

# Challenges to Freedom of Religion or Belief in Malaysia

## A Briefing Paper

March 2019

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# Challenges to Freedom of Religion or Belief in Malaysia

## Executive Summary and recommendations

The right to freedom of religion or belief is guaranteed in international human rights law, including in a number of core human rights instruments. It encompasses a wide range of rights, including the freedom to have or to adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, either individually or in community with others, in public or in private. The right to freedom of religion or belief also covers the right to freedom of thought and personal convictions, including theistic, non-theistic or atheistic beliefs, and the freedom not to disclose one's religion or belief.

The Federal Constitution of Malaysia enshrines a number of legal protections with respect to freedom of religion or belief in the country. It protects the right to freedom of religion under Article 11, including the right to "profess, practise and propagate" one's religious beliefs, with the possibility that federal law may impose certain limits on the right to propagate the Islamic faith among Muslims. Under Article 3, Islam is accorded a special and effectively privileged position within the country.

To understand the operation in practice of the legal framework governing freedom of religion or belief in Malaysia, it is necessary to appreciate the role that religion and ethnicity have played in Malaysian politics and society. Ethnicity and religion have often been utilized by political parties to advance their agenda. Even after the 60-year governance of the Barisan Nasional (National Front) coalition led by the nationalist United Malays National Organization (UMNO) party came to an end in 2018, the propagation of identity-based politics has persisted.

Religious intolerance is also a pressing concern in Malaysia, a concern raised by the UN Special Rapporteur in the field of cultural rights, following a visit to the country in September 2017. Harassment of persons from religious minorities, as well as the recent disappearances of religiously-affiliated social workers or clergy, illustrate the serious consequences of growing religious intolerance.

In this context, jurisdictional disputes affecting the adjudication of matters relating to religion and belief – between civil courts, which apply federal and state laws, and Syariah courts, which apply Islamic laws – have become a main arena of contestation. Exacerbated by a lack of clarity in existing jurisprudence and law about this dual jurisdictional regime, the scope of matters heard by Syariah courts has expanded, resulting in diminished access to civil remedies. Despite the protections offered by the Constitution, legal safeguards to protect the rights of Muslims in respect of personal and family matters remain inadequate, and there is little protection for persons who wish to change their religion. This situation has had a particularly detrimental impact on already at-risk populations, such as religious minorities and children.

The International Commission of Jurists (ICJ) has identified a number of challenges related to the protection and promotion of the right to freedom of religion or belief in Malaysia. This briefing paper identifies six key issues concerning the implementation in practice of constitutional provisions, federal laws and Islamic laws in the context of freedom of religion or belief:

- (1) discrimination against religious minorities;
- (2) limitations on the rights of children relating to personal matters governed by Islamic law;
- (3) discrimination against persons who wish to change or adopt a new religion;

- (4) criminalization and prosecution of proselytism among Muslims; and
- (5) prohibitions on the use of the word 'Allah' by non-Muslims; and
- (6) relationship with freedom of expression and the crime of sedition.

To help address these concerns and assist the Government of Malaysia to ensure that its legal framework is implemented in accordance with international human rights law and fully protects freedom of religion or belief, the ICJ offers the following recommendations:

- Become a party to the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW); the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), and other core UN human rights instruments with a view to upholding the commitments Prime Minister Mahathir Mohamad made to the 73<sup>rd</sup> United Nations General Assembly;
- Withdraw the reservations entered to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), which are incompatible with the object and purposes of those treaties;
- Implement the provisions of the Constitution, particularly Article 11, in accordance with the right to freedom of religion or belief guaranteed in international human rights instruments, including by removing the limitations on proselytism, and enhancing protections for religious minorities and non-believers;
- End the harassment, arrest, detention, forced "rehabilitation" and selective targeting of religious minorities and allow them to exercise their right to freedom of religion or belief freely without State intrusion, including through ending the use of security laws against religious minorities;
- Unconditionally release persons imprisoned on charges solely related to the peaceful practise of their religion as protected under international human rights law;
- Adopt a process of engagement with Islamic religious authorities, including by establishing a commission or working group aimed at preventing actions that threaten the rights of religious minorities, punish apostasy and place limitations on religious practices;
- Repeal or amend legal provisions that allow children under the age of 18 to be married with the permission of a Syariah judge;
- Amend the Child Act 2001 to include a specific provision criminally sanctioning adults responsible for child marriage;
- Amend or repeal laws that criminalize the changing of one's religion, and remove punitive measures, including detention in rehabilitation centres and mandatory counselling sessions, featured within State laws for persons who wish to change their religion;
- Implement legal measures, including departmental regulations, instructing the National Registration Department that matters involving voluntary conversion must be resolved in a manner consistent with protection of the right of persons to choose their own religion or belief;
- Amend or repeal all laws that criminalize the propagation of religious beliefs or proselytism among people of all faiths;
- Conduct independent, impartial and effective investigations into cases of alleged enforced disappearances until the fate and whereabouts of each person is disclosed, provide regular updates on these investigations to the families of the victims and the public, and take all measures necessary to ensure that those responsible for enforced disappearances be brought to justice;
- Amend or repeal the 1986 government directive prohibiting the use of the word "Allah" in non-Islamic religious publications.
- Repeal or substantially amend the Sedition Act to make it human rights compliant.

## Background

Malaysia has an ethnically, culturally and religiously diverse population. According to a 2010 study by the Malaysian Department of Statistics, the population was 61.3 per cent Sunni Muslim; 19.8 per cent Buddhist; 9.2 per cent Christian; 6.3 per cent Hindu; 1.3 per cent adherents of traditional Chinese religions, such as Confucianism and Taoism; and 0.4 per cent adherents of 'other religions', including indigenous religious practices. Malaysia is also ethnically diverse, comprising 67.4 per cent *Bumiputera*, a term which includes Malays (the majority ethnic group in the country) and indigenous groups;<sup>1</sup> 24.6 per cent ethnic Chinese; 7.3 per cent ethnic Indians; and 0.7 per cent 'others'.<sup>2</sup>

Ethnic and religious identity have always been closely linked in Malaysia – both in public discourse and in some areas of the law.<sup>3</sup> The Constitution offers broad protections for freedom of religion or belief, but also makes the link between religion and ethnicity explicit in law. Article 160 of the Constitution defines a Malay person as "a person who professes the religion of Islam, habitually speaks the Malay language (and) conforms to Malay custom".<sup>4</sup> Article 3 establishes Islam as the national religion, whereas Article 4 protects other religious practices.<sup>5</sup> A plethora of state and religious laws, an uneven body of jurisprudence, as well as federal rights protections and international obligations, create a complex patchwork of law and policy relevant to the protection and promotion of the right to freedom of religion or belief in Malaysia.

Political administration in Malaysia has historically been dominated by ethnic-based political parties, which have played crucial roles during the 60-year governance of the Barisan Nasional coalition.<sup>6</sup> Barisan Nasional rule ended in May 2018 when the Pakatan Harapan Party Coalition, led by Tun Mahathir Mohamed, took power. In the May 2018 election, a significant proportion of the Malay-Muslim population voted for either the UMNO-led Barisan Nasional coalition or the Malaysian Islamic Party (PAS), reflecting continuing support for parties advancing policies to protect and promote Malay-Muslim identity and culture. Although the defeat of Barisan Nasional has shown that electoral success is possible without prominent recourse to ethnic and religious identity, they continue to play a central role in Malaysian politics.

Maintaining broad political support for the much-needed reforms, while celebrating and protecting Malaysia's diverse religious and ethnic communities, remains a central challenge for the new government. This was evident in a recent public backlash against the Pakatan Harapan administration's proposal to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In November 2018, some politicians and members of religious communities voiced opposition against ICERD, expressing fear that

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<sup>1</sup> As defined by Article 153 of the Federal Constitution.

<sup>2</sup> Population Distribution and Basic Demographic Characteristic Report 2010; [https://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=117&bul\\_id=MDMxdHZjWtk1SjFzTzNkRXZzcVZjdz09&menu\\_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09](https://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=117&bul_id=MDMxdHZjWtk1SjFzTzNkRXZzcVZjdz09&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09).

<sup>3</sup> The UN Special Rapporteur in the field of cultural rights has warned against equating ethnicity with religion. She also warned against curtailing diverse interpretations of Islam in a way that could exacerbate discriminatory attitudes and practices. See Preliminary Observations by the United Nations Special Rapporteur in the field of cultural rights Karima Bennouna at the end of her visit to Malaysia, 21 September 2017, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22121&LangID=E>.

<sup>4</sup> It is worth noting that the United Nations Special Rapporteur in the field of cultural rights concluded that there has been "growing pressure to adopt a narrow interpretation of the Muslim religion and identity." Preliminary Observations by the United Nations Special Rapporteur in the field of cultural rights, Karima Bennouna. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22121&LangID=E>; UN expert urges Malaysia to protect its tradition of tolerance from the rise of fundamentalism, 25 September 2017, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22139&LangID=E>.

<sup>5</sup> Article 4 of the Federal Constitution.

<sup>6</sup> The Barisan Nasional included the United Malays National Organization, the Malaysian Chinese Association and the Malaysian Indian Congress – all ethnicity-based nationalist parties.

ratification would erode constitutional privileges afforded to Malay-Muslims.<sup>7</sup> The Pakatan Harapan government backtracked on its proposal to ratify ICERD in a public announcement on 23 November, despite the Prime Minister's stated commitment to "ratify all remaining core UN instruments related to the protection of human rights".<sup>8</sup> On 8 December 2018, this opposition culminated in a large rally against Malaysia ratifying ICERD held in the country's capital.

While the historical and political context within which the right to freedom of religion or belief is protected and promoted in Malaysia is no doubt significant, this report is confined primarily to an assessment of the legal framework for the protection of this right, and to identifying key issues of concern. The ICJ, however, considers it nonetheless important that any advocacy around legal and policy recommendations be conducted with due consideration to the historical and current political and cultural context.

## **INTERNATIONAL LEGAL FRAMEWORK<sup>9</sup>**

### ***Duty to respect, protect and fulfill***

When they become parties to international human rights treaties, States undertake to respect, protect and fulfill the rights guaranteed in them. The *obligation to respect* means that States must refrain from interfering with or curtailing the enjoyment of human rights. The *obligation to protect* requires States to protect individuals and groups against human rights abuses. The *obligation to fulfill* means that States must take positive action to facilitate their exercise and enjoyment.

### ***Freedom of religion or belief***

**Article 18 of the Universal Declaration of Human Rights (UDHR) provides that** "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

In respect of treaties, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of thought, conscience and religion (hereinafter, freedom of religion or belief).<sup>10</sup> While Malaysia is one of the few States that has yet to ratify it, the ICCPR, with 172 States parties, reflects the contemporary universal standard, and the jurisprudence produced by its supervisory body, the UN Human Rights Committee, is an authoritative source for identifying the scope and content of the right under general international law.

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<sup>7</sup> No to ICERD 24 Nov 2018: <http://mystar.newspaperdirect.com/epaper/viewer.aspx>.

<sup>8</sup> Speech Text: Dr. Mahathir at the 73<sup>rd</sup> UN General Assembly: <https://www.nst.com.my/news/nation/2018/09/415941/speech-text-dr-mahathir-73rd-un-general-assembly>.

<sup>9</sup> For an expanded exposition of this legal framework, see ICJ, 'A Primer on International Human Rights Law and Standards on the Right Freedom of Thought, Conscience, Religion or Belief', January 2019, available at <https://www.icj.org/wp-content/uploads/2019/01/Universal-Primer-religion-belief-Advocacy-Analysis-brief-2019-ENG.pdf>.

<sup>10</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 18.



### **Article 18 of the ICCPR**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The right to freedom of religion or belief is also guaranteed in other international human rights instruments, both treaties<sup>11</sup> and declaratory standards,<sup>12</sup> including the UN General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 ('1981 Declaration'), and has been elaborated on in great depth, among others, by the UN Human Rights Committee, and the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in their reports.

The right to freedom of religion or belief includes a broad range of rights, including the freedom to have or to adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, either individually or in community with others, in public or private.<sup>13</sup> Moreover, the right to freedom of religion or belief encompasses the right to freedom of thought and personal convictions in all matters, and protects all kinds of beliefs, whether theistic, non-theistic or atheistic beliefs, and the freedom not to disclose one's religion or belief.<sup>14</sup>

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<sup>11</sup> See, e.g., United Nations Educational, Scientific and Cultural Organization (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, Paris, UN Doc. MISC/2003/CLT/CH/14, Article 2 (C). See also Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; and UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180.

