



Ear to Asia podcast

Title: Who decides who's Muslim in modern Islamic states?

Description: The constitutions of both Pakistan and Malaysia enshrine Islam as the state religion while also protecting individuals' rights to freedom of worship. So how do their seemingly parallel legal systems of common law and Sharia jurisprudence operate when it comes to matters of Muslim identity? Dr Matthew Nelson from Asia Institute and Dr Dian Shah from the National University of Singapore Law School examine the question of who decides who is – and who must be – a Muslim. Presented by Ali Moore. An Asia Institute podcast.

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Voiceover: The Ear to Asia podcast is made available on the Jakarta Post platform under agreement between The Jakarta Post and The University of Melbourne.

Ali Moore: Hello, I'm Ali Moore. This is Ear to Asia.

Matthew Nelson: How do we think about limits with reference to religious freedom? I think we need to think about that very carefully. It's not just about asking majorities about whether they think the minorities should have their rights limited. It's about whether there is a broad-based sense that whatever limit we're thinking about is understandable, and justifiable, and legitimate.

Dian Shah: There is a tendency in Malaysia to use public order justification to prevent public disorder, or if you view it in another way, to placate concerns of certain sections of the community who might feel offended or uneasy with the existence or the activities of religious minorities or with religious conversions.

Ali Moore: In this episode, who decides who is and isn't a Muslim? In this episode, who decides who's Muslim in modern Islamic states? In this episode, freedom to worship in Islamic states. In this episode, religious freedoms in Islamic states. Ear to Asia is the podcast from Asia Institute, the Asia research specialists at the University of Melbourne.

Although freedom of religion and belief is often taken for granted in liberal democracies, it's by no means universally available. Yet, it was not uncommon for nation states created in the wake of 20th century de-colonisation to include freedom of worship in their newly minted constitutions. And among those were Pakistan and Malaysia, both with Islam enshrined as their official religion. As former British colonies, both nations adopted British common law as the basis of their respective civil legal systems, yet their Muslim majority populations are also governed by their own systems of Islamic jurisprudence.



Islam, like other forms of organised religion is not particularly ecumenical in its outlook. So, how do these nations reconcile the doctrinal dictates of their state religion with an individual's right to choose their religion or belief system? How do these two seemingly parallel legal systems, common law and Sharia operate when it comes to matters of Muslim identity? And how do political factors play into deciding who can or even must be in the ummah or community, even if against their will?

Joining me on Ear to Asia to peel back the layers of the proverbial onion, a South Asia political scientist, Dr Matthew Nelson from Asia Institute, and specialist in Malaysian law, Dr Dian Shah from the National University of Singapore's, Law School. Welcome to the programme, Dian and Matthew.

Dian Shah: Thank you, Ali.

Matthew Nelson: Thank you.

Dian Shah: Can we start with a bit of context around how religious freedoms are viewed in Malaysia and Pakistan, both former British colonies. As we said, how did that influence how freedom of worship sits in their constitutions and legal frameworks? Matthew, if I can ask you first about Pakistan.

Matthew Nelson: Sure. So, in Pakistan like a lot of countries you will see a section of the constitution that's devoted to fundamental rights. There's a specific chapter and it's called the Fundamental Rights Chapter. And so, within that chapter, there are several different rights, and one of them will be religious freedom. And the particular phrasing of the religious freedom clause looks a lot like the religious freedom clauses that you'll see in other states.

So, in the Pakistan case, it's pretty interesting that that part of their constitution was actually lifted very closely from the Indian experience. And if you look then at the Indian experience and where they got their particular clause on religious freedom, you notice that they're borrowing a lot of their language from the Irish Constitution. And so, there's a lot of international similarity in the religious freedom clauses that sit within the fundamental rights chapters of these different constitutions. So, some people are surprised to find that these clauses in a place like Pakistan already look pretty familiar.

Ali Moore: They look familiar, but not necessarily in the context of British law.

Matthew Nelson: That's right. So, this is something that I think surprises a number of people. When we look at fundamental rights in parliamentary democracies, there's this tension or a challenging balance between on the one hand, parliamentary sovereignty and on the other hand, fundamental rights. And in the British tradition, parliamentary sovereignty really takes pole position there. So, fundamental rights as we would see it in other constitutions where there are explicit and enumerated and enforceable rights, that's not



been part of the British constitutional tradition, which itself is somewhat unusual because it's not an explicitly written constitution.

So, in the British experience, really until the European Human Rights Act came into British law in the late 1990s, you really saw a pattern in which fundamental rights were treated really as a matter of tradition, but if parliament needed to make particular laws or adjustments that we might see as encroaching on fundamental rights, well then the parliamentary sovereignty preference would kick in. And that would be the go to principle. Whereas in these other countries, they're not necessarily following the British example there. What they're doing instead is making the fundamental rights, explicit, enumerated and enforceable right there in the constitution, which is quite different from what the British experience itself has been.

