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## Religious Freedom, The Malaysian Constitution and Islam: A Critical Analysis

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### Abstract

This article seeks to analyze three types of religious freedom as stipulated by the Malaysian Constitution; freedom to profess, freedom to practice and freedom to disseminate one's religion. The article will also analyze whether the provisions on freedom adhere to the objectives of Islamic laws (*maqasid al-shari'ah*) given that Islam is regarded by the Constitution as the religion of the Federation and practically the religion of the majority. In addition, the Charter of Medina will be taken as a concrete model of which policies on religious freedom can be emulated. The author has combined the textual, contextual, historical and comparative methods in the gathering and the analysis of data. It is hope that the article can provide a critical analysis on religious freedom in Malaysia from an Islamic perspective given that the Constitution is explicit about Islam as the religion of the Federation.

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## 1. Introduction

Religious freedom in Malaysia is given its theoretical and legal framework in the Federal Constitution. Islam is spelled out as the religion of Federation for it is the religion of the indigenous inhabitants, the majority population who is the Malay.<sup>1</sup> The cases of religious freedom however have been interdependently deliberated under a number of provisions.

Article 3(1) states about the freedom of professing religion in view of that *Islam is recognized as the official religion of Malaysia and other religions can be peacefully practiced in any territory of the Federation*. Article 11(1) adds on the freedom to practice religion that, *every person has the right to profess and practice his own religion*. However such freedom does not include the freedom of propagating one's religion as it is made subject to Article (4) in which the State and Federal laws have control and restriction over the propagation of one's religion to the Malays. The Constitution in Article 160 defines the Malay as *a Muslim, who habitually speaks Malay, adheres to the Malay customs, born in Malaya or Singapore before or on Independence Day, and resides in Malaya or Singapore*. It is explicit from the definition that the Constitution ties the Malays' with Islam. This has resulted into an interpretation that the Constitution is implicit about two things; its defensive measure towards the Malay's faith and its protective measure against the Malay conversion. Ironically, the Constitution has never been advocated as a full-fledged Shariah-compliant or a Shariah-binding document notwithstanding the fact that there has been a dispute whether Malaysia is an Islamic or a secular state.

This article therefore classifies freedom of religion as stipulated in the Constitution into three; freedom to profess, to practice and to disseminate religion. Such a legal meaning will be analyzed and compared to that of the Muslim jurist *ijtihad*, the good practices during the Muslims governance and the standard model of the Charter of Medina. It is hope that the article will be able to ascertain if the Constitution fulfills the criteria put forward by the Muslim Jurists in order to be regarded as Islamic or conversely it holds a distinct character that retain its unique trait.

## 2. Religious freedom in Malaysia

The provision for religious freedom in the Malaysian Constitution stipulates for three aspects of religious freedom. They are the rights to profess, to practice and to propagate religion.

### 2.1. The right to profess a religion

Article 3 (1) and Article 11 (1). However, the Constitution is rather specific about the Muslims freedom of religion. The Constitution refers such issues to the jurisdiction of the Shariah Court for they are confined under the purview of the Islamic Laws. On the other hand, the Constitution does not cast any specific prohibition for the Non-Muslims from professing any religion or from converting to any other religions. Such freedom is also granted even though they were once Muslims (Lee Min Choon, 1999: 35-38).

Article 160 of The Malaysian Constitutions defines the Malay as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to the Malay Customs. This article should be read with article 11 (4) which prohibits propagation of religions other than Islam to the Muslims. This article is an implicit prohibition for the Muslims to convert.

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<sup>1</sup> Interestingly, a similar trend is witnessed in other countries, where official religions are based on the dominating population, such as the selection of Church of England in the United Kingdom, Shinto in Japan, Catholic in the Republic of Ireland and Islam in Indonesia.

## 2.2. *The right to profess a religion*

Article 11 (3) of the Federal Constitution states that every religious follower is granted the rights to practice the religion, manage religious foundations, and amass wealth. The article also provides other rights that allow the founding of religious associations, attending mass gatherings, building of shrines, founding of educational institutions, forming of welfare bodies, use of holy scriptures, amassing of wealth and propagating religions (Tan Kevin YL & Thio Li-Ann, 1997). It includes the right to found religious associations, where the government allows any ethnic community to form religious associations either as a registered association or a registered company.