<sup>12</sup> See, e.g., UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, UN GA resolution 217 A (III), Article 18; UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 25 November 1981, UN Doc. A/Res/36/55; UN General Assembly, Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief, adopted by the General Assembly Resolution 72/176 of 29 January 2018, UN Doc. A/RES/72/176; UN General Assembly, Freedom of Religion or Belief, adopted by the General Assembly Resolution 72/177 of 19 December 2017, UN Doc. A/RES/72/177; UN General Assembly, Freedom of Religion or Belief, adopted by the General Assembly Resolution 71/196 of 24 December 2016, UN Doc. A/RES/71/196; UN General Assembly, Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief, adopted by the General Assembly Resolution 71/195 of 23 January 2017, UN Doc. A/RES/71/195; UN General Assembly, Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly Resolution 70/166 of 22 February 2016, UN Doc. A/RES/70/166; UN General Assembly, Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the General Assembly Resolution 66/168 of 11 April 2012, UN Doc. A/RES/66/168.

<sup>13</sup> E.g., ICCPR, Article 18 (1).

<sup>14</sup> UN Human Rights Committee (HRC), General Comment 22: The Right to Freedom of Thought,

### **Freedom to adopt, change or renounce a religion or belief**

According to international standards, the right to freedom of thought, conscience, religion or belief guarantees and includes the right to adopt a religion of one's choice, as well as the right to change and retain a religion. These aspects of the right to freedom of thought, conscience, religion or belief have an absolute character and are not subject to any limitation whatsoever, reflecting the nature of the right to freedom of religion or belief guaranteed by Article 18 of the UDHR and Article 18 of the ICCPR. Indeed, to do otherwise would constitute a violation of the right not to "be subject to coercion which would impair [one's] freedom to have or to adopt a religion or belief of [one's] choice", guaranteed, *inter alia*, by Article 18(2) of the ICCPR.

Article 18 of the UDHR proclaims that "everyone has the right to freedom of thought, conscience and religion", and clearly guarantees that such a right "includes freedom to change his religion or belief". While the ICCPR and the ICERD do not explicitly affirm the right to "change religion", they effectively guarantee such a right. Indeed, Article 18 of the ICCPR guarantees to everyone the right "to have or to adopt" a religion of one's choice, as well as the right not to "be subject to coercion which would impair [one's] freedom to have or to adopt a religion or belief of [one's] choice"; and the 1981 Declaration also proclaims the "freedom to have a religion or whatever belief of [one's] choice."<sup>15</sup>

### **The right to manifest one's religion or belief**

Both the UDHR and the ICCPR guarantee the right to manifest one's religion or belief as a fundamental aspect of the right to freedom of thought, conscience, religion or belief.<sup>16</sup> In particular, Article 18(1) of the ICCPR affirms that the right to freedom of thought, conscience, religion or belief includes "freedom, either individually or in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching."<sup>17</sup> In addition, Article 27 guarantees the right of persons belonging to religious minorities to profess and practise their own religion in community with the other members of their group.<sup>18</sup> In this context, the UN Human Rights Committee has found that the freedom to manifest one's religion or belief in worship, observance, practice and teaching encompasses a "broad range of acts, including ritual and ceremonial acts, building of places of worship, the use of ritual formulae and objects, the display of symbols, the observance of holidays and days of rest", customs that include "observance of dietary regulations, the wearing of distinctive clothing or headcoverings", and "acts integral to the conduct by religious groups of their basic affairs".<sup>19</sup>

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Conscience and Religion (Article 18), 27 September 1993, UN Doc. CCPR/C/21/Rev.1/Add.4, paras 1 – 2.

<sup>15</sup> Article 1, 1981 UN Declaration.

<sup>16</sup> Article 18 of the UDHR proclaims, *inter alia*, "Everyone has the right to freedom of thought, conscience and religion; this right includes [...] freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

<sup>17</sup> In Article 1(1), the 1981 Declaration also proclaims the right to manifest one's religion or belief with wording that is identical to that of Article 18(1) of the ICCPR.

<sup>18</sup> Article 27 of the ICCPR read as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

<sup>19</sup> Human Rights Committee, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), 30/07/93.

## **Religious or belief minorities**

Under international human rights law and standards,<sup>20</sup> States have an obligation to guarantee the right of minorities to freedom of religion and the practice of religion. States have a duty to protect religious minorities against abuses committed against them by non-State entities. States are also required to create conditions for promoting the identity, including the religious identity, of minorities.

To fulfil their obligations under international human rights law, States must take a broad and inclusive interpretation of the rights of persons belonging to religious or belief minorities. This includes taking into account the right to freedom of religion or belief of those individuals or groups who do not, or do not seem to, fit into the setting of theologically accepted religions, such as members of other minorities, individual dissenters, minorities within minorities, atheists or agnostics, converts or people with unclear religious affiliation.<sup>21</sup>

## **Freedom of expression**

Article 19(1) of the ICCPR guarantees the right of everyone to hold opinions without interference, and Article 19(2) guarantees the right of everyone to freedom of expression, including to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

The UN Human Rights Committee, expounding on Article 19 of the ICCPR, has specifically stated that “prohibitions of displays of lack of respect for a religion or other belief system, including ‘blasphemy laws’, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant”.<sup>22</sup> The Human Rights Committee has further clarified that it is impermissible for any such laws to discriminate in favour of or against a particular religion or belief system, or their adherents over another or religious believers over non-believers. It is also impermissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>23</sup>

Additionally, the Human Rights Committee has observed that, “all forms of opinions are protected including opinions of a ‘religious nature’”, and that “harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19(1).”<sup>24</sup>

There may be instances in which freedom of expression may be lawfully restricted, including

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<sup>20</sup> See, for example, Article 27 of the International Covenant on Civil and Political Rights; General Comment No. 23 of 6 April 1994 of the Human Rights Committee; Article 30 of the Convention on the Rights of the Child; and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

<sup>21</sup> See “Protecting the freedom of religion or belief of persons belonging to religious minorities”, Heiner Bielefeldt, *Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur 2010 – 2016*, p. 134-144.

<sup>22</sup> UN Human Rights Committee, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man, 25 April 2000, UN Doc. CCPR/CO/79/Add.119 UN Human Rights Committee, General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 48. Article 20(2) of the ICCPR relates to the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This prohibition does not necessarily mean censorship or stifling of freedom of expression but possibility of civil remedies. See Commission of Human Rights, *Travaux Préparatoires* of Article 20 of the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/SR.377,10, cited at, Michael G. Kearney, *The Prohibition of Propaganda for War in International Law*, 2007, New York, Oxford University Press, p. 111.

<sup>23</sup> UN Human Rights Committee, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man, 25 April 2000, UN Doc. CCPR/CO/79/Add.119; UN Human Rights Committee, General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para 48.

<sup>24</sup> UN Human Rights Committee, General comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 9.

for the protection of certain religious communities, particularly minorities, from discrimination. However, such restrictions should be prescribed by law, for the purposes recognized by the ICCPR, and be strictly necessary for the protection of interests set forth in Article 19.<sup>25</sup>

### ***Rights to non-discrimination and equality before the law***

Under international human rights law, everyone has the right to equality before the law, and States have duties to act to prevent, prohibit, eradicate and remedy discrimination. The non-discrimination principle, the right to equality before the law and equal protection of the law without any discrimination, together constitute fundamental principles of human rights protection.<sup>26</sup>

The ICCPR clearly outlines these principles: Article 2(1) provides that States “undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”, while Article 26 dictates that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] religion”.

Other international instruments, including ICERD, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the United Nations Convention on the Rights of the Child (UNCRC) and the 1981 Declaration provide similar protections against discrimination on the grounds of religion or belief.<sup>27</sup>

With respect to religious and ethnic minorities, Article 27 of the ICCPR clarifies that “(where) ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The Human Rights Committee has noted that even as the ICCPR allows States to take measures derogating from certain obligations under the Covenant in times of public emergency,<sup>28</sup> such “measures should not involve discrimination solely on the ground of [...] religion [...] Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of [...] religious hatred which constitutes incitement to discrimination.”<sup>29</sup>

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<sup>25</sup> Article 19 (3) reads “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”; See *Malcolm Ross v. Canada*, Human Rights Committee Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997 Views of 26 October 2000, see paras 11.1 – 11.6.

<sup>26</sup> Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 1.

<sup>27</sup> ICESCR Article 2(2): “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind such as [...] religion”; Article 5, ICERD: “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights [...] the right to freedom of thought, conscience and religion”; CRC, Article 30: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language;” and the 1981 Declaration of the General Assembly, Article 2(1): “No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.”

<sup>28</sup> Under Article 4(1).

<sup>29</sup> Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 2.

As noted above in respect of the ICCPR, even though Malaysia is not a party to the Covenant, it is still bound to respect the core aspects of the right to freedom of thought, conscience, religion or belief. The adoption by consensus of the 1981 Declaration by the UN General Assembly reflects a broad common understanding of the issues addressed in the Declaration itself. Indeed, the 1981 Declaration is now viewed as of interpretative value insofar as the guarantees in Article 18 of the ICCPR are concerned. In addition, the core aspects of the right to freedom of thought, conscience, religion or belief featured in the 1981 Declaration constitute customary international law.<sup>30</sup>

## NATIONAL LEGAL FRAMEWORK

While the Constitution and laws of Malaysia do provide protections for freedom of religion or belief, they fall short of the protections required under international human rights law and standards. This is due in part to a conception of religious freedom that is centred on the administration of religious affairs, rather than on the protection of individual rights. Constitutional protection of Islam as the State religion, and lack of clarity regarding the jurisdiction of civil courts vis-à-vis Syariah courts, further complicate how the right to freedom of religion or belief is protected in practice in the country.

### ***Islam as a State religion***

The 1957 Federal Constitution of Malaysia accords a special status for Islam. Article 3(1) states that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.”

The practice and recognition of a “State religion” is not *per se* contrary to international law. However, the authorities must ensure that any establishment of a State religion does not impair the enjoyment of any rights, and does not produce outcomes that discriminate against those who profess a religion other than Islam, or those who do not profess any religion at all.<sup>31</sup>

The interpretations as to what the establishment of a ‘religion of the Federation’ entails are wide ranging and varied. At play are questions such as: how does the establishment of a State religion impact those who profess that religion? How does it impact those who do not profess the State religion? To what extent can providing special protection and status to a State religion impede protection of the rights of religious minorities and other marginalized and at-risk groups?

Some of these questions have been considered by the judiciary, including the Supreme Court of Malaysia. For instance, in the case of *Che Omar bin Che Soh v Public Prosecutor* (*‘Che Omar’*), the Court found that the framers of the Constitution understood Islamic law to apply narrowly to law pertaining to personal matters, such as marriage, divorce and inheritance. The Court rejected arguments that the operation of Article 3 would essentially void laws that are contrary to Islamic law as a general matter.<sup>32</sup> However, despite the ruling, the interpretation and application of Article 3(1) remains contested, and judicial actions

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<sup>30</sup> Ghanea, N., Lindholm, T., Durham, C., Tahzib-Lie, B. G, 2004. Introduction. In: Lindholm, T., Durham, C., Tahzib- Lie, B. G (eds), 2004. Facilitating freedom of religion or belief: A Deskbook. See, also, Max Planck Encyclopedia of Public International Law, Religion or Belief, International Protection, Christian Walter, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e867>.

<sup>31</sup> The Human Rights Committee in setting out the scope of limitations under Article 18 of the ICCPR has recognized that a “State religion” must not result in “any impairment of the freedoms under Article 18.” The Committee has emphasized that those who do not accept the official ideology of the State must be protected against discrimination.

<sup>32</sup> In the case, the Court rejected an appeal from a lower court that had ruled against a petition seeking a ruling that the death penalty was unconstitutional because it violated Islamic laws and principles. *Che Omar bin Che Soh v Public Prosecutor* (1988) 2 MLJ 55, paras 55 to 56.

continue to be brought seeking to invalidate laws on similar grounds.<sup>33</sup>

This ambiguity over the scope and interpretation of Article 3(1), which has intensified as a result of the introduction of Article 121(1A) into the Constitution in 1988 as noted below, has had implications for the question of whether and when jurisdiction lies with civil versus Syariah courts – including in cases involving human rights violations. This will be discussed further below.

### ***Constitutional protections and limitations***

The Constitution provides a number of important protections for the right to freedom of religion or belief. Article 11 of the Constitution guarantees the right of every person to “profess and practise [their] religion, and to propagate it”, subject to constitutional limitations set out in Article 11(4). Article 11(3) of the Constitution also recognizes the right of each religious group to “manage its own religious affairs, to establish and maintain institutions for religious or charitable purposes, and to acquire and own, hold and administer property”.<sup>34</sup>

Thus, while the Constitution recognizes an individual right to freedom of religion, it is defined within the ambit of Article 11(3), which protects the rights of religious groups to manage their own affairs. Notably, Article 12(2) of the Constitution further provides that “every *religious group* has the right to establish and maintain institutions for the education of children in its own religion [emphasis added].”

