THE GRIFFITH LECTURE 2007

QUEENSLAND CONSERVATORIUM GRIFFITH UNIVERSITY

FRIDAY 16 NOVEMBER 2007

FUNDAMENTAL HUMAN RIGHTS AND RELIGIOUS APOSTASY

The Hon Justice Michael Kirby AC CMG[*]

THE OLDEST HUMAN RIGHT?

Freedom of religion and conscience is possibly the oldest of the internationally recognised human rights.[1] Protection was granted as early as the Peace of Westphalia, signed in 1648, to end the Thirty Year War in Europe. It is now enshrined in a number of international human rights instruments, including the Universal Declaration of Human Rights 1948 ("the UDHR"), art. 18, and the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), art. 18. It is also guaranteed in the constitutions of many nations and in other domestic legislation.

The right to freedom of religion necessarily includes the ability to change one's religion or, as Lionel Murphy often reminded me, the right to throw off religion - freedom *from* religion. The international

---

[*] Justice of the High Court of Australia. The author acknowledges the assistance in the preparation of this lecture of Ms Anna Gordon, Research Officer in the High Court Library.

[1] W Cole Durham Jr, "Freedom of Religion: The United States Model" (1994) 42 *The American Journal of Comparative Law* 617, p 618; A Saeed and H Saeed, *Freedom of Religion, Apostasy and Islam*, Ashgate Publishing Limited, Aldershot, 2004, p 10.

community has thus recognised that religious freedom is a universal feature of human existence that inheres in the inquisitive, reflective, essentially moral character of every human being, everywhere.

Whilst the right to freedom of religion is recognised by states, the universal concept of freedom of religion, and associated freedoms of thought and conscience, do not enjoy an easy relationship with revealed religions. Of its very nature, if a religion is accepted as disclosing an almighty God, deserving of wholehearted and unquestioning faith and obedience, it is difficult for many believers to tolerate the postulate of error: the possibility that another God or earthly messenger may exist, different from their own, or that there may be no God. Upon such central or core ideas, people tend to feel very deeply, sincerely and passionately.

In the Abrahamic religions so it was with the Jews who rejected the polytheism of other more powerful neighbouring communities. So also it was in Christianity, which for centuries killed and oppressed millions who had embraced other faiths or even variants of the Christian belief. My topic, although illustrated by reference to one religious faith, Islam, is not by any means limited to that religion. It is a phenomenon that quite frequently accompanies the conviction and devotion that religious belief tends to occasion in the believers.

Much attention has been given in recent years to the special challenge said to be presented by the resurgence of Islam as a major global religion and to the apparent difficulty of reconciling the universal right to freedom of religion with a supposed tenet of Islamic faith that forbids apostasy, that is, the renunciation or abandonment of the

religion which one was born into, or later came to profess. In some Islamic countries apostasy is a punishable offence. A recent decision of the highest appellate court in Malaysia in the *Lina Joy* case,[2] draws attention to the apparent difficulty of reconciling these concepts. In this sense, the case presents a puzzle that is deserving of attention by Australians living in one of the most diverse, cosmopolitan societies on earth - a land of many religions and in which a majority of the population assigns Christianity as their religion but with an increasing proportion of the population professing no religion at all.

Malaysia is a country with friendly historical, legal and trading relations with Australia. It is a multicultural society and a nation exhibiting many attributes of religious pluralism. About 60% of its citizens embrace Islam.[3] Malaysia considers itself a moderate Muslim state, upholding the basic rights of its diverse population.[4] Although Malaysia is not a signatory to the ICCPR, it has endorsed the UDHR. The right to freedom of religion is expressly provided for in the Federal Constitution of Malaysia.

So this is the setting for the puzzle I will explore. A vibrant and much respected neighbouring country with many links with our own, most precious of all links of friendship and association that go back to

---

2 *Lina Joy v Majlis Agama Islam, WP & Anor* [2007] 3 CLJ 557.

3 M Azam Mohamed Adil, "Restrictions in Freedom of Religion in Malaysia: A Conceptual Analysis with Special Reference to the Law of Apostasy" (2007) 4(2) *Muslim World Journal of Human Rights*, Article 1, p1.

4 Prof K Win, "Is Malaysia a Muslim Example?" *Asian Tribune*, 14 June 2007, http://www.asiantribune.com/index.php?q=node/6159, accessed on 31 July 2007.

the Independence of Malaya, fifty years ago, and indeed much earlier. Many Australians, like myself, have long and enduring friendships with Malaysia and Malaysian colleagues. I therefore approach the story and the puzzle with full respect for Malaysia, its institutions, its people, its achievements and the religion which predominates there - Islam.