Ali Moore: And Matthew, what was the, I suppose, the reasoning behind the determination to have freedom of religion enshrined as a constitution, especially against the backdrop of Pakistan, as one of the world's first states explicitly created on the basis of a religious identity. What was the impetus for freedom of worship to be a constitutional right?

Matthew Nelson: Yeah, in fact, Pakistan was the first state in the world to be created and established, and then constitutionalized with reference to a particular religious community. And when the Pakistani community, if you will, was designing their constitution, they were really trying to balance two different dimensions of their identity, on the one hand of the Islamic perspective, and the other hand, what they called the Islamic democratic perspective.

And keep in mind that Pakistan was divided from India in 1947. And there were still many non-Muslims in the territory that became Pakistan, just as there are still today, many Muslims in the Hindu majority, a territory that we know as India. And so, when they're writing their constitutions, one of the things that they were working on is really a balance between the overall Muslim identity of the new state, but also a recognition that they have many citizens from many different religious traditions, and those citizens would also have rights. And so, there's a famous speech actually from the founding father of Pakistan, Jinnah. In his first speech before parliament, he goes on at length to say that, "Although we are a Muslim majority state, all people, whether they're going to a mosque or a church or a temple, will have their rights."

Ali Moore: And Dian, if we look at Malaysia, which first became independent after Pakistan, is it a similar story about the development of the constitution and the enshrinement of freedom of worship?

Dian Shah: It's similar in the sense that the language used in the bill of rights in the Federal Constitution of Malaysia is actually lifted from the Indian Constitution. So, there's a transplant, if you could call it that. However, in

the pre-independence constitution making process in which there was a committee set up by the British government consisting of five jurists who were foreigners, and they were experts in law, this committee worked with local leaders to figure out or draught a constitution for Malaysia.

Now, it was agreed that a bill of rights would be included in the constitution of the soon to be independent country, but this happened after some resistance from the local leaders. So, the local leaders at that time thought that if a bill of rights were to be included in the constitution, that could hamper government expediency and government decision making processes. But in the end, after all that, they decided to include a bill of rights in the constitution. And that bill of rights includes the freedom of religion, which encompasses freedom of worship, the freedom to profess and practise and propagate any religion, and the freedom to establish and maintain religious institutions.

So, in terms of the constitution itself, freedom of religion is protected in Article 11 of the constitution. But even in Article Three of the constitution, which recognises Islam as the religion of the Federation or the religion of the state, there is an implicit and explicit guarantee of freedom of religion there. So, in Article Three, for instance, it says that Islam is the religion of the Federation, but other religions may be practised in peace and harmony. And then there's another sub clause in Article Three, which says that the recognition of Islam does not derogate from other provisions in the constitution. And essentially in short that means, that even as the constitution recognises Islam as the state religion, that does not trump other provisions in the constitution, including the protection of fundamental liberties.

Ali Moore: So, Dian, in Malaysia, you've got the fundamental rights as laid out in the constitution. You've got a parliamentary system and you've got Islam as the religion of the Federation. How do the various elements fit and work together?

Dian Shah: Of course, there are limits to freedom of religion. And in particular, freedom of religion may be limited on the grounds of public order, public health and so on. There's nothing new here, because it comports largely with provisions that you find in international documents. But in Malaysia's case, when we think about the influence or the position of Islam in the constitution, there's also another clause in the freedom of religion provision, which allows an additional unique limitation. And this is where the constitution allows individual state legislatures to enact laws, to restrict or control the propagation of other religions among Muslims. Now, it is important to note that this captures both intra-Islam propagation as well as inter-religious propagation.

So, there are state laws, for instance, that criminalise acts by Muslims in contempt of lawful official religious authority. So, put simply, Muslims may



be prosecuted under the state laws for contradicting a fatwa issued by a mufti or a state, or national fatwa council, even though in Islamic jurisprudence fatwas are merely legal opinions.

Ali Moore: So, do those state laws, do they sit alongside the civil legal system and does Sharia courts come into play, I guess at all levels of the legal system?

Dian Shah: Yes. The state laws operate alongside the civil legal system, and the Sharia courts have the authority or jurisdiction to enforce this Islamic state laws.

Ali Moore: And I want to look at a minute, both at the issue of limits to freedom in the name of public order, but also the issues that are essentially, what that crossover is between Sharia and civil systems. But if I can ask you Matthew about Pakistan, how do the various moving parts fit together in the Pakistani context?

Matthew Nelson: Yeah. So, in Pakistan, again, you have these three elements, on the one hand, fundamental rights, and then next to that, you have a parliamentary system, and then next to that, you have these Islamic dimensions. And all three could exist in tension, but somehow in the constitution, they try to find some way of working together. So, in lots of places, you will see, if you will, the tension between fundamental rights and parliament working out in a way that allows the Supreme Court to decide when a parliamentary law, for instance, might infringe on a fundamental right.