Equality and non-discrimination are addressed in Article 8, which provides that “all persons are equal before the law and entitled to the equal protection of the law”. Article 8 further provides that “except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.”<sup>35</sup>

While these provisions create a strong basis for the protection of freedom of religion or belief, as well as non-discrimination, they are subject to limitations that are incompatible with international human rights law and standards.<sup>36</sup>

For instance, the definition of ‘freedom of religion’ in Article 11 of the Constitution, limited to the ‘profession, practice and propagation’ of one’s religion, is overly narrow and does not expressly include the freedom to have or adopt a religion or belief of one’s choice. Article 11 does not provide for the freedom to manifest one’s religion or belief in ‘worship, observance, practice and teaching,’ fundamental elements of the right to freedom of religion and belief under the Article 18 of the UDHR and the ICCPR.

In addition, Article 11(4) imposes limitations on the right to propagate any religious doctrine or belief “among persons professing the religion of Islam” in line with state and federal laws, and gives state and federal legislative bodies the power to promulgate laws that restrict and

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<sup>33</sup> See Moustafa, T. (2018) ‘Constituting Religion: Islam, Liberal Rights, and the Malaysian State’, Cambridge University Press, pp. 138 to 154.

<sup>34</sup> Article 11(3) of the Federal Constitution.

<sup>35</sup> Article 8(5), however, omits certain measures from the ambit of this general protection, namely “any provision regulating personal law” and “any provision or practice restricting office or employment”. Article 8(5): See Annex.

<sup>36</sup> In General Comment 22, the Human Rights Committee has affirmed that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another religious belief or to adopt atheistic views, and the right to retain one’s religion or belief. It further stressed that “the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs...the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.” Human Rights Committee, General Comment 22, paras 4-5.

control the propagation of religious doctrine to Muslims.<sup>37</sup> The article does not address proselytism in respect of non-Muslims. Article 11(5) includes a more general limitation, prohibiting “any act contrary to any general law relating to public order, public health or morality,” the ambiguity of which makes it prone to inconsistent or arbitrary enforcement. The language of Article 11(3), along with other provisions that protect the rights of religious groups (such as 12(2)), also create a tension between the protection of individual rights and the rights of religious communities, illustrated in the case of the right of religious groups to provide religious education to children (see *Indira Gandhi* case, treated in greater detail below).

Finally, even as Article 8 of the Constitution recognizes the right to equality and freedom from non-discrimination, there are no laws that specifically protect religious minorities from discrimination or unequal treatment. The Constitution also provides no specific protections for the freedom of ‘thought and conscience’, which includes the freedom to have a theistic, non-theistic or atheistic beliefs and the freedom from coercion to adopt a religion or belief of one’s own choice.

### **State and Federal Law**

The power to promulgate laws at the federal level applicable to the entire country rests with Parliament, pursuant to Article 66 of the Constitution,<sup>38</sup> while laws applicable to states are enacted by State Legislative Assemblies, pursuant to Article 73.<sup>39</sup> Article 74 of the Constitution provides for division of power between Parliament and State Legislative Assemblies.<sup>40</sup>

A wide range of religious and family matters fall within the jurisdiction of the states, including Islamic law pertaining to personal and family matters. Article 74(2) of the Constitution confers power on State Legislative Assemblies, through the ‘State List’, to make laws pertaining to Islamic personal law, including “personal and family law of persons professing the religion of Islam, including Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts.”<sup>41</sup> Islamic law, including laws on the administration of Islamic affairs and Syariah Criminal Enactments, is enacted by State Legislatures and is exclusively applicable to persons professing the religion of Islam.

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<sup>37</sup> Article 74(2) of the Constitution provides that “Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule)) or the Concurrent List.” The State List includes “Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts.”

<sup>38</sup> Article 66(1) of the Constitution provides “The power of Parliament to make laws shall be exercised by Bills passed by both Houses (or, in the cases mentioned in Article 68, the House of Representatives) and except as otherwise provided in this Article, assented to by the Yang di-Pertuan Agong.”

<sup>39</sup> Article 73 of the Constitution provides for the distribution of competencies as between of federal and State authorities. Article 73(a) provides that Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation; 73(b) stipulates that “the Legislature of a State may make laws for the whole or any part of the State”.

<sup>40</sup> Article 74 of the Constitution provides that “Parliament may make laws with respect to any of the matters enumerated in the Federal List or Concurrent List, (that is to say, the First or Third List, set out in the Ninth Schedule). Examples contained in the First List include “external affairs, including (a) treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country, Defence of the Federation or any part thereof, internal security.”

<sup>41</sup> Article 74(2) of the Constitution provides that “Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule)) or the Concurrent List.” The State List includes “Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts.”

At the federal level, Chapter XV of the Penal Code covers 'Offences relating to religion', including 'disturbing a religious assembly' and defiling a place of worship.<sup>42</sup> Section 3 of the Sedition Act 1948, which criminalizes acts that "promote feelings of ill will and hostility between different races or classes of the population of Malaysia",<sup>43</sup> has also been used to suppress religious freedom or punish actions deemed to offend religious sensitivities.

### **Dual Jurisdiction of Civil and Syariah Courts**

Malaysia has a dual legal system comprising both a common-law system applying general law applicable to all persons throughout the country, and Islamic law, applicable only to people professing the Islamic faith. This means that many cases concerning religious freedom are the subject of jurisdictional disputes – often decided in favour of the jurisdiction of Syariah courts.

In 2018 the Committee on the Elimination of Discrimination against Women issued its Concluding observations on the combined third to fifth periodic reports of Malaysia. The Committee stated that it was "concerned about the existence of a parallel legal system of civil law and multiple versions of Syariah law, which have not been harmonized in accordance with the Convention, as previously recommended by the Committee (see CEDAW/C/MYS/CO/2, para. 14), which leads to a gap in the protection of women against discrimination, including on the basis of their religion."<sup>44</sup>

Cases concerning limits to or protection of religious freedom have often been a subject of jurisdictional dispute – particularly surrounding the question of whether Art 121 (1A) grants exclusive jurisdiction, including in respect of judicial review, to the Syariah courts in all matters relating to Islam. This confusion within the legal framework places the well-being of children and families, in particular, at risk. This situation has been complicated further by a 1988 amendment to Article 121(1) of the Constitution.

In 1988, the Constitutional Amendment Act amended Article 121(1) of the Constitution to remove judicial powers 'vested' in the High Courts to supervise and review lower subordinate courts.<sup>45</sup> Article 121(1) now provides that the High Courts and lower courts have "jurisdiction and powers as may be conferred by or under federal law". This amendment was brought into force by the former Prime Minister in the context of a constitutional crisis, following a series of judicial decisions challenging Executive's decisions and powers, and has been the subject of significant criticism for infringing on judicial independence.<sup>46</sup>

The Constitutional Amendment Act 1988 further amended Article 121 (1A) of the Constitution, providing that civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts". This amendment has resulted in a lack of clarity in law as to whether civil High Courts would retain powers of judicial review, including

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<sup>42</sup> Section 295 of the Penal Code: 'Injuring or defiling a place of worship with intent to insult the religion of any class', Section 296: Disturbing a religious assembly, Section 297: Trespassing on burial places, etc., Section 298: Uttering words, etc., with deliberate intent to wound the religious feelings of any person, Section 299: Causing, etc., disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion.

<sup>43</sup> Section 3(1)(e) of Sedition Act 1948.

<sup>44</sup> Para 11 of the Concluding observations of the Committee on the Elimination of Discrimination against Women: Malaysia, CEDAW/C/MYS/CO/3-5, 14 March 2018.

<sup>45</sup> Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely—(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine; (c) (Repealed), and in such inferior courts as may be provided by federal law.

<sup>46</sup> Tew, Y., 'The Malaysian Legal System: A Tale of Two Courts', 19 *Commonwealth Jud. J.* 3-7 (2011), pp. 3 to 4; Foo, Richard S.K., 'Malaysia—Death Of A Separate Constitutional Judicial Power', *Singapore Journal of Legal Studies* (2010) pp. 227–230.



over matters involving Islam.<sup>47</sup> These amendments and their subsequent judicial interpretations have given rise to an expansion of the jurisdiction of Syariah courts at the expense of civil courts.

In the 2007 case of *Subashini Rajasingam v Saravanan Thangathoray* ('*Subashini*'), the Federal Court noted that "although the Syariah courts are state courts, they are not lower in status than the civil courts... they are of equal standing under the (Federal Constitution) (and) this recognition of the Syariah courts was largely due to Article 121(1A)".<sup>48</sup> In the case of *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* ('*Lina Joy*') in the same year, the Federal Court held that Syariah courts, and not civil courts, had jurisdiction to consider cases of conversion out of Islam, even though such cases were not expressly covered under state laws.<sup>49</sup>

In 2018, however, in a landmark ruling in the case of *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* ('*Indira Gandhi*'), the Federal Court clarified that Parliament could not remove the power of judicial review by civil courts through a constitutional amendment, and that "judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence".<sup>50</sup> The judgment further expressly noted that "under Article 121(1) of the Federal Constitution, judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law."<sup>51</sup>

Civil courts have also often pre-emptively removed themselves from deciding on cases involving the issue of Islamic faith, most notably in cases involving apostasy or conversion out of Islam, such as a case in which a person sought the deletion of the word "Islam" from a National Identification Card.<sup>52</sup> This will be discussed further below.

## RELIGIOUS MINORITIES

As a consequence of the weaknesses in the legal framework, the politicization of religion, and an historical legacy of discrimination, certain religious minorities in Malaysia face a heightened risk of persecution and discrimination. Two such groups are the Shi'a and Ahmadiyah communities.

### ***Shi'a communities***

Shi'a Islam is a religious sect within Islam whose adherents differ from majority Sunnis in recognizing Imam Ali as successor to Prophet Muhammad after the death of the Prophet.<sup>53</sup> Shi'a Muslims, both Malaysian and non-Malaysian nationals, have been subject to harassment, arrest and prosecution by the authorities for professing their faith. Both federal and Islamic laws have been misused to harass and discriminate against Shi'a Muslims.

The now-repealed Internal Security Act (ISA) 1960,<sup>54</sup> which allowed for preventive detention

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<sup>47</sup> Some commentators have suggested that Article 121 (1A) does not exclude powers of civil High Courts to judicially review Syariah Court decisions. See Tew, Y., 'The Malaysian Legal System: A Tale of Two Courts', 19 *Commonwealth Jud. J.* 3-7 (2011), p. 5; Harding, A. (1996) 'Law, Government and the Constitution of Malaysia', pp. 136 to 137; Sivaperegasm, R., Rajanthiran, P., 'The Impact Of Art.121 (1a) 1988 On Art. 11 -The Freedom Of Religion In The Federal Constitution Of Malaysia: The Apostasy case Of Lina Joy', *Sejarah*, No. 26, Bil. 1, Jun 2017, p.118.

<sup>48</sup> *Subashini Rajasingam v Saravanan Thangathoray* (2007) 7 CLJ 584, at para. 23.

<sup>49</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* (2007) 4 MLJ 585, at paras 15 and 16. Note dissenting opinion of Richard Malanjum FCJ.

<sup>50</sup> *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak and 2 Others, and 2 Other Appeals* (2018) MYFC 3, at paras 42, 47.

<sup>51</sup> *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak and 2 Others, and 2 Other Appeals* (2018) MYFC 3, at para 52.

<sup>52</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & lain* (2007) 3 CLJ 557.

<sup>53</sup> Sunni Islam recognizes Imam Abu Bakr as the rightful successor to the Prophet.

