CASE COMMENT

UNFETTERED RELIGIOUS FREEDOM HANGS BY THE THREAD OF MINORITY DISSENT IN MALAYSIA: A REVIEW OF THE DISSENTING JUDGMENT OF THE FEDERAL COURT IN THE *LINA JOY* CASE

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The Lina Joy *case has caused judicial and political disquiet and angst in Malaysia ever since it began legal life in the High Court of Malaya by way of originating summons in 2000. In May 2007, the Federal Court delivered a 2-1 majority judgment, which only further exacerbated the feeling of judicial crisis. The majority's (which, regrettably, included the then-Chief Justice) narrow adjudication of the matter, which largely turned on questions of pure administrative law, was a judicial affront to many Malaysian jurists who view the matter more expansively and as an encroachment on the very core of the fundamental liberties (especially freedom of religion) guaranteed under the Malaysian Federal Constitution. The powerful dissenting judgment of Chief Judge of Sabah & Sarawak Richard Malanjum celebrates the richness and tradition of the Constitution and its succoring application to ordinary citizens in trying circumstances of administrative abuse and prejudice.*

L'affaire Lina Joy *a provoqué une inquiétude et un malaise juridiques et politiques en Malaisie depuis qu'elle a amorcé sa vie judiciaire dans la haute cour de la Malaisie occidentale au moyen d'une assignation introductive d'instance en 2000. En mai 2007 la cour fédérale, dans un arrêt majoritaire rendu à deux juges contre un, n'a qu'aggravé le sentiment de crise judiciaire. Le jugement étroit de cette affaire, rendu par une majorité (qui comprenait malheureusement l'ancien juge en chef) et qui portait principalement sur des questions de droit administratif pur, constituait un affront judiciaire pour de nombreux juristes Malaysiens qui envisageaient l'affaire de façon plus large et comme un empiètement sur le cœur même des libertés fondamentales (notamment la liberté religieuse) garanties par la constitution fédérale de la Malaisie. Le jugement dissident convaincant du juge en chef de Sabah et Sarawak, Richard Malanjum, célèbre la richesse et la tradition de la constitution ainsi que son application, qui apporte un soutien aux citoyens ordinaires connaissant des situations éprouvantes d'abus et de préjugés administratifs.*

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I wish to dedicate this article to the memory of my late colleague at BoardEx (UK), Richard Taylor: a good work mate and friend, and a gentle man.

I. INTRODUCTION

Under regulations 3(1) and 3(2) of Malaysia's *National Registration Regulations 1990*, every citizen is required, at the age of twelve, to register with the National Registration Department (NRD) and be issued with a National Registration Identity Card (IC). Under regulation 4,[1] any person who is required to register or who applies for a replacement IC must, among other things, state — only if he is a Muslim — his religion. This seemingly innocuous state of affairs, brought about by what ostensibly appeared to be a routine amendment to ascertain census-rooted demographic information, has led to a major constitutional and political crisis in Malaysia[2] calling into question the application of a fundamental human right (freedom of religion) as enshrined under articles 2 and 18 of the *Universal Declaration of Human Rights*.[3] That fundamental liberty[4] is also enshrined in the Malaysian Federal Constitution,[5] in which article 11 provides that every "person has the right to profess and practice his religion."

1 Which requirement was included under an amendment made to the regulations. See P.U.(A)70/2000, which came into force retrospectively on 1 October 1999.

2 The crisis (and the context in which Ms. Joy's case arose) lies in the fact that Malaysia has a complex legal system which combines Islamic *Syariah* law (as *Shari'a* Islamic law is called in Malaysia) and *adat* (local customary or traditional law) with a quasi-secular constitution and common law. *Syariah* law applies to family and religious matters for Muslims. There is continuing debate in Malaysia about which form of law should have supremacy on the issue of religious freedom. Malaysia is a majority Muslim country, with ethnic Malays, who are officially defined as Muslim, comprising over 50 percent of the population. The total Muslim population is estimated at 60 percent of the total population. Christians are estimated at about 8 percent. Ms. Joy, a convert from Islam to Christianity, was trying to get her change of religion officially recognized. The case set an important precedent for Malaysian converts from Islam to Christianity, who need to be recognized officially as Christian in order to be free to marry a Christian, be buried as a Christian, and raise their children as Christians. This case had provoked extreme reactions amongst some Muslims (for example, a poster was circulated calling for the death of Joy's lawyer, Malik Imtiaz Sarwar).

3 GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) [UDHR]. Article 18 provides: "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" [emphasis added]. Article 2 provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

4 As described in Part II of the Constitution.

5 Available online <http://www.agc.gov.my/agc/images/Personalisation/Buss/pdf/Federal%20Consti%20(BI%20text).pdf>.

When measured by reference to the other absolute fundamental liberties listed in Part II of the Malaysian Constitution[6] (article 6 provides that no "person shall be held in slavery," and article 8 states that all "persons are equal before the law and entitled to the equal protection of the law"), article 11 is stated in terms which guarantee these liberties in by-and-large unfettered terms. Accordingly, such rights are absolute.[7] It follows, therefore, that the fundamental liberty of freedom of religion is guaranteed[8] in absolute and unfettered[9] terms. In turn, under article 11 any person in Malaysia can choose, in an *unfettered* and absolute way, to change his or her religion at any time. Or at least that was the conventional constitutional wisdom drawn from a literal interpretation of the article. That belief (politically naïve perhaps) was called into question and, possibly, rendered illusory by a majority judgment of the Malaysian Federal Court[10] in the recent case of *Lina Joy v. MAIWP*[11] (*Lina Joy*).[12]

II. THE SALIENT FACTS OF THE *LINA JOY* CASE

The plaintiff in this case, Ms. Joy, was brought up as a Muslim. When she was forty-three, she made an application to the NRD to change her name on the basis that she had renounced Islam for Christianity and that she intended to marry a Christian. Her first application was refused by the NRD without reason in 1997. Her second application was made in 1999 for the same reasons. At that time there was no requirement that a Muslim's religion should be

6 There are nine liberties which are regarded as fundamental in the Constitution: liberty of the person (article 5); freedom from slavery and forced labour (article 6); protection against retrospective criminal laws and repeated trials (article 7); equality before the law (article 8); prohibition of banishment and freedom of movement (article 9); freedom of speech, assembly and association (article 10); freedom of religion (article 11); rights in respect of education (article 12) and rights to property (article 13).

