# RELIGIOUS CASES IN THE MALAYSIAN COURTS[1]

by

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"In a multi-racial and multi religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion – so that nobody reading our judgement with our name deleted could with confidence identity our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot."

Tun Mohamed Suffian Lord President, *Braddel Memorial Lecture (1982)*[3]

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[1] This paper seeks to ascertain the role of the Malaysian Judiciary in constitutional rights cases, the propriety and effect of certain Malaysian court decisions on religious apostasy and the reforms that ought to be made to resolve the uncertainties created by the said court decisions

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[3] The Constitution of Malaysia, F A Trindale and H P Lee (1986), pp. 200, 216

## The Role of the Judiciary in Constitutional Rights Cases

The Judiciary is the only branch of Government whose pronouncements on a written constitution is authoritative. Thus, this great power must be exercised with delicate certainty, for it affects not only the Malaysia of today, but the posterity of this great nation.

A Judge's Oath of Office and Allegiance in the Sixth Schedule of the Federal Constitution ("**the Constitution**") call for his allegiance to "*preserve, protect and defend*" the Constitution.

Thus, in all cases of constitutional interpretation in Malaysia, the above remains paramount; the Constitution must always be preserved, protected and defended by the Judiciary.

"Preserve" necessitates a Judge to always have sight of the history which wove the Constitution; the intention of the framers of the Constitution and the founding generation, when ascertained, must be taken into account when interpreting the Constitution[4]. A notable external aid to interpretation is the

[4] *Moses Hinds and others v The Queen* [1976] 2 WLR 366 at 371G, PC*; Minister of Home Affairs v Collins Macdonald Fisher* [1979] 2 WLR 889 at 895E – F, PC

Reid Commission Report where the following was expressed by the framers of our Constitution:-

> "In making our recommendations we have had constantly in mind two objectives; first that there must be *the fullest opportunity for the growth of a united, free and democratic nation*, and secondly that there must be every facility for the development of the resources of the country and the maintenance and *improvement of the standard of living of the people*."[5] [Emphasis added]

"Protect" enjoins a Judge to ensure that the other two branches of Government – the Legislature and the Executive - do not act in disregard or in defiance of the Constitution[6].

While "Defend" calls for a Judge to hear and determine constitutional disputes whenever they arise before a competent court[7].

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[5] *Report of the Federation of Malaya Constitutional Commission 1957*, p. 8 (para 14)
[6] *Lim Kit Siang v Dato' Seri Dr. Mahathir Mohamad* [1987] CLJ (Rep) 168 at 169d – e, SC
[7] *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at pp. 113A – E left and 113B – C right, FC; *Nordin Bin Salleh v Kerajaan Negeri Kelantan & Anor.* [1993] 4 CLJ 215 at p. 221d – f left, SC

The task of the courts, when deciding a case involving constitutional rights, was crisply stated by the Privy Council[8] in *Reyes v The Queen*[9]:-

> "**26** When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not…As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. *A generous and purposive interpretation is to be given to constitutional provisions protecting human rights*. *The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society*... In carrying out its task of constitutional interpretation the court is *not concerned to evaluate and give effect to public opinion*…" [Emphasis added]

[8] The Judicial Committee of The Privy Council (JCPC) is the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee (https://www.jcpc.uk)

[9] [2002] 2 WLR 1034

In substance, what the court must consider is whether the State action *directly affects* a constitutional right or its *inevitable effect or consequence* on the constitutional right is such that it makes its exercise ineffective or illusory. The motives, intentions and political necessities of the legislature and the propriety or expediency of the law are *irrelevant* to the question of a law's constitutional validity. The court is strictly to be concerned with the impugned law's *effect* on the constitutional right[10].

**1983: *Abdul Rahim Bahaudin***: *Muslim law cannot be applied to those not considered "Muslim" by the State*

The case of *Abdul Rahim Bin Haji Bahaudin v Chief Kadi, Kedah*[11] was decided in 1983 by the High Court at Alor Setar, Kedah.

Abdul Rahim applied for judicial review to prohibit the Chief Kadi of Kedah from hearing four Muslim offence cases against him in the Syariah court. The offences concern Abdul Rahim's distribution of religious pamphlets and documents relating to the Ahmadiyya Muslim Jema'at[12]; an offence under the

[10] *Dewan Undangan Negeri Kelantan & Anor. v Nordin Salleh & Anor.* [1992] 1 CLJ 72 (Rep) at 82b, 86i – 87a and 80f – h, SC; *Moses Hinds and others v The Queen* [1976] 2 WLR 366 at 374G, PC

[11] [1983] 2 MLJ 370

[12] A reformist sect of Islam founded in 1889 by Mirza Ghulam Ahmad in Qadian, Punjab, India (https://www.alislam.org/introduction/index.html); The Rules and Regulations of Tahrik Jadid Anjuman Ahmadiyya defines 'an Ahmadi' as "…a Muslim who believes in all the principles and tenets of Islam as pronounced by the Holy Qur'an and the Holy Prophet Muhammad, peace and

now repealed section 163(1) of the Administration of Muslim Law Enactment 1962 of Kedah[13].

Abdul Rahim had publicly declared and embraced the Ahmadiyya sect in 1970. In 1981, a *fatwa* issued by the Majlis Ugama Islam of Kedah was gazetted. The said *fatwa* says that whosoever believes in the teachings of the Ahmadiyya sect is an apostate.

Abdul Rahim's only ground for the judicial review was that: as he is a follower of the Ahmadiyya sect and the Majlis says that he is not a Muslim, therefore the Majlis Ugama Islam and the Syariah courts have no jurisdiction to try him.

Without any compunction, Justice Mustapha Hussain held:-

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blessings of Allah be upon him, and who believes Hadrat Mirza Ghulam Ahmad (peace be upon him) of Qadian to be the Promised Messiah and Mahdi as prophesied by the Founder of Islam Hadrat Muhammad, and who in all controversial issues accepts his interpretation of Islam as the only true interpretation and believes in the institution of Khilafat and owes allegiance to the current Hadrat Khalifatul Masih, Supreme Head of the Worldwide Ahmadiyya Muslim Community."

