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FUNDAMENTALS WITH
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and Transformation

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The Hon. Michael Kirby AC CMG

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The Hon Justice Michael Kirby AC CMG**

THE PEOPLE OF THE BOOK

At a meeting of ‘traditionalist’ Anglican bishops in Jerusalem in June 2008, Archbishop Peter Akinola of Nigeria¹ reportedly said that Anglicans who preach the inclusion of homosexuals in God's church were guilty of apostasy.² He is not alone in this view. In Zimbabwe, the former Bishop of Harare, an ardent supporter of President Robert Mugabe, withdrew from the Anglican province saying he could not co-exist with so many gays and lesbians in the Church.³

Such views are generally justified by reliance on passages from of the *Holy Bible* that have been read as declaring homosexuals an "abomination".⁴ Those passages have affected the way three

* Based on the author's lecture to the Conference of La Trobe University, Melbourne, 30 June 2008. Parts of this address draw on the author's Griffith Lecture, see (2008) 17 *Griffith Law Review* 151.

** Justice of the High Court of Australia (1996-2009). The author acknowledges the assistance of Ms. Anna Gordon, research officer in the library of the High Court of Australia.

¹ "Attack steels rebels' plans to reform Anglican church", *The Australian* 24 June 2008, 10.

² Ibid; See also Institute of Religion and Democracy website: <<http://www.theird.org/NETCOMMUNITY>>(24 June 2008)

³ Reported *The Australian*, 24 June 2008, 10.

⁴ Especially *Leviticus*, 20:13

great world religions have responded to sexual minorities. I refer to Jews, Christians and Muslims, the "People of the Book". Together, they constitute a huge portion of the world's population - millions of people in every continent. What these religions teach about morality is therefore of practical importance for people everywhere. It influences the secular laws by which most people on the planet are governed. Only in a few countries is there a strict constitutional separation of religious institutions and the state.

Archbishop Akinola's talk of apostasy got me thinking about the way in which the offence of questioning or abandoning traditional religious beliefs has played a part in the societies influenced by the three Abrahamic religions. The source of the problem is that those who believe in the inerrancy of religious texts often find it difficult, or impossible, to be tolerant towards those who deny or doubt their understanding of the truth. Especially so where the deniers and doubters were once adherents to the religious teachings proclaimed in those texts. Often the reaction against apostates is explained as being for the "benefit" of those affected. It is ascribed to obedience to a command from God himself.

In the Book of *Deuteronomy*⁵ there are stern warnings against enticing people into serving "other gods". The reader is told not to listen to such tempters. Nor are they to be spared. "Thou shalt surely kill him; thine hand shall be first upon him to put him to death". Death is prescribed by stoning.⁶

⁵ *Deuteronomy*, 13:6-10.

⁶ *Deuteronomy*, 13:6-10.

No doubt there are some in modern Jewish society who adhere to such views. However, few Jews today would take such injunctions literally, as a command intended to govern contemporary civilian law. Yet it was not always so for Jews or Christians. In one of the first descriptions of the traditional English law, Henry de Bracton in the 1250s, declared that apostates were to be burnt to death.⁷ An instance arose in the case of an unfortunate deacon who "apostatized for the sake of a Jewess".⁸ His bishop handed him over to lay officials to be committed to the flames. This was done without the help of any parliamentary law. English common law provided for the burning of heretics and that was enough.⁹

Writing his influential *Commentaries on the Law of England* in the 1770s William Blackstone described an Act of Parliament punishing apostates, being persons "educated in, or making a profession of, the Christian religion" who had denied it to be true or who suggested that the Holy Scriptures were other than the authentic voice of divine authority. Such a person was rendered incapable of holding any office of trust and was liable to three years imprisonment without bail.¹⁰ Certainly, imprisonment was an advance on burning. "Christianity", declared Blackstone, was "part

⁷ H de Bracton, *De legibus et consuetudines Angliae*, translated by S E Thorne, Cambridge, Massachusetts, Harvard University Press, 1968, Vol II, *Of Pleas of the Crown*, p 349 (also accessible at <<http://hls15.law.harvard.edu/bracton/>>)

⁸ See F W Maitland, "The Deacon and the Jewess; or, Apostasy at Common Law" (1886) 2 *Law Quarterly Review* 153, p 153.