THE *LINA JOY* CASE

Lina Joy was born in Malaysia into a Muslim family. At birth, she was given the name Azalina binti Jailani. In 1998, however, she decided to convert to Christianity. She announced her intention of marrying a Christian man. Under the Malaysian *Law Reform (Marriage and Divorce) Act* 1976, she would not be able to contract such a marriage unless her new status as a non-Muslim was recognised.

For these reasons, Azalina applied to the Malaysian National Registration Department ("the NRD") to change her name on her identity card to a Christian name. She was successful in having the name changed to Lina Joy. However, in the year 2000, amendments, which came into force retrospectively, were made to the National Regulations. The amendments required that the identity cards of Muslims should state their religion. Therefore, when Lina Joy received her new identity card, reflecting the change of her name, the word "Islam" still appeared on her card. This defeated the purpose of applying for a change of name. Effectively, it stood as a barrier to her marriage.

Lina Joy therefore applied to the NRD in 2000 to have the word "Islam" removed from her identity card. The NRD rejected her application.

Lina Joy contested the policy of the NRD in the High Court of Malaysia. She raised the administrative law point that, in law, the National Regulations did not, and should not, require an order or certificate of apostasy. More importantly, she argued that the NRD's insistence on its policy infringed her right to freedom of religion under the Malaysian Constitution.

THE MALAYSIAN CONSTITUTION AND ISLAM

In seeking to understand the *Lina Joy* case, it is useful to consider the constitutional context in which the case arose.

Malaysia became a sovereign state on *Merdeka* (or Freedom) from Britain in 1957. The Federal Constitution establishes a parliamentary democracy and federal system of government based on the Westminster model.

The report of the Reid Constitutional Commission, upon which the Constitution had been based, was relatively clear:[5]

> "We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be

[5] *Ibid*, para 169.

> the State religion. There was universal agreement that if any such provision was inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims."

Accordingly, art. 3(1) of the Malaysian Constitution provides that:

> "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

Religious freedom is further strengthened in Malaysia by art. 11(1), which provides that "[e]very person has the right to profess and practise his religion….and to propagate it." However, these entitlements are expressly limited in a number of sections of the Constitution, including art. 11(4). This provides that the states of Malaysia "may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam".

Although, in this way, Islam is declared to be the "religion of the Federation", art. 3(4) specifies that nothing in art. 3 derogates from any other provision of the Constitution. Furthermore, while the Constitution confers a wide discretionary power on state assemblies to legislate on matters regarding the religion of Islam, art. 4(1) declares the Constitution to be the supreme law of the Federation. Ostensibly, it therefore prevails over all other laws.

DECISION OF THE FEDERAL COURT OF MALAYSIA[6]

[6] *Lina Joy v Majlis Agama Islam, WP & Anor* [2007] 3 CLJ 557.

Division in the Court: Upon the rejection of her application by both the High Court[7] and Court of Appeal,[8] Lina Joy appealed to Malaysia's highest court, the Federal Court of Malaysia. In that court, she argued that the requirement that she must obtain the approval of a third party to exercise her choice of religion, was unconstitutional.[9] By a majority of two to one of the judges participating in the appeal, the Federal Court found against Lina Joy. Inevitably, it was noticed that the two majority judges were themselves Muslim and included the Chief Justice of Malaysia. The dissenting judge was a non-Muslim.

The administrative law argument: The majority held that the NRD policy of requiring a certificate of apostasy was lawful. Despite the fact that Lina Joy had provided a statutory declaration to the NRD expressing her decision that she no longer wished to be Muslim and attaching a Christian baptismal certificate, the majority judges declared that "there [was] no conclusive certainty that the appellant no longer professes Islam."[10] Accordingly, the majority concluded that the policy instituted and insisted upon by the NRD, as a public body, was both reasonable and lawful.

In affirming this decision, the majority of the Federal Court of Malaysia in the *Lina Joy* case maintained that the question as to

---

7 [2004] 2 MLJ 119.

8 [2005] 6 MLJ 193. The constitutional issue was not argued before the Court of Appeal.

9 Dawson and Thiru (2007) 16 *Commonwealth Lawyers' Association and Contributors* 54, p 55.

10 At [14] [Unofficial English translation of the majority reasons in *Lina Joy*].

whether Lina Joy was a Muslim or not was a decision exclusively for the Islamic courts. It was not a question for civil courts, except insofar as such courts recognised and upheld the jurisdiction and powers of the *Syariah* courts.

Rewriting the Constitution?: Parallel with these developments has been another of present relevance. This is the elevation by the courts of the status of art. 3(1) of the Constitution. This provides that Islam is the "religion of the Federation". Thus, Justice Faiza Thamby Chik, the judge who presided in the High Court in the first instance hearing of the *Lina Joy* case, held that arts. 3(1) and 11(1) had to be interpreted harmoniously to mean that Islam was:[11]

> "in a special position as the main and dominant religion of the Federation, with the Federation duty bound to protect, defend and promote Islam."