And so, if this piece of legislation is said to restrict a fundamental right in a particular way, someone can file a case and it will arrive in the Supreme Court. And the Supreme Court will decide what that boundary is, so that the fundamental right is preserved and the legislation needs to be amended.

On the other side, however, we have this relationship between parliament and Islam. And in the Pakistani case, there was a controversy about exactly how to ensure that the laws made by parliament, this legislation, would be compatible with the idea of Islamic conjunctions. And initially when they were writing the constitution, some proposed that there should be what they called a Mullah Board, which is like a council of clerics, that would decide whether the laws made by parliament were Islamic enough. A little bit like you might see in Iran today, where there are clerics who actually have supervisory powers. But that idea of the Mullah Board was rejected.

And in the end, what they came up with was something called The Council of Islamic Ideology, which is an advisory board. And basically, it can offer advice to the parliament. And so it can say, "It looks like the legislation you've proposed might be contrary to the Islamic injunctions." But ultimately the decision making power was to lie with the parliament. This is one of the ways they tried to put these different elements together. So, fundamental rights would always be protected by the Supreme Court. The parliament would be subject to its decisions. But when it came to Islam, the

advisory power of this Council of Islamic Ideology left the parliament in the driver's seat, ultimately. So, hopefully that gives you a sense of how they tried to fit some of these pieces together through particular institutions that would have decision making power

Ali Moore: And in a practical sense in Pakistan, how does Islamic jurisprudence sit alongside the civil court system? Is it like Malaysia where they're essentially running parallel?

Matthew Nelson: It's a little bit different. So, as Dian said, in Malaysia you have this hierarchy of Sharia courts that work within the states, the different divisions of Malaysia as a federal system. Well, Pakistan is also a federal system. There are different provinces in Pakistan. But in Pakistan, The Federal Shariat Court is only present at the national level. You don't have a hierarchy of Sharia courts sitting alongside or parallel to civil courts in each province, which you might see in Malaysia. Instead, each province, if you will, in Pakistan just has its ordinary hierarchy of civil courts.

And then, if you will, at the high level, you might bump into this institution, which was introduced in the 1980s, called The Federal Shariat Court. And The Federal Shariat Court really its role is to take a slightly more active role in judging whether legislation is Islamic or not. So, initially you had this Council of Islamic Ideology, which was advisory, but in the 1980s, they stepped that up a little bit by introducing this Federal Shariat Court, which could be a little more active in actually judging whether particular pieces of legislation were Islamic or as they say unIslamic. And so, that's the only place where you would have, if you will, a parallel Shariat court at the federal level.

Ali Moore: So, given that, how are the civil courts used on issues that go to the heart of freedom of religion and worship?

Matthew Nelson: That I think is probably the most interesting question. We have this impression I think, that when it comes to matters Islamic, there will be a Sharia court that will decide these issues. But in the Pakistani case most of the, if you will, religious issues like blasphemy or heresy or apostasy, or these types of things, these are investigated and decided by ordinary common law courts. And they refer to common law principles like public order or the executive discretion of the state, or whether the administrative offices of the state have acted in a reasonable way. And these notions, public order, executive discretion, reasonable administrative action, these are common law legal principles that we bump into in lots of countries.

And so, I think one of the things that it is very helpful to understand is that if there's an issue of blasphemy, for instance, and this is a very sensitive and important issue in Pakistan, the case will not necessarily jump into a Sharia court to be decided, instead it will come up in a criminal court, an ordinary criminal court, and it will be judged with reference to things like the notion



that whatever is considered blasphemous is so provocative that it might actually create a public order risk, that the community will be so outraged and that they might actually pour into the streets and generate some form of public disorder. And so, this risk, this public order risk is the legal hook upon which the case of blasphemy could be decided, and without any reference to Sharia principles. And I think people sometimes suspect that these Islamic issues are decided by Islamic Law. And I think it's useful to correct some of that.

Ali Moore: Dian, in Malaysia, what sort of issues sit at that nexus of the civil and the Sharia systems? And is it clearly defined? Is it really obvious where various cases would go?

Dian Shah: Before I get into that Ali, since we're talking about similarities and differences between Malaysia and Pakistan, I think I should highlight the similarity here, which is really interesting, that, you know, we have this two countries where Islam is the state religion. However, in Pakistan, whereas you have this, what is called the repugnancy clause, which says essentially that all existing laws shall be brought into conformity with injunctions of Islam based on the Holy Quran and Sunnah, and all that. You don't have such arrangements in Malaysia.

In fact, when Article Three on Islam was promulgated in the constitution making process, the intention there was for this to be largely of a ceremonial role for Islam. And indeed we have a judgement from the 1980s by the then Supreme Court in Malaysia saying that, "Yes, Islam is the state religion, but it does not make Malaysia a theocratic state. The laws in this country are secular laws, but Islamic laws only operate in a specific or limited sphere of law."