⁹ See A A Bruce, "Christianity and the Law" (1907) 64 *Central Law Journal* 247, p 253 and W S Holdsworth, "The State and Religious Nonconformity: An Historical Retrospect" (1920) 26 *Law Quarterly Review* 339, p 345.

¹⁰ W Blackstone, *Commentaries on the Laws of England*, 1st ed (reprint), London, Dawsons of Pall Mall, 1966, Vol IV, p 44, referring to 9&10 W. III. c. 32.

of the laws of England",¹¹ enforceable as such. The enforcements were sometimes subtle. Apostates could not make a will. Their property passed on intestacy only to next of kin who had embraced Christianity. Otherwise to the Crown. Apostasy laws have long since ceased to be in force in England.

It is sixty years since the *Universal Declaration of Human Rights*¹² (UDHR) was adopted by the United Nations General Assembly in 1948, based on a report of a committee chaired by Eleanor Roosevelt. It gave effect to one of the Allied war aims in the Second World War upholding the right of everyone to "worship God in one's own way anywhere in the world". The Declaration is now given effect by the *International Covenant on Civil and Political Rights* (ICCPR) and in national and international statements of rights. Even the Australian Constitution, which contains no general charter of rights, contains section 116 which forbids the Federal Parliament from establishing a religion or imposing, by law, religious observances or tests¹³.

For most Jews and Christians today, punishing people because they abandon or deny their religion, is unthinkable. Stoning them to death is out of the question. The fastest growing category answering the Australian census question on religion declares that they have "no religion". So even hard line believers tend to skip

¹¹ *Taylor's Case* 1 Ventr 293, 3 Keb. 607 and *King v Woolston* 2 Strange, 834.

¹² Adopted and proclaimed by the United Nations General Assembly resolution 217A (III) of 10 December 1948.

¹³ *Attorney-General (Vict); Black v The Commonwealth* 91981) 146 CLR 559 at 579 (D.O.G.S. Case).

over the passages in *Deuteronomy*. Much easier to single out those of *Leviticus* and denounce sexual minorities.

Still, in some countries apostasy remains a live issue. Particularly so in some Islamic countries. The *Holy Koran* itself does not prescribe compulsory adherence to Islamic beliefs. On the contrary, it states that "there is no compulsion in religion".¹⁴ God alone has the right to punish those who do not adhere to Islam or who turn their backs on its beliefs.

However, the *Hadith*, a secondary source of Islamic law, records the Prophet as saying that whoever rejects Islam must be killed.¹⁵ This has become a source for civilian law and stern punishments in some Islamic countries. Occasionally, as in Sudan, those laws appear to be used as political tools for removing outspoken opposition personalities.

In Malaysia, the Constitution contains standard guarantees of freedom of religion. However, in 2007, a decision of that country's highest court, in the *Lina Joy* case,¹⁶ by majority, denied the applicant the right to record on her identity papers a change of her religion from Islam to Christianity. Such a change was necessary to allow her to marry her Christian fiancé. Inevitably, it was noticed that the two judges in the majority were Islamic and the dissenting judge was not.

¹⁴ *Holy Koran*, 2:256.

¹⁵ Jamila Hussain, "The Shariah – Ignore It? Reform? Or Learn to Live With It?", (2006) *UTS Law Review* 87 at 97.

¹⁶ *Lina Joy* [2004] 2 MLJ 119.

One of the foremost critics of the Malaysian court decision on apostasy lives and works in Singapore.¹⁷ She is a Professor of Law but also a nominated member of Singapore's Parliament, Dr Thio Li-ann. She is a Christian. Recently, she took a leading part in persuading her colleagues in the Singapore Parliament to reject proposals to repeal the old British laws against homosexuals. She invoked the teachings in *Leviticus*. For her, refusing to permit Lina Joy to enjoy freedom of religious conscience was an abomination, notwithstanding *Deuteronomy*. But the abomination in *Leviticus* had still to be enforced. Singapore rejected the reforming measure. Like most non-Western countries in the former British Empire, Singapore maintains its criminal laws against homosexuals.¹⁸

On the sixtieth anniversary of the UDHR, we need to promote tolerance and acceptance of diversity, including amongst all the People of the Book. We need to establish institutions that assist in this endeavour. For the sake of the planet and the survival of the human species we must embrace universal principles of human rights. It is no accident that they were promised as a foundation stone for the New World Order created by the United Nations. Without respect for the basic rights of all people, peace and security will always be at risk.