<sup>54</sup> The ISA was replaced and repealed by the Security Offences (Special Measures) Act 2012 which obtained royal assent on 18 June 2012, and came into force on 31 July 2012.

without trial for up to 60 days, was used to harass religious minorities,<sup>55</sup> and to interfere with Shi'a religious practice on the basis that it was "prejudicial to the security of Malaysia".<sup>56</sup> In November 1997, ten persons were arrested under the ISA for reportedly disseminating Shi'ite teachings,<sup>57</sup> and between 2000 to 2001, six Shi'a Muslims were arrested under the ISA.<sup>58</sup>

Religious law has also been used by authorities to justify discriminatory measures against Shi'a Muslims. In 1996, the Fatwa Committee for Religious Affairs issued a Syariah order (or *fatwa*)<sup>59</sup> dictating that Sunni Islam is the permitted form of Islam in Malaysia, and imposing a prohibition on the proselytism, promulgation or professing of Shi'a beliefs, including the distribution of any electronic or print resources.<sup>60</sup> Eleven of Malaysia's fourteen states have since given effect to the *fatwa* through state Islamic bodies.<sup>61</sup>

The 1996 *fatwa* left Shi'a Muslims at risk of arrest under criminal provisions of Syariah law, including the Syariah Criminal Offences (Federal Territories) Act 1997.<sup>62</sup> In December 2010, more than 200 Shi'a Muslims, including Malaysians and non-Malaysians, were arrested by the Selangor Islamic State Religious Department (JAIS) at a community centre for attending a closed religious gathering to remember the martyrdom of Imam Hussein on the holy day of Ashura.<sup>63</sup> In October 2016, 50 Shi'a Muslims, including women and children, were arrested by JAIS,<sup>64</sup> and in October 2017, more than 200 Iraqi nationals arrested by JAIS for taking part in ceremonies held on Ashura.<sup>65</sup> In August 2018, ten Shi'a Muslim men and women were apprehended by the Kelantan Islamic Affairs Department (Jaheik), following a raid of a religious centre.<sup>66</sup>

Official public narratives about Shi'a Muslims are also framed by Friday sermons that are prepared by state religious departments and publicly broadcast. These sermons have titles

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<sup>55</sup> For example, Ustaz Ashaari Muhammad, former leader of the Darul Arqam Islamic movement, was arrested under the ISA, see Ahmad Fauzi Abdul Hamid, 'Southeast Asian Response to the Clampdown on the Darul Arqam Movement in Malaysia, 1994-2000', *Islamic Studies*, Vol. 45, No. 1 (Spring 2006), pp. 83-119

<sup>56</sup> Under Section 73 (1) of the ISA, police may detain any person for up to 60 days, without warrant or trial and without access to legal counsel, on suspicion that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof."

<sup>57</sup> Human Rights Watch, 'Malaysia's Internal Security Act and Suppression of Political Dissent: A Human Rights Watch Backgrounder', <https://www.hrw.org/legacy/backgrounder/asia/malaysia-bck-0513.htm>.

<sup>58</sup> Leong Kar Yen, 'Use of ISA against Shia followers 'unIslamic and unconstitutional'', 18 June 2001, <https://www.malaysiakini.com/news/3500>.

<sup>59</sup> A *fatwa* is a "ruling on any unsettled or controversial question of or relating to Islamic Law," according to Section 34 of the Administration of Islamic Law (Federal Territories) Act 1993. The Act provides that it is "binding on every Muslim resident in the Federal Territories as a dictate of his religion it shall be his religious duty to abide by and uphold the fatwa, unless he is permitted by Islamic law to depart from the fatwa in matters of personal observance, belief or opinion."

<sup>60</sup> This *fatwa* overturned a 1984 decision from the same Committee that allowed practice of Shi'a Islam. See Rodger Shanahan, 'Malaysia and its Shi'a "Problem"', 25 July 2014, [https://www.mei.edu/publications/malaysia-and-its-shia-problem#\\_ftn6](https://www.mei.edu/publications/malaysia-and-its-shia-problem#_ftn6); Muhammad Faisal Musa, "Malaysian Shi'ites Lonely Struggle," World Public Forum "Dialogue for Civilizations," 12 December 2013.

<sup>61</sup> David Hutt, 'No Safe Place for SEAsia's Shia Muslims', A Times, 3 February 2018 <http://www.atimes.com/article/no-safe-place-seasias-shia-muslims/>.

<sup>62</sup> For example, Sections 3 to 5 criminalize wrongful worship, the teaching of false doctrine and proselytization to Muslims, while Section 9 criminalizes contempt or defiance of religious authorities.

<sup>63</sup> The Express Tribune, 'Malaysia swoops on 'outlawed' sects, detains 200 Shias', 21 December 2010, <https://tribune.com.pk/story/92587/malaysia-swoops-on-outlawed-sects-detains-200-shias/>.

<sup>64</sup> Shiite News, 'Malaysian Authorities Arrest 50 Shia Muslims On Ashura', 17 October 2016, <http://www.shiiteneews.org/index.php/rest-of-world/item/25436-malaysian-authorities-arrest-50-shia-muslims-on-ashura>.

<sup>65</sup> They were released after substantial international pressure. *IGP confirms arrest of Iraqi nationals*, <https://www.freemalaysiatoday.com/category/nation/2017/10/02/igp-confirms-arrest-of-iraqi-nationals-in-shia-ceremony>; *200 Iraqi Shias released in Selangor after pressure from Baghdad*, <https://www.freemalaysiatoday.com/category/nation/2017/10/01/200-iraqi-shias-released-after-pressure-from-baghdad>.

<sup>66</sup> Kelantan nabs Shia Muslims in Merdeka Eve Raid: <https://www.freemalaysiatoday.com/category/nation/2018/08/31/kelantan-nabs-shia-muslims-in-merdeka-eve-raid/>.

such as "The Shiite Virus" (November 2013 by the Selangor Department of Islamic Development), "The Shia Deception" (June 2014 by the Selangor Islamic Religious Department), and "Together we avoid the Shi'ite heresy" (September 2011 by the Islamic Department of Terengganu).<sup>67</sup> Authors, such as Faisal Tehrani, have also had their books banned over allegations that they contain elements of Shi'a Islam.<sup>68</sup>

In her Preliminary Observations after her 2017 visit to Malaysia, United Nations Special Rapporteur in the field of cultural rights, Karima Bennouna, recognized that Shi'a Muslims in Malaysia complained of their "inability to worship freely", and that they faced "obstacles in carrying out rituals which are both cultural and religious."<sup>69</sup>

### **Ahmadiyah community**

The Ahmadiyah community is an Islamic group from Punjab founded by Mirza Ghulam Ahmad. The Ahmadiyah recognize Mirza Ghulam Ahmad as a prophet. As with Shi'a Muslims, members of the Ahmadiyah community in Malaysia have faced discrimination, arrest, persecution and other barriers to their right to worship.

The Ahmadiyah community in Malaysia has been the subject of several *fatwa*, beginning with a 1975 *fatwa* by the Selangor Fatwa Council that declared them to be 'not Muslims' and recommended that members of the Ahmadiyah community be denied of privileges afforded to Malay-Muslims in Malaysia.<sup>70</sup> In 1998, the state of Selangor issued another *fatwa*, under the Administration of Islamic Law Enactment 1989, declaring the group to be '*kafir*' (infidels) and banning four books concerning the Ahmadiyah faith. The *fatwa* went further in proclaiming that the state had a duty to ensure their conversion to Sunni Islam.<sup>71</sup>

These *fatwa* by Malaysian religious authorities against the Ahmadiyah religion have been the basis for arrests, detention and blocking of access to religious sites of members of the Ahmadiyah community. On several occasions, the community has sought a remedy in the courts.

In one case, in April 2014, the Selangor Islamic State Department (JAIS) arrested 39 Ahmadiyah Muslims, including Pakistani, Indonesian and Indian nationals and three minors, for performing Friday prayers in the community's centre in Batu Caves. They were arrested for allegedly failing to obtain written permission to use the premises.<sup>72</sup> The 39 members, who were ordered to appear before a Syariah court for their alleged offence, applied for judicial review of the arrest. In July 2018, the Shah Alam High Court, which heard their case, ruled that JAIS had no authority over Ahmadiyah Muslims, and they were not covered under Syariah jurisdiction, precisely because the 1975 and 1998 *fatwa* had ruled that Ahmadiyah were 'not Muslims' in Malaysia.<sup>73</sup>

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<sup>67</sup> Fighting Shiites an act of jihad, Muslims told: <https://www.malaysiakini.com/news/247989>.

<sup>68</sup> Ban on Faisal Tehrani's 7 books still not lifted: <https://www.freemalaysiatoday.com/category/nation/2018/06/27/ban-on-faisal-tehranis-7-books-still-not-lifted/>.

<sup>69</sup> Preliminary Observations by the United Nations Special Rapporteur in the field of cultural rights Karima Bennouna at the end of her visit to Malaysia, 21 September 2017, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22121&LangID=E>.

<sup>70</sup> Shanon Shah, 'MAIS forbids Ahmadiyya worship', 28 April 2009, <http://www.thenutgraph.com/mais-forbids-ahmadiyya-worship/>.

<sup>71</sup> Administration of Islamic Law Enactment 1989, Fatwa on Ajaran Ahmadiyah Qadiani: <http://www.muftiselangor.gov.my/85-fatwa/akidah/64-fatwa-tentang-ajaran-qadiani-ahmadiyah> (Dated: 22 June 1998) See also Constitutional arrangements on religion and religious freedom in Malaysia and Indonesia: Furthering or Inhibiting Rights? By Dian A. H. Shah (2014) 1 LNS (A) xxv.

<sup>72</sup> In violation of Section 97 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. V Anbalagan, 'JAIS has no right to stop Ahmadiyah Muslims, court rules', *Free Malaysia Today*, 6 July 2018, <https://www.freemalaysiatoday.com/category/nation/2018/07/06/jais-has-no-right-to-stop-ahmadiyah-muslims-court-rules/>.

<sup>73</sup> V Anbalagan, 'JAIS has no right to stop Ahmadiyah Muslims, court rules', *Free Malaysia Today*, 6 July 2018, <https://www.freemalaysiatoday.com/category/nation/2018/07/06/jais-has-no-right-to-stop-ahmadiyah-muslims-court-rules/>.

Even as this case was a welcome outcome for the Ahmadiyah community in allowing them basic access to a place of worship, this civil court decision effectively reinforced the perception by religious authorities in Malaysia – and the public – that members of the Ahmadiyah community are ‘not Muslim’. Notably, the UN Special Rapporteur on freedom of religion or belief recognized in his 2017 interim report that minority communities, such as the Ahmadiyah, are “particularly vulnerable to allegations of blasphemy and apostasy”, which can result in further persecution.<sup>74</sup>

### ***Rights to freedom of religion or belief and non-discrimination***

As noted above, under international law, the principle of non-discrimination applies and is integral to the enjoyment of all human rights, whether civil, cultural, economic, political or, social. Thus, it applies to the right to freedom of thought, conscience, religion or belief. States, therefore, have the duty to refrain from discriminating against individuals or groups of individuals because of their religion or belief, as well as the obligation to take necessary measures to prevent discrimination by non-State actors. Moreover, this principle is also part of customary international law, binding on all States.

Malaysia’s treatment of Shi’a and Ahmadiyah minorities is directly contrary to its obligations to guarantee the rights to freedom of religion or belief and to equality under the law and non-discrimination of religious minorities.<sup>75</sup> *Fatwa* effectively criminalizing both communities enshrine discrimination in the law, while discriminatory rhetoric by both state and non-state bodies exacerbate religious hatred that further incites discrimination in practice against the minority communities. The use of the ISA and its successor, the Security Offences (Special Measures) Act 2012, against religious minorities is also particularly problematic, as preventive detention in itself is a serious violation of the rights to liberty and fair trial of an individual.<sup>76</sup>

Discriminatory treatment of Shi’a and Ahmadiyah communities is also in direct violation of Articles 8 and 11 of Malaysia’s Constitution, which concomitantly prohibit discrimination on religion grounds, and affirm that equal protection of the law should apply to allow all religious communities to practise and profess their religion.<sup>77</sup> In this respect, it must be noted that these two communities are not the only religious minorities facing persecution in Malaysia. Their situations, however, may be seen as emblematic of the situation faced by persons in religious minority sects in the country.

Where the rights of religious minorities are violated, they are entitled to an effective remedy, in accordance with general principles of law, and article 8 of the UDHR and article 2(3) of the ICCPR. Measures of affirmative action may also be required to ensure protection of the rights of Shi’a and Ahmadiyah communities against persistent discriminatory attitudes and practices in Malaysia. Notably, the UN Human Rights Committee has observed that equal protection under the law does not necessarily equate to “identical treatment in every instance”, and that affirmative action may at times be necessary to combat existing discriminatory practices.<sup>78</sup>

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<sup>74</sup> UN Special Rapporteur on freedom of religion or belief, ‘Interim report of the Special Rapporteur on freedom of religion or belief’, 28 August 2017, A/72/365. In the case of the 39 Ahmadiyah Muslims in Selangor, their lawyer argued that his clients could not be seen as apostates under Syariah, as they had not renounced their religion and in fact were insisting they were Muslims. This argument was accepted by Shah Alam High Court.

<sup>75</sup> As noted above, international human rights law and standards provide unequivocal guidance that States must refrain from discriminating against individuals or groups of individuals because of their religion or belief, protect them from discrimination by non-State actors, and take all necessary measures to ensure that their right to freedom of religion and belief is fully realized.

<sup>76</sup> Articles 9, 11 and 10 of the UDHR.

