

ISLAMIC LAW AND FREEDOM OF RELIGION: A CRITICAL REVIEW ON THE RIGHT OF APOSTASY AND ITS LEGAL IMPLICATIONS IN MALAYSIA

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Abstract: *This paper provides a critical review on freedom of religion, particularly with regards to Muslims right to apostate and its legal implications in Malaysia, bringing to the light some of the academicians' opinion and courts decisions pertaining to the issue. Apostasy is a complex and controversial issue. Despite of a number of cases occurred in the past years, the interpretations to the relevant constitutional provisions are still be debated and some in the opinion that apostasy should be legalized in Malaysia. However, it is strongly argued and suggested that apostasy should not be legalized and taken as a legal right in Malaysia. This paper includes some arguments that are opposed the said suggestion together with the refutation of it. The Islamic view on the status of apostasy is also discussed in this paper. Since apostasy issue remained debated and questioned, this paper proposes that there is a need for a clear law to be implemented in Malaysia to settle this matter.*

Keywords: *Islamic law, Freedom of religion, Apostasy*

Introduction

The right to freedom of religion in Malaysia has been critically discussed since the application to change status of Muslim in the identity card was made by Lina Joy in 1998. The academicians have not stop in giving their opinion regarding this matter. Some of them supported the application while the others objected it (Zarizana Abdul Aziz, 2008). Her application to have her conversion legally recognised by Malaysian courts was rejected in 2007.

There have been other cases happened in the past few years. Recently in 2016, Rooney Rebit's case became a controversial and sensitive issue. The High Court in Kuching on March 24 granted his judicial review and ruled that he had a constitutional right to choose his faith. The

judgment establishes a precedent in a country where religious conversions, particularly from Islam to Christianity, have been steeped in controversy (MK George, 2016).

However, different verdict for three people from the state who want to leave Islam. The Court of Appeal in Kuching, Sarawak, dismissed an appeal by Jenny Peter @ Nur Muzdhalifah Abdullah, Tiong Choo Ting @ Mohd Syafiq Abdullah and Salina Jau Abdullah. (L. Susan, 2016).

Based on cases occurred in the past years, eventhough the Right to religious freedom is provided under art 11(1) of the Federal Constitution and seems to be applicable to every person in Malaysia, but the application of the provision still be debated and questioned, especially when it involves the Muslims right to leave religion. This issue remained unsettled and caused confusion among Malaysian.

Right of apostasy in Malaysia: should it be legalized?

Islam has been recognized as the religion of the Federation under Article 3 of the Federal Constitution¹. Abdul Aziz Bari, (2004) argues that this position is relevant to the issue of apostasy because the phrase ‘religion of the Federation’ shows that Federation has got Islam as her religion.

This gives the implication that the country is under the obligation to implement the teaching of Islam. So, Malaysia must, in performing its obligations, prohibit the apostasy since it is a crime under Islamic law. In other words, the position of Islam in Malaysia makes it bound to rejects apostasy.

The right to religious freedom is guaranteed in Malaysia since everyone has the right to profess any religion (Article 11(1) of the Federal Constitution, 2006)². But it is worth to be reminded that this right is not absolute since it is subjected to provisions in other articles such as Article 3, Article 11(4)³ and Article 12⁴ where the scope of this right is further explained. Hence, it is clear that the right to religious freedom in Malaysia is limited.

By the coming of British, Islamic laws in Tanah Melayu had been confined to personal matters of Muslims. These secular characteristics were intended by the framers of the Federal Constitution to continuously uphold even with the existence of the provision under Article 3 of Federal Constitution. Thus, according to the opposition, since apostasy is allowed in secular state, the same should be done in Malaysia since Malaysia is a secular state (Bon, 2005).

¹ Article 3 (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

² Article 11 (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

³ Article 11 (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

⁴ Article 12 (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth—

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students

in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

However, according to Shamrahayu A. Aziz (2007), it might be true that Malaysia is a secular state as proposed by the opposition, but the concept of secularism in Malaysia is totally different compared to west. This is because the Malaysian laws contain the provisions relating to the religions such as the position of Islam which is never existed in secular state in the west. Therefore, Malaysia could prohibit apostasy despite the fact that it is a secular state.