[13] (1) Whoever shall print, publish or distribute for sale or otherwise, or whoever shall have in his possession any book or document giving or purporting to give instruction or rulings on any matter under the Muslim Law shall, if such book or document contains any matter contrary or repugnant to the belief of Ahli Sunnah Waljama'ah or to the tenets of Shafie, Hanafi, Maliki or Hambali sects or to any lawfully issued Fetua, shall be guilty of an offence punishable with imprisonment for a term not exceeding six months or with a fine not exceeding five hundred dollars. (http://tinyurl.com/pljsbzf)

> "This Application is made to the High Court under s.25(2) of the Courts of Judicature Act 1964 where the High Court in its exercise of the powers of issuing prerogative writs can, in suitable cases and *in particular for the protection of fundamental liberties enshrined in Part II of the Federal Constitution*, issue orders against any person or authority.
>
> The Kedah State Administration of Muslim Law Enactment 9 of 1962, section 41(3)(a) and (b) conferred a jurisdiction to the Kadi's or the Syariah Court *only to Muslims. This means that non-Muslims, (and the Applicant is a non-Muslim as declared by the Majlis itself,) are outside the jurisdiction of the Majlis and its Syariah Courts*.
>
> This being so, the Application is therefore allowed."[14] [Emphasis added]

Justice Mustapha Hussain protected and defended the Constitution. His Lordship recognised that to impose Muslim law on a person declared not to be a Muslim would directly affect that person's constitutional rights; he would not be able to profess, practise and propagate his religion, guaranteed by article 11(1). A relief from the High Court was therefore necessary.

Most admirably, Justice Mustapha Hussain's 1983 decision stands consistently with the 2014 Supreme Court of Pakistan's decision in *Suo Motu Case No 1 of 2014*[15] which held:-

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[14] *Supra*. n. 11, p. 371
[15] [2015] 2 LRC 583

"By freedom of religion and belief is meant the right of a person to follow a doctrine or belief system which, in the view of those who profess it, provides spiritual satisfaction. However, it is impossible to define the term 'religion' in rigid terms. The freedom of religion must then be construed liberally to include freedom of conscience, thought, expression, belief and faith. Freedom, individual autonomy and rationality characterise liberal democracies and the individual freedoms thus flowing from the freedom of religion *must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as a community-based freedom*.

…

The right to profess and practise is conferred not only on religious communities but also on every citizen. What this means is that every citizen can exercise this right to profess, practise and propagate his religious views, even against the prevailing or dominant views of its own religious denomination or sect. *In other words, neither the majority religious denominations or sect nor the minority religious denomination or sect can impose its religious will on the citizen*. Therefore, not only does it protect religious denominations and sects *against each other* but *protects every citizen against the imposition of religious views by its own fellow co-believers*."[16] [Emphasis added]

[16] *Ibid*. [13] & [15](c)

**1988: *Che Omar bin Che Soh***: *Secular law, where morality not accepted by the law is not enjoying the status of law*

On 29-2-1988, a 5-Judge[17] Supreme Court decided *Che Omar bin Che Soh v Public Prosecutor* & *Wan Jalil Bin Wan Abdul Rahman & Anor v Public Prosecutor*[18].

The appellants there, facing the death penalty, raised an *additional* legal argument in their Supreme Court appeals which had constitutional ramifications.

They argued that since Islam is the religion of the Federation (art. 3(1)), and since the Constitution is the supreme law of the Federation (art. 4(1)), the mandatory death sentence for the drug trafficking offence and for the offence under the Fire Arms (Increased Penalties) Act, not being a "*huddud*" or "*qisas*" according to Islamic law, is contrary to Islamic injunction and is therefore unconstitutional.

The Lord President, Tun Salleh Abas, began by first asking:-

[17] Salleh Abas (Lord President), Wan Suleiman, George Seah, Hashim Yeop A Sani & Syed Agil Barakbah SCJJ
[18] [1988] 2 MLJ 55

> "The first point to consider here is the meaning which could be given to the expression "Islam" or "Islamic religion" *in Article 3 of the Constitution*. If the religion of Islam *in the context* means only such acts as relate to rituals and ceremonies, the argument has no basis whatsoever. On the other hand, if the religion of Islam or Islam itself is an all-embracing concept, as is normally understood, which consists not only the ritualistic aspect but also a comprehensive system of life, including its jurisprudence and moral standard, then the submission has a great implication in that *every law* has to be tested according to *this* yard-stick."[19] [Emphasis added]

His Lordship found that this issue ought to be resolved by tracing "the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century." His Lordship crisply detailed the history:-

> "Before the British came to Malaya, which was then known as Tanah Melayu, the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law. Under such law, the sultan was regarded as God's vicegerent (representative) on earth. He was entrusted with the power to run the country in accordance with the law ordained by Islam, i.e. Islamic law and to see that law

[19] *Ibid*. 55I right – 56B left

was enforced. When the British came, however, through a series of treaties with the sultans beginning with the Treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, viz. the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. *By ascribing sovereignty to the ruler, i.e. to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat.* Although theoretically because the sovereignty of the ruler was absolute in the sense that he could do what he likes, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of "advice" to rule the country as it saw fit and rendered the position of the ruler one of continuous process of diminution. For example, the establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the ruler's plenary power to such an extent that Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. *Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of*

*secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only*."[20] [Emphasis added]

His Lordship then concludes as follows:-

"In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" *in the context of Article 3*. *If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void*. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

It would thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking, or any other offence, will be void as being unconstitutional."[21] [Emphasis added]

His Lordship then visits the primary submissions made by counsel and refutes them:-

[20] *Ibid*. 56F left – F right
[21] *Ibid*. 56G - I right

> "It is the contention of Mr. Ramdas Tikamdas that *because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles* and Mr. Mura Raju, in addition, submitted that, *because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law*. Needless to say that this submission, in our view, will be *contrary to the constitutional and legal history of the Federation* and also to the Civil Law Act which provides for the reception of English common law in this country."[22] [Emphasis added]

The Lord President then states the need for judges to remain true to the law and indifferent to their personal feelings:-

> "There is of course no need for us to go further than to say that the standard of justice naturally varies from individual to individual; but the *only* yardstick that the court will have to accept, apart from our personal feelings, is *the law that was legislated by Parliament*.
>
> …However, *we have to set aside our personal feelings* because the law in this country is still what it is today, *secular law, where morality not accepted by the law is not enjoying the status of law.*"[23]

[22] *Ibid*. 57A - C left
[23] *Ibid*. 56D – G left

The 5 Judges preserved and defended the Constitution. They did not steer away from the *additional* legal argument despite its potential for public controversy. Instead, they went on to recognise *Democracy*, and not theocracy, in Malaysia; that morality, for it to have any effect on Malaysians, must first receive democratic deliberation; that morality must first translate to the law. And when such laws have been made, it is those laws and only those laws that Judges must accept; their personal feelings should remain irrelevant.

**1989: *Jamaluddin Othman***: *…the alleged conversion of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country*

In 1989, a 3-Judge[24] Supreme Court decided *Minister for Home Affairs, Malaysia & Anor. v Jamaluddin Othman*[25]. It was a case which had undertones of religious apostasy.

