

## Apostasy: A Legal Implication On Malay Reservation Land's Ownership

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### Abstract

Apostasy in Islam is commonly defined as the rejection in word or deed of one's former religion by a person who was previously a follower of Islam. This article aims to examine the effect of ownership of an apostate toward Malay Reservation Land's title, which can only be owned and dealt over by Malays or persons deemed native residents of the state. This relates to the issue as to whether an apostate is still considered as 'Malay' since religion is an essential element of Malay ethnic identity. Under Article 160 (2) of the Federal Constitution and all thirteen States of Malay Reservation Enactments in Malaysia, the use of the term 'Malay' refers to a person professing Islam. If this interpretation is to be applied strictly, a Malay citizen who converts out of Islam may no longer considered 'Malay' under the law and hence denied the privilege afforded to Malays under the Article 89. The result from the literature reviews shows that the previous discussion construed Islam as an identity of Malay. However, there is no study carried out to suggest that apostasy become a ground for forfeiture of Malay Reservation Land title. This article is based on a qualitative study and the approach applied is a content analysis methodology. This paper will attempt to delve into the definition of Malay and the effect of apostasy towards the ownership of Malay Reservation Land. It is expected that the paper will provide the answer regarding the ownership of Malay Reservation Land title in Malaysia held by an apostate.

**Keywords:** apostasy, Malay Reservation Land, Malay, Islam

### INTRODUCTION

Malaysia is a multi-racial country consisting of the Malays as the major ethnic group, the Chinese, Indians as well as the other minority ethnic groups. With its ethnic, cultural and religious diversities, Malaysia is a typical South-East Asia country. Fifty one percent of the population of Malaysia consists of Malays, all of whom are Muslim (Ahmad Zaharuddin Sani bin Ahmad Sabri, 2012). Under the provision of law, Malaysians are free to practice their own religions. However, Islam is declared as an official religion in Malaysia. It has been clearly spelled out in the Constitution that Islam is the religion of Federation. Article 3 provides that Islam is the religion of the federation, but other religions may be practiced in peace and harmony in any part of the alliance. Even though the constitution allows each person to profess and practice their own religion but it clearly provides for the prohibition to other believers to spread their religion to Muslims.

In actual fact, a religion is a feature that is often used to define the nation. When religion is practised, then this feature can be used as a factor to define the nation. However,

the religion alone can not become a feature of a race. This is because a religion practiced by more than one human race. For example, Islam is practiced by more than one race in the world. Likewise, other religions such as Christianity, Hinduism and Buddhism. In other words, those who profess the same religion cannot be identified coming from the same race. But the law in Malaysia identified 'Malay' race must profess Islam as a religion. However, the discussion must be made in order to know whether this interpretation must be strictly adhered to in order to define a Malay, as 'Malay', is legally recognized for certain privileges under the law in this country including the right to hold the title of Malay Reservation land.

As regards to this issue, it's pivotal to look at the law which governs the matter related to the Malay Reservation, that are Federal Constitution and Malay Reservation Enactments. Article 89 of the Federal Constitution comprehensively underlines the constitutional foundation of Malay reservation policy. The Malay Reservation Enactments on the other hand, can be classified as the 'entrenched laws protected by the Federal Constitution'. It has become a permanent feature of Malaysia's geo-politics. They were already part of the legal landscape at the time of Merdeka (Shad, 2003). The creation of Malay Reservation land is to prevent State land which fell under the Malay Reservation land area, from being handed over in any way to the non-Malays. It is also to prevent Malay Reservation land under single ownership from being used in any form of business transaction between the Malays and the non-Malays. Thus, dealings in respect of such lands can only be transacted amongst Malay and any attempt by non-Malays in dealing with such Malay reserve lands will be held null and void.

Since the aim of this paper is to look at the effect of apostasy as regards to the right of ownership of Malay Reservation Land, one cannot argue that the explanation about the Malay Reservation laws and the act of apostasy become the fundamental discussion. Thus, the first part of this paper will explain about the definition of and the implication of apostasy, whereas, the following part will continue with the definition of 'Malay'. The conclusion of this paper will be dealt with the finding of the discussion as to the issue of the ownership of Malay Reservation Land by the apostate.