The government's stand on the matter has led to the formation of various religious institutions that are later recognized as corporate bodies. They include the *Roman Catholic Bishop Incorporation Ordinance 1957* and *Methodist Church of Malaysia Ordinance 1955* (Philip Koh Tong Ngee, 1987: 11). To ensure the continuity of an establishment, the government consented to enact a few acts, such as the *Pure Life Society (Suddha Samajan) Incorporation Ordinance 1957* and *Superior of The Institution of The Congregation of The Brother of Many (Incorporation) Act 1972*. The establishment of the bodies which manage to control the various associations in Malaysia that struggle to defend their own rights by force. In fact, the associations open up opportunities to any individual to join associations (Shad Saleem Faruqi, 2001: 17).

Every ethnic community is also granted the opportunity to build their places of worship. Since the building of religious shrines often leads to sensitive issues and controversies, the government enacted a Constitution that adheres to the Islamic Laws, where *'every ethnic community is provided the opportunity to build their holy structure'*.

The problem however occurs in terms of implementing the right. The construction of places of worship for example, is subject to the approval from the local council and the state authorities. For example in the year of 2000, it is reported that the government has abolished the condition that enforces on the minimum number (two thousands) of religious population before an approval for construction of a holy structure can be granted. However, the condition was revised and reinstated after the government received complaints from concerned parties (International Religious Report, 2001).

In the past, the illegal erections of holy structures have escalated into legal dispute as they were torn down by the local authorities. Such incident as demonstrated in the court case of Muniandy A/L Subramaniam vs the Langkawi City Council in the Kuah village. He had appealed for the defendant to not to tear down a temple built on an estate land which had been in existence since the British colonization days as it was used by many estate workers. However, since the government had taken over the land in 1985, the court found that he had no grounds in his claims for the construction of the temple was regarded as illegal (Shad Saleem Faruqi, 2001: 17). Despite the legal verdict, the relationship between the local authorities and the local Hindus turned sour.

## 2.3. *The right to propagate a religion*

The Constitution limits the propagation of one's religion to the Malays. A Malay, is define by the Constitution a Muslim and therefore propagation of other religions to a Malay runs against the Constitution. This as stipulated in Article 11 (4);

‘State’s Law and Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Federal Law can control and restrict the spread other faiths or religious beliefs towards Muslims’

As a result, a few rules were enacted under the State Acts to control the Muslims' religious freedom like Kelantan, Terengganu, Pahang, Kedah Melaka, Johor and Perak had adopted the act to control and restriction of the spread of other religions to the Muslims. Some states however have not taken a similar action, including the Federal Territories of Labuan, Kuala Lumpur, and Putrajaya, Pulau Pinang, Sabah and Sarawak. The former Prime Minister

of Malaysia, Tun Abdullah Ahmad Badhawi has made the call to the respective states to urgently implement the enactment to protect the faith of Muslims in Malaysia from conversion (Utusan Malaysia, 25 Mei 2006).

The case of Azlina Jailani is one clear example of the invincibility of the Constitution. Azlina Jailani, a Malay and a Muslim by the definition of the Constitution has submitted her application at the National Registration Department (NRD) to change her Islam status in her identity card. Her application was rejected by the Federal Court since the matter has to be brought under the purview of the Syariah Court. In fact, majority of the judges decided that matters pertaining to Islam do not fall under the jurisdiction of the NRD as they are subject to the Syariah Court. (Zukifli Hassan & Norfadhilah Mohd Ali, 2007: 14-15). Unfortunately, the supremacy of the *Syariah* Court has not been treated with respect as there have been a number of appeals to apostate among Muslims, or revert Muslims who wished to convert to their former religion. (Mohamed Azam Mohamed Adil, 2006).