[24]Abdul Hamid Omar LP, Hashim Yeop Sani CJ (Malaya) & Ajaib Singh SCJ
[25] [1989] 1 CLJ (Rep) 105

Jamaluddin Othman was subject to preventive detention by the then Minister of Home Affairs[26] under the now repealed Internal Security Act 1960. The ground for his detention was:-

"**Alasan-Alasan Untuk Perintah Tahanan**

Bahawa kamu, Jamaluddin bin Othman @ Yeshua Jamaluddin, sejak tahun 1985 hingga ditangkap pada 27 Oktober 1987, telah melibatkan diri dalam satu rancangan untuk menyebarkan agama Kristian di kalangan orang-orang Melayu. Kegiatan kamu itu boleh mendorong kepada timbulnya suasana ketegangan dan permusuhan di antara masyarakat Islam dengan masyarakat Kristian di negara ini dan boleh memudharatkan keselamatan negara."[27]

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[26] Mahathir Mohamad (https://en.wikipedia.org/wiki/Ministry_of_Home_Affairs_(Malaysia))

[27] "Jamaluddin Othman @ Yeshua Jamaluddin, a Malay who converted to Christianity and subsequently became Pastor of the Fellowship of Indigenous Christians in Selangor, arrested on 27 Oct 1987

His interrogators stripped him naked and forced him to enact the crucifixion of Jesus Christ. As he was made to crawl naked on the floor, for 10 minutes, one Inspector Yusoff told several other Special Branch officers in the room, "Ini orang Melayu tak sedar diri."

He was not allowed sleep for days at a stretch and was warned that he would not be fed unless he co-operated. The same Inspector Yusoff also threatened to "disturb" his girlfriend if he did not divulge the information they demanded. Inspector Yusoff and two other Inspectors, Zainuddin and Ayub, assaulted him on several occasions, causing him to injure his back and pass out blood in his urine.

At one stage of interrogation, he was made to stand for two hours on one leg with both arms outstretched holding his slippers. A woman constable and her young daughter were brought in to watch him while a police constable said, "Ini Melayu tak sedar diri, tukar agama, tak malu." Jamaluddin was also coerced to convert back to Islam.

"I got the clear impression that all my interviews with the Special Branch was for the purpose of getting me to change my religion from Christianity to Islam," he told the Supreme Court."

"*Abuse of Power under the ISA*", P. Ramakrishnan, 8-12-2001 (http://aliran.com/archives/monthly/2001/11d.html)

In short, Jamaluddin Othman was alleged for participating in a plan or programme to propagate Christianity amongst Malays.

There were 5 factual allegations made against Jamaluddin Othman in support of the said ground. The first allegation concerned participation in a group (in November 1985) at the First Baptist Church, Jalan Pantai, Petaling Jaya called the "Philip Cheong's Group" said to be formed for the purpose of spreading Christianity among Malays. The second, third and fifth allegations concerned participation (in 1986) in a "khemah kerja" (work camp) and participation in a "seminar on Islamic consultation' (in Singapore). The fourth allegation alleged that the respondent converted into Christianity six Malays.

Jamaluddin Othman applied to the High Court[28] for a writ of habeas corpus[29]. His primary contention was that his "detention is bad in law in that it is inconsistent with the provision of Article 11 of the Constitution"[30]. The Senior Federal Counsel[31], who appeared for the Minister of Home Affairs, argued "that the order of detention is necessary to prevent an act prejudicial to the security of the country. The Minister having been satisfied that [Jamaluddin Othman's]

[28] Anuar Zainal Abidin J (later Chief Judge (Malaya))
[29] By this writ, the court directs the person or authority who has detained another person to bring the body of the prisoner before the court so as to enable the court to decide the validity, jurisdiction or justification for such detention
[30] *Jamaluddin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1989] 1 CLJ (Rep) 626 at 627i, HC
[31] Mohd. Raus bin Sharif (now President of the Court of Appeal)

act is prejudicial to the security of the country, that decision…cannot be challenged in Court"[32].

Justice Anuar Zainal Abidin in allowing Jamaluddin Othman's application held:-

> "Under Article 149 of the Constitution any provision in the Internal Security Act designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with any provision of Articles 5, 9 or 10 of the Constitution. It is therefore clear that any provision in the Internal Security Act which is inconsistent with the provision of Article 11 of the Constitution shall not be valid.
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> The Minister has issued an order of detention under s. 8(1) of the Internal Security Act. Section 8(1) reads as follows:
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> > 8. (1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order.

[32] *Supra*. n. 30, p. 628e – f

directing that that person be detained for any period not exceeding two years.

The power given to the Minister under this section is wide. However it must be exercised within the scope provided under Article 149 of the Constitution.

Although under s. 8(1) of the Internal Security Act the Minister may detain a person with a view to preventing that person from " acting in any manner " prejudicial to the security of Malaysia, *I am of the view the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under Article 11 of the Constitution*. If the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of Article 11 and therefore any order of detention would not be valid."[33] [Emphasis added]

On appeal, the Supreme Court *unanimously* affirmed the High Court's decision with the following being expressed by Hashim Yeop Sani CJ (Malaya):-

"The sum total of the grounds for the detention was therefore the supposed involvement of the respondent in a plan or programme for the dissemination of Christianity among Malays. It is to be observed that the grounds do not however state that any actions have been done by the respondent except **participation**

[33] *Ibid*. 628a – e

in meetings and seminars and that the fourth allegation alleged that the respondent converted into Christianity six Malays.

We do not think that mere participation in meetings and seminars can make a person a threat to the security of the country. *As regards the alleged conversion of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country*."[34] [Emphasis added]

Both the High Court and the Supreme Court preserved, protected and defended the Constitution. They recognised the fundamentality of freedom of religion for all Malaysians; that this freedom cannot be violated even through laws against subversion and organised violence[35]. They prevented the Executive from denying Jamaluddin Othman of his personal liberty because of his religious profession. And they were entirely undeterred in determining the case in accordance with law despite its potential for public controversy.

**1991: *Dalip Kaur***: *If there are clear provisions in the State Enactment the task of the civil court is made easier when it is asked to make a declaration whether such person is or is not a Muslim under the Enactment*

[34] *Supra*. n. 25, p. 107c – d

[35] Permitted by article 149 of the Constitution. This article permits Parliament to make laws "designed to stop or prevent" subversion of Government and organized violence which may violate a citizen's personal liberty, freedom of movement, freedom of speech, assembly & association and rights to property. The now repealed Internal Security Act 1960 was one such example and so is the Security Offences (Special Measures) Act 2012 currently in force.

In 1991, the Supreme Court decided *Dalip Kaur Gurbux Singh v Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor*[36]. The 3-Judge[37] Supreme Court had to decide an appeal which concerned religious apostasy.