7 As opposed to articles 5, 7, 9, 10, 12, and 13, which, on a literal reading, are qualified rights. It is submitted that article 8 is for these purposes absolute, despite article 8(5) (see Part VIII below).

8 At least in terms of its practice and profession, even if article 11(5) provides that article 11 "does not authorize any act contrary to any general law relating to public order, public health or morality." Article 11, however, limits the ability of non-Muslims to *propagate* religion to Muslims by empowering state assemblies to enact state legislation prohibiting such propagation within the federal set up of the Federation of Malaysia.

9 With respect to the ability of ordinary legislation to restrict and fetter such "fundamental liberties" as found under articles 6, 8, and 11 of Part II of the Constitution.

10 Malaysia's apex court. Hereinafter reference to "Federal Court" and "Court" shall be to the Malaysian Federal Court, unless otherwise stated.

11 For the majority judgment, see [2007] 3 AMR 693, [2007] 3 CLJ 557 (Ahmad Fairuz CJ & Allauddin Mohd Sheriff FCJ).

12 For the minority dissenting judgment of Malanjum CJSS (Chief Judge of Sabah & Sarawak) see [2007] 3 AMR 693, [2007] 3 CLJ 557.

stated. Nevertheless, there was undue delay in processing her second application. She alleged bad faith on the part of the NRD for delaying her application and advising her to keep silent the reasons for her application to change her name (*i.e.*, to renounce Islam), which she, in compliance, did. Eventually, on 22 October 1999, her application for change of name was approved and she was asked to apply for a replacement IC. Nevertheless, Ms. Joy testified that when she did so, the regulations had been altered, unbeknownst to her, "to require that the identity card should state the particular of religion for Muslims. Anyway, in the application form which asked her to state her religion [she] stated her religion to be Christianity."[13]

In the event, the application for a replacement IC was refused on the basis that Ms. Joy was a Muslim and that she had not forwarded any documentation from the *Syariah* Court nor any relevant Islamic authority to prove her statement that she had renounced her Islamic faith. As a result, her replacement identity card stated her religion as Islam although the name change was effected, but on the reverse side of the IC her original "Muslim" name was stated (which was authorized by the relevant amendment).

Subsequently, on 3 January 2000, she made a third application to the NRD, wherein she applied to remove the word "Islam" and her original name from her replacement identity card, which application was refused acceptance.

III. THE QUESTIONS FOR THE FEDERAL COURT

Ms. Joy initiated court proceedings to challenge the conduct and decisions of the NRD by seeking judicial review and relief in the High Court,[14] which failed, as did her appeal to the Court of Appeal[15] by a majority 2-1 decision. She then appealed to the Federal Court, pleading, *inter alia*, for several declaratory orders as to:[16]

a) her right to freedom of religion;

b) the constitutionality of section 2 of the *Administration of Islamic law (Federal Territories) 1993, Act 505*;[17]

13 *Ibid.* at para 14.

14 [2004] 6 CLJ 242 (Faiza Thamby Chik J).

15 [2005] 4 CLJ 666. Reference hereinafter to "Court of Appeal" shall be the Malaysian Court of Appeal in this case, from which Ms. Joy appealed to the Federal Court, unless otherwise stated.

16 *Supra* note 12 at para. 20.

17 In which the word "Muslim" is over-widely defined.

c) the applicability of *Syariah* enactments to her who professed the religion of Christianity; and

d) the constitutionality of the state and federal legislations that forbade conversion out of Islam.

The litigation process eventually resulted in three certified questions being put to the Court:[18]

1. Whether the NRD is entitled in law to impose as a requirement for deleting the entry of Islam in Ms. Joy's IC that she produce a certificate or a declaration or an order from the *Syariah* Court that she has apostatized?

2. Whether the NRD has correctly construed its power under the regulations, in particular regulations 4 and 14, to impose the requirement as stated above when it is not expressly provided for in the regulations?

3. Whether *Soon Singh a/l Bikar Singh v. PERKIM*[19] was rightly decided when it adopted the implied jurisdiction theory propounded in *Md Hakim Lee v. Majlis Agama*[20] in preference to *Ng Wan Chan v. Majlis Agama (No.2)*[21] *and Lim Chang Seng v. Pengarah Jabatan Agama Islam*,[22] which declared that unless an express jurisdiction is conferred on the *Syariah* Court, the civil courts will retain their jurisdiction?

This case comment shall only concern itself with the first and second questions.

IV. THE JUDGMENT OF THE MAJORITY IN *LINA JOY*

The majority in the three-person bench of the Federal Court in *Lina Joy* was made up of Chief Justice Ahmad Fairuz and Justice Allauddin Mohd, and the Chief Justice delivered their judgment. Chief Justice Fairuz, in answer to the three certified questions, concluded laconically that:[23]

18 *Supra* note 12 at para. 23.
19 [1999] 1 MLJ 489.
20 [1998] 1 MLJ 681.
21 [1991] 3 MLJ 487.
22 [1996] 3 CLJ 231.
23 *Supra* note 11 at para. 18.

a) The NRD was entitled;

b) The NRD was correct; and

c) The *Soon Singh* case[24] was correctly decided.

This article will not deal with the majority judgment in this case, but limit itself to the review of the dissenting minority judgment, but suffice it to say that majority in the Federal Court conveniently restricted itself to treating the whole matter as solely concerning administrative law, with scant regard for the dimension and aspects of the case touching on the constitutional rights of Ms. Joy, despite vigorous urging by her counsel.