¹⁷ L Thio "Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation" (2006) 2 *Malaysian Law Journal* Article 1, p 8; B Dawson and S Thiru "The *Lina Joy* Case and the Future of Religious Freedom in Malaysia" (2007) 16 *Commonwealth Lawyers' Journal* 54.

¹⁸ *Penal Code of Singapore* s 377. In July 2009, the High Court in Delhi in India upheld a challenge to the constitutional validity of s377 of the *Indian Penal Code* so far as this imposes criminal punishment on adult, consensual private same-sex activities: *Naz Foundation v Union of India* [2009] 5 LRC (forthcoming). Provisions equivalent to s377 still apply in 41 of 53 countries of the Commonwealth of Nations.

The Nobel Laureate and religious leader Desmond Tutu recently wrote a foreword to the life story of Bishop Gene Robinson, the first openly homosexual bishop in Anglican Christianity. Tutu declared his personal acceptance of the authority of Scripture as the Word of God. But he had not forgotten that the Bible had been used in the recent past to justify racism, slavery, the humiliation of women etc.¹⁹

THE OLDEST HUMAN RIGHT

Having established the common affront in which apostasy has been traditionally viewed in all of the Abrahamic religions, I want to explore more closely that particular difficulty presented by texts in the context of reconciling insistence upon religious instruction and respecting the values of universal human rights.

Freedom of religion and conscience may even be the oldest of the internationally recognised human rights.²⁰ Protection was granted as early as the *Peace of Westphalia*, signed in 1648, to bring to an end the Thirty Year War in Europe over the Protestant Reformation in Christianity.

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

¹⁹ Foreword, Bishop Desmond Tutu, 8 January 2009 in G. Robertson, *In the Eye of a Storm* (2008, Seabury, NY), xi at xiv.

²⁰ 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.

several instruments, the international community has recognised that religious freedom is a universal feature of human existence. Essentially, it inheres in the inquisitive, reflective, basically moral character of every human being.

Although my topic will be illustrated substantially by reference to Islam, as I have shown, in practice the problem is by no means limited to that religion. It is a phenomenon that accompanies the exclusivist convictions that religious beliefs tend to occasion amongst their believers. I will illustrate my propositions by reference to a number of recent cases decided in Malaysia, Australia and the United Kingdom.

Let me start with the *Lina Joy* case²¹ in Malaysia. 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 Malaysia's citizens follow Islam.²² Malaysia considers itself a moderate and pluralistic Muslim state.²³ 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. This vibrant and much respected neighbouring country enjoys many links to Australia. It has connections of friendship and association that go back to well before the Independence of Malaya, fifty years ago.

²¹ *Lina Joy v Majlis Agama Islam, WP & Anor* [2007] 3 CLJ 557.

²² 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.

²³ 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 *LINA JOY* CASE IN MALAYSIA

Lina Joy is a young woman who was born in Malaysia into a Muslim family and given the name Azalina. In 1998 she announced her intention of marrying a non-Muslim man. Under the Malaysian *Law Reform (Marriage and Divorce) Act 1976*, she was not entitled to contract such a marriage unless her new status as a non-Muslim was recognised.

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 had been made to the National Regulations. They came into force with retrospective effect. The amendments required that the identity cards of Muslims should state their religion. Therefore, when Lina Joy received her new identity card the word “Islam” still appeared on the card. This defeated the purpose of applying for the change of name. Effectively, it stood as a barrier to her marriage.

Lina Joy therefore applied to the NRD to have the word “Islam” deleted from her identity card. The NRD rejected the application. Lina Joy then contested the lawfulness of the new policy of the NRD in the High Court of Malaysia. She argued that the amended Regulations, and the NRD’s insistence on its policy infringed her right to freedom of religion under the Malaysian Constitution.

Article 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) of the Constitution which provides that “[e]very person has the right to profess and practise his religion....and to propagate it.”

A significant amendment to the Malaysian Constitution was adopted in 1988 with the insertion of art. 121(1A). Malaysia has both Islamic and civil courts. However, art. 121(1A) stipulates that civil courts have no jurisdiction over subject matters that fall within the jurisdiction of the Islamic courts. Essentially, Islamic courts have jurisdiction over Muslims with regard to religious and family matters. The germ of the problem will thus be evident. How is this exclusive jurisdiction of Islamic courts to be reconciled with the strong constitutional expressions in Malaysia guaranteeing individual freedom of religious belief?