And that brings me to your question, Ali. Well, the Sharia jurisdiction has authority only in a limited area of law. And largely this are personal law matters relating to family issues, marriage, divorce, custody, and so on, and only for Muslims. And other issues such as the setting up of Islamic charitable trusts, this are of course within the Sharia jurisdiction and that is spelled out in the constitution. And this would be the issues that would be regulated by individual state legislatures.

But there is also another category. And this is where it gets a bit more complex, more complex, and probably often uneasy relationship between the constitutional recognition of Islam, Sharia's limited jurisdictional autonomy, and the secular issue of fundamental rights, right? So, this is the, what I call the offences against the precepts of Islam. And that is spelled out in the constitution as an issue or an area of law that state legislatures could regulate for the jurisdiction of the Sharia courts. Now, such offences potentially sit at the nexus of the civil and Sharia system.



So, for instance, robbery and theft, these are, technically, offences against the precept of Islam, but they also fall under the federal jurisdiction, and they are regulated by the penal code. So, under the arrangement in the constitution, whatever that is explicitly listed as falling within the jurisdiction of the federal legislature, this cannot be regulated by the states under Islamic law.

However, something that is a little more complex is apostasy. Now, apostasy is seen of course, by Islamic authorities and Muslims as an offence against the precepts of Islam.

Ali Moore: This is of course, is renouncing Islam.

Dian Shah: Yes, renouncing Islam. But fundamentally, renouncing Islam or religious conversion is an issue concerning freedom of religion. And therefore it raises a constitutional issue that, in my opinion, ought to be addressed by the civil courts or the civil jurisdiction.

Ali Moore: I know that there is a very specific case that we need to look at. And we will get to that in just a minute, that talks a little more and explains a little more about, I suppose, the complexities around religious conversion. But Matthew, if I can talk about a very specific issue in Pakistan, and that is the Ahmadi, and how significant they have been to how Pakistan has defined religious freedom.

Matthew Nelson: Yeah. The Ahmadi are a very important group to consider. Just to give you some background here. The Ahmadi are a group that emerged at the end of the 19th century in a part of South Asia, known as Punjab. And basically there was a man named Ghulam Ahmad, who perceived himself and perceived his role as that of a reformer, someone who's going to revitalise Islam in South Asia. And in the context of his activity, he also claimed that he was receiving inspiration, even revelations from God. As such, there were claims that he saw himself as a prophet, if you will, a latter day prophet. And this raised eyebrows in the broader Muslim community, because there is a verse in the Koran, which says that the Prophet Muhammad is the seal of prophecy itself. In other words, the last prophet.

And so, Ghulam Ahmad who claimed to be a later prophet, and those who followed Ghulam Ahmad in his ideas were seen as not at least heterodox, but perhaps heretics. And their particular status within the Muslim community was a source of controversy. Are they Muslim? Are they not Muslim? And so on.

And so, when you see the formation of Pakistan as a state for the South Asian Muslims, there immediately arises during the writing of the constitution, for instance, so a number of questions about who should lead the state for instance. And the idea was that the head of the state should be a Muslim. Okay.

And as soon as you have laws saying that the head of the state should be a Muslim, there is a follow on question, which is who counts as a Muslim? And really there's a historical curiosity here, which is that the leaders of the Pakistan movement to create Pakistan were largely secular Muslims. And many of the religious Muslim leaders in South Asia were initially sceptical of this Pakistan movement, because they said on the one hand, it looks like a movement for Muslims. And on the other hand, it seeks to create a secular Muslim majority state.

And some of the religious leaders said, "If at all, we're going to have a Muslim majority state, it should not be a secular Muslim majority state. It should be in an Islamic state." And so, they did not, curiously, support the push for the creation of Pakistan. But after it was created in 1947 some of these leaders actually moved to Pakistan and to say, "Well, now that Pakistan exists, let's ensure that it is not merely a secular Muslim majority state, but an Islamic state." And they saw themselves as leaders in pushing for that. And the way they did that is related to the Ahmadis.

Basically, they said that, "We need to help these religious leaders," said, "We need to help consolidate the identity of the Pakistani State. And we need to consolidate its Islamic identity. In order to do that, we need to more clearly define what this means, who is and who isn't a Muslim in Pakistan, who counts as a member of the community, and who counts as being on the periphery of this community." And they basically drew attention to the Ahmadi community to draw that boundary and say, "All those who call themselves Muslims and identify Mohammad as the last prophet, will count as Muslims. Those who call themselves Muslims, but do not necessarily have that view, will fall outside the boundary."

And so, the Ahmadis, if you will, became a group that played an instrumental role for the construction of what counts as a Muslim identity in Pakistan. And that's why that group has become particularly important.

Ali Moore: And why were they of such concern, given as I understand it, they are a tiny proportion of the population?

Dian Shah: This is surprising that such a tiny, tiny group-

Ali Moore: It's 1%, is that correct?

Dian Shah: Less than 1%. And so, the role is in constructing the identity of the country far exceeds their numbers. And yet as a symbolic point of reference, as a keystone for thinking about what the boundaries of the Islamic community might mean, their significance has become vastly increased. And so, many cases concerning things like blasphemy will really build on the statements and beliefs and practises of the Ahmadi community.