The majority judges in the Federal Court in Lina Joy's case did not refer to the non-derogation clause in art. 3(4), nor to art. 4 which declares the supremacy of the Constitution. Nor did they expressly take into account the constitutional history which suggests that Malaysia was not intended to be a theoretic Islamic state. According to Benjamin Dawson and Steven Thiru, members of the legal team representing Lina Joy, the majority in the Federal Court simply treated the apostasy issue "as an Islamic question simpliciter rather than a constitutional matter."[12] This allowed them to invoke the escape clause committing all such matters to the *Syariah* courts, thereby

---

[11] [2004] 2 MLJ 119 at 144.

[12] Dawson and Thiru (2007) 16 *Commonwealth Lawyers' Association and Contributors* 54, p 59.

denying their own jurisdiction and power to go further and uphold Lina Joy's ostensible constitutional rights.

It would certainly have been more conformable with the way that other final courts have construed appeals to fundamental rights provisions in national constitutions to decide such a case in a way that maintained the predominance of such provisions. In a sense, it would also have been more prudent for the civilian courts to shoulder their responsibility in that way, giving effect to *all* parts of the Constitution.

Assigning the exclusive responsibility to the specialist, religious judges involved no kindness to them. They will submit to civilian power, exercised in the name of the nation and its laws. However, it is sometimes very hard for them to give effect to such laws themselves. In a modern society to ask people of a particular religious conviction to deny publicly a possible tenet of their Faith is often unreasonable, even impossible.

Answering Lina Joy's argument that her right to freedom of religion had been infringed, the majority in the Federal Court adopted an extremely restricted interpretation of art. 11(1). They stated that:[13]

> "The freedom of religion under Article 11 of the Federal Constitution requires the Appellant to comply with the practices or law of the Islamic religion in particular with regards to converting out of the religion. Upon complying with the requirements of the religion and the religious authorities confirming her as an apostate only then can the Appellant profess Christianity. In other words one cannot *at one's whims and fancies* renounce or embrace a religion. When professing a

[13] *Lina Joy* at [14] (emphasis added).

> religion, common sense itself requires him to comply with the laws and practices of the religion."

The dissenting reasons: The dissenting judge in the Federal Court adopted a different approach. Justice Richard Malanjum FCJ, the Chief Judge of Sabah and Sarawak, acknowledged that, underlying the administrative law issue, "[lurk] fundamental constitutional issues involving fundamental liberties."[14]

Justice Malanjum began his analysis by restating the relevant "well-entrenched legal principles which may seem obvious to many yet [are] often overlooked".[15] He dealt with the constitutional position of Islam in the Malaysian Constitution stating that:[16]

> "Article 3(1) of the Constitution placed Islam to a special position in this country. However, Article 3(4) clearly provides that nothing in the Article derogates from any other provision of the Constitution thereby implying that Article 3(1) was never intended to override any right, privilege or power explicitly conferred by the Constitution….Indeed this is consonant with Article 4 of the Constitution which places beyond doubt that the Constitution is the supreme law of this country."

Justice Malanjum concluded that the NRD had acted beyond its powers under the Regulations. No exercise of those powers could be inconsistent with the law of the Constitution. Justice Malanjum also noted that, although art. 121(1A) protects *Syariah* courts in matters

---

[14] *Lina Joy* at 602 [49].

[15] *Ibid* at 602 [50].

[16] *Ibid* at 602 [51].

within their jurisdiction, this does not include interpretation of the Constitution.[17] The judge observed that:[18]

> "when jurisdictional issues arise, civil courts are not required to abdicate their constitutional function. Legislations criminalising apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution are constitutional issues in nature which only the civil courts have jurisdiction to determine."

Justice Malanjum finally stated that "[n]o court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted."[19] He concluded that the NRD's policy, which only applied to Muslims, also violated art. 8(1) of the Constitution which prohibits discrimination on the basis of religion, race, descent or place of birth or gender.[20] Malaysia and Australia are fortunate to have inherited from Britain a precious feature of judicial transparency – the right and duty of judicial dissent.

THE PRACTICAL IMPLICATIONS OF THE DECISION

The punitive consequences: In order to appreciate fully the serous impact on religious freedom in Malaysia occasioned by the decisions in cases such as *Lina Joy*, it is important to notice two significant practical implications that the case bears.

---

17 *Lina Joy* at 613 [83].

18 *Loc cit*.

19 *Ibid* at 619 [102].

20 *Ibid* at 606 [63].

First, apostates in Malaysia are subject to a range of penalties under state legislation. In some states, apostasy is a criminal offence. In the State of Pahang, s 185 of the *Administration of the Religion of Islam and the Malay Custom Enactment* of 1982 (Amendment 1989) provides:

> "Any Muslim who states that he has ceased to be a Muslim, whether orally, in writing or in any other manner whatsoever, with any intent whatsoever, commits an offence, and on conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and to whipping of not more than six strokes."