THE MALAYSIAN COURT DECISIONS²⁴

Following the rejection of her application by both the High Court²⁵ and Court of Appeal,²⁶ Lina Joy appealed to Malaysia’s highest court, the Federal Court of Malaysia. In that court, she submitted that the requirement that she must obtain the approval of a third party in order to exercise her free choice of religion, was unconstitutional.²⁷ That argument failed. The majority maintained

²⁴ *Lina Joy v Majlis Agama Islam, WP & Anor* [2007] 3 CLJ 557.

²⁵ [2004] 2 MLJ 119.

²⁶ [2005] 6 MLJ 193. The constitutional issue was not argued before the Court of Appeal.

²⁷ Dawson and Thiru (2007) 16 *Commonwealth Lawyers' Association and Contributors* 54, 55.

that the question as to 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. Accordingly, the civil courts in Malaysia concluded that matters of apostasy are of such a character that they need to be dealt with by jurists who are appropriately qualified in the field of *Syariah* law.²⁸

This decision presents a Catch 22-type problem. Freedom of religion is a guaranteed personal right. Yet, according to the majority's reasoning in *Linda Joy*, it can only be invoked and upheld in Malaysia if the courts of the religion that is rejected are willing to permit the assertion of that right. In Malaysia, in the case of Islam, this ruling places the *Syariah* courts themselves 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 the *Syariah* courts to do so is quite another.

Answering Lina Joy's argument that her constitutional right to freedom of religion had been infringed, the majority in the Federal Court adopted a narrow interpretation of art.11(1) of the Constitution. They stated:²⁹

“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

²⁸ See *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 1 CLJ 77 at 85g-1 – 86a per Mohd Yusoff Mohamed SCJ, affirmed by Gunn Chit Tuan SCJ in *Habibullah bin Mahmood v Faridah bte Dato' Talib* [1993] 1 CLJ 264; *Zubeydah bte Shaik Mohd v Kalaichelvan a/l Alagapan* [2003] 2 MLJ 471 (HC).

²⁹ *Lina Joy* at [14] (emphasis added).

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

The dissenting judge in the Federal Court, Justice Richard Malanjum FCJ, the Chief Judge of Sabah and Sarawak, took a different view.³⁰ He concluded that the NRD had acted beyond its powers under the Regulations. No exercise of such powers could be inconsistent with the Constitution.

In order to appreciate fully the serious impact on religious freedom in Malaysia occasioned by decisions in cases such as *Lina Joy*, it is important to notice two significant practical implications.

First, apostates in Malaysia are subject to a range of penalties under State legislation. For example, 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 the type of punishments to be meted out to apostates. It states:

“ ... On conviction [they] 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.

³⁰ *Lina Joy* at 602 [49]-[51].

Secondly, if Lina Joy were now to apply to a *Syariah* court in Malaysia for a declaration of apostasy she would face a number of additional practical obstacles. Islamic principles discourage Muslims from 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.

Clearly, obtaining an apostasy order from a *Syariah* court in Malaysia is no mere formality. 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 Catherine. For many at the time this was seen as impossible because contrary to God's law, as revealed in Holy Scripture. Asking religious people to be complicit in the divorce imposed intolerable burdens on their consciences. Some (like Sir Thomas More) were willing to pay for their refusal with their lives. It is almost certain that, in Malaysia, an apostate would be considered, at least in many circles, as a social outcast.³¹ Before the Federal Court hearing, Lina Joy and her fiancé received several death threats. They were forced into hiding.

A professor at the International Islamic University in Malaysia, Abdul Aziz Bari, suggests that freedom to profess and practise religion does not mean that an individual should be able to renounce Islam easily.³² Other constitutional law experts in

³¹ Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, 144.

³² A. Aziz Bari in M. Azam Mohamed Adil (2007) 4(2) *Muslim World Journal of Human Rights*, Article 1, 18.

