

FREEDOM OF RELIGION AND THE COVID-19 PANDEMIC

Emeritus Prof Datuk Dr Shad Saleem Faruqi
Tun Hussein Onn Chair, International Institute of Strategic Studies, Malaysia

Any place on earth can be a mosque and prayer can be offered wherever there is the presence of God. The movement restriction order is preventing us from going outside but it does not prevent us from going within the recesses of our soul to discover the untapped spiritual force within.

THE IMPORTANCE OF RELIGION

The Covid-19 pandemic is a global, grim and life-threatening crisis. It calls for exceptional measures that inevitably restrict basic freedoms. Nevertheless, governments around the world must comply with international human rights standards and rule of law requirements in all aspects of human rights areas including freedom of religion.

Religion is one of the most potent forces of human civilization. It satisfies our innermost needs and reflects our deepest yearnings. Nearly 84% of the world's population claims adherence to some faith or the other.¹ More than in times of peace and prosperity, we need the spiritual, psychological, emotional and social support that religion can supply in times of vulnerability such as these. Religion gives hope in despair, light in darkness, strength in weakness and is an antidote to depression. I am reminded of the Holy Qur'an, Surah 2:285 that Allah does not impose on a soul a burden it cannot bear.

A student of constitutional law will also acknowledge that freedom of religion is a compendium of rights that includes the freedom to profess, to manifest beliefs in speech and practice, to propagate one's beliefs, to assemble, to march, to form associations and to educate the flock.

Scholars of religion submit that freedom of religion has two aspects: the *forum internum* aspect (right to profess a religion) and the *forum externum* aspect (right to practise one's religion) in rituals, gatherings, marches, singing, worshipping as a group and management of the multifarious aspects of a group's religious affairs. In the Malaysian Constitution there is clear recognition of group-based activities. Article 10(1) of the Federal Constitution guarantees freedom of speech, assembly and association. Article 11(3) proclaims that every religious group has the right to manage its own affairs, to establish and maintain institutions for religious or charitable purposes, to acquire and own property and to hold and administer it in accordance with law. Article 12(2) confers a right to establish and maintain institutions for religious education.

¹ Pew Research Center, "Religion & Public Life", Dec. 18, 2012, pewforum.org/2012/12/18/global

Except for the freedom to profess, all other aspects of the right to religion are severely, but unavoidably, being impacted by the Covid-19 pandemic regulations.

RITUALS OR SPIRITUALITY?

Nevertheless, despite the Covid-19 prohibitions, there is nothing to prevent us from emphasising the spiritual part of religion, giving importance to substance over form and embracing the importance of love, compassion, tolerance, and sacrifice over mere rituals.²

I am reminded of the Holy Qur'an's Surah Al-Baqara (2:177)³ which reminds us that righteousness is not in the performance of rituals but in the way we lead our life. "It is not righteousness that ye turn your faces towards East or West; But it is righteousness ... to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer and practice regular charity; to fulfil the contracts which ye have made..."

I am reminded of the inscription on the Kamel Lazaar Foundation of Tunis, Tunisia that "All the world is a mosque".⁴ I am reminded that Islam has no clergy and no mediators between man and God. We can, in all places, in and outside the mosque, establish a connection with the divine. Any place on earth can be a mosque, and prayer is wherever there is the presence of God. Faith is matter of the heart rather than an enclosed space.⁵

I am reminded of the Lebanese, Christian poet and philosopher Khalil Gibran who said: "Is not religion all deeds and all reflections." "Who can separate his faith from his actions, or his belief from his occupations?" "Who can spread his hours before him, saying, "This for God and this for myself; This for my soul and this other for my body"? "He who wears his morality but as his best garment were better naked". "Your daily life is your temple and your religion".⁶

The movement restriction order is preventing us from going outside but it does not prevent us from going within the recesses of our soul to discover the untapped spiritual forces within.