In other states of Malaysia apostasy is punishable by mandatory detention at a rehabilitation centre for periods of up to three years. During such period, apostates undergo a course of education and, (presumably under this persuasion) they are asked to repent.

The practical impediments: Secondly, if Lina Joy were now to apply to a *Syariah* court for a declaration of apostasy she would face a number of impediments. Islamic principles discourage Muslims supporting or facilitating renunciations of the Islamic faith by other Muslims. Thus, it would be difficult for Lina Joy to find a lawyer, specialising in *Syariah* law, who would be willing to represent her in such a case. She might therefore have to represent herself. Moreover, *Syariah* judges might also find themselves breaching Islamic law if they granted declarations permitting Muslims to leave the religion.[21] The legal representatives of Lina Joy have stated that:[22]

---

[21] Choon, Freedom of Religion Paper, p 349.

[22] B Dawson and S Thiru (2007) 16 *Commonwealth Lawyers' Association and Contributors* 54, p 58.

> "In reality, the prospects of obtaining an apostatisation order is illusory given the general belief that apostatisation is a sin and the Muslim community has an obligation to prevent its adherents from falling into sin."

It follows that obtaining an apostasy order from a *Syariah* court is no mere formality in Malaysia. In a sense, it is akin to the King's "great matter" when King Henry VIII in England sought to secure a divorce from Queen Katherine. For many at the time this was seen as impossible because contrary to God's will, revealed in scripture. Appealing to religious people to be complicit in the divorce imposed unreasonable burdens on their consciences. Some (like Sir Thomas More) were willing to pay for refusal with their lives. The only resolution was the intercession of secular State power, manifested in an Act of Parliament.

The options for Lina Joy: The consequences of these developments is that the only way that Lina Joy could realistically exercise her right to freedom of religion would now seem to be for her to leave Malaysia. In an interview on the ABC's *The Religion Report*, prior to the commencement of the Federal Court hearing, the Chairman of the Christian Federation of Malaysia, Bishop Paul Tan Chee Ing, indicated that the usual advice that he offered to non-Muslims who wanted to marry a Muslim was:

> "if you really want to marry the man or woman, and you don't want to be discriminated, pressured and sometimes persecuted, then you migrate."[23]

---

[23] "Freedom of Religion in Malaysia?" ABC *The Religion Report*, 28 June 2006, <http://www.abc.net.au/rn/religionreport/stories/2006/1673632.htm>, accessed on 9 October 2007.

RESTRICTING THE SCOPE OF FREEDOM OF RELIGION

The emerging doctrine: From what I have said, it will be clear from the *Lina Joy* case (and a number of other similar cases) that the Malaysian judges have given a most restricted scope to freedom of religion. Despite the practical implications, Malaysian civil courts do not consider that the requirement that Muslims obtain an apostasy order from a *Syariah* court, in order to convert from Islam, infringes the right to freedom of religion. A number of recent decisions have indicated that Muslims are not forbidden to renounce Islam so long as the certification precondition is met.[24]

Constitutional law experts in Malaysia similarly argue that punishment and detention for education and "repentance" purposes do not infringe upon an individual's right to religious freedom.[25] In most parts of the world such arguments would, I believe, be rejected out of hand. How can there be true freedom of religion if leaving one religion to join another (or to become a humanist) is fraught with great difficulty or effectively impossible?

Islam and the umma: In order to understand why apostasy is forbidden in Islam and why freedom of religion is interpreted so

---

[24] See *Daud Mamat & Ors v The Government of Kelantan & Anor* Civil Appeal at the Federal Court No. 01-7-2002(D) – 01-10-2002 (D), 21 July 2004; *Kamariah Ali & Ors v The Government of Kelantan & Anor* Civil Appeal at the Federal Court No. 01-11-2002(D) – 01-14-2002 (D), 21 July 2004.

[25] M Azam Mohamed Adil, (2007) 4(2) *Muslim World Journal of Human Rights*, Article 1, p 18.

restrictively, it is important to appreciate the emphasis that is placed in Islamic tradition on the welfare of the *umma*, or community, for which apostasy is treated as relevant.

In contrast to the generally individualist traditions of Western liberal social theory, Islamic tradition presents a communitarian view. It is not unique in this respect. (The Confucian view of society likewise lays emphasis on the community prevailing over the individual.) According to such concepts, the self is realised collectively. It is defined through traditions and concepts of honour. In Islam, individualism must be realised within the *umma*, or community, which is of paramount importance.[26] Accordingly, from a Muslim perspective, the renunciation of the Islamic faith does not simply affect the particular individual concerned. It is harmful to the community as a whole.