## **APOSTASY IN ISLAM**

Apostasy is a particularly contentious issue in Muslim countries. In Islam, apostasy or *riddah* (Arabic term) come from the root word *radd*, which means 'to retreat, to retire, to withdraw or to fall back from'. Within the context of Muslim jurisprudence the word implies the abandonment or renunciation of Islam (Mohamed Imran, 2011). A Muslim can be an apostate if he or she attributes Allah with something else either by intention, speech or act. It can also lead to apostasy when someone denies Islam or a rule on it, or denies a clear Islamic law. In Islam, the two key elements that must be fulfilled before a person can be declared as an apostate are action and intention (Zulkifli et.al, 2007).

Under the Islamic law, a person who has been convicted by a court of committing apostasy and he refused to repent when asked to do so and be given a period of three days to repent, the judge may declare the death sentence on him and order that all properties acquired before or after the apostasy to be seized and handed over to the Baitul Mal. All his properties then become the ownership of Baitul Mal (Wahbah al-Zuhaili, 2001). According to the consensus of Muslim jurists, the apostate's property cannot be inherited by his heir as their religion was different even if the property is acquired before his apostasy. However, according to Imam Hanafi, the property of the person which was acquired during his apostasy can be inherited by Muslim heirs (Wahbah al-Zuhaili, 2001).

There is also discussion on the issue of management of property by the apostate. The consensus opinion of jurists consisting of Imam Malik, Hanafi and Hanbali states that apostate is not only prohibited to undertake the management of their wealth but any transactions as regards to their property also should be suspended (frozen). If only after he/she repented and came back to Islam he/she can continue to manage the property. But if a person dies in his/her apostasy, then his/her rights to his/her property is withdrawn because it involves the rights of others. According to Imam Syafie, among the dealings of property which cannot be suspended (frozen) are the sale and purchase, gift, lease or rent, mortgage and so on. Imam Abu Hanifah further states that the apostate's debt during his period of Islam must be paid by the property acquired during his period of Islam.

## **APOSTASY IN MALAYSIA**

In a multi-religious society like Malaysia, conversion from one religion to another is not a new phenomenon. There are many cases involving Muslims who have changed the status of Islam in Malaysia. However, it is noted that it become a sensitive matter if it involves a Muslim abdicate his religion. Although no precise statistics on the actual number of Muslims for apostasy, but the cases reported by the media is clearly increasing. Until now, there is no specific measure taken up by the states to be used in order to curb this apostasy, although some states have included specific provisions in respect of the Syariah Criminal Offences as in Negeri Sembilan, Kelantan, Selangor and certain other states.

According to the statistic, from 1999-2003 there were 750 applications for change of name of the non-Muslims in the National Registration Department (NRD). Only 220 applications were approved after they had their official declaration documents from the Syariah Courts declaring that they were no longer Muslims (Mohd Azam Mohamed Adil, 2006). Among the identified factors which lead to apostasy are poverty, hardship and lack of knowledge about Islam. Besides, the marriage factors may also lead to this issue.

In Malaysia, the offence involved apostasy falls under the jurisdiction of the Syariah Court. It has been clearly stated in many of the administrative enactments of Islam in Malaysia. For example, in Selangor, Section 61 (3) (b)(x) Islamic Religious Administration Enactment (Selangor) 2003 gives the power to the Syariah High Court to hear and decide all the proceeding relating to apostasy. Generally there are three approaches to be imposed to the apostasy offender in Malaysia. First, the offence can be fined up to RM5,000 or imprisonment for up to three years or to whipping up to six strokes or mixtures of any of the three forms of these sentences. Second, a mandatory detention can be ordered at Faith Rehabilitation Centre until 36 months. Third, there is no form of punishment but he/she is obliged to undergo through counseling sessions. For instance, Section 185 of Administration of the Religion of Islam and the Malay Custom of Pahang Enactment 1982 states that "a person who claims that he is no longer a Muslim, whether through speech, writing or in any way with any intent, is guilty of an offence and shall upon conviction be fined not more than RM5,000 or imprisonment of not less than 3 years or both, and whipping of not more than 6 strokes".