Dalip Kaur sought a declaration that her deceased son, a resident of Kedah who had converted to Islam, was not a Muslim at the time of his death. The High Court[38] had rejected evidence that the son had become a Sikh again before his death, and dismissed Dalip Kaur's application.

On appeal, Hashim Yeop A. Sani CJ (Malaya) and Harun M. Hashim SCJ formed the majority of the Supreme Court ("**the Majority Judges**") while Mohd. Yusoff Mohamed SCJ wrote a concurring judgment (dismissing the appeal but for different reasons) ("**the Concurring Judge**").

The Majority Judges did not dismiss the appeal on the basis that the Supreme Court had no jurisdiction to decide the matter, but dismissed it on the basis that "the trial Judge who saw and heard the witnesses and made an assessment on the credibility and weight of evidence before him"…"did not misdirect himself in law or in fact"[39].

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[36] [1991] 1 CLJ (Rep) 77
[37] Hashim Yeop Sani CJ (Malaya), Harun Hashim & Mohd. Yusoff Mohamed SCJJ
[38] Abdul Hamid Mohamed JC (later Chief Justice). See also: *Lim Chan Seng v Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain* [1996] 3 CLJ 231 at pp. 246i & 254i – 255d, HC
[39] *Supra*. n. 36, p. 84g

The Majority Judges were appraised of sections 139 to 141 of the Administration of Muslim Law Enactment (Kedah) 1962 ("**Kedah Enactment**") on conversions *into* Islam; a matter within the *administrative* purview of the Majlis Agama Islam.

They however found that "[t]here is no provision in the [Kedah Enactment] for converts to leave Islam"[40]. They then lamented that "clear provisions should be incorporated in all the State Enactments to avoid difficulties of interpretation by the civil Courts. This is particularly important in view of the amendment to Article 121 of the Federal Constitution made by Act A704 of 1988. The new Clause 1A of Article 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil Courts in respect of matters within the jurisdiction of the Syariah Courts. But that clause *does not take away the jurisdiction of the civil Court to interpret any written laws of the States enacted for the administration of Muslim law*"[41].

They contemplated that "[i]f there are clear provisions in the State Enactment the task of the civil Court is made easier when it is asked to make a declaration relating to the status of a person whether such person is or is not a Muslim under the Enactment"[42].

And with utmost honesty they suggested that "[a] clear provision can for example be in the form of a provision imposing obligation on the relevant

[40] *Ibid*. p. 83e
[41] *Ibid*. p. 83g
[42] *Ibid*. p. 83h

authority to keep and maintain a register of converts who have executed a deed poll renouncing Islam"[43].

On the other hand, the Concurring Judge stated:-

> "It is apparent from the observations made by the [High Court] that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law.
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> …
>
> Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
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> …
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> In this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the Syariah Court."[44] ("**the *Obiter* passage**")

However, the above passage is *obiter dicta* i.e. a non-binding opinion. It is *obiter dicta* for three (3) reasons:-

i. The Majority Judges were clear in their finding that there is no provision in the Kedah Enactment for converts to leave Islam[45];

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[43] *Ibid*. p. 83i
[44] *Ibid*. p. 85h – 86a
[45] *Ibid*. p. 83e

ii. Section 37(4) of the Kedah Enactment itself stipulates "[i]f in any Civil Court any question of Muslim law falls for decision...the question shall be referred to the *Fetua Committee* which shall…give its opinion thereon and certify such opinion to the requesting court"[46]. This request was in fact made by the High Court in *Dalip Kaur*[47]; and

iii. The Concurring Judge *did not decline* to hear the appeal for lack of jurisdiction but went on to *dismiss* the appeal with the primary reason being "[t]he [High Court] after receiving the fatwa from the Fatwa Committee confirmed his earlier findings and decisions", and as a result "[the appellant's counsel's] application to reopen the case on different issues cannot be allowed"[48].

Poor Dalip Kaur may not have gotten the relief (or closure) she wanted, but justice still prevailed. It must be remembered that the *civil* Supreme Court *heard and determined the appeal* and found that, based on evidence, Dalip Kaur's son had died as a Muslim. The Judges *did not decline* to hear the appeal for lack of jurisdiction or direct the dispute elsewhere. They defended the Constitution.

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[46] (http://tinyurl.com/pvmuag3)
[47] *Supra*. n. 36, p. 86e
[48] *Ibid*. p. 86e

**1999: *Soon Singh***: *The erroneous proposition that "…**all** State Enactments and the Act expressly vest the Syariah courts jurisdiction to deal with [religious apostasy]"*

In 1999, a 3-Judge[49] Federal Court unanimously decided *Soon Singh Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor*[50]. It was the apex court's next brush with religious apostasy.

Soon Singh converted to Islam in Kedah and subsequently renounced Islam. He sought in the Kuala Lumpur High Court[51] a declaration that he was no longer a Muslim.

The *Obiter* passage in *Dalip Kaur* was considered by the High Court and it dismissed the application on the ground that the subject matter in the application fell within the jurisdiction of the Syariah courts. The High Court seemed to have either forgotten or ignored the fact that the Supreme Court in *Dalip Kaur* did not decline jurisdiction to the Syariah court.

On appeal, the Federal Court made the following *finding of law* that was, with the greatest of respect, patently and manifestly erroneous:-

[49] Eusoff Chin (Chief Justice), Lamin Mohd Yunus (President of the Court of Appeal), Mohamed Dzaiddin (Federal Court Judge)
[50] [1999] 2 CLJ 5
[51] Wan Adnan bin Ismail J (later CJ (Malaya))

> "Thus, on a matter relating to conversion to Islam, **all** State Enactments and the Act expressly vest the Syariah courts jurisdiction to deal with the matter. See, for example, ss. 139, 140, 141 of the Kedah Enactment; Part IX (ss. 85-95) of the Administration of Islamic Law (Federal Territories) Act 1993; and Part VIII (ss. 77-89) the Penang Administration of Muslim Law Enactment 1993."[52] ("**the Erroneous Finding**")

**None** of the sections mentioned "expressly vest the Syariah courts jurisdiction to deal with" conversion *into* Islam. In fact, the sections[53] show that conversion *into* Islam remains within the *administrative* purview of the Majlis Agama Islam or the Registrar of Conversion/*Muallaf*.

Building on the Erroneous Finding, the Federal Court then erroneously held:-

> "…in our opinion, the jurisdiction of the Syariah courts to deal with the conversion out of Islam, although not expressly provided in the State Enactments can be read into them by implication *derived from the provisions concerning conversion into Islam*."[54] [Emphasis added] ("**the Erroneous Conclusion**")

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[52] *Supra*. n. 50, p. 20f – h
[53] Kedah (http://tinyurl.com/o6g3n3u); Federal Territories (http://tinyurl.com/pdsqgzb); Penang (http://tinyurl.com/pnwu6nu)
[54] *Supra*. n. 50, p. 21f

The Erroneous Conclusion is plainly at variance with *Democracy* and the *Separation of Powers*. It is for the Legislature (the will of the people) to determine the jurisdiction that ought to be conferred on the Syariah court (within the limits of the Constitution), and to confer the same by way of written law. The function of the court is to interpret the law, not to make new laws or create a new jurisdiction when none had existed in the first place.

