

## **Headscarf (*Hijab*) at Work and Dismissal: Whether A Workplace Discrimination? \***

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### **Introduction**

Discrimination implies an unfair treatment of two or more persons or subjects on grounds such as race, gender, disability, age and religious belief, among others. The International Labour Organisation (ILO) considers discrimination as a differential and less favourable treatment of certain individuals because of any characteristics such as sex, race and religion, regardless of their ability to fulfil the requirements of the job. The Universal Declaration of Human Rights (UDHR) 1948 provides that all human beings are born free and equal in dignity and rights. Gender discrimination exists when women, for example, are treated less favourably or suffer detrimental treatment at the workplace as a result of unreasonable differential treatment between men and women. All forms of discriminatory practices against women in the workplace are prohibited by the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979.

Further, ILO's Conventions on Equal Remuneration (No. 100); and Discrimination (Employment and Occupation) (No. 111) address the elimination of discrimination in respect of employment and occupation. Convention No. 100 is confined to the subject of remuneration between men and women while the Convention No. 111 is wide enough to cover almost any aspect of employment that would cause discrimination on various grounds. In other words, it is unlawful for an employer to discriminate against an employee on the ground of the employee's sex in the terms or conditions of employment, denying or limiting the employee's access to opportunities for promotion, transfer or training, or to any other benefits associated with employment, dismissing the employee or subjecting the employee to any other detriment. In light of the above, this article discusses on the issue of whether preventing a female Muslim employee from wearing a headscarf (*Hijab*) at work amounts to discrimination and whether such refusal constitutes a valid ground for termination from employment. It is observed that there have been few incidents in Malaysia where women, particularly those working in customer service or the frontline, been

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prohibited from wearing headscarves at work, a violation of her constitutional rights to practice her religion.

### **Headscarf: Guarding Modesty and Symbol of Religious Faith**

Guarding of one's chastity from immorality is highly emphasised in Islam. In many verses in the Quran, Allah (*s.w.t.*) tells mankind to guard their chastity. In *Surah Al-Mumenoon* (23), verses 5, 6 and 7, Allah (*s.w.t.*) says about the believers who shall be deemed successful namely: "Those who guard their chastity (i.e. private parts, from illegal sexual acts). Except from their wives or (slaves) that their right hands possess, - for them, they are free from blame; But whoever seeks beyond that, then those are the transgressors". Again, in *Surah Al-Maarij* (70), verses 29, 30 and 31, Allah (*s.w.t.*) says: "And those who guard their chastity. Except with their wives and the (captives) whom their right hands possess - for (then) they are not to be blamed. But those who trespass beyond this are transgressors". Similarly, in *Surah Al-Ahzab* (33), verse 35, Allah (*s.w.t.*) says: "For Muslim men and women - for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves) for men and women who guard their chastity and for men and women who engage much in Allah's praise - for them has Allah prepared forgiveness and great reward".

As an important component of woman's dignity, the Quran has specified in clarity as regards a woman's dressing in the presence of strange men and non-*mahram* relatives.<sup>1</sup> In *Surah An-Nur* (24), verse 31, the Quran outlines the criteria of modest dressing: "And tell the believing women that they should lower their gaze and guard their sexual organs, and not display their adornment, except that which is apparent of it; and they should draw their head-coverings over their bosoms, and not display their adornment except to their husbands or their fathers or their husbands' fathers, or their sons or their husbands' sons, or their brothers or their brothers' sons or their sisters' sons, or their women, or those whom their right hands possess, or male servants who lack sexual desire, and children who are not aware of women's nakedness; and that they should not strike their feet in order to make known what they hide of their adornment. And O you believers, Turn you altogether towards Allah, that you may attain bliss". The above verse emphasised that a woman should draw their head-coverings over their bosoms or their chests. The lists the people with whom a woman is permitted to be less exhibitivie is also clearly stated therein. Aside from the list mentioned therein, Muslim woman must be properly covered in the presence of strangers and non-*Mahram* relatives.