LEGALITY OF RESTRICTIONS

The restrictions imposed by the government can, of course, be challenged in the courts on many legal and constitutional grounds. Recently Germany's top Court

² Shad Saleem Faruqi, "Religion, reason can go hand in hand", Reflecting on the Law, The Star, Thursday, 23 April, 2020, p.14.

³ The Holy Qur'an, A. Yusuf Ali Translation, Amanah Corp, 1983, pp. 69-70

⁴ <https://www.kamellazaarfoundation.org/grant/all-world%E2%80%99s-mosque>

⁵ ibid

⁶ Kahlil Gibran, The Prophet, Heinemann; London, 1974, pp. 90-91.

allowed Muslims to hold congregational Friday prayers subject to necessary health precautions.⁷

Powers are not inherent: The orders, instructions, directives, standard operating procedures and actions must be derived from some valid law⁸ and must not be based on arbitrary power. There must be a government of laws and not of men. Human rights are inherent; it is power that needs legal justification.

Fundamental rights: The law or laws in question must be anchored in and consistent with the Constitution's chapter on fundamental liberties. Thus, any law restricting freedom of religion must be supported by the grounds permitted by Article 11(5) of the Constitution. Article 11(5) permits the enactment of any general law to restrict freedom of religion on the grounds of "public order, public health or morality". The Prevention and Control of Infectious Diseases Act 1988 [Act 342] and the National Security Council Act 2016 [Act 776] are within the permissible restrictions of "public order, public health or morality" in Article 11(5).

Non-discrimination: Subject to the Constitution's Articles 3(1) and 11(4), all laws and executive actions restricting freedom of religion must respect the equality requirement under Article 8. They must apply equally to all religious communities whether Muslim or non-Muslim.⁹

Subversion or emergency: It is noteworthy that the Prevention and Control of Infectious Diseases Act 1988 [Act 342] and the National Security Council Act 2016 [Act 776] are not anti-subversion or emergency laws under Articles 149-150. They must, therefore, comply with all the provisions of the chapter on fundamental liberties in Articles 5-13.

Federal-state division: The laws in question must also be consistent with the Constitution's federal-state division of powers. In the nine States with Malay Rulers, Islam is under the control of State Sultans. The topic of Islam is in the State List¹⁰ and many people are questioning whether a federal law or a federal directive can

⁷ *Free Malaysia Today, FMT*, April 30, 2020.

⁸ The relevant laws in Malaysia are: Prevention & Control of Infectious Diseases Act 1988 [Act 342], PU(A), 374/2006; Prevention & Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020.

⁹ There are unresolved issues about the vehicle that must be used to establish religious organisations. Muslim Mosques are established under State Enactments because Islam is within State jurisdiction. For non-Muslim religious institutions, there is diversity of legal vehicles. Several laws provide for their incorporation. Among them are the Superior of the Institute of the Franciscan Missionaries of Mary (Incorporation) Ordinance 1957, Synod of the Diocese of West Malaysia (Incorporation) Act 1971 (Act 36), Superior of the Institute of the Congregation of the Brothers of Mercy (Incorporation) Act 1972. Hindu, Buddhist, Sikh, Jain, Bahai, Taoist temples have to register as a society under the Societies Act. Under a policy that may be unconstitutional they are not allowed to establish themselves as a Trust, Partnership or Company Limited by Guarantee. I am grateful to Advocate & Solicitor, Satish Ramachandran, for his views on this matter. See also: Chapter 24 "Freedom of Religion and Registration of Religious Groups" in Tommy Thomas, *Abuse of Power, Selected Works on the Law and Constitution*, 2016.