<sup>77</sup> Article 5 of Malaysia’s Constitution also protects the rights to life and liberty “*save in accordance with the law*”, this limitation has resulted in occasions of violations of these rights in practice.

<sup>78</sup> Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, paras 8, 10.

## CHILDREN

Given the fact that Syariah courts exercise jurisdiction in many cases concerning personal and family matters, dual jurisdiction has also resulted in negative implications on the protection of the rights of children, parents and families.

### **Child Marriage**

Child marriage is a serious violation of children's rights and places children subject to it at risk of further human rights violations. As a form of forced marriage, child marriage violates numerous rights of the child. Furthermore, it undermines children's rights to health, education,<sup>79</sup> and contravenes the principles of non-discrimination, development, best interests and participation.<sup>80</sup> Child marriage may also undermine the child's rights to an adequate standard of living, leisure, and protections from violence and exploitation.<sup>81</sup>

Child marriage is a serious problem in Malaysia where it is exacerbated by the dual jurisdictional structure described above. Under civil law, the Law Reform (Marriage and Divorce) Act 1976 provides that a marriage is void if either party to the marriage is below 18 years of age.<sup>82</sup> However, Muslim marriages are governed by state Syariah laws, which often allow for girls under the age of 16 to be married with the approval of a Syariah court judge.<sup>83</sup> Furthermore, no clear guidelines exist for Syariah judges who have full discretion to determine whether a child is 'suitable' for marriage.<sup>84</sup> It was in this context that the Malaysian Human Rights Commission, SUHAKAM, expressed concern that a 2016 amendment to the Child Act 2001 in Malaysia did not include any specific provision to prohibit and criminalize child marriage.<sup>85</sup>

In July 2018, a marriage between a 41-year-old Malaysian man and an 11-year-old Thai girl was widely reported in the media, bringing Malaysia's child protection legislation and its dual-jurisdictional system to the fore.<sup>86</sup> Rather than being charged under the civil

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<sup>79</sup> Girls not Brides, 'About child marriage', <https://www.girlsnotbrides.org/about-child-marriage/>. The UN Special Rapporteur on the sale and sexual exploitation of children recognized that child marriage is "a form of forced marriage with adverse public health-related consequences, often associated with early and frequent pregnancies and subsequent higher infant and maternal mortality and morbidity rates, schools drop outs and increased risk of domestic violence", see End of mission statement of the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio on her visit to Malaysia (24 Sept-1 Oct): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23675&LangID=E>.

<sup>80</sup> Articles 2 and 3 of UNCRC.

<sup>81</sup> Articles 19, 27, 31, 34 and 36 of the UNCRC.

<sup>82</sup> Section 10 of the Act states: "Any marriage purported to be solemnized in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years unless, for a female who has completed her sixteenth year, the solemnization of such marriage was authorized by a licence granted by the Chief Minister under subsection 21(2)". Section 21(2) thereafter clarifies: "The Chief Minister may in his discretion grant a licence under this section authorizing the solemnization of a marriage although the female party to the marriage is under the age of eighteen years, but not in any case before her completion of sixteen years".

<sup>83</sup> For example, Section 8 of the Islamic Family Law Enactment 2002 (Kelantan) provides: "*No marriage may be solemnized under this Enactment where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah Judge has granted his permission in writing in certain circumstances.*" The Islamic Family Law (Federal Territory) Act 1984, Section 8 provides: "*No marriage may be solemnized under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah Judge has granted his permission in writing in certain circumstances.*" Similar provisions exist in Perak, Pahang and Negeri Sembilan (Section 8, Islamic Family Law (Perak) Enactment 2004; Pahang Islamic Family Law Enactment 2005; Islamic Family Law, (Negeri Sembilan) Enactment 2003).

<sup>84</sup> See also End of mission statement of the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio on her visit to Malaysia (24 Sept-1 Oct): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23675&LangID=E>.

<sup>85</sup> Malay Mail, 'Suhakam concerned child marriages still legal', 18 April 2016, <https://www.malaymail.com/s/1102455/suhakam-concerned-child-marriages-still-legal>.

<sup>86</sup> *Statement on Shocking reports on child marriage*, [https://www.unicef.org/malaysia/media\\_27744.html](https://www.unicef.org/malaysia/media_27744.html);

jurisdiction for child marriage, the man was charged under Sections 19 and 124 of the Islamic Family Law Enactment 1983 of the state of Kelantan for solemnizing the polygamous marriage without the permission of the Syariah court (the child was his third wife), and he was fined RM1,800 (USD 430) by the Kelantan Syariah Criminal Court.<sup>87</sup> In August 2018, the girl was returned to Thailand, to be placed under social welfare care.<sup>88</sup> Unfortunately, this is far from the only case in Malaysia of child marriage.<sup>89</sup>

In her end of mission statement in October 2018, following an eight-day visit to Malaysia, the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio, highlighted child marriage as a primary area of concern requiring the urgent attention of the authorities. She stated that the situation was made worse by a lack of comprehensive data and statistics on child marriages in Malaysia, low reporting rates and the absence of effective identification and assistance mechanisms for children in marriages. She pointedly noted that this problem was “further exacerbated by the existence of a parallel legal system of civil law and multiple versions of the Sharia law, and the implications of the dual legal system in family and religious matters.”<sup>90</sup>

### **Unilateral Conversions of Children**

Another issue affecting children that has emerged in the context of the jurisdictional debate in Malaysia is the question of which laws apply when one party unilaterally converts his or her child and the issue of custody over the child then follows. Articles 11(3) and 12(2) of the Constitution appear to protect the right to freedom of religion on the basis of a group right. This can pose problems particularly in cases involving custody or guardianship of children of divorced parents.

For instance, in the case of *Indira Gandhi*,<sup>91</sup> the court had to decide on the unilateral conversion of a non-Muslim child by the father without the consent of the mother. The mother, Indira Gandhi, and her husband were married under civil law. Her husband converted to Islam in 2009, and officially converted their three children to Islam. She filed a judicial review at the High Court for an order to quash the certificates of their conversion.

The High Court found that the Syariah courts could not confer jurisdiction upon themselves over the matter, if it was not specifically listed in Item 2 of the State List in the Federal Constitution (which lists the matters that fall under the jurisdiction of state courts). In relation to the family, it found that if either spouse in a civil marriage converted to Islam, they were nonetheless still subject to the operation of the civil law and any children of the marriage would remain members of the religion of their parents at the time of their marriage – Hinduism in the *Indira Gandhi* case – and that the children could not be converted unilaterally.<sup>92</sup>

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Malaysian man fined S\$605 for marrying 11-year-old girl without Syariah Court's consent, <https://www.straitstimes.com/asia/se-asia/malaysian-man-fined-s605-for-marrying-11-year-old-girl-without-syariah-courts-consent>.

<sup>88</sup> 11-year-old bride of Malaysian man is returned to Thailand, <https://www.nytimes.com/2018/08/16/world/asia/11-year-old-bride-thailand.html>.

<sup>89</sup> For example, in September 2018, a 15-year-old girl was married to a 44-year-old man in Kelantan state, see Statement on child marriage between 15-year old girl to 44-year old man: [https://www.unicef.org/malaysia/media\\_27896.html](https://www.unicef.org/malaysia/media_27896.html); in February 2013, a 40-year-old man was charged with the rape of a 13-year-old girl, whom he thereafter married as a second wife, see Girls not Brides, 'Child Marriage Case Draws Attention In Malaysia', 24 May 2013, <https://www.girlsnotbrides.org/child-marriage-case-draws-attention-in-malaysia/>; in 2012, a 12-year-old girl and her 19-year-old boyfriend were married, see Voice of the Children, 'Child Marriage In Malaysia, A Child Rights Issue', <https://www.girlsnotbrides.org/tackling-child-marriage-in-malaysia-a-child-rights-activists-perspective/>.

<sup>90</sup> End of mission statement of the UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio on her visit to Malaysia (24 Sept-1 Oct): <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23675&LangID=E>.

<sup>91</sup> (2018) 3 CLJ 145.

<sup>92</sup> See also: *Viran Nagapan v Deepa Subramaniam & Other Appeals*, Federal Court, Putrajaya (2016) 3 CLJ 505.



## ***Rights of the child and parental rights to freedom of religion or belief***

Malaysia acceded to the Convention on the Rights of the Child (CRC) in 1995. Under Article 2 of the CRC, Malaysia has an obligation to “respect and ensure the rights” that are guaranteed under the Convention without discrimination of any kind, “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, **religion**, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” (emphasis added). State parties have a positive obligation to take “all appropriate measures” to ensure that the child is protected from discrimination, and State parties also undertake to ensure that children receive the care and protection necessary for their well-being.<sup>93</sup>

The UN Special Rapporteur on freedom of religion or belief has clarified that the right to freedom of religion or belief can never be used to justify violating the rights of children, as an individual child is a rights holder under Article 14 of the CRC, entitled to his or her own right to freedom of religion or belief.<sup>94</sup>

Malaysia’s Child Act 2001 also acknowledges the child’s rights to non-discrimination, protection and development in its preamble which states that “a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance”, and that “every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, **religion**, social origin or physical, mental or emotional disabilities or any other status”.

International human rights law is also clear regarding the rights of parents to religious and moral education of their child. For example, Article 5 of the 1981 Declaration protects the rights of parents and legal guardians to “organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up”. In addition, Article 14(2) of the CRC protects the rights of parents or legal guardians to “provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.”<sup>95</sup> Although Malaysia is a party to the Convention, it entered a reservation with respect to this specific provision indicating that it would only apply “if [it is] in conformity with the Constitution, national laws and national policies of the Government of Malaysia.” This reservation is invalid, as it is inconsistent with the object and purpose of the CRC.<sup>96</sup>

Article 5 of the 1981 Declaration also protects the child’s right to “have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.”

With respect to the issue of unilateral conversions of a child, the guiding principle in determining such conflicts should remain the best interests of the child. The case of *Indira Gandhi* was crucial in ruling that civil courts retain jurisdiction in matters involving unilateral conversions – reversing the Court of Appeal’s judgment that had ruled that conversion into Islam was a strictly religious matter that would fall under the jurisdiction of the Syariah court.

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<sup>93</sup> Article 2(2) and Article 3(2), (3) of the Convention on the Rights of the Child.

<sup>94</sup> UN Special Rapporteur on freedom of religion or belief, ‘Children also have the right to freedom of religion or belief, and that must be protected’, 23 October 2015.

<sup>95</sup> Article 14 of the CRC provides: “1. States Parties shall respect the right of the child to freedom of thought, conscience and religion. 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”

<sup>96</sup> Austria, Finland, Germany, Ireland, The Netherlands, Norway, Portugal and Sweden entered objections, stating that the reservation is in contravention with the purpose of the Convention on the Rights of the Child: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en).

This reversal of the lower court's judgment was important to protect parental rights to religion and belief. The Federal Court established that the consent of both parents was required in the religious conversion of a child, and the rights to religion or belief of both parents needed to be balanced equally against each other.<sup>97</sup> In addition, the *Indira Gandhi* ruling took into account the principles of best interests and participation of the child in matters pertaining to him or her. It recognized that where children were brought up in a non-Muslim family for years up till their conversion by a parent, their participation was also required. The Federal Court ruled that the religious authority in the case had acted beyond its powers in converting the children when they had not been present before the court or uttered the Affirmation of Faith required under state law.<sup>98</sup>

## 'APOSTASY' AND RELIGIOUS CONVERSION

As noted above, the right to freedom of religion or belief necessarily entails the right to change one's religion and adopt a new religion. In the Malaysian context, this right has been threatened by laws criminalizing 'apostasy', and the fact that jurisdiction over matters of conversion most often falls within the purview of the Syariah courts. Civil courts often move to confer jurisdiction on Syariah courts to hear matters of conversion from Islam to a different religion, which often treat these cases with harsh consequences for those accused of apostasy.

State laws criminalize acts of apostasy, often making those convicted liable to large fines and even prison sentences. In the state of Perak, for example, apostasy is defined as "(a)ny Muslim who by his word or conduct whatsoever intentionally claims to cease to profess the religion of Islam or declares himself to be non-Muslim", and is punishable with up to two years' imprisonment or a fine of RM 3,000 (USD 730).<sup>99</sup> The state of Pahang criminalizes the act of 'claiming to be a non-Muslim', an 'attempt to leave the religion of Islam', and the act of 'declaring to leave the religion of Islam for any purpose'<sup>100</sup> with a penalty of up to three years' imprisonment, a fine of RM 5,000 (USD 1,218), or both, and to whipping of not more than six strokes.<sup>101</sup> The states of Malacca, Sabah and Terengganu criminalize apostasy with fines and/or imprisonment, as in Perak and Pahang.<sup>102</sup>

State laws do permit the act of renouncing Islam, though the implementation of these regulations in practice effectively prevents a Muslim from leaving the religion. While the state of Negeri Sembilan provides for a process of 'Renunciation of the Religion of Islam', a declaration from the Syariah High Court must be obtained in order to renounce Islam, it must be made in open court and the person in question must undergo counselling sessions.<sup>103</sup> The state of Malacca contains a similar provision for the "attempt to leave Islam"

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<sup>97</sup> In *Indira Gandhi*, the Federal Court also referred to Islamic law tenets which call for the consent of the non-Muslim spouse before changing the religion of children born to a civil marriage. *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak and 2 Others, and 2 Other Appeals* (2018) MYFC 3, at paras 128 to 130.