Further, the Quran instructs the believing men and women alike to lower their gaze. The Quran in *Surah An-Nur* (24), verse 30 states: "Tell the believing men that they should lower their gaze and guard their sexual organs; that is purer for them. Indeed, Allah is well-acquainted with what they do". Again, in the same *Surah*, the first part the next verse (verse 31) provides: "And tell the believing women that they should lower their gaze and guard their sexual organs". Aside from the above, the Prophet (*s.a.w.*) said: "A man should not look at the *awrah* of another man, nor a woman of a woman, nor should a man go under one cloth with another man, not a woman

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<sup>1</sup> *Mahram* refers to either her husband or any male relative with whom her marriage is permanently prohibited.

with another woman”.<sup>2</sup> For a man, the *awrah* is from his navel to his knee, while a woman’s *awrah* is her entire body except only her face and hands. It is therefore important for a believing woman to conceal their beauty and adornment from strangers so that it would prevent them from being molested as the modest dress generally is not a source of attraction to man. As the Quran mentions; “O Prophet! tell thy wives and daughters, and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested: and Allah is Oft-Forgiving, Most Merciful”.<sup>3</sup>

Therefore, wearing headscarf among Muslim women is a sign of modesty and a symbol of religious faith. In relation to wearing of *hijab* or *khimar* to work, it is noted that - except in Saudi Arabia and Iran - *hijab* (head scarf) is not made compulsory throughout all other Muslim countries. For the rest, like Egypt, Jordan, Syria, Algeria and Bosnia it is not forced upon the woman but is merely optional. However, in some Muslim countries, majority of the women prefer to adorn the *hijab*, like Yemen and United Arab Emirate (UAE). In Malaysia, for Islamic organisations and institutions of higher learning, it is compulsory for its staff and students to wear the *hijab*, dress according to Islamic dress code and display proper Islamic ethics.<sup>4</sup> In an attempt to maintain these rules, disciplinary action will be taken if these rules are flouted. Other than this, many women in government organisations have chosen to wear the *hijab* although it is not made compulsory for them.<sup>5</sup>

### **Discrimination against Women in Workplace**

The wearing of headscarf at the workplace has long been a divisive issue in many European countries. There had been numerous instances where the Muslim female workers were told to remove the *hijab* and their refusal to comply with the directive had lost them their jobs. For example, Samira Achbita, a Belgian woman who work as a receptionist in a Belgian security firm; and, Asma B, a French woman who work as a software designer in a French company, were dismissed from employment because of their refusal to remove the headscarf at work despite repeatedly been advised by the employer. Their action went against the work regulations which generally prohibited any ‘political, philosophical or religious’ symbols. In affirming the dismissal, the European Court of Human Rights held inter alia, that religious symbols - including headscarves - may be prohibited in the workplace and that this does not constitute direct discrimination.<sup>6</sup>

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<sup>2</sup> Reported by Sahih Muslim, Abu Daoud, Al-Tirmidhi. As cited in Yusuf Al-Qaradawi, “The Lawful and the Prohibited in Islam (Al-Halal Wal Haram Fil Islam)”, (Trans) Kamal El-Helbawy, M. Moinuddin Siddiqui, Syed Shukry, (American Trust Publications: 1994), p. 66.

<sup>3</sup> *Surah Al-Ahzab* (33), verse 59.

<sup>4</sup> See Section 27 of the Students’ Discipline Rules 2004 of International Islamic University Malaysia states that: (1) *Muslim* students are expected to dress in a manner considered proper by the *Shariah*. (2) *Non-Muslim* students may adopt the *Islamic* dress if they so desire. Otherwise, they should dress in accordance with the University Dress Code. Such mode of dress shall also be decent, neat and clean. (3) Any student who is inappropriately attired will be barred altogether from entering all academic and administration buildings and shall be guilty of a disciplinary offence.

<sup>5</sup> See *Hajjah Halimatussaadiah Binti Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 CLJ 532 (SC).