V. THE DISSENTING JUDGMENT OF RICHARD MANLANJUM CJSS

In a far-reaching and powerful dissenting judgment, well-grounded on constitutional principles, the Chief Judge of Sabah & Sarawak, Richard Malanjum, was unable to agree[25] with the judgment of his colleagues in the majority and, in respect of the three certified questions, concluded emphatically that his answers were all in the negative.[26] He went on to deal with questions one and two together and then separately with question three (which shall not be dealt with in this article). In reaching his conclusions, Justice Malanjum prefaced his analysis by stating that, in respect of question one and two:[27]

> These Questions appear to be substantially an administrative law issue. However beneath it lurks [sic.] fundamental constitutional issues involving fundamental liberties and in the context of the constitutional arrangement in Malaysia the division of powers between the State and Federal authorities.

VI. WELL-ENTRENCHED CONSTITUTIONAL PRINCIPLES RESTATED

In this connection, Justice Malanjum took the opportunity to restate cer-

24 *Supra* note 19.
25 *Supra* note 12 at para. 2.
26 *Ibid.* at para. 89.
27 *Ibid.* at para. 31.

tain well-established constitutional principles[28] as a prelude to his examination of the certified questions, especially questions one and two, as follows:

1. The combined effect of articles 3(1),[29] 3(4),[30] and 4(1)[31] of the Constitution is to place Islam in a special position, but not in a way as to derogate from any other provision of the Constitution[32] or from the fact that the Constitution is the supreme law of the land. Accordingly, to be valid all laws must be in conformity with the provisions of the Constitution including those dealing with fundamental liberties.[33]

2. Legislative bodies (whether Parliament or state assemblies) do not possess independent and sovereign legislative power. They derive such powers from the Constitution. Thus, the legislative lists — which prescribe and demarcate areas of legislative competence between federal and state legislatures[34] — are subordinate to the fundamental liberties provisions enshrined in the Constitution.[35]

3. Administrative, departmental, and executive discretions, policies, and decisions must not only avoid infringing any provision of the Constitution,[36] they must also be within the ambit of the enabling legislations otherwise they too will be struck down for being *ultra vires* the legislations.[37] Needless to say, such enabling legislation too

28 To wit, that special and unique provisions in any constitution are always subject to the basic principle that fundamental liberties enshrined therein shall not be derogated from; legislative bodies do not possess independent and sovereign legislative power: they derive such powers from the constitution; not only must administrative decisions be constitution compliant so must enabling legislation which empower such decisions; and administrative decisions must not be illegal, irrational or procedurally improper.

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

30 "Nothing in this Article [3] derogates from any other provision of this Constitution."

31 "This Constitution is the supreme law of the Federation and any law passed after Merdeka [Independence] Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

32 See Salleh Abas LP in *Che Omar bin Che Soh v. PP*, [1988] 2 MLJ 55.

33 *Supra* note 12 at para. 33. See *Surinder Singh Kanda v. Goverment of the Federation of Malaya*, [1962] 28 MLJ 169; *Aminah v. Superintendent of Prisons*, [1968] 1 MLJ 92; *City Council of George Town v. Government of Penang*, [1967] 1 MLJ 169; and *Nordin Salleh v. Dewan Undangan Kelantan*, [1992] 1 MLJ 697).

34 There is a Federal List, a State List & a Concurrent List.

35 Supra note 12 at para. 34. See *PP v. Mohamed Ismail*, [1984] 2 MLJ 219 [*Mohamed Ismail*].

36 See *PP v. Su Liang Yu* [1978] 2 MLJ 79; & *Madhavan Nair v. PP*, [1975] 264.

37 See *Ghazali v. PP*, [1964] 30 MLJ 159.

must also be in conformity with the provisions of the Constitution.[38]

4. To be valid administrative, departmental or executive discretions must not be exercised in such a way as to make it illegal, irrational and procedurally improper.[39]

VII. AN EXAMINATION OF THE RELEVANT PROVISIONS OF THE REGULATIONS

Having restated some of the relevant, applicable, and well-entrenched doctrines of the Constitution, Justice Malanjum proceeded to examine and consider the scope and implementation of regulations 4 and 14, especially in relation to the policy adopted and requirement imposed by the NRD in dealing with Ms. Joy's applications. Regulation 4 provides that any person who is required to register under the regulations must state "his religion (only for Muslims)." In that regard, Malanjum CJSS found that:[40]

> Regulation 4(c) stipulates, inter alia, when any person applies for a replacement identity card the Registration officer has to be supplied with the particulars stated therein and *"such other particulars as the registration officer may generally or in any particular case consider necessary for the purpose of identification..."* and *"produce such documentary evidence as the registration officer may consider necessary to support the accuracy of any particulars submitted..."* Besides supplying the required particulars under Regulation 4 a person applying for change of name is also required under Regulation 14 to furnish a statutory declaration declaring *"to the effect that he has absolutely renounced and abandoned the use of his former name and in lieu thereof has assumed a new name and the reason for such change of name."*

Justice Malanjum conveyed the process of his thinking by stating that it was predicated upon three matters: (1) the above finding, vis-à-vis the relevant provisions of the regulations; (2) the submissions and arguments of learned counsels; and (3) most significantly, "having the Constitution in the forefront of [his] mind."[41] Submitting himself to such a process of thought, Justice Malanjum, in respect of questions 1 and 2, focused on the constitutionality of the relevant provisions of the regulations.

38 *Supra* note 12 at para. 35. See also *Mohamed Ismail, supra* note 35.

39 *Ibid.* at para. 36. See also *CCSU v. Minister for the Civil Service,* [1984] 3 All ER 935; and *Persatuan Aliran Kesederaran Negara v. Minister of Home Affairs,* [1988] 1 MLJ 442.

40 *Supra* note 12 at paras. 41-42.

41 *Supra* note 12 at para. 43.