Chaos and confusion: Justice Faiza Thamby Chik, the trial judge in the *Lina Joy* case, noted that, if Lina Joy were permitted to renounce Islam without first settling the matter with the religious authorities, it would "create chaos and confusion with the administrative authority" managing Islamic affairs "and consequently the non Muslim community as a whole."[27]

---

[26] D Jordan, "The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence" 9 *Washington & Lee Race & Ethnic Ancestry Law Journal* 55, p57 (2003). See also H Roborgh, "Militant Islam and the Qur'an" (2007) 441 *Quadrant* (Vol L1, No 11) 56 at 58.

[27] [2004] 2 MLJ 119, at 126G para 10; 132I, para 27.

The journey of Christianity: These aspects of Islamic tradition explain the underlying rationale of the Islamic principle forbidding the renunciation of the Islamic faith.

In earlier times Christianity had a very similar approach to apostasy. It was most evident during the bloody wars, forced conversions and burnings of heretics that accompanied the Christian Reformation and Counter Reformation. Because of my family's Ulster origins, I was raised with heroic tales of Archbishop Cranmer, who was burnt at the stake, and the Protestant martyrs, who resisted “Bloody” Mary.

The Roman Catholic Church in my youth in Australia did not permit Protestants to be married in their churches. It required them to “convert” or to be married “behind the altar”. This was Australia only fifty years ago. Partly from exhaustion, partly from practicality, partly from the advance of rational mutual respect, Christians in Australia and most other lands have generally, but not wholly, emerged from such sectarian attitudes. They have generally embraced an acceptance of the tolerance that lies at the heart of the universal right to freedom of religion and the right to change or renounce earlier beliefs. Looking at the issue of apostasy historically, Islam so far, is at an earlier stage of this same journey.

THE KORAN AND FREEDOM OF RELIGION

No compulsion in religion: It is most important for those who support the universality of human rights within Islam that the primary

source of Islamic principles, the Holy Koran, states expressly that "there is no compulsion in religion."[28]

According to many adherents of Islam, the Koran provides that God alone has the right to punish those who do not adhere to the Islamic faith, or those who cease to adhere to the Islamic faith. Certainly, the holy text appears to specify that apostates will be punished with eternal damnation in the afterlife. However, it excludes the involvement of human agency in the punishment of non-believers in this life.[29] Those who support the universality of human rights note that this aspect of the Koran is entirely compatible with modern concepts of human rights.

The foundation of human punishment for apostasy in Islam is essentially found in an interpretation, not of the Holy Koran, but of the *hadith*, or recorded sayings, of the Prophet Mohammed. We have parallel developments in Christianity, based on contested scriptural texts and Church traditions, where the occasion for the rule disappears but the religious tradition lingers on. The *Leviticus* "holiness code" contains many such examples.

---

[28] (2:256). "There is no compulsion in religion. Verily the Right Path has become distinct from the wrong path. Whoever disbelieves in *Tâghût* and believes in Allâh, then he has grasped the most trustworthy handhold that will never break. And Allâh is All-Hearer, All-Knower."

[29] See Shah (2005) 6(1-2) *Asia-Pacific Journal on Human Rights and the Law* 69; D Jordan, "The Dark Ages of Islam: Ijtihad, Apostasy, and Human rights in Contemporary Islamic Jurisprudence" (2003) 9 *Washington & Lee Race and Ethnic Ancestry Law Journal* 55, p 61.

LEGITIMATE RESTRICTIONS ON HUMAN RIGHTS

Restrictions on religious observance: As with many fundamental rights, the right to freedom of religion is not an absolute one in any society. This fact is recognised in the ICCPR. In the case of freedom of religion, a distinction is often drawn between the right to *hold* religious beliefs and the right to *manifest*, or *demonstrate*, those beliefs. The right to *hold* religious beliefs is generally considered as an absolute right. In a sense, no state, no religion and no court can invade the ultimate privacy of the individual human mind and conscience. Even in a solitary prison cell, the mind and conscience belong to the person concerned. Wisely, the Koran recognises this. However, as the right to *practise* one's religion can impinge upon the rights of others, it may sometimes be appropriate to restrict at least some of the manifestation of such beliefs. This will be so as long as the impediments are proportionate, do not erode the basic right and are consistent with the norms of a democratic society.

There have been, in recent years, numerous cases across the world, including in Malaysia,[30] in which courts have upheld rules, policies or laws both upholding and restricting the right to manifest certain Islamic beliefs. Such cases have concerned, for instance, the right of a Muslim woman to wear the Islamic headscarf or similar dress.

The British jihab case: In the United Kingdom, religious freedom is protected in the *Human Rights Act* 1998 (UK). That Act incorporates

---

[30] See *Meor Atiqulraham bin Ishak & Anor. v Fatimah Bte Sihi & Anor* Civil Application No. 01-3-2005 (N) Federal Court, July 12, 2006.

into domestic law the nation's treaty obligations under the *European Convention on Human Rights and Fundamental Freedoms* ("the European Convention").