<sup>6</sup> Jennifer Rankin and Philip Oltermann, “Europe’s right hails EU court’s workplace headscarf ban ruling” (14 March 2017) <<https://www.theguardian.com/law/2017/mar/14/employers-can-ban-staff-from-wearing-headscarves-european-court-rules>> (accessed on 03 April 2021).

In Malaysia, the Federal Constitution stresses on the importance of protection of ‘life’, a priceless possession which cannot be made a mockery. In *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal*,<sup>7</sup> the Court of Appeal noted that the word ‘life’ in Article 5(1) is not merely confined to physical existence alone but includes the quality of life such as the protection of one’s honour and dignity. Further, Article 3 of the Constitution deals with Islam as the religion of the federation and the status of Islam in the context of this article is related only to rituals and ceremonies as held by the Supreme Court in *Che Omar bin Che Soh v Public Prosecutor*<sup>8</sup> and *Fatimah Sihi & Ors v Meor Atiqulrahman Ishak and Ors*.<sup>9</sup> Further, article 11(1) of the Constitution guarantees every person has the right to profess and practise his religion. This right however is subject to clause 5 namely that this article does not authorize any act contrary to any general law relating to public order, public health or morality. Therefore, the restriction of an individual to practice his or her religion can only be restricted if it is related to ‘public order, public health or morality’.

In *Fatimah Sihi*’s case, the High Court decided in favour of the pupil who had been unlawfully expelled from school for disregarding the school directive of not to wear *turban*, an Islamic dressed, to school. Mohd Noor Abdullah J held inter alia, that the rule that prohibits the wearing of *turban* was in breach of the provision of the Federal Constitution. The court further stated that Article 3 of the Constitution should be interpreted to mean that the religion of Islam exceeds rituals and ceremonies, and that the Government is given the responsibility to protect and promote Islam as best as it could.<sup>10</sup> On appeal, the Court of Appeal reversed the said decision. It was held that whether or not the wearing of a *turban* formed an integral part of the religion of Islam involved a question of evidence for the respondents to adduce which they had failed in this case.

On a further appeal, the Court of Appeal’s decision was affirmed by the Federal Court.<sup>11</sup> In particular, the Federal Court held inter alia, that: “whether a practice is or is not an integral part of a religion is not the only factor that should be considered. Other factors are equally important in considering whether a particular law or regulation is constitutional or not under Article 11(1) of the Federal Constitution. I would therefore prefer the following approach. First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion. All these having been proved, the court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or ‘an integral part’ of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it”.

It is noteworthy that a veil covering the full face or *niqab* is not allowed among female employees at the workplace based on the decision of the Supreme Court in *Hjh Halimatussaadiah v Public Service Commission, Malaysia & Anor*.<sup>12</sup> The Supreme Court held

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<sup>7</sup> See *Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2002] 3 MLJ 281 at 296, CA.

<sup>8</sup> [1988] 2 MLJ 55, SC.

<sup>9</sup> [2005] 2 CLJ 255, CA.

<sup>10</sup> [2000] 5 MLJ 375.

<sup>11</sup> See *Meor Atiqulrahman Ishak & Ors v Fatimah Sihi & Ors* [2006] 4 CLJ 1, FC.

<sup>12</sup> [1992] 1 MLJ 513.

inter alia, that the prohibition against the wearing of attire covering the face by female civil officers at the workplace does not violate the appellant's constitutional right to profess and practise her Muslim religion. In this case, the appellant, a clerk in the Perak State Legal Adviser's Office, was dismissed after she persisted in wearing the *niqab* at the workplace in contravention of a government circular which prohibited female civil servants from wearing attire covering the face during office hours. The court relied on the opinion of the *Mufti* that Islam does not make it obligatory for a Muslim woman to wear a *niqab*. The court also noted that while Article 11 protects the practice of one's religious belief, Article 11(5) clearly forbids any act which may lead to public disorder, affect public health or public morality. The service circular was issued for the purpose of preserving public order. It is worthwhile noting that the prohibition in *Hjh Halimatussaadiah's* case is only in relation to *niqab* and does not include *hijab*, and hence, no employer should indiscriminately bar a female Muslim employee from wearing *hijab* at the workplace.