In the 1980s, there was actually a revision of the blasphemy laws in Pakistan, specifically targeting the Ahmadi community. And saying that those who identify prophets after Muhammad, will outrage the community, that that particular belief or statement should be prosecuted as a criminal matter. Basically, posing a risk of outrage, and as I indicated earlier, a public order risk. And so, even the peaceful practises of the Ahmadi, just simply believing what they believe and saying what they believe, became a criminal matter.

Ali Moore: Were they essentially considered to be the potential thin edge of the wedge?

Dian Shah: They were potentially seen as the thin edge of the wedge, in so far as once this doctrinal difference could be accepted, what other doctrinal differences might be accepted as well. And slowly but surely if so many different versions of what it means to be a Muslim can be considered and legalised and accepted and so on, then perhaps the boundaries of the community itself would begin to become difficult to discern, difficult to identify. And the community's identity, in other words its boundaries would unravel, and that would be considered very risky for the state.

Ali Moore: What impact did that had on the Ahmadi?

Dian Shah: Very serious impact. So, I think it's useful to take just a second to talk about the blasphemy context in Pakistan. Because there are curiously colonial laws concerning blasphemy that were derived from British laws concerning blasphemy, but then took shape in the Indian Penal Code in the 19th century. And so, if you look at the Indian Penal Code at Sections 295 and 298, those are the sections that are about blasphemy.

And then after the separation of India and Pakistan, if you will, Pakistan inherited the Indian Penal Code. So, even today in the Pakistan Penal Code, you'll see Sections 295 and 298 about blasphemy. Even in Bangladesh, which, of course, split from Pakistan, you will look at Sections 295 and 298 concerning blasphemy. In fact, the reach of this code was so great that in Malaysia and then in Singapore, and for that matter, in Burma, if you look at the penal code of each country, you'll see Sections 295, 298 are also concerning blasphemy. So, this just gives an indication of, again, the transnational reach of some of the colonial laws.

What you see in these laws is again, the legacy of British ideas about blasphemy. As you may know the British laws concerning blasphemy protected Christianity in particular, until 2008 when the blasphemy law was finally removed from the British statute books. Well, in Pakistan, it wasn't until a bit later that the blasphemy law was then specified to protect Islam in particular. And when we might think that specifying a protection for Islam in particular could be specific to the Muslim majority Pakistani context. It is useful to remember that these are derived from British blasphemy laws that protected Christianity in particular.



But eventually in the 1980s, this protection for Islam in particular, in the blasphemy elements of the penal code went one step further. And protecting Islam in particular took on a new meaning, which is to say, in order to protect Islam in particular, we need to address particular practises from the Ahmadis as blasphemous. Okay. And so, when the Ahmadis would describe their faith, they were regarded as already articulating a form of blasphemy, which was seen as offending Islam in particular. That's why the blasphemy laws have become such an important part of the pattern of persecution for the Ahmadi community. So, peaceful religious practise still regarded as very provocative and potentially a public order risk.

In fact, it is interesting that the blasphemy laws are really used to target people who call themselves Muslim in Pakistan, not necessarily Christians or Hindus or Sikhs or other groups. And so, the Ahmadis are disproportionately, far disproportionately affected by that law.

Ali Moore:

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I'm Ali Moore. And I'm joined by a political scientist, Dr. Matthew Nelson, who specialises in South Asia, and law researcher, Dr. Dian Shah, who focuses on the intersection of law and religion. Dian, we've just been talking there about the construction of the identity of a Muslim in a Pakistan context and the Ahmadi. Can we look a little bit about, I suppose, the political landscape in Malaysia. Since independence, there have been two major parties that have essentially battled for the hearts and minds of Muslims in Malaysia. Can you tell us a little bit about them and whether or not their interpretations of what it means to profess Islam differ?

Dian Shah:

Sure. I guess, I'll start by saying that just like in Pakistan, who counts as a Muslim in the context of Malaysia is an important issue. And it's important in the context of nation building, particularly with regard to the Malay Muslim community. And the Malays are the dominant ethnic group, about 70% of the population. And the constitution defines Malays as persons who profess the religion of Islam. Of course, there's no specification officially or in the constitution of what branch or school of Islam that is enforced. But traditionally, and it's understood that the main stream doctrine is the Sunni School, and more specifically, of the Shafi'i madhhab school of thought.

Now, Ahmadis also exist in Malaysia. They have been at various points in time, prosecuted as heretics under state level Sharia laws. They have reported some cases of harassment by state religious authorities, for



instance, to prevent them from conducting religious events or worship. So, if one were to visit the Ahmadiyya headquarters in the State of Selangor, the authorities have actually erected this huge signboard outside their premises saying that the Ahmadiyya is not Islam and they are not Muslims.