As a matter of fact, Azlina Jailani, has been receiving much attention from the non-Muslims group and international observers who criticized the court decision. The critics prolonged with an initiative to establish an *Inter Faith Commission*, an NGO who demanded that the Malay freedom of religion to be granted. 500 people converged to demonstrate against Article 11 (KA 11) and organized a forum titled 'Federal Constitution Protects all parties'. There was also a bill to challenge the status of Islam as the Federal religion as the IFC protested against Article 121 (A) of the Constitution which stipulated that its enforcement on individuals that would be subject to rules and laws that were not their religion (Wan Norhasniah, 2012). In response, the government firmly stood by the court decision, stating that the apostasy act was non-retractable. Azlina Jailani's application was later on submitted to the *Syariah* Court. Her application was rejected by the court.

Having deliberated the three classification of freedom and the struggle for its application the article look forward to examine its relevancy in the following aspects; its generic meaning as delineated in the Muslims interpretation of the Qur'an, its practices in the course of Muslims rulings and its relevance with the *ijtihad* and the legal decisions of the Muslim jurists.

### 3. Religious freedom in Malaysia

#### 3.1. *The religious freedom: A theoretical framework*

The Muslims take it that the basis for religious freedom in Islam is inspired by the Qur'an in al-Baqarah 2:256 which plainly stated that religion is not a matter of compulsion.<sup>2</sup> In al-Kafirun 109:6, the Qur'an makes it clear that every man is granted freedom to resume to their belief.<sup>3</sup> The two verses stress on two important issues; the freedom to choose religion and the freedom to practice the religion of choice. As a matter of fact, choices that a man makes are the outcome of his personal verification of sifting the truth from error as the difference between the two is crystal clear. Compulsion runs against the very reason for the creation of man, in that life is a trial and a challenge for man to perform righteousness. As man is conferred with intellectual and physical capacities, he has been equipped with the will to choose and the freedom to act. Compulsion is indeed a denigration of his talents and a violation of man's dignity. As a matter of fact, it is through the freedom of will and action that man can be tested and therefore held responsible for his undertakings.<sup>4</sup> Indeed it is due to his freedom (to choose and to act) that man's submission to God is highly regarded.

With regard to the freedom of dissemination; the constitution prevents other religions from disseminating to the Muslims, which means Muslims are restrained from changing his religion. Ideally speaking the Qur'an puts it that

<sup>2</sup> "Let there be no compulsion in religion. Truth stands out clear from error. Whoever rejects evil and believes in *Allāh* hath grasped the most trustworthy handhold that never breaks".

<sup>3</sup> "To you be your way and to me mine".

<sup>4</sup> *Qur'ān, Al-Mulk* 67:2. 'He who created death and life, that He may try which of you is best in deed'

truth is clearer than error and it suggests that Muslims should also possess the freedom to choose between the two. There shouldn't be imposition on his decision making.

The provision for religious freedom, however, does not mean that Islam takes all religions as equally true. The freedom is to provide the opportunity for every believer to evaluate for themselves which one is the most credible truth. As the choice is made, Islam educates its followers to have respect for one another. Thus the Qur'an prohibits the Muslims from insulting others for it is an act of derogatory.<sup>5</sup> Such prohibition is made because Islam is the religion of peace and therefore it avoids potential conflicts in society. The Qur'an teaches the Muslims to observe religious sensitivities to hinder potential retaliation.

The constitution defensive nature of the Malay faith can be interpreted that it does not favor to the idea of leveling of all religions. The Malay, defined by Muslims further strengthen its role as the religion of the constitution, therefore special attention is given by the constitution.

### 3.2. Religious freedom: A historical account

Historically, the call for religious freedom under the Muslims governance has been documented as early as in the Charter of Medina. The Charter refers to a compilation of contractual and legal conventions set up by the Prophet Muhammad PBUH as the leader of Medina. It bound the people of Medina, Muslim and non-Muslim under a nation-state concept that each of them is responsible to the well-being of the state. The Charter is divided into two parts, the first part consisting of 23 clauses that focused on the relations and responsibilities of the Muslims and the second part consisted of 24 clauses that spelled out the relations and the responsibilities of the non-Muslims; specifically with the Jewish communities in Medina.

Generally it ordained its citizens of human rights, sovereign rights, protection rights, and religious tolerance, besides providing a few provisions that dealt with the statecraft of Islam which include the insertion of the divine messages as the backbone of the nation, the plural society of Medina as a unified citizenry holding responsibilities towards the Islamic state, recognizing Prophet Muhammad PBUH as the community leader and Head of Nation, and the commitment to safeguard the safety of its citizen (Yusūf Qardhāwī, 1977; Mat Saad Abdul Rahman, 1995).