Malaysia argue that punishment and detention for education and “repentance” purposes do not infringe an individual’s right to religious freedom.³³ In most parts of the world such arguments would, I believe, be rejected as inconsistent with the purpose of the constitutional guarantee. The notion that Lina Joy had rejected Islam as a matter of a “whim or fancy” likewise seems to underestimate the large struggle in which she had engaged in order to effect her purpose.

In order to understand why apostasy is forbidden in Islam and why freedom of religion is interpreted so restrictively, it is important to appreciate the emphasis that is placed in Islamic tradition on the welfare of the *umma*, or community, for which the offence of apostasy is treated as relevant.

In contrast to the generally individualist traditions of Western liberal social theory, Islamic tradition generally adopts a communitarian view. It is not unique in this respect. The Confucian view of society likewise lays emphasis on the community, often prevailing over the individual. According to such concepts, the self is commonly 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.³⁴

Justice Faiza Thamby Chik, the trial judge in the *Lina Joy* case, noted that, if Lina Joy were permitted to renounce Islam without

³³ M. Azam Mohamed Adil, (2007) 4(2) *Muslim World Journal of Human Rights*, Article 1, 18.

³⁴ 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, 57 (2003). See also H Roborgh, “Militant Islam and the Qur’an” (2007) 441 *Quadrant* (Vol L1, No 11) 56 at 58.

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.”³⁵ But it seems unlikely that many would-be converts in Malaysia would battle on to the extent that Lina Joy has. Still the *Lina Joy* decision has supporters in Malaysia as well as critics.

QUESTIONING THE UNIVERSALITY OF HUMAN RIGHTS

The divergent views on the position of the individual within a twenty-first century community, and the impact of an individual’s renunciation of a religious faith, can be placed within a broader global debate over whether human rights are truly universal. Many Muslims, and also non-Muslims, question the universality of the modern concepts of human rights.

Abdullah Saeed, a Professor of Arab and Islamic Studies at the University of Melbourne, points out that:³⁶

“For the Muslims who oppose universality, Islam has a particular concept of human rights, including religious freedom, and these must be understood in the context of the Islamic law, which itself determines the scope of freedom available to a Muslim.”

Contemporary concepts of universal human rights grew out of Western philosophical tradition. These contrast with the Islamic emphasis on the *umma*. Although, Western systems of beliefs

³⁵ [2004] 2 MLJ 119, at 126G para 10; 132I, para 27.

³⁶ *Ibid.*

sometimes restrict the activities of individuals, on the basis that their activities interfere with the welfare of the community, Islam commonly imposes limitations on the indeterminate ground that “fostering social discord offends the communal spirit.”³⁷

By way of contrast, supporters of the applicability of universal human rights within Islam argue that the rights provided for in the UDHR are not alien to Koranic instruction and that, “in fact, most rights can be supported by the Koran and the practice of the Prophet.”³⁸ They indicate that what is required is a re-interpretation of the religious scriptures. In Christianity too, we know about the need for re-interpretation. *Leviticus* and *Deutoronomy* contain many passages in point.

The fact that several Muslim nations have signed and ratified the ICCPR helps to support the argument that human rights are, as is claimed, universal. But this does not necessarily mean that such nations have always acted in accordance with the principles enshrined in the ICCPR. For that matter, neither has Australia which would pride itself as generally being a human rights compliant country, adhering to the principles in the ICCPR.

Islamic human rights instruments have been developed which opponents of the concept of the universality of human rights have used to justify their arguments. In 1981 the Islamic Council of Europe adopted the *Universal Islamic Declaration of Human*

³⁷ 4 *Temple International and Comparative Law Journal*, 30 (1990).

³⁸ Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, 12.

Rights. In 1990, the Organisation of the Islamic Conference adopted the *Cairo Declaration of Human Rights in Islam*. Both of these instruments address freedom of religion. However, they do not reflect the same level of freedom of conscience provided for in the UDHR of 1948. For instance, neither Islamic instrument specifically provides for a right to *change* one's religion.

Within diverse Muslim communities there are differing views as to whether religious freedom includes a right to change religion.³⁹ In 1948 the representative of Saudi Arabia to the United Nations maintained that freedom to change one's religion was prohibited under Islamic law. He therefore objected to art. 18 of the UDHR. By contrast, the Pakistani representative, at the time, supported art. 18. He did so on the ground that the *Holy Koran* permits an individual to believe, or not to believe.