¹⁰ Schedule 9, List II, Item 1.

impinge on the rights of Muslims to go to the Masjid to attend congregational prayers especially on Fridays or for the nightly *terawik* during Ramadan or for Aidilfitri and at marriages, funerals etc. Breaking fast at the masjid during the month of Ramadan is a practice close to Muslim hearts. However, it must be noted that during this pandemic the federal government can regulate religious freedom on the following grounds. First, under the permissible restrictions of Article 11(5) which are public order, public health and morality. These restrictions apply to all religions. Second, in our federal-state division of power, the following laws are within the exclusive jurisdiction of the federal Parliament: (i) all laws dealing with “internal security”¹¹ (ii) Medicine and health, hospitals, clinics and dispensaries¹² and (iii) “Pilgrimages to places outside Malaysia”¹³ Third, the power over public health, sanitation, and the prevention of diseases is in the Concurrent List,¹⁴ and, therefore shared with State governments. However, under Article 75, any inconsistency between a federal and a State law must be resolved in favour of the federal law. Under Article 81 the executive authority of every State shall be so exercised as to ensure compliance with any federal law applying to the State.

Proportionality: The laws that are enacted must not be harsh. The penalties imposed must be proportionate: *Alma Nudo Atenza v PP* [2019] 5 CLJ 780 FC. Recently, in Germany, the constitutional court has overturned a blanket ban on religious services during the coronavirus crisis, saying that exceptions can be granted if sufficient precautions were taken to avoid infection.¹⁵

Jurisdictional issues: The executive action must be undertaken by officials who are authorised by the law.¹⁶

Procedural requirements: The authorised officials must comply with all procedural requirements. It is not enough to have power. Power must be exercised in the manner prescribed by the law.

DEMONISATION OF RELIGIOUS AND ETHNIC COMMUNITIES

In addition to legal and administrative restrictions, there is increasing occurrence of blaming minority religious communities for the pandemic. There is persecution and demonisation of religious and cultural minorities in some countries like India, Myanmar, Australia, the USA and some parts of Europe. Political and religious extremists in these countries are exploiting the Covid-19 tragedy to foment hatred against minority races and faith groups. Xenophobia is on the rise around the world including in Malaysia where the Rohingya refugee community is the object of much

¹¹ Schedule 9 List I, Item 3. It is noteworthy that “internal security” includes “public order”

¹² Schedule 9 List I, Item 14.

¹³ Schedule 9 List I, Item 1(h).

¹⁴ Schedule 9, List III, Item 7

¹⁵ “Germany’s Top Court Allows Muslims to Hold Friday Prayers”, *Free Malaysia Today, FMT*, April 30, 2020.

¹⁶ Questions have been raised whether it is legal for the government to deploy the armed forces to enforce the Movement Control Order. See GK Ganesan, PARADOX, Legal Issues Simplified, *gkg.legal*, March 21, 2020.

hatred. Governments must take note that in many countries, quarantined radicals in self-isolation are relying on digital means to spread venom. Many hate crimes are being recorded. The laws against hate speech and fake news need to be bolstered. The hate campaigns against minorities denigrates everyone – those victimised, the perpetrators, and also the faith the perpetrators supposedly represent.

PITTING GOD AGAINST SCIENCE

Having cautioned on the need to balance the might of the state against the rights of citizens, it must, however, be added that all citizens and especially all religious leaders have a duty in these testing times to cooperate with public authorities to curb this pandemic; to take all necessary health precautions; to avoid harming themselves and, more importantly, avoid harming others. We can censure freely but we must obey promptly.

Religion may sometimes lead people to ignore health risks - by putting things “in God’s hands” when our own efforts could mitigate the dangers. We have heard from some people of faith that “I reject such and such restrictions because I fear God more than I fear Covid-19”. I think it is unwise and irreligious to pit God against science and to show callous disregard for avoidable loss of human lives.

All religions have teachings that profess the importance of assisting others, saving lives and not harming oneself. The Holy Qur’an tells us: “If anyone saved a life it would be as if he saved the life of the whole humanity.” (Surah Al-Maidah 5:32). In Surah 13:11 the Holy Qur’an says: “Allah never changes the condition of a people unless they strive to change themselves”. The Bible says that “thou shalt not test the Lord” (Mathew 4:7). This means that one should not take unnecessary risks. In Judaism, the Talmud emphasises the preservation of human life and this takes precedence over all other commandments.