Now, going back to the political context of this. Now, until 2018 or 2019, I'll explain in a moment why I say that, the two parties that have fought or vied for Muslim – Malay Muslim support have been UMNO and PAS. UMNO is a Malay nationalist party. PAS is an Islamic party, who rose to become UMNO's main competitor for Malay votes, especially in the Malay heartlands, in the states of the Malay heartlands.

So, PAS has always campaigned among others on the premise that UMNO or the UMNO led government coalition at that time, they lacked the capacity and motivation to pursue the fundamental principles of Islam in governance. But PAS, its emergence actually had its roots in UMNO's political strategy itself. So, UMNO, we're talking about in the 1950s here. UMNO at that time, they were conscious about the need to appeal to the Malay Muslim masses. And therefore they sort to expand their Malay support base in the villages, in the rural areas, by attracting local religious leaders. And to do that, they created an Islamic camp of sorts within the party itself.

However, the main characters in UMNO or the main leaders were of course of a secular orientation. And eventually the relations between these competing parties soon began to sour, and some personalities broke away from UMNO in 1951 to form PAS, which is the Islamic party. Of course, it is a very different story now, especially after 2019, because now both PAS and UMNO have set up a coalition. They have worked together now, which is called the Muafakat Nasional or the National Consensus. And they are now part of the ruling coalition since February 2020.

Ali Moore: And are they united in their approach and their interpretation of the identity of what it is to be a Muslim?

Dian Shah: To the extent that a Muslim is a Sunni Muslim, Malay Muslim, yes, they are United in that respect.

Ali Moore: You mentioned earlier, you talked about the focus on public order. Can you talk a little more about the tools that the government and the political parties use for those that they consider to be provocateurs if you like.

Dian Shah: So, there are various tools that have been used. So, the use of national security laws such as the Internal Security Act. So, there was a time in the 1980s, especially, and in the 1990s, when UMNO and PAS were really at the height of their rivalry, the government at that time used national security laws to detain political opposition or opponents, including PAS members or PAS politicians. At one point there was the amendment and the use of the penal code.

So, the penal code at one point was amended to introduce Section 298. And this section criminalises acts that cause or attempt to cause, or are likely to cause disharmony or feelings of enmity on the grounds of religion, either between persons professing the same religion or between persons of different religions. Now, it's really interesting here because in the parliamentary debates, after the amendment was passed, the government actually admitted to some extent that the penal code was amended. And this section was introduced to target anti-government propaganda delivered through sermons and other forms of religious propagation.

So, the context to this is that PAS back then was very notorious for using mosques and madrassas to advocate against supporting the government on the grounds that the government was not Islamic enough, and that the personalities within the government were infidels. So, that's one of the examples.

There are many other initiatives that the government in Malaysia has used. So, there was an Islamization programme, especially from the 1980s onwards to show that the government is committed to Islam. So, that was one of the more policy-oriented initiative to counter PAS's rhetoric, that this is not a government that is fighting for Muslim interests. Of course, subsequently the then Prime Minister Mahathir declared that Malaysia is an Islamic state. So, legal tools, they have been used by the governments, both at federal and state levels to control and restrict political rivals, including by classifying them or touting them as heretics.

Ali Moore:

Matthew, I know that we've been talking with you about Pakistan, but can we compare Indonesia at all here? Like Malaysia and Pakistan, it's a Muslim majority country. It's not, of course a former British colony. It's a former Dutch colony. But they do, Indonesia does have the Ahmadi and the Shia who identify as Muslims, but they're regarded as heretics by the mainstream. How does the Indonesian government deal with those communities?

Matthew Nelson:

This is again, a very interesting question. Because initially talking about Pakistan and Malaysia, we're talking about countries that to certain extent, as we've discussed, have a British common law tradition. And then we turn to Indonesia, a former Dutch colony where the civil law tradition is present. We also have Pakistan and Malaysia referencing Islam as the religion of the state. And then we turned to Indonesia where that's not the case. And instead there's this notion of Pancasila.

And so, both on the, if you will, the colonial background and on the reference to religion in law, you might think that the Pakistan and Malaysia experience might be very different from the Indonesian experience. And yet what we find is that the actual legal process whereby debates about who counts as a Muslim, who counts as a heretic and so on, end up sounding very similar. And the reason they sound similar is that in the penal laws and



even in the constitutional dimension, questions of public order are common across all three states.

So, for instance, if you look at a constitutional provision concerning religious freedom, it will say religious freedom is protected subject to public order or public health or public morality, and so on. In Indonesia, you see very similar language. And so, the tools that are used legally to address the provocation of people who are considered heretics or heterodox in one way or another, the offence created by their beliefs or their statements. Those concerns about provocation and offence and public order are all finding their legal hook, again in laws that say religious freedom is protected as a right subject to public order. And that's the same in Indonesia as it is in Pakistan and Malaysia.