It is worth adding that all workers are required to obey the lawful and reasonable orders or instructions of the employer. The employee is not entitled to disobey the order of his superior. In *Tuan Hj Mohd Noor Sandiman v Federal Power Sdn Bhd*,<sup>13</sup> the Industrial Court stated that: "As a subordinate, claimant must realize that it is only with full cooperation and mutual respect that industrial harmony in a workplace can be achieved or maintained. A subordinate should abide by all lawful and reasonable orders or instructions of his employer or superior for otherwise, the smooth operation of an organization may not be sustained". It is submitted that when the superior order touches an employee's dress code which is based on his or her religious belief, the worker may refuse to obey the instruction of the employer. In the foresaid circumstances, should the employer decide to terminate the services of an employee who refuses to wear certain apparel or refrain from wearing certain apparel must show business justification of such requirement. It would be obvious that there would be no valid explanation that the headscarf is a hindrance to work to these workers.

### **Workplace discrimination**

It is worthwhile to consider the workplace discrimination law as it is undisputable that workplace discrimination is a common recurrent in many organisations and sectors. It is noteworthy that when contemplating hiring of workers, the employer would need the best possible candidate and this necessarily requires scrutinising the prospective employee's past experience, his capability in handling a particular job, and his ability of working as a team, among others. There is however no restriction or limitation imposed on a company in advertising a job vacancy on the social media or other publication provided that such invitation must be genuine and not misleading or deceptive and further, not discriminatory to any particular race or religious group. However, refusing to employ a person by reasons of his race, religion or religious attires, discriminating against a prospective employee on the terms and conditions in the offer of employment, and a woman granted maternity leave being excluded when it comes to promotion among others would be contrary to workplace discrimination law.

Workplace discrimination is undoubted a bitter experience that demoralizes workers who normally feel their services to the organisation is not appreciated and this inevitably affects their

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<sup>13</sup> [2008] 3 ILR 382.

work performance. It arises due to several factors such as age, disability, race, religion, national origin, political opinion or affiliation, gender, marital status and sexual orientation, among others. As mentioned earlier, there are many international instruments that promote equal right to both men and women and further, prohibit workplace discrimination such as the UDHR and the CEDAW. Likewise, the ILO has taken proactive measures to eliminate workplace discrimination which mainly is to give effect to the principle that 'poverty anywhere constitutes a danger to prosperity everywhere', in their 1944 Declaration of Philadelphia. The two significant ILO's conventions that addresses on discrimination in respect of employment and occupation are the Convention on Equal Remuneration (No. 100); and Discrimination (Employment and Occupation) Convention (No. 111).

Many countries have enacted workplace discrimination law, for example, the Australian Human Rights Commission Act 1986 prohibits inter alia, discrimination in employment because of a person's religion, political opinion, national extraction, nationality, social origin, medical record, criminal record or trade union activity. In the United Kingdom, the Equality Act 2010 prohibits discrimination by reasons of age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race (including colour, nationality, ethnic and national origin), religion or belief, sex and sexual orientation. Likewise, in New Zealand Human, the Rights Act 1993 prohibits discrimination on a wide variety of grounds in areas of public life including employment.

In Malaysia, the basic concept of equality before the law and equal protection of the law is enshrined in Article 8(1) of the Federal Constitution. The above article generally prohibits discrimination against a person or class of persons unless there is a rational basis for such discrimination. The word 'gender' was inserted into Article 8(2) in order to comply with Malaysia's obligation under the CEDAW, to reflect the view that women were not discriminated. As persons can be classified in many aspects such as age, education, ability and occupation to name but a few, the varying needs of these persons often require separate treatment and hence, the doctrine of classification was held constitutional. In fact, Article 8(2) begins with the preclusion clause of "Except as expressly authorised by this Constitution", which demonstrates that certain kinds of discrimination may be allowed under the express provisions of the Constitution.