As a result, Soon Singh was left without a remedy. He was told to avail himself to the Syariah court; a court which was not even conferred with jurisdiction or procedure to determine that he was no longer a Muslim! Soon Singh's right to profess his new found religion was rendered illusory.

**2007: Lina Joy**: *The Federal Court says "Kes Soon Singh telah diputuskan dengan betulnya"*

Unfortunately, the Erroneous Conclusion in *Soon Singh* went on to be affirmed by a majority[55] of the Federal Court in *Lina Joy*[56] despite the Administration of Islamic Law (Federal Territories) Act 1993[57] conferring **no** jurisdiction on the Syariah courts in the Federal Territories to deal with conversions *into*[58] or *out*

[55] Ahmad Fairuz CJ & Alauddin Mohd Sheriff PCA
[56] [2007] 3 CLJ 557
[57] The applicable law in Lina Joy's dispute
[58] Administration of Islamic Law (Federal Territories) Act 1993: sections 85 – 95 (http://tinyurl.com/pdsqgzb)

*of*[59] Islam. Conversion into Islam, in the Federal Territories, is placed within the *administrative* purview of the Registrar of *Muallaf*. In fact, till this day in 2015, there is *no law* in the Federal Territories Act for converts to leave Islam.

The majority judgment of the Federal Court expresses the following statement:-

> "**[14]** …Dengan lain perkataan seseorang tidak boleh sesuka hatinya keluar dan masuk agama. Apabila ia menganuti sesuatu agama, akal budi (common sense) sendiri memerlukan dia mematuhi amalan-amalan dan undang-undang dalam agama itu.
>
> *[English translation]*
>
> …In other words one cannot at one's whims and fancies renounce or embrace a religion. When professing a religion, common sense itself requires him to comply with the laws and practices of the religion."

With the greatest of respect, the sincerity of religious belief is no business of a Judge save there being fraud[60]. A Malaysian woman coming to the courts for enforcement of her constitutional right to profess her religion *must* have her dispute heard and determined, and her dispute must be judged "without going at all into the question of motives for [her] conversion or their relative religious or ethical values"[61]. The personal feelings of a Judge is irrelevant in a constitutional rights dispute.

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[59] *Ibid*.: section 46
[60] *Rakeya Bibi v Anil Kumar Mukherji* 1948 52 Cal.W.N. 142 at pp. 147 – 8
[61] *Mussamat Ayesha Bibi* v. *Subodh Chakravarty* 1945 Cal.W.N. 439 at p. 442

On the contrary, the minority Judge[62] in *Lina Joy,* held:-

"**[83]** …In my view *apostasy involves complex questions of constitutional importance especially when some States in Malaysia have enacted legislations to criminalize it* which in turn raises the question involving federal-state division of legislative powers. It therefore entails consideration of arts. 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(e), 12(3) and the Ninth Schedule of the Constitution. Since constitutional issues are involved especially on the question of *fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing art. 121(1A)*. In my view the said article only protects the Syariah Court in matters within their jurisdiction which does not include the interpretation of the provisions of the Constitution. Hence when jurisdictional issues arise civil courts are not required to abdicate their constitutional function. *Legislations criminalizing 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*.

…

**[88]** Another aspect of the unreasonableness of the policy of NRD is in its consequence if followed. *In some States in Malaysia apostasy is a criminal offence*. Hence, to expect the appellant to apply for a certificate of apostasy when to do so would *likely expose her to a range of offences under the Islamic law is in my view unreasonable for its means the appellant is made to self-incriminate*.

[62] Richard Malanjum CJSS

…

**[96]** In view of the approach taken by their Lordships in *Soon Singh* case I think there is nothing to prevent this court hearing this present appeal to reconsider the views expressed in those cases referred to above and the cases in the High Courts.

**[97]** In *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487 Eusoff Chin J (as he then was) who incidentally was also in the panel that decided *Soon Singh* case said this at p. 489:

> The Federal Constitution, Ninth Schedule List II – State List, specifically gives powers to state legislatures to constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matter included in this paragraph'.
>
> Therefore, a syariah court derives its jurisdiction under a state law, (for Federal Territories – Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.
>
> If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.

…

**[101]** The views expressed in the last two cases decided by the apex court of this country came from eminent judges[63] of our time which should therefore be given the weight they deserved. And I can appreciate the approach adopted by the learned High Court Judges in *Ng Wan Chan*[64] and *Lim Chan Seng*[65].

**[102]** Hence, I am in agreement with those views in that jurisdiction must be express and not implied. The doctrine of implied powers must be limited to those matters that are *incidental* to a power already conferred *or* matters that are *necessary* for the performance of a legal grant. *And in the matters of fundamental rights there must be as far as possible express authorization for curtailment or violation of fundamental freedoms. No court or authority should be easily allowed to have implied powers to curtail rights constitutionally granted*." [Emphasis added]

*Lina Joy* then became the subject of intense criticism.

In '*Legislating Faith in Malaysia*'[66], Nurjaanah Abdullah (a Senior Law Lecturer in University of Malaya) writes:-

"Despite acknowledging the fact that there are no legal provisions in the Administration of Islamic Law Act governing apostasy, [Ahmad Fairuz CJ]

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[63] Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur*; Harun Hashim SCJ in *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1993] 1 CLJ 264 at 268, SC
[64] Eusoff Chin J (later Chief Justice)
[65] Abdul Hamid Mohamed J (later Chief Justice)
[66] [2007] Singapore Journal of Legal Studies 264

> agreed with the majority decision of the Court of Appeal[67] that the insistence of the department on an order by the Syariah Court pertaining the status of the appellant is reasonable as it is 'a matter of Islamic law,' thus bringing the matter within the jurisdiction of the Syariah Court. *A person is therefore still required to get an order from the Syariah Court even though there are neither procedures nor legal provisions on renouncement.* Jurisdiction of the said court is assumed. It is difficult to follow this reasoning as it ignores the reality that whether or not a person has renounced Islam is actually a question of fact, not of law. How can the renouncement of an individual of his faith be 'a matter of Islamic law'? *When there is no provision at all in the said Islamic law on the matter of renouncement, how can it be 'a matter of Islamic law'?*"[68] [Emphasis added]

The Honorable Justice Michael Kirby of the High Court of Australia in a lecture delivered at Griffith University in 2007 titled *Fundamental Human Rights and Religious Apostasy – The Malaysian Case of Lina Joy*[69] says:-

> "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,

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[67] Gopal Sri Ram JCA (later FCJ)(dissenting), Abdul Aziz Mohamad JCA (later FCJ) & Arifin Zakaria JCA (now CJ)

[68] *Supra*. n. 66, p. 269

[69] (http://www.michaelkirby.com.au/images/stories/speeches/2000s/vol64/2007/2226-GRIFFITH_LECTURE_NOV_2007.doc)

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." This allowed them *to invoke the escape clause committing all such matters to the Syariah courts, thereby denying their own jurisdiction and power* to go further and to uphold Lina Joy's ostensible constitutional rights.