In fact, Dian mentioned in passing earlier on, that even when you look at international conventions of human rights, like the ICCPR on civil and political rights, again, you will see language that says religious freedom is protected subject to public order. And so, while Pakistan and Indonesia have actually ratified the ICCPR, not Malaysia, you can again see a connection between what they say in their constitutions and an international human rights clause concerning religious freedom. And it's that element of the religious freedom legal language, the public order element that has allowed for the Ahmadiyya in Indonesia and other groups to be prosecuted or sometimes persecuted on the basis of what would otherwise be regarded as peaceful religious practise, but still regarded as so provocative that it could create a public order problem, and therefore falls foul of protection for that right.

Dian Shah: If I could chime in Ali, if you don't mind. So, in Indonesia, there is a blasphemy law, and this is not a new law. This was enacted in 1965 by President Sukarno through a presidential decree. The law prohibits a person from publicly advocating or seeking support for a religious interpretation or religious activities that deviate from the core doctrines of a religion. And this blasphemy law inspired Article 156A of the Indonesian Criminal Code. And if you recall the case of the former Jakarta governor, Ahok, he was charged under this criminal code. And the justification behind this law was precisely what Matt mentioned, to safeguard public order, national unity and religious harmony.

Ali Moore: And I want to explore the broader ramifications of that as we near the end of our podcast. But I need to return Dian, to this issue of religious conversion. So, what happens when someone no longer wishes to identify as Muslim, if someone wants to officially change their religion as has happened in Malaysia?

Dian Shah: The short answer to that Ali, is it depends on which state you find yourself in, in Malaysia. So, because Islam is regulated at the state level, so there are various procedures regulating how a Muslim would want to leave his or her



religion. So, there are some states where there are punitive measures involved, like if you renounce Islam, you would be jailed, for instance.

There is a state where the procedure is more permissive, and that is the State of Negeri Sembilan, where you can apply to the religious authorities, telling them you want to renounce Islam. And they will make you go through a programme. They call it rehabilitation in some ways, essentially to assess if you are still comfortable with the religion, what is it that you are not satisfied with the religion? And after going through that procedure for one year or this rehabilitation process, if you still decide at the end of that you want to leave the religion, then you can do so. But that is only in one state, in the State of Negeri Sembilan.

Ali Moore: So, what happened with the case of Lina Joy, where was she?

Dian Shah: Lina Joy, unfortunately, her case emerged in the federal territories. And the federal territories in the context of the Malaysian constitutional arrangement is governed by the federal legislature. Now, what happened here was that she had converted to Christianity. She was baptised in the religion. And so, she wanted to remove the word Islam as her official religious identification from her national identity card. And the federal court, essentially said that, "If you want to remove this word Islam from your national identity card, essentially if you want to change your religion, then you have to go through the Sharia courts procedures to do so." The federal court did not say that she didn't have freedom of religion or that she absolutely cannot change her religion, but it's just that she needed to go through the Sharia court procedures to do so. Now, the problem was that in the federal territories law, there was simply no procedures spelled out governing how a Muslim could renounce Islam.

Ali Moore: So, in the end, where did Lina end up?

Dian Shah: In the end, she did not avail herself to the Sharia courts. I think she found that it would be futile. So, she left the country. That was the last information that I received.

Ali Moore: So Dian, do you see the ability to change religion at the heart of religious freedom? And to what extent does this particular case show that that ability to self identify is in the end inextricably linked to government interpretation?

Dian Shah: That's a very good question, Ali. Yes, for me personally, the ability to change your religion or to choose one's religion lies at the heart of one's freedom of religion. That is the forum internum aspect of freedom of religion, the freedom to believe.

In the context of Malaysia, there is a whole multitude of other factors that are involved here. And one is mentioned by Matt earlier, the idea of public

order. So, one of the reasons why the federal court in Lina Joy decided that she had to go through the Sharia court procedures was this concern. And this was a concern that was also expressed by the government, that if a person was allowed to freely enter or leave a particular religion in this case, Islam, then it would destabilise the Muslim community. In the court's specific words, it would cause chaos to the Muslim community.

And of course, the identification of a person as a Muslim is important because as you know, it's identified in the national identity card. And therefore it has a lot of implications on the status of this person in terms of what he or she cannot do, will he or she now be subjected to Islamic laws or not. As long as you have the word Islam on your identity card, you will be identified as a Muslim, and therefore you are subjected to Islamic laws in matters such as personal laws, family, marriage, divorce, and so on.

Ali Moore: So Dian, do you believe there is freedom of religion in Malaysia?

Dian Shah: Yes. I do believe that there is freedom of religion in Malaysia, however there are limitations. And the question that we are of course, faced with in Malaysia, and this is perennial question, and this is a continuing issue, is to what extent can those limits be justified?

So, limits can be understandable for instance, to protect a public order, but if it goes too far, then that would be problematic. Now, the conception of public order in Malaysia, as it has been used, is that it has this preventative or preemptive notion attached to it. In other words, there is a tendency to use public order justification to prevent public disorder, or if you view it in another way, to placate concerns of certain sections of the community who might feel offended or uneasy with the existence or the activities of religious minorities or with religious conversions.