VIII. REQUIREMENT TO STATE A MUSLIM'S RELIGION IS UNCONSTITUTIONAL

Under article 8(1) of the Constitution, all persons are equal before the law and entitled to the equal protection of the law. Accordingly, the rule that all persons in like circumstances should be treated alike applies to both legislative powers and administrative discretion, as well as to substantive and procedural rights and duties.[42] Even though, pursuant to article 8(2),[43] certain forms of discrimination may be countenanced, that is only provided they are explicitly permitted by the Constitution. In this regard, classification of persons is permitted only if it is a reasonable classification and not one based on constitutionally forbidden grounds, or arbitrary or irrational differences.[44] Such classification of persons, however, must be based on "intelligible differentia which distinguishes those that are grouped together from the others that are left out."[45] That being so, article 8(5) — which provides that article 8 does not invalidate or prohibit any provision regulating personal law — has no application here because registration and identity card regulations do not touch on personal law.[46]

Accordingly, Malanjum CJSS concluded that because regulation 4 requires that any registrant or person applying who is a Muslim state his or her religion (which requirement does not apply to non-Muslims), there is a differential treatment for Muslims not countenanced (as argued by counsel) by article 8(5), because the regulations do not touch the personal law of Muslims.[47] Justice Malanjum declared:[48]

Hence, in my view this tantamount to unequal treatment under the law and in the absence of any exception found to justify the discrimination the said sub-regulation [regulation 4(c)(iva)] has infringed Article 8(1) of the Constitution. In other words it is discriminatory and unconstitutional and should therefore be struck down. For this reason alone the relief sought for by

42 *Ibid.* at para. 44. See *Lachmandas v. State of Bombay*, [1952] SCR 710.

43 Which provides: "Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

44 *Supra* note 12 at para. 44.

45 *Ibid.* See *Datuk Haji Harun Idris v. PP*, [1977] 2 MLJ 155; and *Pathumma v. State of Kerala*, [1978] SC 771

46 *Ibid.* at para. 44.

47 *Ibid.* at para. 46

48 *Ibid.* at para. 45

the Appellant should be granted namely, for a declaration that she is entitled to have an NRIC (Identity Card) in which the word "Islam" does not appear.

IX. OBJECT AND PURPOSE OF REGULATIONS 4 AND 14 UNDERPINS RELEVANT FACTORS TO CONSIDER

Justice Malanjum next proceeded to consider the object and purpose of regulations 4 and 14 in order to determine whether the way in which the NRD applied them was in line with that object and purpose. In this regard, Justice Malanjum observed:

> ... Regulations 4 and 14 provide the mechanics by which a person can apply for replacement identity card, that is, the applicant has to supply particulars as stipulated and such other particulars necessary for the purpose of *identification* and to produce documentary evidence to support the *accuracy* of *any particulars submitted.* [49]

Accordingly, Justice Malanjum concluded that the NRD, by insisting that Ms. Joy produces an apostasy certificate from the relevant *Syariah* court or some other Islamic authority before her third application could be processed, had clearly based its policy on matters unexpressed in or covered by regulations 4 or 14.

To the argument that the NRD was entitled to ask for additional information as well as documentary evidence[50] (*e.g.*, a certificate from the relevant *Syariah* court or any other relevant Islamic authority) under regulation 14, Justice Malanjum rejoined that such an argument could only stand scrutiny if Ms. Joy's third application was considered in isolation "for it is true that in her identity card issued after the second application the word 'Islam' appeared consequent to the amendment."[51] However, if all three applications were taken in account together and as "one continuous episode,"[52] the position should be as approached by the (equally powerful) dissenting judgment of Justice Gopal Sri Ram (which approach Justice Malanjum cited with approval) in the Court

49 *Ibid.* at para. 47 [emphasis added].

50 After all, it was argued against Ms. Joy, that she applied to correct her particulars pertaining to the word "Islam" in her IC under regulation 14(1)(c) and so there was nothing illegal in the registration officer calling for additional information as well as documentary evidence from her when she applied to correct her particulars.

51 *Supra* note 12 para. 51.

52 *Ibid.* at para. 54.

of Appeal in *Lina Joy*:[53]

> In her statutory declaration dated February 21, 1997 stated, among other matters: (i) that she had never professed or practiced Islam as her religion since birth; (ii) that she had embraced Christianity in 1990; and (iii) that she intended to marry a Christian. Her later statutory declaration dated March 15, 1999 affirmed in support of her application dated January 3, 2000 adds little to what she had previously declared. The form she attempted to submit on January 3, 2000 makes it clear in column 31 that she no longer wished to be a Muslim. In these circumstances, an order from the Syariah Court does nothing to support the accuracy of the particular that the appellant is a Christian. However, the baptismal certificate dated May 11, 1998 produced by the Appellant in evidence amply supports the accuracy of the particular that the Appellant is a Christian. This conclusion is amply supported by examining the way in which Regulation 14(2) is constructed. That Sub-regulation requires the applicant to state in his or her statutory declaration the reason for the change of name. In the appellant's case, she stated that her reason for the change of name was that she was now a Christian. Accordingly, there is nothing in Regulation 4(cc) (xiii) (sic) (to read Regulation 4(c)(x)) that supports the action of the Director General in this case. It follows from what I have said thus far that an order or certificate from the Syariah Court is not a relevant document for the processing of the appellant's application. It is not a document prescribed by the 1990 Regulations. Nor is it a particular that a registration officer is entitled to call for as a particular under Regulation 4(cc) (xiii) (sic) (to read Regulation 4(c)(x).)