The case of *R (SB) v Headteacher and Governors of Denbigh High School*[31] concerned the right of a Muslim school girl to wear a *jihab* to school, that is, a full length gown. The school was a public school funded entirely by taxpayer subventions. She attended mixed-sex, multi-community classes. At the relevant time, about four-fifths of the pupils at the school were Muslims. Two thirds of the governing board were Muslims. The head teacher was Muslim. Under the policy of the school regarding uniforms, female pupils were offered three options. One of those options was the *shalwar kameeze*, a combination of a smock dress and trousers. This option had been developed after consultation with parents, pupils, staff and local mosques. The claimant had worn the *shalwar kameeze* for two years. One day she arrived at school in *jihab*. She was not permitted to attend school wearing the *jihab*. In the resulting litigation, she lost the best part of two years' schooling.

The majority of the House of Lords rejected the claimant's argument that her rights under art. 9 of the European Convention (and hence the *Human Rights Act*) had been infringed. They held that this was not the case because the claimant had a choice of alternative schools which she could have attended and where she would have been permitted to wear a *jihab*.[32] Emphasis was also placed on the

---

31 [2007] 1 AC 100; [2006] UKHL 15.

32 At 114 per Lord Bingham of Cornhill.

care with which the school had worked out its uniform policy.[33] A minority in the House of Lords accepted that there had been a likely interference with the claimant's rights. However, they concluded that it was justified in the circumstances.[34]

Comparison between the approaches: There are some similarities between the approach of the House of Lords in the *jihab* case, and the approach of the courts in Malaysia in the *Lina Joy* case. First, both decisions permit restrictions to be placed on individuals based on considerations of the community interest, although for different reasons. Secondly, the courts in both countries defer, to varying degrees, to an authority which they consider to be more qualified on the particular issue.

However, the Malaysian courts went much further in this attitude of deference to religion. In effect, the majority concluded they had no jurisdiction on the matter, even to uphold the Constitution, a civil law document. The House of Lords, on the other hand exercised its jurisdiction. It merely allowed a margin of appreciation to the school board in deciding what policy was appropriate in the particular case.

APOSTASY ISSUES IN AUSTRALIA

Apostasy in refugee cases: Australian courts and tribunals have occasionally addressed the issue of apostasy and its relationship with fundamental human rights. Thus, the question has arisen before

---

33 At 117 per Lord Bingham of Cornhill.

34 At 132 per Baroness Hale of Richmond.

courts and tribunals in the context of applications by persons claiming to be refugees.

In 2006 in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another*,[35] the applicant was a seaman employed by an Iranian shipping line. He applied for a protection visa in Australia, having jumped ship in Port Kembla. The Refugee Review Tribunal did not accept that the appellant was "considered by the Iranian authorities to be an apostate or actively involved in Christianity, prior to his arrival in Australia". It therefore refused to grant him a protection visa. At stake was procedural fairness rather than apostasy as such. The High Court held that the Tribunal had not accorded procedural fairness to the appellant. It sent the case back to be reheard without this disqualifying imperfection in the Tribunal's reasoning.

Differences of judicial views: In 2005, over the dissents of Justice McHugh and myself, the High Court declined to interfere in a case of an Iranian man, who had become a Christian, claiming fear of persecution if returned to Iran. The majority found no error in the attention paid by the Tribunal to the fact that the applicant would be safe in Iran so long as he practised his Christian religion "quietly". The dissentients rejected that requirement as incompatible with the essential entitlements of freedom of religion.

---

[35] (2006) 228 CLR 152.

RECONCILIATION – SOME SUGGESTIONS

Responding to Lina Joy: Against the background of these cases in Malaysia, Britain and Australia, let me return to the issue of apostasy. Rules that prohibit or seriously impede the renunciation of the Islamic faith appear difficult or impossible to reconcile with the right to change one's religion, as freedom of religion is expressed to contemplate in international human rights instruments.

How can these competing world views be reconciled in a way respectful to each? Are we condemned to irreconcilability between a particular religion and the universal human right to freedom of religion to which most countries of the world now adhere - or at least give lip service? Is it fair that Malaysian Islamic adherents may proselytize their religious beliefs in countries like Australia or the United Kingdom but that Christian or Hindu adherents may not do so in Malaysia? Is the only solution for people like Lina Joy to quit Malaysia or to "live quietly" without marriage to her fiancé and put the restrictions down to the stage of history that her country has reached at this time?

Permitting a change of faith: In the Malaysian state of Negeri Sembilan, after an individual applies to a *Syariah* court for a declaration acknowledging the renunciation of Islam, he or she must undergo counselling and education sessions with the *Mufti* for 90 days.