<sup>98</sup> *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak and 2 Others, and 2 Other Appeals* (2018) MYFC 3, at para. 125.

<sup>99</sup> Section 13 of the Perak Islamic Criminal Law Enactment of 1992. Note that even though this Perak law is technically a law criminalizing blasphemy, as there is no clear distinction between apostasy and blasphemy in Malaysian jurisprudence, this offence is also one criminalizing apostasy. See Mohamed Azam Mohamed Adil, 'Law of Apostasy and Freedom of Religion in Malaysia', *Asian Journal of Comparative Law* 2(1), January 2007, pp. 177 to 199. Available at: <https://core.ac.uk/download/pdf/78276405.pdf>

<sup>100</sup> Section 8, 9 and 10, Pahang Enactment No. 11 of 2013, Syariah Criminal Offences Enactment 2013.

<sup>101</sup> Section 185 of the Administration of the Religion of Islam and the Malay Custom Enactment of 1982 provides "Any Muslim who states that he has ceased to be a Muslim, whether orally, in writing or in any other manner whatsoever, with any intent whatsoever, commits an offence, and on conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and to whipping of not more than six strokes."

<sup>102</sup> See Sections 55(1) and 55(2) of Sabah state's Islamic Criminal Law Enactment of 1995; Section 29 of the Terengganu Administration of Islamic Law Enactment of 1996

<sup>103</sup> Section 119 of the Administration of the Religion of Islam (Negeri Sembilan Enactment) 2003.



that requires an individual to spend time in a counselling session for 'education' and to 'repent'.<sup>104</sup>

The dual jurisdiction issue again arises in the context of conversion cases. When the issue of conversion is brought before civil courts, they have often ceded jurisdiction to Syariah courts, which wield considerable power over personal and family matters. Syariah courts have the power to deny applications submitted by Muslims to convert out of Islam, and have often ordered applicants into 'rehabilitation', counselling sessions, and other interventions.

In a recent case, a Malay appellant filed an appeal with the Court of Appeal to determine whether Sarawak's Syariah Court had the jurisdiction to deal with a case of apostasy. In this case, the appellant had sought to change her name in her identification card from Syarifah Nooraffyza binti Wan Hosen to Vanessa Elizabeth after converting to Christianity. The Sarawak Islamic State Department denied her request, ordered her to attend counselling sessions, and refused to provide the 'letter of release from the religion of Islam.' The appellant sought a *mandamus* order to compel state authorities to issue the letter of release.<sup>105</sup>

In its decision delivered in July 2017, the Court of Appeal, noting that "Malaysia has a unique system of legal pluralism", held that Syariah courts had jurisdiction to deal with the issue of conversion out of Islam as Federal Courts had "consistently spoken that apostasy is a matter within the jurisdiction of the Syariah Court".<sup>106</sup> Notably, this decision also rejected appeals by three other joint appellants, all of whom were non-Malays who had converted to Islam to marry and had sought to leave Islam after divorce or death of their partner.<sup>107</sup>

In one of the key cases referenced by the court, *Lina Joy*, the Malay appellant, a Muslim at birth who had converted to Christianity, applied to the National Registration Department to change her name from Azlina bte Jailani to Lina Joy. Even as the name on her identity card was changed to Lina Joy, the word 'Islam' remained on her card as her religion. The Director General of the National Registration Department informed her that a change of religion could only be made with a court order from the Syariah court certifying she had left the religion of Islam. When Lina Joy brought a petition to the High Court on the basis that the decision had violated her constitutional freedoms, under Article 11(1), the Court decided against her, finding that any matter involving the renunciation of Islam fell within the jurisdiction of the Syariah courts. The Court ruled that "A Malay under Article 160(2) remains in the Islamic faith until his or her dying days".<sup>108</sup>

In another case, a Muslim-born Indian woman, who had sought to change her religion in her

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<sup>104</sup> Section 66 of the Syariah Offences Enactment (Malacca) 1991, in Malay at, [http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/State\\_Enact\\_Ori.nsf/100ae747c72508e748256faa00188094/3f927e711202b1c54825707d002b3805?OpenDocument](http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/State_Enact_Ori.nsf/100ae747c72508e748256faa00188094/3f927e711202b1c54825707d002b3805?OpenDocument); Section 209 (2) of the Melaka Administration of Islamic Law Enactment of 1986 provides that any Muslim declaring him or her self to leave the religion of Islam will be treated as insulting Islam, and upon be subject to a fine not exceeding RM 3,000 or imprisonment for a term not exceeding one year or both.

<sup>105</sup> *Syarifah Nooraffyza Wan Hosen v Director of the Sarawak Islamic State Dept & Ors* (2018) 3 CLJ 620.

<sup>106</sup> See *Syarifah Nooraffyza Wan Hosen v Director of the Sarawak Islamic State Dept & Ors* (2018) 3 CLJ 620, paras 5, 20, 36. The Court Identified the following cases as precedent: *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705; (*Lina Joy Iwn. Majlis Agama Islam Wilayah Persekutuan Dan Lain-Lain* [2007] 4 MLJ 585; *Hj Raimi bin Abdullah v. Siti Hasnah Vangarama Abdullah And Another Appeal* [2014].

<sup>107</sup> *Tiong Choo Ting of Chinese-Bidayuh parentage and a Christian who converted to Islam to facilitate his marriage, decided to return to Christianity after his wife passed away; Salina Jau – a Kayan/Kenyah by ethnicity and a Christian who converted to Islam to facilitate her marriage, decided to return to Christianity after she divorced; Jenny Peter – a Melanau by ethnicity and a Christian who converted to Islam to facilitate her marriage, decided to return to Christianity after her divorce. See Churchill Edward, Anasathia Jenis, 'Apostasy cases under Syariah Court', *Borneo Post*, 28 February 2018, <http://www.theborneopost.com/2018/02/28/apostasy-cases-under-syariah-court/>.*

<sup>108</sup> See Iza R. Hussin, 'The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State', University of Chicago press, p.246.

identification documents after marrying a Hindu man, was ordered to attend 100 days of "rehabilitation and counseling" by Malacca's Islamic Religious Department, while her daughter was placed in the custody of her Muslim mother. Her 'rehabilitation' was extended a further 80 days, resulting in 180 days of detention at the rehabilitation center, during which she was separated from her daughter, and reportedly urged to wear a headscarf, pray as a Muslim and eat beef in contradiction of her Hindu beliefs.<sup>109</sup> A *habeas corpus* petition filed by her husband was dismissed.<sup>110</sup>

Cases such as these established a wide ambit of powers for Malaysian authorities, particularly Malaysia's National Registration Department, in restricting the right of people to choose and change their own religion.<sup>111</sup> Persons who have been branded as "apostates" also face social stigmatization and threats to their safety;<sup>112</sup> often they have difficulty finding lawyers to take up their cases, and lawyers who defend their cases have, in some instances, faced death threats.<sup>113</sup>

### **Right to change or adopt a religion**

Existing state laws criminalizing apostasy in Malaysia contravene a fundamental aspect of one's right to freedom of religion or belief as they effectively coerce persons to retain or adopt a particular religion against their will, in violation of applicable international human rights law and standards. As mentioned above, the right to freedom of religion or belief guarantees and includes the right to adopt a religion of one's choice, as well as the right to change religion, and the right to retain a religion. These aspects of the right to freedom of religion or belief have an absolute character and are not subject to any limitation whatsoever, reflecting the nature of the right to freedom of thought, conscience, religion or belief guaranteed by Article 18 of the UDHR and of the ICCPR. In Article 18, the UDHR proclaims that "everyone has the right to freedom of thought, conscience and religion", and clearly guarantees that such a right "includes freedom to change his religion or belief". The 1981 Declaration also proclaims the "freedom to have a religion or whatever belief of [one's] choice."<sup>114</sup> The UN Special Rapporteur on Freedom of Religion or Belief has also emphasized that, normatively speaking, the right to change religion is an essential aspect of the right to freedom of thought, conscience, religion or belief.

The criminalization of apostasy also violates the principles of non-discrimination and equality before the law in indiscriminately targeting a particular group of people, those who wish to leave the religion of Islam. Criminalization of apostasy also violates the right to freedom of expression of individuals who wish to profess and manifest their religion or belief, in contravention of Article 19 of the UDHR, Article 19 ICCPR and Article 10 of Malaysia's Constitution.

Even as state laws permit the act of renunciation of one's religion, these laws exist in clear contradiction of apostasy laws that criminalize renunciation. State regulations permitting renunciation, in practice, are often implemented in a manner that prevents persons from

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<sup>109</sup> Malaysiakini, 'Malaysia: Islamic courts 'rehabilitate' members of other faiths', 28 April 2007, <http://www.wluml.org/node/3628>.

<sup>110</sup> Suresh Veerappan v Penguasa Pusat Pemurnian Akidah Baitul Aman (Baitul Aman Spiritual Rehabilitation Center), (2007) 1 LNS 651.

<sup>111</sup> The dissenting decision of the court by Judge Richard Malanjum in *Lina Joy* found that the NRD had acted 'ultra vires' of its powers, as these restrictions ultimately impede on Lina Joy's choice of religion, religious expression and her right to private and family life, including her choice of who to marry (a Muslim is unable to marry a non-Muslim in Malaysia).

<sup>112</sup> In 2008, in a report to the UN Human Rights Council for Malaysia's Universal Periodic Review, it was noted that Lina Joy had gone into hiding. See The Becket Fund, 'Submission of the Becket Fund to United Nations Human Rights Council: Universal Periodic Review of Member-State Malaysia', 8 September 2008, [file:///C:/Users/User/Downloads/Law\\_of\\_Apostasy\\_and\\_Freedom\\_of\\_Religion\\_in\\_Malaysi.pdf](file:///C:/Users/User/Downloads/Law_of_Apostasy_and_Freedom_of_Religion_in_Malaysi.pdf).

<sup>113</sup> Apostasy: death threats against lawyer: [http://www.malaysianbar.org.my/bar\\_news/berita\\_badan\\_pequam/apostasy\\_death\\_threats\\_against\\_la\\_wyer.html](http://www.malaysianbar.org.my/bar_news/berita_badan_pequam/apostasy_death_threats_against_la_wyer.html).

<sup>114</sup> Article 1, 1981 UN Declaration.

leaving the religion of Islam, and used to curtail the rights of individuals to liberty (for instance, by placing them in mandatory detention for 'rehabilitation').

Rights to freedom of religion or belief, freedom of expression and liberty are placed at further risk of being undermined by the widening of the scope of jurisdiction for Syariah courts in matters of renunciation, which, in turn, has resulted in encouraging and prolonging discriminatory practices by authorities, social stigmatization and threats to the safety of individuals who wish to change their religion.

## PROSELYTISM

The right to freedom of religion or belief guaranteed in international human rights law and standards includes, as mentioned above, the freedom to manifest one's religion or belief. This freedom, in turn, comprises, in principle, the right to attempt to convince and convert other people, that is, to proselytize. This could, for example, include attempting to convince others to convert or adopt a religion through "teaching". The 1981 Declaration clarified that proselytism is a legitimate expression of religion or belief, which should enjoy protection afforded by "the freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief in teaching", guaranteed by Article 18 of the UDHR and ICCPR and other relevant international instruments.

Not only would constraints on peaceful acts of proselytism almost always be inconsistent with international human rights law but, even when the circumstances may justify the authorities' taking of constraining measures on the exercise of the right, such measures would have to be justified on the facts of each case. At the minimum, this means they must pursue a legitimate aim, be strictly necessary and proportionate, and be applied in a non-discriminatory manner.

Malaysia's laws related to proselytism are inconsistent with international law and standards. While the Constitution provides for the right to profess, practise and propagate one's religion, that right is restricted. Article 11(4) of the Constitution, in practice, allows for the limitation of proselytism as part of the right of a religious group to "manage its own affairs," and Article 5 contains very broad language restricting acts contrary to "public order, public health or morality."