In Islam, even though there is no compulsion to profess Islam, once one has professed it, he could not apostate as it is a crime under Islamic law. Thus, it is argued that apostasy should not be legalized in Malaysia and taken as a legal right in Malaysia due to the special position of Islam in Malaysia, the restricted scope of religious freedom in Federal Constitution and the different concept of secularism in the Malaysian context.

i. The special position of Islam in Federal Constitution

Islam has the special position in the Federal Constitution based on provisions in Article 3, Article 12 and Article 150(5)⁵. According to Abdul Aziz Bari (2007), Islam is traditional and indigenous character of the Federal Constitution. Islam has been recognized as the religion of the Federation under Article 3 (1) of the Federal Constitution (2006) where it is stated that “Islam is the religion of the Federation” (p. 20).

Ones might find it difficult to relate between the issue of apostasy and the position of Islam. In fact, these two issues are relating to each other in the sense the phrase ‘religion of the Federation’ indicates that the Federation has Islam as her religion and must perform the religious obligations (Abdul Aziz Bari, 2004). This gives the implication that the country is under the obligation to implement the teaching of Islam.

However, there could be a view that it is impossible for the Federation to manifest all religious obligations and it is unable to possess the *aqidah* as it is not a human being. In order to answer this argument, it would be nice if the opinion of Shamrahayu A. Aziz (2006) could be referred in this matter. She said:

The manifestation of religious teaching in the context of a state may not necessarily be the same to that of individuals’ –it is sufficient for the Federation to proclaim its religion in the supreme law of the land as the provision preserved in Art. 3(1). In the constitutional context, it may be said that it is inherent in Art. 3(1) the ideology of the state signifying Islam as a way of life where its doctrines and laws are the integral part of Malaysian polity (p. 40).

Therefore, it can be inferred that Malaysia must, in performing its obligations, prohibit apostasy since it is a crime under Islamic law.

⁵ Article 150 (5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

Article 3 is not the only relevant provision to support this point. Article 12 of the Federal Constitution, for example, allows every religion to established and maintain educational institution. The special position of Islam is demonstrated by an explicit provision authorizing the government to provide financial assistance to Islamic education (Article 12 (2) of the Federal Constitution, 2006)⁶. Although by virtue of this provision, the government is allowed to give financial assistance to other religious educational institution, it does not have any constitutional sanction as in the case of Islamic educational institution. This proves the higher concern of the Constitution about Islam other than other religions in Malaysia (Abdul Aziz Bari, 2003).

The protection and special position of Islam in the Constitution is seen even in the state of emergency where the Parliament may make law inconsistent to the Constitution as provided in Article 150(5) of the Federal Constitution. Shamrahayu A. Aziz (2006) believes that this provision is an exception to the rules that the Federal Constitution is the supreme law of the land and the invalidity of any laws which is inconsistent with the Constitution (Article 4 of the Federal Constitution, 2006)⁷ since it authorizes the making of such laws. But even the Parliament may impose a law that might be conflicted with the Constitution, Clause (6A) of the Constitution (2006) do not allow it to make a law in matter of Islamic laws. This shows a great protection of the Federal Constitution towards Islam even in the state of emergency.

As a result of these provisions on the special position of Islam in Malaysian laws, there is no possible reason why apostasy should be allowed in Malaysia since it contradicts to Islamic teaching.

ii. The restricted scope of religious freedom

The right to freedom of religion in Malaysia is not an absolute right as it is further explained in Article 11 (4) and Article 12 (3)⁸ of the Federal Constitution.

The governing law for the right to religious freedom is Article 11(1) of the Federal Constitution (2005) where it is confirmed that everyone has the right to profess and practice any religion as he or she wished. This provision seems to give unlimited right of religious freedom to all persons in Malaysia. This view might be true if this provision is read in isolation. But it is worth to be reminded that all provisions in the Federal Constitution must be read in harmony with each other. Thus this right could not be an absolute right since it is subjected to provisions in other articles in the Constitution where the right has been restricted (Abdul Aziz Bari, 2003).