## **'MALAY' DEFINITION**

The confusion arising in Malaysia today over who shall be considered 'Malay' is due to the various definitions provided in the Federal Constitution of Malaysia, other Acts and Enactments. However, one cannot disagree that all the definitions in the statutes were

intended to achieve the same objective, that is to ensure that the Malays receive the privileges and benefits they are guaranteed. Despite the definitions provided in all the various statutes, the question as to 'Who is Malay?' remains unresolved. The other question to be determined is; what are the relevant criteria to classify a person as 'Malay' in Malaysia?

When the British came to Malaya, they examine and classify all aspects of life in the Malay world; in the field of zoology, geology, botany, economics, history and sociology to conduct a systematic review. By arranging their schedules, they can make colonies prediction and determination of the economic, social and political. Thus, they conducted the population census to record information on race, ethnicity, religion and others to enable them to categorize the Malays and other indigenous groups for administrative purposes (Shamsul Amri 2004: 135-148, in Barnard & Maier 2004). Finally, using the measures, they draws Malay identity by the introduction of Malay Reserve Enactment approved in 1913. Through this Enactment, the English could determine who are the Malays. These determinants became the factors that specify the definition of Malay identity in Malaysian Constitution, who are entitled to the certain privileges such right to own Malay Reserve Land (Abdullah Hassan, 2009).

The past studies show that confusion reigns over who has the right to be called 'Malay' and who does not. Serious queries are made to determine once and for all as to who is 'Malay' by those who wish to enjoy the Malay privileges (Ainul Jaria, 2008). Historically, the British definition of Malay is derived from their own perception and understanding of Malay customs and culture from long observation. When the British first came, the majority of the people of Malaya (as it was known then) were Malay Muslims, especially in the West Malaysia (Mohd Roslan, 2011). According to Stamford Raffles, the Malay nation has to be considered as one people, "speaking one language, though spread over so wide a space, preserving their character and customs, in all the maritime states lying between Sulu Seas and the Southern Oceans (Stamford Raffles, "On the Malayu Nation," *Asiatice Researches*, 12 (1816):103). The British felt that for the protection and preservation of the Malay race and the establishment of a permanent agricultural population, they had to define 'Malay' by way of religion. It was argued that it was impossible to define the 'Malay' without religious census. In the Selangor Land Code 1891, the term 'Mohammedan' as found in section 23 was used to consider Malays under the Enactment if they were Muslims (Selangor Order in Council, No. 111 of 1891).

*A number of writings have examined the meaning of Malayness (Leonard Y Andarya, 2006). Many articles dealt extensively with the meaning of Malay, particularly in relation to Islam. Thus, the result of survey of some of the recent discussion construed Islam as an identity of Malay. Shamsul (2001) discussed on how the three pillars of 'Malayness', i.e, language, ruler and religion were instituted within the colonial period. In the opinion of Mohd Ridzuan bin Awang (1987) and Yahaya bin Udin (1991), the article (i.e, Art. 160) lays down only four criteria an individual has to fulfill to be declared as Malay. He or she must be a Muslim, speak Bahasa Malaysia, comply with the Malay custom and have his permanent domicile in Malaysia or Singapore. In the Federated Malay States the terms 'Malay' and 'Muslim' are used synonymously. Thus, Islam is viewed as synonymous to 'Malay' and being a member of Malay society. It was perceived that all Malays were Muslims, and those who converted to Islam became Malays (Mohd Salleh Abbas, 1986). Syed Naquib Al-Attas (1972) and Norhashimah Yassin (1994) wrote that the process of conversion to Islam was called 'masuk Melayu', which literally means to enter or convert into the Malay race. Thus, born Malays would only be considered Malays under the law if they were Muslims.*

Historically, the interpretation of 'Malay' emerged in several stages:

- a) Malay interpretation during Pre-Malay Reservation Enactment.

Malay Reservation concept was introduced in the British colonial period. However, the British have difficulty in determining the interpretation of 'Malay'. There are several interpretations that have been made as follows:

- a) The definition of 'Malay' given by the Legislative Drafting Committee of the Malay Reservation:

*".. by 'Malays' the committee meant that all the inhabitants of the Malay Peninsula and Archipelago of Malay Race including Banjarees, Boyanese, Javanese etc, the object being to establish a permanent agricultural population of Malayan race".*

- b) The definition of 'Malay' is used in the draft "The Malay Kampung Lands Enactment, 1912.