…Freedom of religion is a guaranteed personal right. Yet according to the majority's reasoning, it can only be invoked and upheld in Malaysia if the courts of the religion that is rejected are willing to permit that rejection. In Malaysia, in the case of Islam, this ruling places the *Syariah* courts in an impossible position. For the civil courts and civilian power to uphold the right to change the religion of Islam is one thing. To expect *Syariah* courts to do so is quite another.

…

*Judicial protectors of fundamental rights*: Ordinarily, in Malaysia, as in other pluralistic societies, civilian courts play a significant role in protecting fundamental freedoms…The Lina Joy case suggests, however, that Malaysia's courts have not exercised their judicial power in favour of this interpretation but have denied it.

...

Assigning the exclusive responsibility to the specialist, religious judges involved no kindness to them. By inference, 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 may sometimes be unreasonable, even impossible*.

…

*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, on one view, *Syariah* judges might also find themselves *breaching Islamic law if they granted declarations permitting Muslims to leave the 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 restricted scope to the constitutional guarantee of 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. [Ahmad Fairuz CJ] stated that:

> "I do not see this as an infringement to right of religion….She is merely required to fulfil certain obligations, for the Islamic authorities to confirm her apostasy, before she embraces Christianity."

…

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?"[70]

Justice Michael Kirby makes a cogent point. In fact, in the Syariah court case of *Roslinda Mohd Rafi*[71], where the applicant sought for a declaration that she had left Islam, it was held by a Syariah court judge:-

> "**[17]** …pada pendapat mahkamah, soal seseorang itu mahu murtad atau memurtadkan dirinya adalah hak individu selari dengan art. 11(1) Perlembagaan Persekutuan. Mahkamah Syariah hanya akan memutuskan sama ada perbuatan seseorang itu telah menyebabkan dirinya terkeluar dari akidah Islam atau murtad atau pun sebaliknya berdasarkan aduan atau dakwaan.
>
> **[18]** Mahkamah Syariah tidak bercadang untuk memberi apa-apa tafsiran ke atas art. 11(1) Perlembagaan Persekutuan. Apa yang nyata ialah agama Islam adalah milik Allah dan Allah jualah yang menentukan hukuman perbuatan murtad.
>
> …
>
> **[20]** Membenarkan seseorang keluar Islam/murtad adalah bertentangan dengan tugasan Mahkamah Syariah iaitu menjaga dan mempertahankan Hukum Syarak. Jika permohonan ini bagi menentukan status seseorang sama ada kekal Islam atau telah murtad berdasarkan sesuatu perbuatan yang telah dilakukan, saya bersetuju bahawa Mahkamah Syariah adalah berbidang kuasa membuat

[70] *Ibid*. p 12 – 14 & 21 – 22
[71] [2009] 1 CLJ (Sya) 485, Syariah High Court (Kota Kinabalu, Sabah)

> pengisytiharan. Bagaimanapun dalam kes ini pemohon hendak keluar Islam atas alasan yang telah dinyatakan dalam afidavit."

In late 2007, Abdul Aziz Mohamad FJC[72], after subjecting the Erroneous Conclusion in *Soon Singh* to painstaking analysis, elaborates in his Lordship's lengthy *dicta* in *Subashini*[73]:-

> "The reason why this court found that apostasy fell within the jurisdiction of the Syariah Courts can be seen in the passage at pp. 21d-22c. It proceeds from the perception that "it is clear that all State Enactments and the Federal Territories Act contain express provisions vesting the Syariah courts with jurisdiction to deal with conversion to Islam", *a perception which was not entirely correct*, because at least where the "Federal Territories Act", that is the Administration Act, is concerned, *conversion to Islam is not a judicial matter within the jurisdiction of the Syariah Courts but an administrative matter under Part IX of the Act, involving only the Registrar of Muallafs*.
>
> …
>
> …if it be considered that if the Syariah Courts had not been *perceived* to have express jurisdiction in respect of conversion to Islam, *Soon Singh would not have been decided as it was*."[74] [Emphasis added]

The above judicial analysis shows forthright that the decision in *Soon Singh* was erroneous; the Federal Court had not presented to its mind the precise terms

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[72] His Lordship also delivered the majority judgment of the Court of Appeal in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193

[73] [2008] 2 CLJ 1

[74] *Ibid*. pp. 75D – F & 76G

of the relevant law(s). Yet, *Soon Singh* was anomalously adopted by the Federal Court in *Lina Joy* despite legal counsel informing the court of the lack of provision in the Federal Territories Act for converts to leave Islam[75].

Yet again, a Malaysian's right to profess her religion of choice was rendered illusory. She is told to avail herself to a tribunal with no jurisdiction or procedure, and must be forced to self-incriminate and risk committing religious offences connected to apostasy.

## The Way Forward

Entertaining a thought or discussion on religious apostasy may be considered blasphemous to some. But to some others, it may be liberating if not necessary. All Malaysians should be allowed to think about, discover and pursue all shades of religious truth so that they may find their own path to personal contentment, self-worth and inner peace.

Freedom of Thought, Conscience and Religion is intrinsic to human dignity. Thoughts inspire us. Conscience directs us. And Religion moves us. Arguably, without respect for freedom of thought, conscience and religion, a democratic society would cease to exist.

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[75] *Supra*. n. 56, pp. 580B – E & 588F – 589D

Thus, in order to preserve Malaysia's democratic way of life and its diversity, respect for freedom of thought, conscience and religion must always be safeguarded; if not by the Legislature and the Executive, then certainly by the Judiciary.

*Human Rights and the Malaysian Constitution*

Article 18 of the Universal Declaration of Human Rights 1948 confirms that:-

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[76]

Article 11 of our Constitution is titled 'Freedom of religion'.

[76] (http://www.un.org/en/documents/udhr/index.shtml#a18)

Article 11(1) guarantees to "every person" in Malaysia (and not merely citizens or non-Muslims) 3 distinct rights i.e. the right to profess[77], practise[78] and propagate[79] his religion.