LEGITIMATE RESTRICTIONS ON HUMAN RIGHTS

As with many fundamental rights, the right to freedom of religion is not absolute one. This fact is recognised in art.18.3 of the ICCPR itself. It provides that:

“Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order and health, or morals or the fundamental rights and freedoms of others.”

In similar language, the Malaysian Constitution states that a group may not act in any matter which might be contradictory to public

³⁹ Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, 14.

order, public health or morality.⁴⁰ The Constitution also specifies more questionable restrictions, for instance, that non-Muslims cannot propagate any religious doctrine among Muslims although the reverse is not the case.

In recent years, there have been numerous cases across the world,⁴¹ in which courts have upheld rules, policies or laws restricting the right to manifest certain Islamic beliefs or practices. Such cases have concerned, for instance, the right of a Muslim woman to wear the Islamic headscarf or similar dress. Such a case came before the House of Lords in England in 2006. Their Lordships had to decide whether a school uniform policy infringed a student's right to freedom of religion. The decision in that case contrasts with the Malaysian courts' treatment of the same fundamental right in the *Lina Joy* case.

In the United Kingdom, religious freedom is protected by history, by strong social conventions and now by the *Human Rights Act* 1998 (UK). That Act incorporates into domestic law the nation's treaty obligations under the *European Convention on Human Rights and Fundamental Freedoms* ("the European Convention"). Article 9 of the European Convention, which is set out in Schedule I, Part I of the *Human Rights Act*, protects the freedom of the individual to have a religion or belief, and the right to manifest that religion or belief.

⁴⁰ Article 11(5).

⁴¹ See *Meor Atiqulrahman bin Ishak & Anor. v Fatimah Bte Sihi & Anor* Civil Application No. 01-3-2005 (N) Federal Court, July 12, 2006.

The decision in *R (SB) v Headteacher and Governors of Denbigh High School*⁴² concerned the entitlement of a Muslim schoolgirl to wear a *jihab* to school, that is, a full length gown. The school was a public school, funded entirely by taxpayers. The pupils attended mixed-sex, multi-community classes. About four-fifths of the pupils at the school were Muslims. Two thirds of the governing board were Muslims. The head teacher was a Muslim. Under the policy of the school about uniforms, female pupils were offered three options. One was the *shalwar kameeze*, a combination of a smock dress and trousers. This option had been developed following consultation with parents, pupils, staff and local mosques. The claimant wore the *shalwar kameeze* for two years. However, one day she turned up at school in a *jihab*. She was not permitted to attend school so dressed. 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*.⁴³ Emphasis was placed on the care with which the school had worked out its uniform policy.⁴⁴

⁴² [2007] 1 AC 100; [2006] UKHL 15.

⁴³ At 114 per Lord Bingham of Cornhill.

⁴⁴ At 117 per Lord Bingham of Cornhill.

A minority in the House of Lords accepted that there had been an arguable interference with the claimant's rights. However, they concluded that it was justified in the circumstances.⁴⁵ One of the English Law Lords later emphasised that the opinions in:

“ ... the House of Lords are notable for their emphasis on the details of the particular case, and for avoiding (indeed, rejecting the possibility of) any broad general rule.”⁴⁶

When balancing individual freedoms and community interests in such cases the question arises whether, “the court should inquire into the centrality of a particular manifestation or demonstration of religious belief.”⁴⁷ Given the sensitive nature of the matter, and the inexperience of most (or all) judges on such questions, courts of our tradition have commonly been reluctant to delve into disputes regarding theological or liturgical principles.⁴⁸

There are some similarities between the approach of the House of Lords in the *jihad* case, and the approach of the courts in Malaysia in the *Lina Joy* case. Both decisions permitted restrictions to be placed on individuals based on considerations of the community interest, although for different reasons. The courts in both countries deferred, to varying degrees, to an authority which they considered to be more qualified on the particular issue. However,

⁴⁵ At 132 per Baroness Hale of Richmond.

⁴⁶ Lord Robert Walker of Gestingthorpe, “A UK Perspective on Human Rights ‘Judging’” (2007) 8 *The Judicial Review* 295, 319. The decision of the House of Lords has been criticized on other grounds: see P Lenta, “Muslim Headscarves in the workplace and in Schools” (2007) 124 *South African Law Journal* 296 at 317-319.

⁴⁷ Lord Walker *ibid* p 319.