In support, Justice Malanjum stated that it is axiomatic that the NRD should only take into account matters pertaining to the requirements of regulations 4 and 14, and should not bring in any extraneous factor such as the retrieval of information from its record.[54] From the outset, even when the first application was made, Ms. Joy made it plain that she was a Christian. Therefore, if an applicant has satisfied the requirements of regulations 4 and 14, the NRD has no option but to allow the application. Justice Malanjum declared:[55]

> It is not the function of NRD to add in further requirements which have not been stipulated in those Regulations. It is also not the function of NRD to ensure that the Appellant has properly apostatized. Such matter should be left to the relevant religious authorities to take up any action deemed necessary or appropriate. NRD has not shown that one of its statutory duties is to ensure that a person has properly renounced the Islamic faith in accordance with the requirements by the Islamic authorities. I would therefore think that in coming to its decision to reject the application of the Appellant on account of non-production of an order or a certificate of

53 *Ibid.* at para. 55.

54 *Associated Provincial Picture Houses v. Wednesbury Corporation*, [1948] 1 KB 223. See also *SEIU, Local No: 333 v. NDSNA*, [1975] 1 S.C.R. 382 at 389, *per* Dickson J.

55 *Ibid.* at para. 54.

> apostasy from the Federal Territory Syariah Court or Islamic authorities NRD had asked itself the wrong question and had taken legally irrelevant factor into account and excluded legally relevant factor.

And so the NRD, in requiring the production of a document that was neither provided for nor authorized by the regulations, had acted *ultra vires* its powers under the regulations.[56] Thus, the NRD acted illegally because it had not understood correctly "the law that regulates [its] decision making power."[57] In coming to this conclusion, Justice Malanjum relied on the following dictum of Lord Diplock in *CCSU v. Minister for the Civil Service*:[58]

> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

X. HOLISTIC NOT "COMPARTMENTALIZED" APPROACH PREFERRED

The decision of the majority in *Lina Joy* treated each application as separate and new and in that sense "compartmentalized" its judgment on each application made by Ms. Joy. However, the Chief Judge of Sabah & Sarawak refused to follow this — in the view of the present writer — unreasonable approach and instead treated the various applications by Ms. Joy as a single series of applications; thus, Justice Malanjum's approach was holistic.[59]

Accordingly, Justice Malanjum took the view that the majority in the Court of Appeal had turned down Ms. Joy's appeal by falling into the error,

56 *Ibid.* at para. 55.

57 *Ibid.*

58 [1984] 3 All ER 935.

59 In another sense too there can be made the distinction between "holistic" and "compartmentalized" approaches. The approach taken by the majority in this case was to deal with it as a purely administrative law matter, that is to say that if a policy or decision met the standards of administrative law (*i.e.*, in essence, English administrative law) no further scrutiny is required. And the traditional standards of administrative law are two-fold — which flow from two principles of natural justice — (i) the right to be heard (*audi alteram partem*) and (2) right to be judged impartially *(Nemo judex in sua causa)*, buttressed by rules relating to such factors as "legitimate expectations" of the parties and the "reasonableness" of a decision (See *Baker v. Canada (Ministry of Citizenship and Immigration)* [1999] 2 S.C.R. 817). In this sense the judgment of the majority was "compartmentalized" in the administrative law field. The Chief Judge of Sabah & Sarawak, however, took a rather more macro view and subjected the decisions of the NRD to the standards demanded by the Constitution and in that sense, Justice Malanjum's approach was holistic.

unwittingly or otherwise, of compartmentalizing the third application for sole scrutiny and excluding and omitting from consideration the first and second applications. Justice Malanjum took the view that to single out the third application for consideration was to miss the tree for the forest. The correct approach should be holistic,[60] treating the three applications as "one continuous episode."[61]

In this connection, Justice Malanjum agreed with argument of counsel for the appellant, Ms. Joy, that:[62]

> the insistence by NRD for a certificate of apostasy is not consonant with the requirement of Regulation 4 (c) (x) because the call for proof of renunciation of religion does not fall within the meaning of the words "particulars submitted." The only "particulars submitted" by the Appellant was her status as a Christian or of her conversion to Christianity...NRD was only empowered to call for such documentary evidence that it considered "necessary to support the accuracy of any particulars submitted." The relevant "particulars submitted" was that the Appellant was a "Kristian" [sic.]. Thus the NRD could call for documentary evidence to support the accuracy of that particular ("Kristian") [sic.] which the Appellant had submitted. However, the NRD could not call for documentary evidence that the Appellant was or was not a Muslim. This is because the Appellant had not submitted any particular that she was a Muslim.

In the third application, however, the majority in the Court of Appeal[63] took the view that the retrospective requirement of the law, that the IC of a Muslim should state his religion, meant that — since the records of the NRD indicated that Ms. Joy was a Muslim (based on NRD advice, Ms. Joy had not stated that the reason for her request for change of name was change of religion) — the nub of her third application was not so much to state that she was a Christian, but rather to remove the word "Islam" or renounce Islam. In this connection, therefore, the NRD could require her to produce documentary evidence to support the accuracy of her contention that she was no longer a Muslim.

Against that view of the majority in the Court of Appeal Justice Malanjum held thus:[64]

> With respect, the holding in the majority judgment of the Court of Appeal completely disregarded the fact that the Appellant made several applications for a change

60 Put differently, to be expansive rather than narrow.
61 *Supra* note 12 at para. 54.
62 *Ibid.* at para. 57.
63 *Ibid.* at para. 58.
64 *Ibid.* at para. 59.

> of name.[65] Surely those applications should be regarded as part of a continuing act on the part of the Appellant. To confine the matter to the third application only is completely ignoring the history of the plight of the Appellant in her dealings with NRD. I am inclined to agree with the submission that "if the NRD had correctly acted on the Appellant's choice of religion for the replacement I.C. in October 1999, and had not rejected it on the ground that she had not produced an apostatisation order, there would have been no necessity for the third application to correct the particulars as regards entry of 'religion'."[66]

Consequently, Justice Malanjum chastised the majority in the Court of Appeal for taking this ill-founded "compartmentalized approach," which ignored and omitted the significant and striking history of the predicament of Ms. Joy, thus changing the true complexion and character of her compelling case.