Shamrahayu A. Aziz (2007) argues that Article 11 (4) and Article 11(5) of the Federal Constitution state that the right under Article 11(1) could be restricted by state laws and the practice of this right should not cause a threat to public order, public health and morality. Article 11(4) and Article 11(5) read:

⁶ Article 12 (2) (2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

⁷ Article 4 (1) 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.

⁸ Article 12 (3) (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) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restricts the propagation of any religious doctrine or belief among persons professing the religion of Islam.

(5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality (p. 28)

These two provisions illustrate the limitation to the right of religious freedom in Article 11(1) where a person might be restrained by state law from propagating his religious teaching to Muslims and any action which could be a threat to public order, public health or morality will be void and illegal even though it is practiced according to the right in Article 11(1).

Article 12 (3) of the Federal Constitution (2006) provides that a person could not be instructed to take part in any ceremony or act of worship of a religion other than his own. This Article guarantees a person's right from being forced or ordered to practice the teaching of other religion than his faith. However, Clause (4) of the Article has limited this right in the sense that it gives the right to a parent or guardian to determine the religion for a person under the age of eighteen. The Article states:

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.

12. (4) For the purpose of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian (pp. 28-29).

In other words, as stated by Abdul Aziz Bari (2007), a person below eighteen years old does not have a complete right of religion freedom since he cannot choose his own religion.

These provisions of the Federal Constitution prove that the right to freedom of religion in Malaysia is limited and not absolute. Thus, the argument that apostasy should be legalized as it is within the right of religious freedom in Malaysia is rejected.

iii. Malaysia is a secular state v. The different concept of secularism in Malaysian context Malaysia is a secular state

The oppositions argue that apostasy should be legalized in Malaysia because of the fact that Malaysia is a secular state. In a secular state, apostasy should be legalized because it is an individual personal matter and state does not have any authority over personal matters.

According to the oppositions, the secular characteristics of Malaysia could be seen through the history of Islam in Malaysia after the British intervention in the affairs of Malay States. Before the coming of the British, the sultans in each of their respective states were the heads in all matters including religion and politics and were regarded as God's vicegerent. When the British came, the position of rulers had been limited and they were regarded as a sovereign within his territory only. By the change in this concept, the divine source of legal validity is severed and the British turned the system into secular institution. As a result, all laws including the administration of Islamic laws had to receive this validity through a secular fiat. Consequently,

only laws relating to family and inheritance were left to be administrated according to Islamic laws and only applicable to Muslims as their personal laws (Bon, 2005). Thus, during the British colonial period, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only.

Based on above facts, the oppositions declare that Malaysia was a secular state during the colonization of the British and the status still does not change as Malaysian laws are inherited from the British (Thio, 2006). The provision on the position of Islam as the religion of the Federation also does not change the secularism of Malaysian law. Tun Salleh Abas CJ (1988) in the case of *Che Omar bin Che Soh v Public Prosecutor*, after considering the legal history of Islam in Malaysia said:

In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word “Islam” in the context of Article 3 (of Federal Constitution). If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162 on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter...we have to set aside our personal feeling because the law in this country is still what it is today, secular law... (p. 56)

In his judgment, Tun Salleh Abas CJ said that the word “Islam” meant by the framers of the Constitution was “Islam” as in the period of colonization which only confined to personal matters only. According to Bon (2005) and Thio (2006), the constitutional framers also assured that Article 3 does not diminish state secularity and does not prevent Malaysia from being a secular state.

So, according to the oppositions, Malaysia has no authority to prohibit apostasy since it is a secular state. This argument is solely based on the intention of the framers of the Constitution as argued before.

The different concept of secularism in Malaysian context

It might be true that Malaysia is a secular state as proposed by the opposition, but the concept of secularism in Malaysia is totally different compared to the west.