⁴⁸ *Ibid*, 319-20. For recent Australian cases see *Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95 at 110 [37]-[39]; 118 [64]; 121-122 [74]-[76] and *Re McBain; ex parte Catholic Bishops' Conference* (2002) 209 CLR 372 at 429 [134].

the Malaysian courts went much further in its deference. In effect, the majority in Malaysia concluded that they had no jurisdiction on the matter, even to uphold the Constitution, a civil law document.

AUSTRALIAN COURTS ON APOSTACY

Australian courts and tribunals have occasionally, addressed the issue of apostasy and its relationship with fundamental rights. Not infrequently, the question has arisen before courts and tribunals in the context of applications by persons claiming Australian protection as refugees.

In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*,⁴⁹ I noticed that apostasy, for individuals born and raised as Muslims in Islamic countries, is quite a common issue in refugee claims. It is an issue that has arisen more than once in the High Court of Australia. Applicants for protection visas claim that they have renounced their Islamic faith of their birth. They then argue that they fear the consequences of this renunciation if they are returned to their country of nationality.

In 2006 in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs and Another*,⁵⁰ the applicant was a seaman employed by an Iranian shipping line. Having jumped ship in Port Kembla, he applied for a protection visa in Australia. He had earlier been invited by a seaman on the same ship to attend a Christian church service while the ship was in port in Dubai. Following this

⁴⁹ (2005) 223 ALR 171 at [64]; (2005) 80 ALJR 367; (2005) 88 ALD 257; [2005] HCA 77.

⁵⁰ (2006) 228 CLR 152.

experience, over the next four years, the applicant attended Christian services in various ports.

The Refugee Review Tribunal did not accept that the applicant 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. The question that arose before the High Court was whether the issues, to which the Tribunal’s reasoning processes were directed, had been adequately notified to the appellant. At stake was a question of procedural fairness rather than apostasy, as such. The appellant argued that he was not on notice of how his adherence to Christianity had become an issue in the decision under review. The High Court held that the Tribunal had not accorded procedural fairness to the appellant. It remitted the case to be reheard without this disqualifying imperfection in the Tribunal's reasoning.

In 2005, in *Applicant NABD v Minister for Immigration and Multicultural Affairs*⁵¹, over the dissents of Justice McHugh and myself, the High Court rejected a claim of an Iranian man, who had become a Christian, alleging fear of persecution if he were returned to Iran. He relied on the fact that such cases often raise acute questions. It is not unusual to see divided judicial decisions. 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 dissenting reasons rejected that requirement as incompatible with the essential

⁵¹ (2005) 79 ALJR 1142. See also *SAAP v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at 306 [31], 339 [146], a case involving adherents to the Sabian-Mandean beliefs in Iran.

entitlements of enjoying freedom of religion⁵², including open affirmation and proclamation.

RECONCILIATION – SOME SUGGESTIONS

Against the background of these judicial decisions I return to apostasy as an archetypal challenge to the universal principle of religious freedom. Rules that prohibit, or seriously impede, the renunciation of a person's religious 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 of each other? Are we condemned to irreconcilability between particular religions and the universal human right to freedom of religion to which most countries of the world now adhere - or at least to which they give lip service?

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. The aspiration of these sessions, at least on the *Mufti's* part, is "repentance" by the would-be apostate. However, if the individual refuses or fails to "repent", the court may grant a declaration that the person has renounced Islam.

⁵² Cf. *Appellant s395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

While this is a somewhat lengthy and drawn-out process, there is clearly merit in the replacement of dire punishments by imposition of counselling. Moreover, it is a whole lot better than birching, imprisonment or stoning to death.

The procedure in Singapore is more straightforward. A person wishing to renounce Islam simply attends a counselling session at the State *Mufti's* Office. If, after counselling, the former Muslim maintains a change of faith, that person's conscience is respected. There is no whipping, no imprisonment and no refusal.

Some commentators have concluded that the outcome of the *Lina Joy's* case was inevitable in a country such as Malaysia. Thus, Lee Min Choon has commented:⁵³

“In countries such as....Malaysia, it is unrealistic to expect judges to protect freedom of religion when the laws and the law-makers are not committed to creating a liberal environment for religious expression in the country.”