Syariah law and state criminal laws expressly penalize the propagation of religious doctrines other than the doctrines and beliefs of the religion of Islam among persons professing the Islamic faith. The states of Selangor and Terengganu, for example, criminalize 'persuading, influencing or inciting a Muslim to change faith', 'subjecting a minor who is a Muslim to influences of a non-Islamic religion', 'approaching a Muslim to subject him to any speech on or display of any matter concerning a non-Islamic religion', and 'sending, delivering or distributing publications concerning a non-Islamic religion to a Muslim'.<sup>115</sup> Similarly, the Syariah Criminal Offences (Federal Territories) Act 1997 makes any person found guilty of proselytism liable to a maximum penalty of a fine of RM 3,000, or two years' imprisonment, or both.<sup>116</sup>

In a key case on the issue of proselytism, *Minister for Home Affairs and Another v Jamaluddin bin Othman*, a man was detained under Section 8(1) of the Internal Security Act 1960 (repealed) for allegedly distributing information on Christianity to Malays and converting six Malays to Christianity. The order for his detention was sought by the Minister for Home Affairs who argued that it was necessary as his proselytising acts were "prejudicial to the security of Malaysia", and that they could spark racial and religious tensions between the Muslim and Christian communities. The Court found that the man's activities did not

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<sup>115</sup> Non-Islamic Religions (Control of Propagation Against Muslims) Enactment 1988, the State of Selangor; Control and Restriction of the Propagation of Non-Islamic Religions Enactment 1980, Terengganu.

<sup>116</sup> Section 5: Propagation of religious doctrines, Syariah Criminal Offences (Federal Territories) Act 1997.

amount to a threat to the security of the country, and that the Home Minister had no power to “deprive a person of his right to profess and practise his religion, guaranteed under Article 11 of the Constitution.”<sup>117</sup>

It must be noted that this case was decided in a civil court, and it concerned the enforcement of the Internal Security Act, legislation that allowed for prolonged detention without trial, and that had been misused to crack down on legitimate exercise of fundamental freedoms of individual citizens. The issue of how Syariah courts decide on what constitutes ‘criminal’ proselytism is markedly different. For instance, in a 2002 case, a non-Muslim was charged in Pahang Syariah Court for allegedly threatening the complainant and demanding that he abandon Islam and embrace Hinduism. He was sentenced to 20 days in prison for ‘voluntarily causing grievous hurt’ under Section 325 of the Penal Code, and ‘propagation of non-Islamic religion’ under Pahang state law.<sup>118</sup>

### **Cases of “disappearance”**

A number of “disappearances” in recent years have been linked to a heavy crackdown on religious minorities in Malaysia. From November 2016 to February 2017, four persons “disappeared” after they were allegedly accused of proselytising to Muslims, and their whereabouts have remained unknown. These developments give rise to concerns that certain individuals may be targeted because of their religious activity, as well as about the unavailability of effective judicial remedies for the families of the “disappeared”.

On 13 February 2017, Pastor Raymond Koh was abducted in Kelana Jaya suburb just outside of Kuala Lumpur in what appeared to be a professionally executed operation in broad daylight in a public area. CCTV footage showed that the pastor’s car had been surrounded by three large SUV vehicles before around eight men emerged to take the pastor out of his car.<sup>119</sup> This was the last time Pastor Koh was seen. His “disappearance” occurred after a raid conducted by JAIS (the Selangor Islamic State Religious Department) in 2011 of a church where the pastor had hosted a charity event, which had Malay-Muslims in attendance.<sup>120</sup> This had led to allegations that Pastor Koh had attempted to proselytize Muslims. Pastor Koh’s wife noted that after these allegations, the pastor was stopped nine times by immigration officials when travelling to Singapore and had received hate mail, including two bullets and a warning letter in a package.<sup>121</sup> On 7 December 2018, SUHAKAM (the Malaysian Human Rights Commission) concluded a public inquiry into the pastor’s case.<sup>122</sup> Its findings as to whether his case should be classified as an enforced disappearance are expected to be presented to the Parliament this year.<sup>123</sup>

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<sup>117</sup> *Minister of Home Affairs v Jamaluddin Bin Othman* (1989) 1 CLJ Rep 109, Supreme Court.

<sup>119</sup> Tessa Wong, ‘A missing pastor and the disappearances chilling Malaysia’, 12 April 2017, <https://www.bbc.com/news/world-asia-39252139>.

<sup>120</sup> The Sun Daily, ‘Pastor Koh knew he was a marked man: Witness’, 20 October 2017, <https://www.thesundaily.my/archive/pastor-koh-knew-he-was-marked-man-witness-BTARCH494860>.

<sup>121</sup> Straits Times, ‘Missing Malaysia pastor, wife often stopped by immigration, hearing told’, 20 October 2017, <https://www.straitstimes.com/asia/se-asia/missing-malaysia-pastor-wife-often-stopped-by-immigration-hearing-told>; Harry Farley, ‘Raymond Koh: Why was this Christian pastor kidnapped in a military-style ambush?’, Christian Today, 31 May 2018, <https://www.christiantoday.com/article/raymond-koh-why-was-this-christian-pastor-kidnapped-in-a-military-style-ambush/129504.htm>.

<sup>122</sup> Ho Kit Yen, ‘Suhakam closes inquiry on Pastor Raymond’s disappearance’, Free Malaysia Today, 7 December 2018, <https://www.freemalaysiatoday.com/category/nation/2018/12/07/suhakam-closes-inquiry-on-pastor-raymonds-disappearance/>.

<sup>123</sup> Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) defines ‘enforced disappearance’ as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

The case of Pastor Koh was not the only case of such a “disappearance”. On 24 November 2016, social activist Amri Che Mat was last seen near his home, and his car found with its windows smashed, after he had been accused of spreading Shi’ite beliefs in Perlis state, where he had founded a charity to provide social services.<sup>124</sup> Amri’s wife has reportedly denied allegations that he was involved in proselytism.<sup>125</sup> SUHAKAM’s inquiry into his case closed in October 2018.<sup>126</sup> On 30 November 2016, Pastor Joshua Hilmy, a Muslim convert to Christianity, and his wife, Ruth Sitepu, were last seen near Kuala Lumpur, albeit their “disappearance” was only reported in March 2018. A lack of information has reportedly hampered investigation of their case, and SUHAKAM has yet to formally launch an inquiry.<sup>127</sup> Suspicions remain that their “disappearance” was likely linked to Pastor Hilmy’s conversion and his profession of Christian beliefs. In addition, after Pastor Koh’s “disappearance”, Peter Chong, a social activist who had allegedly been involved in prayer and vigils for the pastor, also went missing for a week in April 2017.<sup>128</sup>

These “disappearances”, occurring within months of each other, have greatly heightened concerns in Malaysia that religious fundamentalists can operate freely, even potentially with State support, to silence religious minorities. Key similarities between the “disappeared” persons were that they openly professed their religion and were actively involved in social work while doing so.

These cases of “disappearance” violate not only the rights to freedom of religion or belief, equality and non-discrimination of religious minorities, as protected under international human rights law and Articles 8 and 11 of Malaysia’s Constitution, but also other rights, including the rights to life; liberty and security of person; freedom from torture or other cruel, inhumane and degrading treatment or punishment; and right to recognition as a person before the law.

Should suspicions that these “disappearances” were conducted by “agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State” be proven by inquiries conducted by SUHAKAM or any other independent and impartial investigative body, they would also constitute acts of enforced disappearance criminalized under international law, including under the ICPPED, the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, ICCPR and the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT).

The Malaysian government is obliged to investigate these cases promptly, independently, impartially, thoroughly, and transparently and to bring to justice the perpetrators of these crimes – particularly in line with Article 5 of Malaysia’s Constitution, which protects the rights to life and personal liberty of persons.

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<sup>124</sup> Shannon Teoh, ‘Missing in Malaysia’, Straits Times, 16 April 2017, <https://www.straitstimes.com/asia/se-asia/missing-in-malaysia>.

<sup>125</sup> Nawar Firdaus, ‘Prove my husband spread Shia teachings, says Amri’s wife’, 10 April 2017, <https://www.freemalaysiatoday.com/category/nation/2017/04/10/prove-my-husband-spread-shia-teachings-says-amris-wife/>.

<sup>126</sup> The inquiry closed without any conclusion on his whereabouts. See Ho Kit Yen, ‘Suhakam closes inquiry on Pastor Raymond’s disappearance’, Free Malaysia Today, 7 December 2018, <https://www.freemalaysiatoday.com/category/nation/2018/12/07/suhakam-closes-inquiry-on-pastor-raymonds-disappearance/>.

<sup>127</sup> Pastor Hilmy had reportedly been detained under the now-repealed ISA once before his disappearance. See Ho Kit Yen, ‘Suhakam closes inquiry on Pastor Raymond’s disappearance’, Free Malaysia Today, 7 December 2018, <https://www.freemalaysiatoday.com/category/nation/2018/12/07/suhakam-closes-inquiry-on-pastor-raymonds-disappearance/>; Shannon Teoh, ‘Missing in Malaysia’, Straits Times, 16 April 2017, <https://www.straitstimes.com/asia/se-asia/missing-in-malaysia>.

<sup>128</sup> Shannon Teoh, ‘Missing in Malaysia’, Straits Times, 16 April 2017, <https://www.straitstimes.com/asia/se-asia/missing-in-malaysia>.



## USE OF THE WORD 'ALLAH'

Malaysia has also imposed restrictions on non-Muslims' use of certain words in their publications and practices, resulting in limitations to their ability to exercise their religious freedoms. Specifically, in 1986, a government directive was issued prohibiting the use of the words, "Allah", "Kaabah", "Solat" and "Baitullah"<sup>129</sup> in non-Islamic religious publications, on the basis that they were "sensitive" and had potential to constitute a "security issue".<sup>130</sup> This directive was issued even though the use of the word 'Allah', was not only a reference in Islam to God,<sup>131</sup> but also the only word used in the Malay language, Bahasa Malaysia, to refer to 'God', and had long been used by non-Muslims in the region, including in Indonesia.<sup>132</sup> This directive has been challenged in the courts as a violation of freedom of religion and freedom of expression, but these challenges have not succeeded.

The lawfulness of this directive was challenged in a 2013 case, resulting in heightened concerns surrounding state encroachment on the rights to freedom of religion or belief and freedom of expression. In 2007, a Catholic publication, 'The Herald', received letters from the Ministry of Home Affairs threatening to revoke its publication permit for using the word 'Allah' in its Malay language issues to refer to God. In response, The Herald filed a suit against the Malaysian government, seeking judicial review of the directive, which it argued was unconstitutional. In 2009, the High Court ruled in favour of The Herald, finding that the word 'Allah' was integral in communicating about religion in Bahasa Malaysia.<sup>133</sup> In 2013, however, the ruling was reversed by the Court of Appeal, on the basis that "such usage, if allowed, would inevitably cause confusion within the community". The Federal Court upheld the Court of Appeal's decision in June 2014.<sup>134</sup>

Following this decision, in October 2017, the High Court of Kuala Lumpur rejected a Sabah church's request for judicial review of the ban on the use of the word 'Allah' in its education material for Christian children, and rejected the church's request for disclosure of documents "containing reasons for the government's ban; documents showing confusion among Malaysians or misunderstanding between Muslims and Christians over the use of the word "Allah" in Bahasa Malaysia Christian publications; or showing threats to public order due to non-Muslims' use of the term". The court's reasoning was that disclosure was not permitted as such information was classified in accordance with the Official Secrets Act.<sup>135</sup> Following the High Court's decision, religious tensions escalated in Malaysia, resulting in attacks on churches.<sup>136</sup>

In 2013 the United Nations Special Rapporteur on freedom of religion or belief released a statement urging the Malaysian government to reverse its ban on the use of the word 'Allah' by non-Muslims, warning that "[i]t cannot be the business of the State to shape or reshape religious traditions", and emphasizing that the right to religion and belief was exercised and

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<sup>129</sup> Referring to God, the Islamic holy building of Kaabah, Islamic prayers and an Islamic place of worship respectively.

<sup>130</sup> *Jerry W.A. Dusing @ Jerry W. Patel and Sidang Injil Borneo v Majlis Agama Islam Wilayah Persekutuan (MAIWP), Menteri Keselamatan Dalam Negeri Malaysia and Kerajaan Malaysia*, Civil Appeal No: W-01(IM)-93-04/2016, para 5(p).

<sup>131</sup> 'Allah' has been used to refer to God by religions other than Islam in Arabic speaking countries for long. See Christopher Howse, 'The Christians who call God 'Allah'', The Telegraph, 30 January 2010, <https://www.telegraph.co.uk/comment/columnists/christopherhowse/7110855/The-Christians-who-call-God-Allah.html>.