Through this Charter, there outlined two important concepts in communal life under the leadership of Prophet Muhammad PBUH. The first is the importance of promoting the spirit of brotherhood between the Muslim *Ansar* (the original Medina residents) and *Muhajirin* (the Mecca residents that immigrated to Medina); and secondly, the need to co-exist in peace between the pluralistic society; the Muslims and non-Muslims of Medina. Every community was expected to have respect for one another, to value their own religion, to protect their inheritance, to revere their traditions, to share the responsibilities as Medina citizens and to join arm forces in protecting the state. Furthermore it has also provided a few provisions that organized the plural society of Medina who has been regarded as part of the Ummah with certain responsibilities toward the state including recognizing prophet Muhammad PBUH as the Head of the Nation. The non-Muslims were identified as the *Dhimma* community which means the non-Muslim who receive protection under the good governance of Islam.

The Article 13 of the Charter stated 'indiscriminate rule of law and justice for all the communities: And every group shall secure the release of its captives ensuring an indiscriminate rule of law and justice is applied among the believers.' The article emphasized on justice the good practice in Islamic governance.

The article 25 of the Charter stated 'Guarantee of freedom of religion for both the Muslims and non-Muslim minorities (the Jews)' after which the following articles until article 40, deliberate in specific the right of religious freedom of the Jews in Medina.

It is interesting to summarize that the good governance of Medina was regulated under the Charter that upheld the following issues: justice, brotherhood, unity, peaceful cooperation, protection, freedom of religion and conflict

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<sup>5</sup> *Qur'ān, Al-An'am* 6:108. The Quran states "Revile not ye those whom they call upon besides Allah, lest they out of spite revile Allah in their ignorance."

resolution. Indeed, Yetkin (2006) proposed that the Charter of Medina should be regarded as one reliable document on peace and conflict resolution.

The Constitution unfortunately fails to underscore in clear terms on the issue of justice as explicit as the charter. The charter did not deliberate however the extent to which freedom of religion is granted to the Muslims. A superficial meaning would recommend that both Muslims and non-Muslims enjoy the similar type of freedom. However it is made clear that the Charter warns the non-Muslims on the responsibilities of securing the well-being of Medina. Failure to do so as clearly stated in the charter that a stern action will be taken, which is death punishment.

In another example, a treaty between the Muslims and the Najran Christians was formed to ensure the protection for the later (Muhammad Ibn Sa'ad, 1960: 357) and the freedom to carry out their religious rituals. The treaty confirmed that reasonable taxes will be imposed on the Christians. In return, they were free to maintain their religion and to continue their service in the church. The legal binding has granted the Christians freedom to believe, to build churches, to appoint priests, to celebrate religious festivals and to involve in income generating activities (Muhammad Ibn Sa'ad, 1960: 358). In another event, the Prophet also made calls to his companions; Muadz Ibn Jabal and Abu Musa al-Asyhari, and sent them as emissaries to Yaman, to strive towards preserving peace and bestowing respects towards non-Muslim communities in Yemen (Al-Bukhāri, 1986: Hadith 275).

Taking from this perspective the Constitution fails to make it clear the reciprocal condition between the government and the subjects. The Constitution is clear about the responsibilities of the subjects, the juridical institutions. However there is lack of deterring element that may educate the way people of religions should behave.

Similar peaceful venture was taken up during the leadership of Caliph Umar bin al-Khattab r.a's. He formed a truce with the Christians of Baitul Muqaddis', and granted the non-Muslims religious freedom with a condition that they agreed to abide to the Muslim authorities (Ahmad Ibn Abī Ya'qūb, 1974).