While this is a somewhat lengthy and drawn-out process which delays and clearly impedes the renunciation of Islamic faith, there is obviously much merit in the replacement of punishments with

counselling and the fact that a declaration of apostasy is routinely issued at the end of the process, if the person still does not "repent".

The procedure in Singapore is even more conformable with the fundamental human right at stake. Any such procedural or administrative requirement should surely be, as it is in Singapore, a comparative formality.

Support from Australian Muslims?: In June 2007, Justice David Hodgson, a Judge of Appeal in the Supreme Court of New South Wales, provided a suggestion as to how to encourage legislatures and courts in Islamic countries to alter their views on apostasy. In an article published soon after the decision of the Federal Court of Malaysia, Justice Hodgson noted the doubts raised by the *Lina Joy* case, as to whether Islam is compatible with freedom of religion. He suggested that one possible means of expelling uncertainties on this score, would be for Muslim leaders in Australia, and other countries where their adherents enjoy a very high measure of religious freedom, "to speak firmly and clearly against the denial of religious freedom in countries such as Malaysia."[36] He concluded by stating that, "if they cannot and don't, doubt must remain."[37]

---

[36] "Malaysia's shackles on religious freedom", *Sydney Morning Herald,* 22 June, 2007, <www.smh.com.au/news/opinion/malaysias-shackles-on-religious-freedom/2007/06/21/1182019279687.html> accessed on 13 August 2007.

[37] *Ibid*.

PROTECTING MINORITY RELIGIONS

Protecting minorities – including Islam: It is very important to appreciate that a fundamental objective of a right to freedom of religion, in any society, is the protection of the rights of *minority* religious groups in that society. In most parts of the world today that includes adherents to Islam. In most countries, they remain in the minority. They are, as such, entitled to the benefit of this precious freedom. Rightly, they expect and demand it. Freedom of religion is protected in a limited way under s 116 of the Australian Constitution. Chief Justice Latham stated of this that:[38]

> "…..it should not be forgotten that such a provision as s 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, unpopular minorities."

The situation of Lina Joy provides just such an example of when protection ought to be afforded by courts. On this occasion, in a neighbouring land that we respect and admire, the civil courts did not uphold the supremacy of the constitutional right to freedom of religion. In harsh theocratic countries, with autocratic regimes, backward economies and intolerant traditions we would not be surprised. It would hardly raise an eyebrow. It would be of little or no interest. But with Malaysia we share a deep historical link. It is reinforced in a shared legal and judicial tradition.

---

[38] *Ibid*. at 124.

Learning from each other: The case of *Lina Joy* has therefore come to us in Australia as a surprise. We are entitled to express our concern about it. In today's world, no land is an island entire unto itself. We have our own faults and Malaysia should, and sometimes does, point them out to us. We can all learn from each other. We know that the one universal principle that is shared by all the world's great religions is the Golden Rule. To do unto others as we would wish them to do unto you and yourselves.

Dr Thio Li-ann, an Associate Professor at the National University of Singapore, commenting on the *Lina Joy* case in one of the most telling criticisms of the earlier decisions, pointed out:[39]

> "There is a certain agony about this case which at its heart concerns a woman who wishes to make a change in religious profession and to marry and have a family. Lina Joy is not a religious provocateur out to defame or denigrate a religion which is constitutionally recognised; she is simply a person who wishes to marry and lead a quiet life, which the current legal regime poses obstacles to."

When I read this critique I applauded the wise words in which Dr Thio expressed her views. Imagine my disappointment soon after to read the *Hansard* record of the same Dr Thio's remarks, not one year subsequently, as a Nominated Member of the Parliament of Singapore opposing proposals (drawing some support from recent observations

---

[39] L Thio, "Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation" [2006] 2 *The Malayan Law Journal Articles* 1, p 8.

of Lee Kwan Yew no less) that the criminal laws of Singapore against homosexual men, inherited from Britain, should at last be repealed[40].

Making her contributions on penal reform for homosexuals from a standpoint as a Christian believer, Dr Thio rallied the opposition to enlightened and long overdue reform proposal.[41] Her speech on this topic was full of partisan rhetoric.

She denounced what she described as "the sexual libertine ethos of the wild, wild West"[42]. She protested that "religious views are part of our common morality". She declared "you cannot make a human wrong a human right". She said "there are no ex-Blacks but there are ex-gays". (Well, there aren't many of them. Those that exist are mostly in denial to please people like Dr Thio.) She threw in the usual confusion of homosexuality with "bestiality, incest, paedophilia".[43] She denounced gays declaring that "[w]hilst we cherish racial and religious diversity, sexual diversity is a different kettle of fish. Diversity is not a license for perversity".[44] She asserted that "[h]edonism … breeds narcicism" and that "some desires are undesirable, harming self and society". She defended the present law of Singapore criminalising homosexual men because the Bible and

---

[40] Penal Code of Singapore, s 377A. This provision remains in force in most countries of the Commonwealth of Nations. It has never existed in Indonesia, the world's most populous Muslim country.