*"Malay means a man or woman born in the Malay Peninsula, habitually speaking the Malay language and professing the Muslim Religion as well as such at the time of the coming into force of this Enactment be the owners of or entitled to the ownership of Kampung Lands and such foreign born Malay speaking Moslems as shall after the commencement of this Enactment be permitted to become the owners or be permitted to be in possession of Kampung Lands".*

- c) The definition of 'Malay' is used in the draft Malay Reservation Enactment, 1913.

*" A person born in the Malay Peninsula, or on any island adjacent thereto, or belonging to any Malayan race of the Malay Archipelago who habitually speaks the Malay Language or any Malayan Language and professes the Muslim Religion".*

- d) The definition of 'Malay' is used in Malay Reservation Enactment, 1913.

*"A person belonging to any Malayan race who habitually speaks the Malay Language or any Malayan Language and professes the Moslem Religion".*

- e) Interpretation of 'Malay' in accordance with recommendations made by Skinner and Eu Tong Seng.

Skinner and Eu Tong Seng (Chinese traders from Penang) being two of the Federal Executive Council members discussed the draft of the Malay Reservation Enactment 1913 had suggested that the interpretation of 'Malay' shall include all of the Malays, Chinese and Indians who frequently speak in Malay. However, this proposal has been rejected by the Council because the British felt that the Chinese and Indian as the British are immigrants and not the "subjects of His Highness the Sultan".

Thus, the interpretation which was given at this early stage shows that the British intend to interpret the 'Malay' as a person born in the Malay Peninsula or the islands adjacent thereto, or known as the Malay Archipelago. It consists of Singapore, Philippine, Indonesia, North Borneo, Brunei, Southern Thailand, Cambodia and Ceylon where there is a Malay people.

Of Malaya, there are ethnic Malay indigenous descent, Java, Banjar, Bugis, Minangkabau, Boyan and others. They are also regarded as the nation "Malay"(Muhammad Said, 1992). These are the 'Malay' interpretation under states Malay Reservation Enactments:

- i) Kelantan Malay Reservation Enactment  
*"... a person belonging to any Malayan race who speaks any Malayan Language and professes the Muhammadan religion; and shall include (a) the Majlis Ugama Islam (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay".*
- ii) Kedah Malay Reservation Enactment  
*"... a person professing the Muslim religion and habitually speaking the Malay Language of whose parents one at least is a person of Malayan race or Arab descent".*
- iii) Perlis Malay Reservation Enactment  
*"... a person belonging to any Malayan race or person of Arab descent who habitually speaks the Malay Language or any Malayan Language and professes the Muslim religion".*
- iv) Johor Malay Reservation Enactment  
*"... a person belonging to the Malay or any Malaysian race who habitually speaks the Malay Language or any Malaysian Language and professes the Muslim religion and such expression shall be deemed to include the authorities, boards, bodies, societies, associations and companies described in the Second Schedule to this Enactment".*
- v) Terengganu Malay Reservation Enactment  
*"... a person belonging to any Malayan race who habitually speaks the Malay Language or any Malayan Language and professes the Muslim religion".*

The definitions of 'Malay', founded by Malay Reservation Enactment 1913 are not fully utilized by the Malay Reservation Enactment created later. For example, Kedah and Perlis have considered that there are some important things in their respective states. In both these states, it had to take into account the Arabs who had married the local Malay community. The Descendants of the mixture to the marriage is also regarded as Malays (Muhammad Said, 1992). Therefore, it can be concluded that this interpretation is not the same 'Malay' from one state to another state. However, these states have retained three important factors as determinants of Malay interpretation of the factors of race, speech and religion.

## CONCLUSION

Based on these interpretations and arguments, a person ceases to be a 'Malay' if he renounces the Islamic faith. Consequently, according to Article 89 (1A) of the Federal Constitution, Malay Reservation Land may be forfeited by the State Authority where the owner of the Malay Reservation Land ceases to qualify to own the Malay Reservation Land. Thus, it's clear that the State Authority may forfeit the Malay Reservation Land from the apostate without paying any compensation.

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