DEFIANCE OF THE LAW

We must not use freedom of religion as an excuse to defy the law and to disregard the government’s Covid-19 restraints. Despite the Covid-19 pandemic and its imperative of social distancing, some religious leaders in Italy, the USA, South Korea, Indonesia, Iran and India continue to emphasise rituals, mass ceremonies and gatherings that emphasize collective worship, close contact, hand-holding, sharing of the communion and touching or kissing religious objects. From the medical point of view, there can be no doubt that these ritualistic practices must be avoided or modified till the pandemic is controlled and normalcy returns.

In a confrontation between religion and law, neither will emerge unscathed. These counterproductive attitudes will bring a bad name to religion and will cause unnecessary casualties among the believers.

Malaysians have maintained a relatively high degree of discipline. But with the Muslim fasting month, the religious tradition of sharing and caring at the break of fast, nightly *terawih* prayers in the mosque, the approaching celebration of Eid on 24 May and the Hajj pilgrimage from 28 July to 2 August, there is bound to be sadness and even some desperation.

We must be reminded, however, that Islam is cognisant of the need for flexibility in times of danger. It is known that the Hajj has been suspended about forty times since the first pilgrimage in 629 CE for cholera outbreaks and plagues. It is respectfully submitted that temporary avoidance of ritualistic practices will not weaken religion if we emphasise spirituality instead.

ROLE OF RELIGIOUS AUTHORITIES

One must caution that the impact of the epidemic on faiths could be similar to that of the 14th-century bubonic plague on the Catholic religious establishment in Europe. In the initial days of the bubonic plague, religious leaders contended that the disease was a punishment from God for the sins of disbelievers, witches, homosexuals and other minority groups that were targeted by the then religious establishment. Prayers, penance and harsh punishments were seen as ways to protect society from the epidemic. But when the catastrophe continued despite all these pious exertions, people slowly started losing faith in the religious hierarchy. This culminated in one the biggest revolutions in Western religious history: the “reformation movement” in Europe.

Covid-19 may well become a challenge to the authority and the self-anointed eminence of religious leaders in society. The pandemic may threaten their credibility. It may also affect their lucrative sources of income.

Religious leaders must, therefore, adapt to a world view in which science and religion can go hand in hand. They must reinterpret their articles of faith. They must re-analyse religious practices and provide theological opinions on how faith practices or rituals can be adapted to meet the response of Covid-19.

They must avoid resistance to civil authority. Religious leaders of all persuasions must come together over Covid-19 and support government efforts to control the coronavirus.

They must avoid fomenting religious intolerance and scapegoating of minorities, disbelievers etc. Religious leaders have an important duty to oppose incitement to bigotry or violence.

Religious leaders must take to the media, email and radio to conduct daily prayers and worship, mobilize individual volunteers to serve the elderly and those at risk,

collaborate on charitable initiatives and serve as a reinforcement mechanism of government messaging.

ROLE OF CITIZENS

We, the citizens, too have a role to play. As people of faith we should turn attention to the beautiful tapestry of doctrines, principles, and beliefs in our religion that embrace the inter-connectedness of life, the importance of love, compassion, tolerance, sacrifice and community service.

The youth amongst us can supply their digital know-how to help the clerics to build good communication during the crisis. The youth can work with the clergy to promote theological discussions digitally about the need to protect human life and the need to halt gatherings that are medically dangerous and to implement social-distancing guidelines.

ROLE OF GOVERNMENT

The government in turn must engage with theological leaders and religious organisations and must not ignore the factor of spirituality in its handling of the Covid-19 crisis. Middle paths need to be found to ease restrictions on freedom of religion and to balance physical health considerations with spiritual health considerations.

Involving official and unofficial religious organizations in mitigating this pandemic is important because enlightened religious leaders can rebut fatalistic understandings of the Covid-19 crisis and explain to the community what must be done, and what must be avoided from a theological perspective.