The right to practise is subject to general laws relating to public order, public health or morality[80], and the Constitution permits the States to control or restrict, *by law*, "the propagation of any religious doctrine or belief" among Muslims[81].

However, there is no constitutionally permitted ground to restrict or prohibit the mere *profession* of one's religion. Thus, the right to profess ones religion is

[77] To openly and freely declare his religion. See: *Black's Law Dictionary*, 8th Ed., p. 1246, "profess" means "[t]o declare openly and freely; to confess"; *In Re Allen, Decd. Faith v Allen.* [1953] 2 All ER 898 at 905, CA (England); *Sri Lakshmindra Theertha Swamiar of Sri Srirur Mutt v The Commissioner, Hindu Religion Endowments, Madras* AIR 1952 Mad 613 at 637, HC (India); *Punjab Rao v D. P. Meshram & Ors* [1965] 1 SCR 849 at 859, SC (India); *John Vallamattom v Union of India* (2003) 6 SCC 611 at [40], SC (India)

[78] The practical expression of a person's belief in the particular form of private or public worship. See: *Sri Lakshmindra Theertha Swamiar of Sri Srirur Mutt v The Commissioner, Hindu Religion Endowments, Madras* AIR 1952 Mad 613 at 637, HC (India)

[79] The transmission or spreading of one's religion by an exposition of its tenets. See: *Rev Stainislaus v State of Madhya Pradesh* (1977) 1 SCC 677 at 682, SC (India)

[80] Article 11(5)

[81] Article 11(4)

an absolute right[82]. This would also be consistent with the constitutional position in the United States of America[83], Canada[84] and the United Kingdom[85].

Article 11(3) guarantees 3 distinct rights to "every religious group" i.e. the right to manage its own *religious* affairs, the right to establish and maintain institutions for religious or charitable purposes and the right to acquire and own property and hold and administer it in accordance with law.

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[82] *Halimatussaadiah v Public Service Commission, Malaysia & Anor* [1992] 1 MLJ 513 at 526C – E, HC (per Eusoff Chin J (later CJ))

[83] *United States v Ballard* (1944) 322 US 78 at 86 – 87, SC: "…the [First] Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be…Freedom of thought, which includes freedom of religious belief, is basic in a society of free men…Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. …If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."

[84] *R. v Big M Drug Mart Ltd.* (1985) 18 D.L.R. (4th) 321 at 353 – 354, SC: "The essence of the concept of freedom of religion is the the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" and "…no one is to be forced to act in a way contrary to his beliefs or his conscience."

[85] *Regina (Williamson and others) v Secretary of State for Education and Employment* [2005] 2 WLR 590 at [16] & [17], HL: "…freedom of religion…is not confined to freedom to hold a religious belief. It includes the right to express and practise one's beliefs…The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified. This is to be expected, because the way a belief is expressed in practice may impact on others."

Thus, article 11(1) protects the rights of *individuals*; and article 11(3) protects the rights of *groups*[86].

Lastly, article 11(2) confirms that no person shall be compelled to pay any tax the proceeds of which are specially allocated for the purposes of a religion other than his own. Thus, a non-Muslim cannot be compelled to pay to the funds of *Zakat, Fitrah* and *Baitulmal*[87].

*Islam and Freedom of Religion*

In Malaysia, like Pakistan[88], Islam is the State religion[89]. But the position of Islam as the State religion in Malaysia does not take away from any other provision the Constitution[90]. Thus, the position of Islam as the State religion does not, and cannot, override any right, privilege or power explicitly conferred by the Constitution[91].

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[86] *Acharya Jagadishwarananda Avadhuta and Anor v Commissioner of Police, Calcutta and Ors* AIR [1990] Cal 336 at 349, HC (India) (on the equipollent freedom of religion constitutional provisions i.e. articles 25 and 26 of the Constitution of India)

[87] 9th Schedule, List II, Item 1 of the Constitution: "Zakat, Fitrah and Baitulmal or similar Islamic religious revenue"

[88] Article 2 of the Constitution of Pakistan: "Islam shall be the State religion of Pakistan." (http://www.pakistani.org/pakistan/constitution/part1.html)

[89] Article 3(1)

[90] Article 3(4)

[91] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557 at [51], FC (per Richard Malanjum CJSS)

Of critical importance is what the Supreme Court of Pakistan[92] reminds all on Islam:-

> "[25] Islam does not compel people of other faiths to convert. It has given them complete freedom to retain their own faith and not to be forced to embrace Islam. This freedom is documented in both the Holy Quran and the Prophetic teachings known as Sunnah. Allah addresses the Prophet Muhammad (PBUH) in the Quran:
>
> > 'If it had been your Lord's will, they would all have believed all of who are on earth! Will you then compel humankind, against their will, to believe?' (See Holy Quran (10:99).)
> >
> > 'Let there be no compulsion in religion; truth stands clear from error: whoever rejects false gods and believes in God has grasped the most trustworthy hand-hold that never breaks. And God hears and knows all things.' (See Holy Quran (2:256).)"

In fact, in the early decades of Malaysia's history, a few State enactments already had express provisions which *mandatorily* requires the Syariah court/Kadi to make a declaration that a person is not a Muslim if informed the

[92] *Suo Motu Case No 1 of 2014* [2015] 2 LRC 583, SC (Pakistan)

same. The following sections have since been repealed by the State Legislature(s):-

"**Section 146. Report of Conversion**

"(2) This Enactment is binding on all Muslims and if any Muslim converts himself to other religion he shall inform Court of his decision and the Court shall publicise such conversion."[93]

"**Section 141. Statement of a person converted into or out of Islamic Religion**

"(2) Whoever is aware of a Muslim person has converted out of the Islamic Religion shall forthwith report the matter to the Kadi by giving all necessary particulars and the Kadi shall announce that such person has been converted out of the Islamic Religion and shall register accordingly."[94]

In light of the above matters, the following provisions penalizing apostasy by way of fines, imprisonment and rehabilitation in Malaysia are all arguably unconstitutional for being inconsistent with article 11(1):-

[93] Administration of Muslim Law Enactment 1965 (Perak) (http://tinyurl.com/o9qw8u8)
[94] Administration of Islamic Law Enactment 1978 (Johore) (http://tinyurl.com/peohw4l)

"**Seksyen 66. Percubaan murtad.**

(1) Apabila seseorang Islam dengan sengaja, sama ada dengan perbuatan atau perkataan atau dengan cara apa jua pun, mengaku hendak keluar dari Agama Islam atau mengisytiharkan dirinya sebagai orang yang bukan Islam, Mahkamah hendaklah, jika berpuashati bahawa seseorang itu telah melakukan sesuatu yang boleh ditafsirkan telah cuba menukarkan iktikad dan kepercayaan Agama Islam sama ada dengan pengakuan atau perbuatannya sendiri, memerintahkan orang itu supaya ditahan di Pusat Bimbingan Islam untuk tempoh tidak melebihi enam bulan dengan tujuan pendidikan dan orang itu diminta bertaubat mengikut hukum syarak."[95]