<sup>132</sup> Boo Su-Lyn, 'Jakarta Post: 'Allah' ruling risks spreading to Indonesia', Malay Mail, 17 October 2013, <https://www.malaymail.com/s/544433/jakarta-post-allah-ruling-risks-spreading-to-indonesia>.

<sup>133</sup> Bernama Malaysia, 'Malaysia: Court Rules Catholic Magazine Can Use the Word "Allah"', 5 January 2010, <http://www.loc.gov/law/foreign-news/article/malaysia-court-rules-catholic-magazine-can-use-the-word-allah/>.

<sup>134</sup> AFP, 'Malaysia's highest court backs a ban on Allah in Christian bibles', The Guardian, 23 June 2014, <https://www.theguardian.com/world/2014/jun/23/malaysia-highest-court-allah-bible-ban>.

<sup>135</sup> Today Online, 'Reasons for 'Allah' ban on non-Muslim publications classified under OSA, says KL high court', 16 October 2017, <https://www.todayonline.com/world/asia/malaysias-reasons-allah-ban-non-muslim-publications-classified-under-osa-says-kl-high>.

<sup>136</sup> Associated Press, 'Malaysian churches attacked with firebombs', The Guardian, 8 January 2010, <https://www.theguardian.com/world/2010/jan/08/malaysia-churches-firebomb-attack>.

enjoyed by individuals and not a right of the State. In the same statement, the UN Independent Expert on minority issues also voiced concern that the ban violated the rights of religious minorities.<sup>137</sup>

### ***Rights to freedom of religion or belief and to freedom of expression***

The 1986 government directive banning the use of the word 'Allah' by non-Muslims not only impairs the rights of religious minorities to freely manifest their religion or belief, but also constitutes a violation of the right to freedom of expression, in violation of international law and Article 10 of Malaysia's Constitution which grants "every citizen... the right to freedom of speech and expression."<sup>138</sup>

The UN Human Rights Committee has observed that freedom of expression should protect "all forms of opinions... including opinions of a...religious nature", and that criminalizing the holding of an opinion, no matter what the opinion, is incompatible with Article 19 of the ICCPR.<sup>139</sup> It has also clarified that protection of a particular religion or religious belief per se, or a person's religious sentiments, do not constitute legitimate grounds for lawful restriction on the exercise of the right to free expression as permitted under Article 19(3).<sup>140</sup>

The Malaysian courts' judgments upholding the constitutionality of the 1986 government directive raise serious questions about the encroachment of the state on the rights to freedom of religion or belief and freedom of expression.

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<sup>137</sup> UN expert urges Malaysia to reverse decision that restricts use of 'Allah' to Muslims, 25 November 2013,

<https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14023&LangID=E..>

<sup>138</sup> In the same 2013 statement by the UN Special Rapporteur on freedom of religion or belief, the UN Special Rapporteur on freedom of expression voiced concern about violation of the right to free expression. See UN expert urges Malaysia to reverse decision that restricts use of 'Allah' to Muslims, 25 November 2013,

<https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14023&LangID=E..>

<sup>139</sup> UN Human Rights Committee (HRC), General Comment 34: Freedoms of Opinion and Expression (Article 19), UN Doc. CCPR/C/GC/34, (2011), para. 48, available at: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>140</sup> *Malcolm Ross v. Canada*, Human Rights Committee Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997 Views of 26 October 2000, see paras 11.1 – 11.6.

## FREEDOM OF RELIGION OR BELIEF AND THE CRIME OF SEDITION

The right to freedom of religion or belief at times may come into tension with other rights, such as the right to freedom of expression. However, as noted by UN Special Rapporteur on the Freedom of Religion or Belief, both rights facilitate “the flourishing of free and democratic societies in conjunction with other rights to freedom”,<sup>141</sup> and the idea of conflict between the right to freedom of thought, conscience, religion or belief and other human rights is usually based on the “misunderstanding that the right to freedom of religion or belief protects religions or belief systems per se.”<sup>142</sup> However, the international human rights law framework guarantees the right to freedom of expression and the right to freedom of thought, conscience, religion or belief of *individual human beings*, as opposed to guaranteeing the supremacy of any particular belief or religious system or specific expression.

In Malaysia, however, there are a host of federal laws that aim to protect the right to freedom of religion or belief through curtailing freedom of expression. While freedom of expression is not an absolute right and may be subject to State regulation, it, like freedom of religion or belief, is subject to limitation only under circumstances provided by law, and that are necessary for the respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*) or of public health or morals. Malaysia relied on overly wide conceptions of ‘national security’ and ‘public morals’ as a method to limit free speech in realms of religion and also to harass government critics.

The UN Human Rights Committee has clarified that: “[p]rohibitions of displays of lack of respect for a religion or other belief system, including “blasphemy laws”, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20” of the Covenant, that is, when they relate to the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>143</sup> The Committee has further clarified that it is impermissible for any such laws to discriminate in favour of or against a particular religion or belief system, or their adherents over another or religious believers over non-believers. It is also impermissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>144</sup>

In Malaysia, the Sedition Act 1948 is legislation from the colonial era that provides a blanket, vague and arbitrary ban over discourse that may be ‘seditious’. The term *seditious* is defined vaguely and includes statements that “promote feelings of ill will and hostility between different races or classes of the population of Malaysia”, or “question any matter, right status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153, or 181 of the Federal Constitution, in section 3”.

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<sup>141</sup> See ‘Two closely interrelated rights: freedom of religion or belief and freedom of opinion and expression’, Heiner Bielefeldt, *Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur 2010 – 2016*, p. 331.

<sup>142</sup> *Ibid.*

<sup>143</sup> UN Human Rights Committee, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man, 25 April 2000, UN Doc. CCPR/CO/79/Add.119, HRC, GC 34, para. 48. Article 20(2) of the ICCPR relates to the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This prohibition does not necessarily mean censorship or stifling of freedom of expression but possibility of civil remedies. See Commission of Human Rights, Travaux Préparatoires of Article 20 of the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/SR.377,10, cited at, Michael G. Kearney, *The Prohibition of Propaganda for War in International Law*, 2007, New York, Oxford University Press, p. 111.

<sup>144</sup> See, for example, International Commission of Jurists, “On Trial: the implementation of Pakistan’s blasphemy laws,” November 2015.



Even prior to the insertion of the word 'religion' in this Act, prosecutions of individuals were carried out under the legislation for statements pertaining to religion, purportedly to protect the sentiments of the general public. In 2015, an amendment to the Sedition Act was passed to include the word 'religion' in the section on the promotion of 'ill will, hostility or hatred'. The current administration continues to backpedal on its promises to abolish this repressive act.

In 2015, a couple was charged for the publication of an allegedly seditious photograph on the internet, and on social media sites such as Facebook, of themselves eating a pork dish (Bak Kut Teh) with wishes of breaking fast, during the holy month of Ramadan observed by Muslims. They were found guilty of sedition, and Lee May Ling was sentenced to an RM5,000 (1207 USD) fine, in the case of *Lee May Ling v Pp & Another Appeal* (2018).<sup>145</sup>

The Malaysian government has also extended its powers to ban books that contain themes of Shi'ism. The Malaysian author Faisal Tehrani has had his books banned over allegations that they contain elements of Shia Islam. A book by Sisters in Islam, entitled 'Muslim Women and the Challenges of Islamic Extremism', a compilation of essays submitted for an international roundtable meeting, was banned pursuant to an order in the Printing Presses and Publication Act 1984 and Printing Presses and Publications (Control of Undesirable Publications) No. 5) Order 2008 (see, *SIS Forum Malaysia v Jawatankuasa Fatwa Negeri Selangor & Ors Court of Appeal, Putrajaya* (2018) 6 CLJ 748).

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<sup>145</sup> 10 CLJ 742. (See also Eric Paulsen's case for calling the Islamic Department of Malaysia Extreme: <https://www.malaymail.com/news/malaysia/2018/08/15/prosecution-drops-sedition-cases-against-psms-arul-lawyer-eric-paulsen/1662642>)

## RECOMMENDATIONS

In November 2018, the UN Human Rights Council undertook Malaysia's third Universal Periodic Review (UPR). During the UPR process, Malaysia received numerous recommendations on the question of freedom of religion or belief, including that it should:

- *Enhance protections for the right of freedom of religion or belief for all people in Malaysia, including the right to freely choose and practise their faith (United States of America);*
- *Guarantee freedom of religion or belief to all, stemming racial and religious intolerance, including against the Christian community (Croatia); and*
- *Undertake administrative, policy and legislative measures to guarantee freedom of religion and belief for all in Malaysia consistent with their constitution (Kenya).<sup>146</sup>*

Malaysia has agreed to examine these recommendations and provide its responses by the 40<sup>th</sup> Session of the Human Rights Council, to be held between 25 February and 22 March 2019.

In light of the concerns detailed in this briefing, and in addition to the UPR recommendations mentioned above, the ICJ makes the following recommendations to address some of the weaknesses and gaps in existing law, and to safeguard protections for freedom of religion or belief enshrined in the Constitution and required by Malaysia's international obligations.

- Become a party to the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW); the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), and other core UN human rights instruments with a view to upholding the commitments Prime Minister Mahathir Mohamad made to the 73<sup>rd</sup> United Nations Assembly; and to remove the reservations entered to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) which are incompatible with the object and purposes of those treaties.
- Withdraw the reservations entered to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD), which are incompatible with the object and purposes of those treaties;
- Implement the provisions of the Constitution, particularly Article 11, in accordance with the right to freedom of religion or belief guaranteed in international human rights instruments, including by removing the limitations on proselytism, and enhancing protections for religious minorities and non-believers;
- End the harassment, arrest, detention, forced "rehabilitation" and selective targeting of religious minorities and allow them to exercise their right to freedom of religion or belief freely without State intrusion, including through ending the use of security laws against religious minorities;
- Unconditionally release persons imprisoned on charges solely related to the peaceful practise of their religion as protected under international human rights law;
- Adopt a process of engagement with Islamic religious authorities, including by establishing a commission or working group aimed at preventing actions that threaten the rights of religious minorities, punish apostasy and place limitations on the religious practices;
- Repeal or amend legal provisions that allow children under the age of 18 to be married

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<sup>146</sup> The recommendations are from Cambodia, Bolivarian Republic of Venezuela, Albania, Belarus, Croatia, Haiti, Iraq, Kenya, Denmark and Myanmar: [https://www.upr-info.org/sites/default/files/document/malaysia/session\\_31\\_-\\_november\\_2018/a\\_hrc\\_wg\\_6\\_31\\_l\\_8\\_as\\_adopted.pdf](https://www.upr-info.org/sites/default/files/document/malaysia/session_31_-_november_2018/a_hrc_wg_6_31_l_8_as_adopted.pdf)

- with the permission of a Syariah judge;
- Amend the Child Act 2001 to include a specific provision criminally sanctioning adults responsible for child marriage;
  - Amend or repeal laws that criminalize the changing of one's religion, and remove punitive measures, including detention in rehabilitation centres and mandatory counselling sessions, featured within State laws for persons who wish to change their religion;
  - Implement legal measures, including departmental regulations, instructing the National Registration Department that matters involving voluntary conversion must be resolved in a manner consistent with the protection of the right of persons to choose their own religion or belief;
  - Amend or repeal all laws that criminalize the propagation of religious beliefs or proselytism among people of all faiths;
  - Conduct independent, impartial and effective investigations into cases of alleged enforced disappearances until the fate and whereabouts of each person is disclosed, provide regular updates on these investigations to the families of the victims and the public, and take all measures necessary to ensure that those responsible for enforced disappearances be brought to justice;
  - Amend or repeal the 1986 government directive prohibiting the use of the word "Allah" in non-Islamic religious publications;
  - Repeal or substantially amend the Sedition Act to make it human rights compliant.

## **ANNEX**

### *Relevant Provisions of the Federal Constitution of Malaysia*

#### **Article 3 Religion of the Federation**

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) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him.

(3) The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.

(4) Nothing in this Article derogates from any other provision of this Constitution.

(5) Notwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose Parliament may by law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.

#### **Article 4 Supreme law of the Federation**

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. (2) The validity of any law shall not be questioned on the ground that— (a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or

(b) it imposes such restrictions as are mentioned in Clause (2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or— (a) if the law was made by Parliament, in proceedings between the Federation and one or more States; (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

## **Article 8 Equality**

8. (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, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit— (a) any provision regulating personal law; (b) any provision or practice restricting office or employment

## **Article 11 Freedom of religion**

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

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

(3) Every religious group has the right— (a) to manage its own religious affairs; (b) to establish and maintain institutions for religious or charitable purposes; and (c) to acquire and own property and hold and administer it in accordance with law.

(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.

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



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October 2018 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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