During the leadership of Caliph Umar bin 'Abdul Azīz, he prohibited any form of trespassing or tearing down of shrines and churches built by non-Muslim. In fact, stern action would be taken against anyone who built mosques in non-Muslim residential areas, or on church ruins (Muhammad Sadiq, 1980: 90). There was one case during the Caliph Khalid al-Walid's rule when a church was converted into a mosque in order to accommodate the increasing number of the Muslim population in a territory. The Caliph Umar 'Abdul Azīz directed that the mosque to be returned to the Christians and its original function to be restored (Ahmad Ibnū Yahya, 1982: 132). Yusuf al-Qardhawi (1977: 21) in fact stated that it was the compassion of the Muslim caliphs that a number of great cathedrals were built and sustained during the Caliphates' era. Indeed the Muslims are obliged to respect for religious freedom by protecting religious holy places as well as the sanctity of other religions as stated in al-Hajj 39-40.<sup>6</sup>

Again the Constitution i did not address this issue in specific leaving the matters under the purview of the state council which resulted into differences in understanding and practices on the issues. This has open up avenues for interpretation and dialectical disputation between Muslims and non-Muslims.

According to al-Qaradhawi, religious freedom granted to the non-Muslim in the course of Muslim history is explicit in two aspects, the freedom to build their shrines, and the freedom to express their identity and religious symbols. The freedom to spread their religions however, are only restricted to the non-Muslim communities (Yusūf Qardhāwī, 1977). Taking al-Qardhāwī, his readings and view on the Muslims history seems to be reflected in the National Constitution.

Thus, during the Caliph Khalid bin al-Walid's reign, the Christians were not allowed to toll their church bells during the Muslims' praying hours. They were also prohibited from displaying the cross symbol within Muslim-dominated residential areas (Abū Yusuf, 1934: 147). With regard to places of worships, guidelines were set up by the government to administer its affair. It was also reported that as mosques were built in Muslim-developed towns

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<sup>6</sup> '[They are] those who have been evicted from their homes without right - only because they say, "Our Lord is Allah ." And were it not that Allah checks the people, some by means of others, there would have been demolished monasteries, churches, synagogues, and mosques in which the name of Allah is much mentioned. And Allah will surely support those who support Him. Indeed, Allah is Powerful and Exalted in Might'

like Kufah dan Baghdad, the building of temples or holy shrines required an official consent from the government. Another reports say that in cases of regions dominated by the Muslim and a truce was established with the non-Muslim community to adhere to Islamic Laws, permission was given to them to enact their holy place ('Abdul Karīm Zaydān, 1984: 96).

Such practices are not adopted by the Malaysian government. It should be understood that such governance may not be a good practice in the Malaysian context. Certainly there are local councils which look into the issue of approval for construction and this is managerial and technical. Should it be the issue of principle, it is impossible for Malaysia to have the largest Buddhist statue in Penang, the highest church in Kinrara and the tallest idol in Batu Caves.

### 3.3. *Religious freedom according to Muslim Jurist*

Regarding to the building of holy structures in remote areas or villages, Muslim scholars are of different opinions. The Hanafi Madhab offers two views – the first view allows the non-Muslim minority to build a shrine provided that they secure the permission from the ruling government. The permission should be granted to avoid disputes between ethnics of different religions that have different ways of worshipping and praying ('Alā al-Dīn Abī Bakr Ibn Mas'ūd al-Kasānī al-Hanafī, 1910: 114). The second view upholds that if a place is mainly populated by Muslims, then the construction of any non-Muslim shrine is prohibited altogether. The reason was to protect the sanctity of Islam and safeguard the sensitivity of Muslims (Ibnu 'Ābidīn, 1906: 374).

Meanwhile, according to the Syafi'i Madhab, non-Muslim minorities are allowed to erect their shrines as long as they are subject to any Islamic law imposed upon them (Ibnū Syīhāb, tt: 239). The view by the Syafi'i Madhab is in line with the views of Jumhūr fuqāhā' that allow non-Muslim minorities to build their holy places in Muslim-dominated areas as long as they get the permission from the relevant authorities, if the shrine that has been in existence the Jumhur fuqaha prohibits that the place to be torn down. Abdul Karim (1984: 96) therefore regards it as an issue of religious autonomy.