In *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Anor*,<sup>14</sup> the Federal Court held inter alia, that Article 8 only addresses the contravention of an individual's rights by a public authority. But when the rights of a private individual are infringed by another private individual, the above constitutional provision will take no recognisance of it. Again, in *Airasia Berhad v Rafizah Shima bt Mohamed Aris*,<sup>15</sup> the Court of Appeal held inter alia, that clause 5.1(4) of the training agreement entered into between the appellant and the respondent which provides inter alia, that the respondent must not get pregnant during the duration of the training period was a lawful contract between private parties and thus, the agreement did not violate Article 8 of the Constitution.

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<sup>14</sup> [2005] 3 MLJ 681.

<sup>15</sup> [2014] MLJU 606.

Apart from Article 8 of the Constitution, an important piece of legislation which prescribes the minimum protection rights to workers in West Malaysia is the Employment Act 1955. The broad purpose of the Act is to protect employees by guaranteeing certain minimum standards in conditions of employment. Parties to an employment contract must abide by the minimum conditions laid down by the Act. This includes the payment of wages, restrictions in the deduction of workers' wages, maternity protection, protection of female workers by prohibiting them from carrying out night work, underground work and in certain places of work, prescribing the rest days in each week, maximum hours of work a day, prescribing public holidays each year, annual leave, sick leave and overtime rates payable for extra hours of work.

The minimum provisions set out by the Act must be complied with and failure to provide any of those benefits is an offence for which an employer can be prosecuted in the 'Labour Court.' Further, the Act provides that any term or condition of a contract of service or of an agreement, which provides a term or condition of service that is less favourable to an employee than a term or condition of service prescribed by the Act, shall be void and of no effect to that extent, and the more favourable provisions of the Act shall be substituted in its place. The Act is applicable to all workers including foreign workers, with the exception of domestic servants. Although that being the case, the Act does not cover an employee whose wages exceed RM2,000 unless they fall within the category of manual labour as provided in the First Schedule of the Act.

The term manual labour involves physical exertion as opposed to mental or intellectual effort. It is not manual labour if the real labour involved is the labour of brain and intelligence. The test to determine whether or not a person is engaged in manual labour would depend on the question what is the substantial or dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment. It is therefore necessary to determine whether the work in question is essentially physical in nature as opposed to work which has a physical or manual content but which is readily dependent upon acquired skill, knowledge or experience. Further, the term 'wages' here does not include any commission, subsistence allowance or overtime pay. With effect from 1 August 1998, persons earning more than RM2,000 but not more than RM5,000 per month who are not manual workers are eligible to seek redress in the 'Labour Court'.

It is observed that the Employment Act does not address on workplace discrimination let alone discrimination on grounds religious attires. In light of the above and with reference to the superior court's decision on gender discrimination in the context of Article 8, it is submitted that Malaysia is in need of a comprehensive anti-discrimination legislation to protect inter alia, workers against discrimination and this necessarily to include on grounds of religion or religious attires. The proposed law should be based on the concept of gender discrimination as defined under the CEDAW and the relevant conventions of ILO. This is aside from the fact that all human beings are born free and equal in dignity and rights as provided in the UDHR. Alternatively, the Employment Act should be amended to include provisions that prohibit all form of workplace discrimination including on grounds of religious attires.

### **Workplace Discrimination Dismissal: The Industrial Court's Approach**

Although there are no awards of the Industrial Court in relation to termination of employment due to the employee's attire, nevertheless it must be noted that the court has insisted, inter alia, that employees must be protected from victimisation, harassment and discrimination. The requirement of *bona fide* is essential in any impending dismissal. The gender discrimination claims can be construed and rationalised through section 20(1) of the Industrial Relations Act 1967. An employee who had been subjected to unreasonable detrimental treatment at the workplace may seek his or her recourse for dismissal without just cause or excuse pursuant to the above section.