And these feelings may stem from the perception and belief that the minorities could be heretics, that they could be tarnishing the sanctity of a particular religion. If you renounce Islam, if you leave Islam, you are tarnishing the integrity and the sanctity of Islam itself. And that if you convert to another religion, or if you profess another religion, then you might be out to spread your beliefs to others. And there is a lot of anxiety about that.

Ali Moore: Matthew, I guess, I mean, indeed both you and Dian have written in a joint academic writing that essentially the question is, at what point do administrative regulations render one's right to religious freedom meaningless. As Dian was just very clearly explaining those tensions there, your thoughts on where that tension leaves the basic right of religious freedom?

Matthew Nelson: I think that the first thing people frequently overlook is that when we think about fundamental rights, most of the fundamental rights that we're

familiar with, free speech or freedom of religion or freedom of mobility, and so on, those rights in law always come with a qualifier, which is that the right is protected subject to public order, public health and sometimes public morality, and so on. And so, the idea of a fundamental right being guaranteed and unlimited is a little bit of a misconception.

And so, the questions that Dian and I have written about, and that I think you're touching on, is if there will be limits, how do we think about those limits with reference to religious freedom? And one of the things we've tried to point out is that when there's going to be a limit, it has to be justifiable and widely accepted. It has to be understood as legitimate. Okay? And that legitimacy is sometimes considered only with reference to majority communities and not with reference to minority communities or people who are moving between communities, for instance, through conversion and so on.

And so, when we talk about whether a limit on a fundamental right is justified or legitimated and so on, I think that we need to think about that very carefully. It's not just about asking majorities whether they think that the minorities should have their rights limited. It's about whether there is a broad-based sense that whatever limit we're thinking about is understandable and justifiable, and legitimate.

So even today, when we're in the context of a global pandemic, I think it's a useful moment to think about some of these issues. There are limits on our rights, for instance, with reference to lockdowns. And we have some people who think that those limitations on, for instance, your fundamental right to mobility are justified, and that people should be locked down. And that is legitimate, in order to protect the nation, in order to protect public health.

And other people disagree. Other people think that these lockdowns and these restrictions, these limits on our fundamental rights, which are introduced to protect the nation, protect against a public health risk, that those have gone too far. And I think what we're saying with reference to these limits on fundamental rights, whether it's a fundamental right of religious freedom or a fundamental right of mobility, is that those limits have to be examined. And they have to be considered by broad sections of the public, not just majoritarian, but also with reference to minorities and individuals on the margins.

And so, when it comes to fundamental rights of religious freedom, I think that they do exist. And I think that they are occasionally limited. And I think that those limits are occasionally justified. But I think what we're really trying to highlight in some of our work is the importance of keeping those limits under review.



Ali Moore: Dian makes the point that it is a perennial question, the extent to which the limits are justified. It's not something that a point in time you can decide. It is a perennial issue that must be constantly reexamined.

Matthew Nelson: Exactly. There's no universal law of the limit. There is only the political circumstances that let you consider what the limit should be. And we sometimes think of a fundamental right being related to a universal trans-historical right, that is just fixed in time for all places. But when we think about those secondary clauses about public order, we have to realise that even those rights and then their limits are related to particular circumstances.

And I think that's really important to keep in mind. Even in the context of Islamic thought when it comes to religious freedom, there is this notion that there should be no compulsion in religion. That religion should be a matter of personal reflection, personal belief and personal, as Dian said, choice. And there's extensive debate about how to protect that right, while also protecting the larger community. So on the one hand, the individual's right to believe, on the other hand the risk that the community as a whole could be under threat, if all kinds of people are doing all kinds of different things. And there's a sense of having to look at that very carefully. And that ultimately, one's belief is a matter for an individual and God, but that in the community there are also considerations about how the community can hold itself together.

Ali Moore: Well, Dian, I know that you are Singapore, Matthew and I are recording this podcast in Melbourne, where we are in hard lockdown at the moment as we speak. So, we very much understand the attention between public order and public health and freedoms. But as you both say, it's one of those issues that needs to be constantly revisited. An enormous thank you to both of you for joining Ear to Asia.

Matthew Nelson: Thank you for having us.

Dian Shah: Thank you for having us, Ali.

Ali Moore: Our guests have been South Asia political scientist, Dr Matthew Nelson from Asia Institute at the University of Melbourne, and Malaysia law specialist, Dr Dian Shah from the National University of Singapore's Law School. Ear to Asia is brought to you by Asia Institute of the University of Melbourne, Australia. You can find more information about this and all our other episodes at the Asia Institute website. Be sure to keep up with every episode of Ear to Asia, by following us on the Apple Podcast App, Stitcher, Spotify, or SoundCloud. If you like the show, please rate and review it on Apple Podcasts. Every positive review helps new listeners find the show. And of course, let your friends know about us on social media.



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