According to this somewhat pessimistic view, in order to reconcile the fundamental right to freedom of religion with Islamic religious principles, there needs to be a substantial shift in attitudes within Islam towards apostasy and an acceptance of spiritual diversity. The fact that many individual Muslims throughout the world, including scholars, already support the universality of human rights, and a concept of religious freedom which includes the right to change one's religion, indicates that achieving such a change is far from impossible.

⁵³ Choon, Freedom of Religion Paper, 349.

PROTECTING MINORITY RELIGIOUS VIEWS

A fundamental objective of a right to freedom of religion in any society is the protection of the rights of *minority* religious groups. In most parts of the world today Islam itself is in a minority. Adherents of Islam are, as such, entitled to the benefit of this precious freedom. They expect and demand it. In Australia, freedom of religion is protected in a limited way under s 116 of the Australian Constitution. Of that provision Chief Justice Latham wisely stated:⁵⁴

“.....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 world has a very strong interest in the reconciliation of the religions of the Book with modern notions of tolerance and the acceptance of diverse reality. Accommodating religions with modernity and diversity cannot be securing effectively by one faith alone. A starting place for achieving general reconciliation may indeed be the strengthening of a pluralistic, tolerant, multicultural society such as Australia.⁵⁵ Change will not happen if leaders of the Abrahamic religions and citizens of different religions (and no

⁵⁴ *Ibid.* at 124.

⁵⁵ Amartya Sen in *Identity and Violence* (2006) has pointed out that defence of ethnic rights can sometimes lead not to true “multiculturalism” but to “plural monoculturalism”: people living side by side but apart, policed by their own intolerant patriarchs. J Button, “Liberals getting left out of the debate on Islam”, *Sydney Morning Herald*, 22 October 2007, 17.

religion) remain silent out of fear of causing offence, or worse still, out of fear of violence or punishment.

The principle of mutual respect and acceptance lies at the heart of the world-wide movement for the protection of universal human rights. A good indication that we can make a difference in Australia may be seen in the work of the Law Trobe University Centre for Dialogue. It can also be seen in the announcement by the Australian Catholic University⁵⁶ in Melbourne that it will launch the world's first professorial chair in Muslim-Catholic relations.

At Griffith University in Brisbane, the Griffith Asia Institute provides another valuable venue for interfaith dialogue on region.⁵⁷ It affords another venue for the political, cultural and legal dimensions of religious freedom in Asia and Oceania. There are more such bodies in Australia. Indeed, there is a flowering of them. Such bodies need to be aware of the apostasy and other debates and to play a part in the building of human rights institutions for the Asia/Pacific region. This is the last region in the world to lack a comprehensive human rights charter and a court or other body to make it effective. Australia is well placed to contribute to dialogue of this kind. Such dialogue demands much more than tribal loyalties and partisan conflict. People of religious faiths can learn from each other. They can also sometimes learn from humanists and people of no religious faith.

⁵⁶ B Zwartz, "Interfaith Chair at Catholic University a World First", *The Age* (Melbourne), 7 November 2007, p 8.

⁵⁷ The Griffith Asia Institute has initiated investigations of aspects of Islam in Asian societies. See "International collaboration on Islam bears fruit" in *Griffith Asia Institute Newsletter*, vol 10, no 3 (Spring 2007), 3.

HUMAN RIGHTS ARE AWKWARD

Universal human rights afford common ground for all people to join together. Such rights are needed to permit everyone to fulfil themselves as our unique human natures, intelligence and moral sense demands.

Universal human rights are awkward. This is because they are often claimed by people who are not exactly like ourselves. Yet they are not new. They have historical origins⁵⁸ in centuries old reflections about the essential ingredients of what being a human being really means.

The notion that human beings have an essential dignity that demands respect and requires legal protection, derives, in part, from the ideal, common to all of the Abrahamic religions, expressed in the metaphor that human beings are made “in the image of God”. This is another belief that the people of the Book share in common, together with monotheism and other shared religious tenets.

This is why it should be possible to build a common acceptance of diversity upheld by the UDHR and later instruments. However, it will be a race against time as we attempt to copy the moves towards tolerance that have taken centuries for other societies to attain. For the future of the world and of our species we must hope that humanity wins this race.

⁵⁸ David B Goodman, *Globalization and the Western Legal Tradition: Recurring Patterns of Law and Authority*, (Law in Context Series) Cambridge University Press, 2007 at 227 Cambridge