[41] Speech, Singapore Parliament, Debates on the Penal Code Revision Bill, 22-23 October 2007.

[42] *Ibid*, speech of Dr Thio Li-Ann, Nominated Member, p 2.

[43] *Ibid,* p 4.

[44] *Ibid*, p 5.

Koran declared "homosexuality morally deviant".[45] She warned, in borrowed words, against "slouching back to Sodom". She denounced making "a mockery of strong family values".[46]

We have all heard all this type of language from religious zealots in Australia. Fortunately, recent evidence suggests that we are growing up. We are throwing off such infantile, ignorant and unkind notions which seem so alien to the essence of true religion.[47]

Truly universal mutual respect: My point is that it is not good enough for Christians, or people of the Christian tradition, to be selective about tolerance and acceptance. We cannot selectively denounce Islam for its views on apostasy but then do equally nasty and cruel things to others, at home or elsewhere, by invoking imperfect understandings of our own religious tradition and texts.

In Australia, at least, we must be truly committed to the principle of mutual respect and acceptance that lies at the heart of the world-wide movement for the protection of fundamental, universal human rights.

---

45 *Ibid*, p 7.

46 *Ibid*, p 8.

47 Roy Morgan Poll Data in Australia. See M Coultan, "Forget Tradition, We're Ready to Take More Risks", *Sydney Morning Herald*, 6 November 2007, p 7; P Maley “Christian support for gay couples” in *The Australian*, 12 November 2007, p 4. The position in Thailand, a Buddhist nation, may be contrasted. See *The Nation*, (Bangkok), editorial, “Towards equality for the “third sex”, 4 November 2007, p A4.

Professor Thio, the champion of Lina Joy, temporarily succeeded in the Singapore Parliament in maintaining the dark side for homosexual men. Like many, she is selective in the causes of human rights and law reform that she embraces. We, in Australia, must not be. But we need Islamic friends who will stand shoulder to shoulder with us in the cause of mutual respect and in advocating fundamental rights for all. By that I mean all. For women. For Islamic Australians. For people of all religions or of no religion. For gays and other minorities.

A promising interfaith initiative: A good indication that we can make a difference, creatively, in our diverse Australian society came earlier this month with an announcement in Melbourne. The Australian Catholic University[48] stated that it would launch the world's first professorial chair in Muslim-Catholic relations.

A Turkish Interfaith group has paid the first of five annual instalments of more than half a million dollars to fund the Fetullah Gulen Chair of Islamic Studies. The funds for the chair have been provided by members of the Australian Turkish community. It is intended to concentrate on religious rather than political Islam.

In my view, we in Australia are well placed to contribute to dialogues of this kind. It demands much more than tribal loyalties and partisan conflict. I saw those features in the Protestant-Catholic sectarianism in my youth in Australia. I have grown up. Australia has

---

48 B Zwartz, "Interfaith Chair at Catholic University a World First", *The Age* (Melbourne), 7 November 2007, p 8.

matured. So, change *can* happen. People of religious faiths can learn from each other. They can also sometimes learn from humanists of no religious faith. The human species is genetically programmed to prefer the rational over the irrational, science over dogma, love for one another over hate. Putting it bluntly, the alternative is the risk of mutual extinction.

Not whims or fancies but rights: Universal human rights afford common ground for us all to join together on a shared platform. Such rights are needed to permit each and every one of us to fulfil ourselves as our unique human natures, intelligence and moral sense demands. For Lina Joy and her fiancé this means the freedom to worship together as they believe, and to marry and live, in their own country. For the homosexual man in Singapore, it means freedom from the fear of harassment and humiliation by antique criminal laws. For the Aboriginal child born today in Australia, it means an expectation of truly equal opportunities with the rest of us in this much blessed country.

Lina Joy should have our support. She should have it, not because she is a Christian. Nor because she is seen by some as someone striving to enjoy conventional family values. She should have our support because she is a human being standing up for the integrity of her basic rights. Those rights are not, as the majority judges in Malaysia said of her case, her "whims and fancies". They are precious manifestations of deep-seated human feelings that express part of the very essence of what it is to be a human being. As such, people everywhere should support Lina Joy. Universal human rights, you see, are awkward. They exist in people who are not exactly like ourselves. All people. Australians and Malaysians. Christians

and Muslims. People of other faiths and of no faith. Fair and dark. Rich and poor. Straight and gay.

THE GRIFFITH LECTURE 2007

QUEENSLAND CONSERVATORIUM GRIFFITH UNIVERSITY

FRIDAY 16 NOVEMBER 2007

FUNDAMENTAL HUMAN RIGHTS AND RELIGIOUS APOSTASY

The Hon Justice Michael Kirby AC CMG