XI. THE NRD MISAPPREHENDED THE APPLICABLE LAW AND ITS PRESCRIPTION

It is trite law in the world of public administration that a tribunal decision, such as the one taken by the NRD, would be a nullity if it does (or fails to do) something in the course of its inquiry which it should not (or should) have done, as the case may be. This might happen, for example, if a tribunal were to misconstrue its empowering provisions, such that it based a decision on matters which, under the provisions setting up the tribunal, it had no right to take into account in the first place.[67] If this were to happen, it can be said that the tribunal has acted "unlawfully." That would indeed be the case if a tribunal were to outright refuse to consider a relevant matter, or take into account some wholly irrelevant or extraneous consideration, or wholly omit to take into account a relevant consideration.[68] Equally, if a tribunal fails to understand the object and scope of its empowering provisions and its functions and duties thereunder, it misdirects itself in law.[69]

65 And this was unacceptable to Justice Malanjum even despite the less than ingenuous statement of the majority in the Court Appeal that: "In any case... since the administrative law question that has been framed for this appeal is concerned with the appellant's third application, and is not concerned with the second application, any criticism of the NRD's manner of handling the second application is irrelevant." *Supra* note 12 at para. 58.

66 Supra note 12 at para. 61. Compare *Ismail bin Suppiah v. Ketua Pengarah Pendaftaran Negara* (R–1–24–31 of 1995) (unreported).

67 See *Anisminic Ltd v. Foreign Compensation Commission*, [1969] 2 AC 147, *per* Lord Reid. See also *South East Asia Firebricks v. Non-metallic Mineral Products Manufacturing Employees' Union*, [1981] AC 363 (PC).

68 See *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] AC 997, *per* Lord Upjohn.

69 See *Bristol DC v. Clark*, [1975] 1 WLR 1443 at 1451, *per* Scarman LJ.

Lina Joy found that the NRD did request a certificate of apostasy for two reasons: (a) it took the view that the renunciation of Islam is a question of Islamic law for Muslim authorities to decide; and (b) therefore, the NRD was not equipped or qualified to decide that issue (and, indeed, that it was a matter outside its jurisdiction). Consequently, Justice Malanjum held that by insisting that a certificate of apostasy be produced, the NRD had erred in considering and taking into account a factor which it should not have in the first place.[70]

And so it was found that the NRD had abused its power "when it failed to take into consideration a legally relevant factor, namely the statutory declaration and the documents submitted by the Appellant, preferring its policy of requiring a certificate of apostasy from the Federal Territory Syariah Court which in the first place is not stipulated in the Regulations 4 and 14 thereby taking legally irrelevant factor into consideration in making a decision."[71]

XII. "REASONABLENESS" OF ADMINISTRATIVE ACTION SUBJECT TO FUNDAMENTAL CONSTITUTIONAL LIBERTIES

It is axiomatic that administrative polices and actions in Malaysia must pass what is known as the *Wednesbury*[72] reasonableness test. It is equally plain that it is for the administrative tribunal to make policies and arrive at decisions and not for the court to substitute its decision for the decision of the tribunal. In other words, when conducting judicial review, a court is primarily concerned with the decision-making process and not with the merits of the decision itself. Be that as it may, it is for the court to determine whether a policy established or a decision made was pursuant to the tribunal having directed itself properly in law and as a result of the consideration of matters that upon the true construction of the empowering regulations ought to have been considered (and irrelevant matters excluded). Therefore, if a tribunal misdirects itself as to the law or takes account of irrelevant factors, or if it fails to take account of relevant matters, it can be said to have acted *unreasonably*

70 *Supra* note 12 at para. 62.

71 *Ibid.* at para. 61. See *R v. Inner London Education Authority ex* parte *Westminster City Council*, [1986] 1 All ER 19; *Breen v. Amalgamated Engineering Union*, [1971] 1 QB 175; and *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd*, [1979] 1 MLJ 135.

72 See *Associated Provincial Picture House Ltd v. Wednesbury Corporation*, [1948] 1 KB 223 [*Wednesbury*]. See also *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh*, [1997] 1 MLJ 789; and *R Rama Chandran v. Industrial Court*, [1997] 1 MLJ 145.

under the *Wednesbury* doctrine. But even if there is no failing in regards to these factors, the doctrine could still lead to a finding of *unreasonableness* if a court concludes that the tribunal arrived at a conclusion so unreasonable that no reasonable tribunal could have come to it. Accordingly, *Wednesbury* is a multifaceted and composite concept.

On the facts of *Lina Joy*, Justice Malanjum concluded thus:[73]

> [I]n the present appeal the insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This is because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy. It is trite law that jurisdiction must come from the law and cannot be assumed. Thus the insistence was unreasonable for it required the performance of an act that was almost impossible to perform.[74]

Moreover, it was held that since in some states in Malaysia apostasy is a criminal offence, to expect Ms. Joy to apply for a certificate of apostasy when to do so would likely expose her to a range of offences under the Islamic law was unreasonable, for it meant that Ms. Joy would have been made to incriminate herself.[75]

The majority of the Court of Appeal in *Lina Joy* held that the disputed policy pursued by the NRD was reasonable according to the *Wednesbury* doctrine. However, Justice Malanjum disagreed on the basis that the majority in the Court of Appeal had neglected to consider a "cardinal principle."[76] Justice Malanjum observed:[77]

> The implementation of the policy has a bearing on the Appellant's fundamental constitutional right to freedom of religion under Article 11 of the Constitution. Being a constitutional issue it must be given priority and independent of any determination of the Wednesbury reasonableness. A perceived reasonable policy could well infringe a constitutional right. Hence, before it can be said that a policy is reasonable within the test of Wednesbury its constitutionality must be first considered. The majority judgment failed to carry out such an exercise before coming to its conclusion on the NRD policy.