Any dismissal tainted with unfair motives, having the element of discrimination, victimisation, capricious or *mala fide* actions that are incorporated under unfair labour practices would come within the scope of the earlier mentioned section.<sup>16</sup> In *Shell Malaysia Trading Co Sdn Bhd v National Union of Petroleum & Chemical Industry Workers*,<sup>17</sup> it was held inter alia, that the company must act in good faith without caprice or discrimination and without any motive of victimisation or intimidation or resorting to unfair labour practice, and there must be no infraction of the accepted rules of natural justice. Further, in *Khariah Abbas v Pesaka Capital Corporation Sdn Bhd*<sup>18</sup> the Court of Appeal held inter alia, that when a termination is found to be a colourable exercise of the power to dismiss or as a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal.

It is observed that from the numerous Industrial Court's awards, the emphases have been that an impending dismissal must be substantively justified which could be based on the conduct, capability, redundancy, breach of statutory duty or some other substantial reason. In determining whether the employer's decision to terminate the employment due to incapacity was fair and reasonable in all the circumstances, a balance has to be drawn between the interests of the employer's legitimate need to run a business on the one hand with the interests of the employee in the continuity of service on the other.

In other words, dismissal should always be a last resort and should not be a colourable exercise of managerial authority to dismiss, or is seen as a result of unfair labour practice or discrimination. Hence, any dismissal due to the failure by the employee to adhere to the company's guidelines, for example, not to wear religious headwear at the workplace, may be contested in the Industrial Court as being without just cause or excuse. If the termination is as a result of religious discrimination, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal. The company must therefore be committed to a discrimination free work environment and must respect their workers attire which is based on its religious belief unless there is a valid basis to insist for its removal such as safety reasons, among others.

## Conclusion

Like many other religious beliefs, Islam placed high regards to individual honour and dignity. Guarding chastity and appropriately dressing for the Muslims is guided by their religious beliefs. The modest dressing for woman has been prescribed in the Quran and at workplaces, they

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<sup>16</sup> *Kamaruddin Abd Rais v. Tasek Corporation Berhad* [2014] 2 LNS 0484.

<sup>17</sup> [1986] 1 ILR 677 (Award No. 134 of 1986).

<sup>18</sup> [1997] 3 CLJ 827.



should be allowed to dress following the religious attires, unless employers have dress code requirements that are suited for the nature of their work or for operational and safety reasons. Any company directive or rule indiscriminately barring Muslim women from wearing *hijab* at the company frontline such as receptionists, servers, waitress or cleaners among others should not be entertained. Some may argue that the prohibition was not discriminatory as it is an international practice. Those who defended the wearing of *hijab* at workplace may state that whatever the international policy may be, it is beyond doubt that the international company should take into account the local religious beliefs and sensitivities. Thus, the compromise here is that women should be allowed to practice their religion freely as per the Federal Constitution without having to choose between having a job or to practice their religion.

It is observed that, the case of *Hjh Halimatussaadiah* is primarily concerned with the prohibition of *niqab* at the workplace, which is based on the government's circular and her dismissal was justified mainly due to preserving public order and safety. The prohibition, however, does not extend to *hijab* that only covers the hair and, as such, Muslim women should be allowed to wear it at work. Any termination from employment which is tainted with unfair motives, having the element of discrimination, victimisation, capricious or *mala fide* actions that are incorporated under unfair labour practices would come within the scope of section 20 of the Industrial Relations Act 1967. Last but not least, Malaysia is in need of a comprehensive anti-discrimination legislation to protect against all forms of discrimination and as in this article, on grounds of religious attires. After all, the woman's dress in the presence of strange men and non-*mahram* relatives is ordained by the divine laws and hence no employer should encroach into their religious practices by imposing restrictions or limitations more so in a country with the majority population being Muslims.