With regard to freedom to display religious symbols, the non-Muslim are also accorded some rights to express their identity and symbol(s) of their religious belief. They are permitted to wear the cross in public, display alcohol or pork signs, toll their church or temple bell, increase the volume during their prayers, and celebrate their religious festivals. However, they are expected not to promote their religious symbols in public as a token of respect for the Muslims. According to Jumhūr fuqāhā', non-Muslim are prohibited from carving the cross on church doors, as it is to be displayed only in hidden places, away from the view of the public. They may display their religious symbols only to the members of their community (Ibnū al-Qayyīm, 1997: 1240-1241).

In terms of celebration of religious festivals, some scholars from the Hanafi Madhab permit the non-Muslim to celebrate it within their community setting and only around their religious shrines, like churches or temples. A jurist of Hanafi School commended that such practice to avoid public areas to observe the sensitivities of the Muslims. (Al-Kasānī, 1910: 113). On the other hand, the Syafi'i Madhab tolerates non-Muslims public consumption of alcohol and pork, wearing of cross and tolling of the church bell in the Muslim majority communities. Nonetheless the Syafi'i Madhab is stern about misbehavior such as adultery and commultery committed by non-Muslims as they can be punished under the hudud law (al-Mawdūdī, tt: 9).

Abdul Karim (1984: 96) acknowledges that the laws appeared to limit the non-Muslim communities of their freedom. Nevertheless, he viewed that clemency and compassion in exercising the laws are important in order to preserve peace in the society. The Muslims are called upon to rely on the *Maslahah* policy to give some room of tolerance as long as it does not contradict with the *Syariah*. Most importantly, there is a need for the freedom of religion to be defined in order to realize the best practice in managing the non-Muslims affairs.

It is at this juridical aspect that the claim that Malaysian Constitution is a *Syariah* -compliant should be review and the thus the allegation that Malaysia. it is clear that the Malaysian Constitution is inspired by the Reid Commission. The constitution herself has limited the so called *Syariah* court to the affairs of the Muslims, of which the ramifications of the mazhab views lies therein. At this point, the Constitution is silent about the fuqaha ijihad on matters pertaining to the affairs with the non-Muslims. It is clear that issues pertaining to the non-Muslims are to be

brought to the public court and not under the purview of the *Syariah* court. In this regard, an assumption that the constitution is bias to the Muslims is misleading. As a matter of fact, the Constitution has made it impossible for similar jurisdiction to be applied to the non-Muslims in Malaysia. This is the criteria that makes the claim that the Constitution is Islamic simply a void claim

#### 4. Religious freedom in Malaysia

Having discussed the three classification of freedom expound in the Constitution and examined them from the three perspectives; of meaning, of practices and of *ijtihad* of the Muslim jurists, it is proposed that the Constitution has reflected some basic principles taught in Islam pertaining to the freedom to profess and freedom to practice. However as it comes to the prohibition of dissemination, it is unclear whether the limitation imposed on the Malay from conversion has basic ground in the teaching of Islam. As a matter of fact, the definition of Malay as Muslims on the superficial seems to contradict the Quranic verse about freedom in that every man with sound mind, Muslim or non-Muslim are credible enough to differentiate between the truth and error and therefore responsible to choose between the two. Such limitation however may be implicitly traced in the view of *fuqaha'* who have made stringent conditions for the non-Muslims to construct their holy building within the Muslims vicinity.

It is also interesting to note that in the case of Malaysia, the federal constitution can be regarded as the binding document between the Muslims and the non-Muslims. At minimum, it has emulated the basic idea about justice and freedom of religion exemplified by the charter of Medina. However unlike the charter, the Constitution fails to deliberate in details of the nature of relationship and the *dos* and *don'ts* of the two communities in Malaysia.

Finally, it is important to emphasize that justice is a universal value adhered to by all religions, whether or not Malaysia is an Islamic country and hence whether or not the Constitution is Islamic, it is essential that Malaysia to uphold justice for people of religions in Malaysia. The dispute on its status will drive the people of Malaysia into religious discrimination and thus affected the general well-being of the country. Instead of being simplistic, it is suggested that Constitution to be read, understood and interpreted in the spirit of *muhibah*, which advocate the affectionate feeling towards each other in a kinship of humanity. Be it Muslims or Non-Muslims, both are responsible for the well-being of Malaysia and it should be put the nation utmost priority.

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