In other words, even if an administrative policy or the action of an administrative tribunal or authority (like the NRD) has apparently overcome the

73 *Supra* note 12 at para. 69.
74 See *Oriental Insurance Co Ltd & Anor v. Minister of Finance*, [1992] 2 MLJ 776.
75 *Supra* note 12 at para. 70.
76 *Ibid.* at para. 64.
77 *Ibid.*

basic *Wednesbury* hurdles of properly directing itself as to the law pursuant to its empowering provisions, taking into account only relevant factors, not considering irrelevant factors and concluding (on the face of it) as a reasonable tribunal would, it can still have acted unreasonably under the *Wednesbury* doctrine, if it fails to consider a constitutional matter which impinges on the policy or decision.

XIII. APOSTASY IS NOT A MATTER EXCLUSIVELY FOR THE *SYARIAH* COURTS

As mentioned above,[78] in respect of the question of the proper forum to deal with the question of a Muslim's apostasy, the NRD, in the proceedings below, took a four-fold position that: (a) the renunciation of Islam is a question of Islamic law for Muslim authorities to decide; (b) the NRD was not equipped or qualified to decide that issue; (c) it was a matter outside the jurisdiction of the NRD; and (d) apostasy is exclusively within the realm of the *Syariah* Court.[79] Indeed, in respect of the last contention of the NRD the majority in the Court of Appeal wholeheartedly agreed.[80] However, Justice Malanjum in the Federal Court disagreed and rejected all four submissions, concluding thus:[81]

> 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 Articles 5(1), 3(4), 11(1), 8(2), 10(1)(a), 10(1)(c), 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 Article 121(1A).[82] 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.

78 See Part XI above. See also *supra* note 12 at para. 62.

79 *Ibid.* at para 55.

80 *Ibid.*

81 *Ibid.* at para. 65.

82 Which provides that the two Malaysian civil High Courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the syariah courts."

It is submitted that Justice Malanjum was incontrovertibly correct in his pronouncement that article 121(1A) *only* protects the *Syariah* courts in matters within their jurisdiction and nothing else. In an authoritative pronouncement on the clear and unambiguous intendment of article 121(1A), Justice Harun Hashim, in *Mohamed Habibullah Mahmood v. Faridah Dato' Taib*,[83] declared that it "is obvious that the intention of Parliament by Art 121(1A) is to take away the jurisdiction of the High Court in respect of any matter within the jurisdiction of the Syariah Court."[84] (And, it is submitted, that is all.)

Furthermore, as regards the purpose and effect of the article, one cannot put it better than did Justice Jeffery Tan in Shaik *Zolkaffily bin Shaik Natar v. MAIPP*:[85]

> [T]he key is not whether the High Court has jurisdiction but whether jurisdiction of the matter at hand is with the syariah courts. But art 121(1A) is not the written law giving jurisdiction to the syariah courts.[86] *It merely settles the issue of concurrent jurisdiction of the High Court, in that there is none, when the jurisdiction of the subject matter is given to the syariah courts.*

Again, in *Barkath Ali bin Abu Backer v. Anwar Kabir bin Abu Bacher*,[87] Justice Tan observed that article 121(1A) is a marker delineating the extent of the High Court's jurisdiction as it took away the jurisdiction of the High Court in respect of any written law within the jurisdiction of the *Syariah* courts.

Accordingly, it is a fallacy to assert that article 121(1A) has taken away the jurisdiction of the civil courts in respect of all Islamic matters. It has not. The effect of article 121(1A) is to take away the jurisdiction of the High Court *only* over matters which have been conferred to the *Syariah* courts by any written law. In other words, where jurisdiction is expressly conferred on the *Syariah* courts by written law, the High Court no longer enjoys *concurrent* jurisdiction.[88] Thus, for example, where a matter relating to or impinging on the Constitution arises — even though it is an "Islamic" matter — the superior civil courts alone have jurisdiction over it and not the *Syariah* courts, for only the former courts have jurisdiction over constitutional matters. This was confirmed by Justice Malanjum: where "constitutional issues are involved espe-

83 [1992] 2 MLJ 793.

84 *Ibid.* at 800.

85 [1997] 3 MLJ 283 at 293 [emphasis added].

86 Nor is it the written law dealing with the status and/or standing of the *Syariah* courts in any regard whatsoever. See A.L.R. Joseph, "Whither the doctrine of separation of powers in Malaysia?" (2007) Singapore J. of Legal Studies 380.

87 [1997] 4 MLJ 389.

88 *Supra* note 85.

cially 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 Article 121(1A)."[89] For that reason, the present writer submits that superior civil court judges should never abdicate their duty to deal with such cases properly and robustly; they should not "pass the buck" (and, indeed, jurisdiction) willy-nilly by referring to article 121(1A) and declaring, falsely, that it has taken away jurisdiction from the civil courts in all matters pertaining to Islam.[90]

XIV. PUBLIC BODIES ARE BY STATUTE DUTY BOUND TO ACT IN THE PUBLIC INTEREST

On the facts of *Lina Joy*, what the NRD did, in essence, was delegate its authority to determine the question of the religion of an applicant to the *Syariah* courts and other Islamic authorities. This delegation was unsanctioned by the relevant regulations. The NRD was fixed with discretionary powers which it alone had the right and duty to exercise and any delegation thereof would be unlawful. Indeed the unlawful delegation "extinguished its statutory discretion by a self-imposed fetter."[91] Justice Malanjum concluded:[92]

> [B]y voluntarily abdicating its discretionary power under a federal law to an outside religious body NRD had acted with irrationality... I would say that NRD had unlawfully agreed to act under the dictation of another. It is well accepted in administrative law that a decision maker or body is entitled to consult and seek advice from any source, provided it retains the ultimate authority to make the final decision. It must retain its power to act independently in pursuance of the statutory purpose of the law... Indeed a public authority is obliged to make its own decision and not act on the dictates of another.[93]

Further, it was concluded that even though a public authority is allowed to adopt departmental policies and to broadcast them to all concerned, it must

89 *Supra* note 12 at para. 65.