Abdul Aziz Bari (2005) has explained clearly about the secularity of Malaysia in his article, “Freedom of Religion in Malaysia: It is not Complicated”. This article was written particularly to answer the statement made by Bon (2005) who said that Malaysia is a secular state intended by the framers of the Constitution. He said:

There is no need to discuss the secular nature of the Constitution. In any case the Reid Commission – which has made it clear that the Constitution seeks to implement democracy and democratic ideals-, did not say on the alleged secular nature; only certain members of the Commission mentioned the secular nature of the Constitution in passing (p. 266).

He further argued that even though the case of *Che Omar bin Che Soh v Public Prosecutor (1988)* which is used by the oppositions in their argument was decided by the Supreme Court thus became a binding law, it was not clear about certain points. The case discussed about the intention of the framers of the Constitution, but in fact the framers did not say anything about the so-called intention. Thus, in his opinion, by looking at this factor, there is no absolute proof to say that Malaysia is a secular state. The reliance on the intention of the framers of the Constitution is very weak and could not be used to support the opponent's argument.

Even if the intention of the constitutional framers could be used as an argument to say that Malaysia is a secular state and consequently apostasy should be legalized, it could still be rebutted. Shamrahayu A. Aziz (2007) suggested that the discussion on the meaning of 'secular' in the Malaysian context must be based on provisions under the Constitution. If 'complete separation between religion and state' is meant by the word 'secular' by the framers of the Constitution in the Federation of Malaya Constitutional Proposal 1957, it would be inconsistent with the various provisions relating to the religion in the Constitution especially Article 3(1) which guarantees the high position of Islam.

Another good example for this type of provision is the proclamation of the Yang di-Pertuan Agong's oath to protect the religion of Islam under the Fourth Schedule of the Constitution. The second limb to Article 3(1) also is a criteria contradicting to the ideology of secularism in the sense that it acknowledges the right to practice other religions.

Abdul Aziz Bari (2005) and Shamrahayu A. Aziz (2007) pointed out that since in a true secular state or Constitution religion has no place at all, the existence of various provisions in the Constitution relating to the religion denies the secularity of the Malaysian laws even it does not successfully turn Malaysia into a full-fledge Islamic state.

Thus, the Malaysian laws could still restraint the right of apostasy even if it is a secular state as stated by the framers of the Constitution in the Reid Commission Report and White Paper (Abdul Aziz Bari, 2003) since the concept of secularism in Malaysia is different.

Conclusion and Recommendation

To conclude, the freedom of religion does not apply to Muslim as this is opposed the religion's teaching itself. Allah states in His Holy Quran (Al-Baqarah, 256) that there is no compulsion in religion. In another verse He says (Al-Kafirun, 6) to you be your way, and to me mine.

These verses have been used by those who alleged that freedom of religion also applies to Muslims. On the other hand, Allah condemns those who do apostasy (Al-Baqarah, 217). This is because, Islam promotes the freedom of religion however only to the extent that one will not be forced to embrace Islam. It does not mean that Muslims are allowed to renounce Islam. If they do so, they have committed a grievous sin to Allah.

Constitutionally speaking, every right under the Constitution has to be viewed with its background and context. When it involves the right of religious freedom, it must be read within the constitutional framework, namely the position of Islam. It does not sound right where a state that inserts Islam as its official religion, allows a renunciation from its official religion. This shows that the laws conflicting within itself. It is the duty of the Federation to protect, defend and promote Islam.

However, given the controversy and debate on the issue, perhaps there is a need to set up a commission or commission of inquiry to look into the matter. To ensure a fair solution, members of this body should comprise of all interested parties. The authorities also is hoped to provide the necessary information including the number of conversion into and out of Islam to the public. It is important to know the profiles of the applicants since there are people saying that in reality apostasy generally involved new converts who did not really understand the religion.

In the conclusion, based on the arguments presented, it is clear now that there is no solid reason why the government should allow apostasy. The arguments used by the oppositions are rather weak and not impressive enough to prove the contrary. However, these fragile arguments have successfully confused the society in understanding this issue. Thus, as stated before, there is a need for a clear law to be implemented in Malaysia to settle this matter.

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