"**Seksyen 13. Perbuatan atau perkataan murtad.**

Seseorang Islam yang dengan sengaja, sama ada dengan perbuatan atau perkataan atau dengan cara apa jua pun, mengaku hendak keluar daripada Agama Islam atau mengisytiharkan dirinya sebagai orang yang bukan Islam adalah melakukan suatu kesalahan mempersendakan Agama Islam dan hendaklah, apabila disabitkan, dikenakan hukuman denda tidak melebihi tiga ribu ringgit atau penjara selama tempoh tidak melebihi dua tahun atau kedua-duanya."[96]

[95] Enakmen Kesalahan Syariah (Negeri Melaka) 1991 (http://tinyurl.com/nrozppr)
[96] Enakmen Jenayah (Syariah) 1992 (Perak) (http://tinyurl.com/ngtplg7)

"**Seksyen 55. Menghina agama Islam.**

(2) Seseorang Islam yang mendakwa dirinya sebagai seorang bukan Islam adalah bersalah atas suatu kesalahan [menghina agama Islam] dan boleh, apabila disabitkan, dikenakan hukuman [denda tidak melebihi dua ribu ringgit atau penjara selama tempoh tidak melebihi satu tahun atau kedua-duanya sekali]"[97]

*Reforms*

With utmost respect, our apex courts in *Soon Singh* and *Lina Joy* have simply failed in their responsibility to protect, preserve and defend freedom of religion in 21st century democratic Malaysia.

With that being the case, it is my humble view, that the following reforms ought to be made to ensure that all Malaysians have the fullest constitutional protection with respect to freedom of religion:-

*By the State Governments*: to repeal all anti-apostasy laws immediately, and to prescribe the administrative procedures relating to apostasy (i.e. for the

[97] Enakmen Kesalahan Jenayah Syariah 1995 (Sabah) (http://tinyurl.com/pgczkvf)

resolution of a convert's religious obligations relating to his marriage, succession, inheritance, religious offences, etc.). The Supreme Court's suggestion in *Dalip Kaur* could be a guide[98].

Taking the State of Penang as an example, the Syariah High Court in Penang is now conferred with jurisdiction to make "a declaration that a person is no longer a Muslim"[99]. However, no procedure is prescribed by law. This only creates tremendous uncertainty for an applicant and opens the door to arbitrariness in decision-making which would affect constitutional rights. An immediate review by the State Government is therefore necessary.

*By the Chief Justice*: to introduce a mandatory human rights component to judicial training that is consistent with the standards of the United Nations, the Universal Declaration of Human Rights and is *not* associated with the Executive[100]. The trainings could be facilitated by the Human Rights Commission of Malaysia[101] (SUHAKAM) with the assistance of the Malaysian Bar.

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[98] *Supra*. n. 43: "[a] clear provision can for example be in the form of a provision imposing obligation on the relevant authority to keep and maintain a register of converts who have executed a deed poll renouncing Islam"

[99] Administration of the Religion of Islam (State of Penang) Enactment 2004, section 61(b)(x) (http://tinyurl.com/pkscqh9)

[100] The current "Institut Latihan Kehakiman dan Perundangan (ILKAP)" is under the auspices of the Prime Minister's Department (http://www.ilkap.gov.my). There is, to my mind, serious concerns about the independence of the trainings provided vis-à-vis Separation of Powers.

[101] Human Rights Commission of Malaysia Act 1999, section 4(1)(a): "In furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be—*(a)* to promote awareness of and provide education in relation to human rights…"

The importance of human rights awareness to the Judiciary cannot be overstated. In fact, our present Chief Justice Arifin bin Zakaria[102] had eruditely stated in the 50th Turkish Constitutional Court and International Symposium in April 2012:-

> "1. I would begin by stating briefly what I understand by human rights. To me, human rights are the rights that every one of us as human being is endowed with from the day we were born into this world of ours until we leave this world. These rights cannot be taken away, nor derogated or denied based on colour, *religion*, age or other personal factors. Human right is meaningless without freedom.
>
> 2. Central to the concept of human rights and freedom are the *protection of human dignity*. To quote Kofi A. Annan, the former Secretary General of the United Nations *"Human rights are the foundation of human existence and co-existence; that human rights are universal, indivisible and interdependent; and that human rights lie at the heart of all that the United Nations aspires to achieve in peace and development. Human rights are what made us human. They are the principles by which we create the sacred home for human dignity."*
>
> …

[102] His Lordship formed the majority in the Court of Appeal in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193

33. The Human Rights Commission of Malaysia Act 1999 has tremendous impact in Malaysia in one important respect. It has imported the international law on human rights enshrined in the Universal Declaration of Human Rights 1948 into our domestic constitutional law.

34. This means that whatever rights and liberties not mentioned in the Human Rights Commission of Malaysia Act 1999 but referred to in the Universal Declaration of Human Rights 1948 must still be considered provided that there is no conflict with the Federal Constitution.

35. It may be thus be argued that the provisions on human rights enshrined in the Human Rights Commission of Malaysia Act 1999 are an extension to the fundamental liberties provided in the Federal Constitution. Therefore, there is no doubt that the Human Rights Commission of Malaysia Act 1999 has a constitutional status.

…

38. As against the above background, the Federal Court as the final court of appeal *has a crucial role to play in the protection of the fundamental rights and freedoms* as embodied in the Federal Constitution and the *Universal Declaration of Human Rights*."[103] [Emphasis added]

*By the Federal Government/Minister of Home Affairs*: pursuant to powers under the National Registration Act 1959, to remove the requirement of the particular "*Religion (only for Muslims)*" to be contained in an identity card. Such a

[103] *The Malaysian Perspective on Human Rights and Freedom in 21st Century and the Role of Court*, Rt. Hon. Tan Sri Arifin Zakaria (Chief Justice Malaysia), 2012 (http://tinyurl.com/pyllktk)

particular is arguably unconstitutional as it discriminates on the ground of religion (inconsistent with article 8(2) of the Constitution[104]), and has also in recent times created undue hardships for Malaysians[105].

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[104] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557 at [62] – [63], FC (per Richard Malanjum CJSS)
[105] E.g. *Sabah's Bumiputera Christians' MyKad predicament*, Borneo Post Online, 5-11-2012, (http://www.theborneopost.com/2012/11/05/sabahs-bumiputera-christians-mykad-predicament/)