under Islamic teachings. Even the provision in the Administration of Islamic Religion Enactment (Pulau Pinang) 2004 has not provided for the power to declare that an individual had already left Islam. What the Court can decide was only the process of becoming a Muslim had not been fulfilled therefore, the applicant remain as a Buddhists. On appeal, the Court decided that the pronouncement of 'syahadah' was not made in certainty. Therefore, the applicant remained as a Buddhists.

Cases in Syariah Courts showed that Muslims are able to change their religion by tendering evidence that showed the person had never practice Islam and is only Muslim by name. It is just a matter of proving their case up to the satisfaction of the Court. In this context the right to choose one's own faith is a qualified right subject to strong evidence being tendered to the court. The evidence can be either in writing or oral. Therefore, the right is not denied to the individual on a constitutional basis rather all arguments are subjective and within the discretion of the Syariah Court. This ruling has been accepted in the recent case of Rosliza

Ibrahim v Kerajaan Negeri Selangor & Another, Court of Appeal, Putrajaya [2019] 4 CLJ 640.

ANALYSIS AND COMMENTS

Based on the above discussions and Court decisions, it could be concluded that freedom to choose a religion is a rights protected under freedom of religion clause in Article 11(1) of the Federal Constitution. However, it is not an absolute right in the case of Muslims since the provision is subjected to personal law. Those who wish to get declaration on their religious status involving Islamic religion has to go to the Syariah Court and follow the procedure stated in the relevant State Islamic Religious Enactments. Article 11(1) basically does not deny those rights to Muslim citizens. Therefore, if an issue involving persons who wanted to get declaration on their status as a Muslim or a non-Muslim will not be on a constitutional basis rather it is a state matter by virtue of State Islamic Religious Enactments. This is where the jurisdiction of The Syariah Courts will be invoked. Therefore when this is the case, some involving very high profile court cases which has posed a constitutional question should not be raised. It should be understood that the constitutional rights of a Muslim and a non-Muslim are different when it comes to the question of changing one's religious status. To renounce Islam is a very serious matter in the Islamic faith and the law has given the sole authority to the Syariah Court to deal with and therefore it is a non-issue and must never be sensationalized.

CONCLUSION

Malaysia is a multi-racial country with people from different ethnic background, culture and religion. The freedom to practice one's faith is clearly provided in Article 11 of the Federal Constitution. An understanding on the nature of this country and the position of Islam will make people understand our current practice in handling issues relating to religion especially with regard to the issue of changing religious belief. Judicial perspectives actually showed a correct approach in interpreting the current law pertaining to this issue. The cases that has been illustrated in this work varies in terms of the background and facts having to do with the issue of renouncement of the Islamic faith. Each of them differ and required detailed analysis of the facts and reasons leading to the intention of renouncing his/her faith. In conclusion, changing religious belief is a legal and social phenomenon in Malaysia and proper understanding of the situation will make the public accept this situation in a good way and not incite debates which might be harmful to Malaysia's peace and harmony.

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