90 See the appalling decision of the High Court in *Kaliammal a/p Sinnasamy v. JAWI*, [2006] 1 MLJ 685.

91 *Supra* note 12 at para. 67. See also *Jackson Stanfield v. Butterworth*, [1948] 2 All ER 358; *Lavender v. Minister of Housing*, [1970] 3 All ER 871; and *Isman bin Osman v. Govt of Malaysia*, [1973] 2 MLJ 143.

92 *Ibid.* at para 68. See also J.M. Evans, ed., De Smith's Judicial Review of Administrative Action, 4th ed. (London: Stevens, 1980) at 309.

93 See *Bread Manufacturer of New South Wales v. Evans*, (1986) 56 ALJR 89; *Commissioner of Police v. Gordhandas Banji*, AIR 1952 SC 16; and *P Patto v. Chief Police Officer, Perak & Ors*, [1986] 2 MLJ 204.

not allow its policies to override its statutory duty to act in the public interest. Moreover, "a public authority must also have the legal authority when it wishes to impose a substantive or procedural requirement to those who come before it. Administrative powers cannot be utilized to achieve collateral or unauthorized purposes no matter how noble or well-intended these purposes or policies might be."[94]

XVI. NRD ACTED MECHANICALLY, WITHOUT AFFORDING A FAIR HEARING, AND UNFAIRLY

In rounding up his judgment, Justice Malanjum further held that:

1. against the settled principles of administrative law that a public authority must not act mechanically, retaining its discretion and dealing with each case on its own merits, the NRD responded throughout in a mechanical fashion, more concerned with extra-judicial matters;[95]

2. because Ms. Joy did not receive a fair hearing from the NRD (nor did it give reasons for its decisions), the NRD failed to observe the principles of natural justice, a procedural impropriety that could be a basis for nullifying any judicial, administrative, departmental or executive decision.[96]And the failure was much exacerbated in the event because (a) Ms. Joy's constitutional rights under article 11(1) were involved; (b) her legitimate expectations were raised when her name change was allowed; (c) she had spent many years to try to resolve her problem with the NRD including her compliance with an advice given by NRD staff; and (d) it was the inclusion of the word "Islam" in her new identity card that led her to seek judicial review.

3. there is a duty on the NRD to act fairly towards Ms. Joy, but there was a clear failure to so in the NRD's omission — when she was asked to make her third application — to inform her of the impending amendment to regulation 4.[97] Accordingly, there was a failure to

94 *Supra* note 12 at para. 66. See also *Pyx Granite v. Ministry of Housing*, [1959] 3 All ER 1; and *Padfield v. Minister of Agriculture*, [1968] 1 All ER 694.

95 *Ibid.* at para. 71. See *R v. Windsor Licensing ex parte Hodes*, [1983] 2 All ER 551.

96 *Ibid.* at para. 72. See *J P Berthelsen v. Director General Immigration*, [1987] 1 MLJ 134.

97 Justice Malanjum took the view that "there is therefore a reasonable suspicion that Regulation 4, although formulated in 2000, was deliberately amended retrospectively to 1.10.1999 in order to target and to prejudice the third application of the Appellant made on 23.10.1999." *Supra* note 12 at para. 73.

comply with an aspect of the rules of natural justice.

XVII. CONCLUSION

In arriving at his dissenting judgment, the Chief Judge of Sabah & Sarawak correctly refused to be cocooned solely by considerations of administrative law, as was the majority in this case. Indeed, Justice Malanjum considered the constitutional implications of Ms. Joy's predicament, especially in regards to the various breaches and infringements of her fundamental liberties (especially freedom of religion) as guaranteed by the Federal Constitution of Malaysia. At the very beginning of his judgment, Justice Malanjum found that, despite the ostensible appearance that *Lina Joy* merely involved administrative law matters, it concerned "fundamental constitutional issues involving fundamental liberties and in the context of the constitutional arrangement in Malaysia the division of powers between the State and Federal authorities."[98]

This dissenting judgment commends itself for many reasons, but above all because Justice Malanjum sensibly kept his focus squarely on certain fundamental constitutional principles (which conveniently escaped, for one reason or another, the attention of the majority judges). With those well-established constitutional principles as underpinning, Justice Malanjum ruled — correctly in the view of the present writer — in favour of Ms. Joy but against the NRD in various respects, as considered above.

Justice Malanjum insisted at the outset of his judgment that, having sworn to uphold the Constitution, it was his duty to ensure that it was upheld at all times. Indeed, in *Lina Joy*, this meant giving effect to what, in Justice Malanjum's view, the founding fathers of Malaysia had in mind when they framed the sacred document which is the Constitution.[99] As Justice Malanjum reminded us, recalling those oft-cited prudent words of Justice Salleh Abas in *Che Omar bin Che Soh v. PP*[100]: "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." And so, Justice Malanjum enjoined "that when considering an issue of constitutional importance it is vital to bear in mind that all other interests and feelings, personal or otherwise, should give way and assume only a secondary role if at all."[101]

98 *Ibid.* at para. 31.
99 *Ibid.* at para. 3.
100 [1988] 2 MLJ 55 at 57.
101 *Supra* note 12 at para. 4.

In turn, Justice Malanjum cautioned that "cursory handling" of *Lina Joy* may result in unnecessary anxieties to the general public.[102]

Lastly, it only remains to be highlighted that of the seven judges — from the High Court to the Court of Appeal and then the Federal Court — who heard Ms. Joy's originating summons, the five who found against her were all Muslims, but the two who found in her favour were from non-Muslim minorities. The latter two were not only in the minority in racial and religious terms, but were also the two minority dissenting judges, one in the Court of Appeal and the other in the Federal Court. In view of this, it is submitted that it is not overdramatic to suggest — as the title of this article does — that, for more reasons than one, *unfettered religious freedom hangs by the thread of minority dissent in Malaysia*. For a young multiracial and multi-religious nation this, indeed, is cause for concern.

102 Alas the allegation of "cursory handling" could be justifiably leveled against the majority's somewhat derisory, eighteen-paragraph judgment.