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MATT NELSON AND DIAN A.H. SHAH: THE POLITICS OF ADMINISTRATIVE "REASONABLENESS" IN MALAYSIA

In 1997, a Muslim-born woman (Lina Joy) applied to the Malaysian National Registration Department (NRD) to have her name changed – she stated in her application that she had converted to Christianity to marry a Christian man. The NRD rejected her application six months later (without stating any reasons). But, in 1999 she submitted a second application and included a statutory declaration that she had converted to Christianity. Her application was approved, but owing to new regulations her revised identity card nevertheless stated that her religion was 'Islam'. Joy then submitted a third application to remove the word 'Islam' from her identity card, but this was not accepted as she failed to produce a syariah court order certifying that she had renounced Islam.

The bureaucratic processes that Lina Joy faced to secure official state recognition of her conversion shows that, in practice, the exercise of religious freedom is often extremely difficult to separate from state-enforced administrative procedures. In other words, despite constitutional protections for a right to 'profess and practice' one's religion, in practice this right is routinely tied to procedures through which the state might come to *recognize*, and *formalize*, the right. Ensuring a person's correct religious identification (for the purpose of state records) is all the more pertinent in Malaysia as Muslims and non-Muslims are

governed by different laws with regard to personal and family matters. In addition, Muslims are subject to laws regulating 'syariah criminal offences'. The question is: at what point do administrative 'regulations' render one's 'right' to religious freedom meaningless? Which bureaucratic procedures are 'reasonable' for the purpose of operationalizing this basic right?

In the particular circumstances surrounding Lina Joy's case, the state's bureaucratic demands required Joy to complete a set of procedures that did not yet exist in the jurisdiction where her case arose (i.e. the Federal Territory of Kuala Lumpur). Whereas in some Malaysian states procedures for the renunciation of Islam are spelled out in specific syariah enactments passed by state legislatures, there was (and still is) no such procedure in Kuala Lumpur.

Typically, the case of Lina Joy has been read as a clash between Malaysia's state-level syariah courts and a fundamental right to religious freedom. Without detracting from the weight and significance of such analyses, we put forward an alternative approach, focusing on *administrative* law, to understand why Lina Joy's case turned out as it did while, at the same time, illuminating the implications of her case for religious freedom in Malaysia.

When Joy appeared before Malaysia's highest court, the court was asked to determine whether, in bridging the gap between Joy's constitutionally protected right to religious 'self-identification' and the state's 'recognition' of that identification, asking her to complete a set of as-yet-non-existent bureaucratic procedures should be considered administratively *'reasonable'*. In the end, the Federal Court, by a 2:1 majority, concluded that the NRD's actions were 'reasonable' for three principal reasons.

First, the Court noted that the NRD's insistence on authoritative evidence from a syariah court confirming that Joy was no longer a Muslim (instead of Joy's statutory declaration that she had renounced Islam) was 'reasonable' because, in the Court's view, renouncing Islam implicated Islamic law, so it was perfectly reasonable for the state to require formal confirmation from Islamic authorities who were thought to possess the expertise required to adjudicate such matters.

Second, the court noted that, even though the Administration of Islamic Law (Federal Territories) Act (1993) did not provide any procedures governing Muslim apostasy, the majority in a previous case known as *Soon Singh* had declared that, in cases of Muslim apostasy, the jurisdiction of the syariah courts could be *implied* even in the absence of any clear statutory prescription.[1]

Third, the NRD's 1990 Regulations did not offer any clear guidance as to what must be provided to correct erroneous particulars on an ID card; however, the Court held that it

was within the discretion of each NRD officer to determine which documentary evidence was required to confirm the accuracy of any applicant's details and that, in cases of Muslim apostasy, it was 'reasonable' in light of prevailing jurisprudence to expect some type of certification from Malaysia's state-level syariah courts.[2]

The Lina Joy saga reminds us that religious freedom is never merely a 'negative' right constraining the power of the state. The *enforceability* of this right almost invariably depends on 'positive' forms of bureaucratic intervention and state-based 'recognition'. In this respect, the Court was careful to avoid stating that Lina Joy had no right to change her religion; instead, it merely emphasized that the exercise of one's *right* to religious freedom was subject to the relevant *regulations*.

Jurisprudential analysis aside, it is worth understanding the Lina Joy case within its larger historical and political context. Here, we highlight two main issues.

The first issue concerns the federalized system of administering Islam in Malaysia and the position of state-level sultans vis-à-vis the definition and enforcement of Islamic laws and Malay customs. Malaysia's pre-independence constitutional settlement led to the establishment of Islam as the religion of the Malaysian Federation, but the Malay rulers were assured that this establishment would not encroach on their centuries-old position as the heads of Islam in their respective states. Matters concerning Islamic law and Malay customs thus fall under the jurisdiction of each state with certain limitations. In particular, List II Schedule 9 of the Malaysian constitution specifies which aspects of Islamic law (namely personal and family laws and 'offences against the precepts of Islam') fall within the legislative competence of each state legislature.

Furthermore, each state-level sultan has the authority to decide – usually in consultation with state religious councils and state religious bureaucracies – whether or not to accept specific 'Islamic' laws governing the Muslims residing in that state. From time to time, such laws emerge from the work of state-level legislatures, fatwas issued by state-level muftis, or the advice of a federal Islamic Affairs department known as JAKIM. But, in Malaysia's *Federal Territories*, where the case of Lina Joy emerged, 'Islamic' laws must be promulgated by the federal parliament and, then, endorsed by Malaysia's king (a position that rotates, every five years, amongst Malaysia's state-level sultans). Needless to say this arrangement produces different Islamic laws in different parts of Malaysia, with Malaysia's Federal Territories functioning like any other Malaysian state.

Different states have different mechanisms for dealing with Muslim apostasy, ranging from more 'punitive' to more 'permissive' measures. In fact one of the most important

political questions to emerge from the case of Lina Joy was this: *which* procedural standard, governing Muslim apostasy, should Malaysia's Federal Territories adopt? So far, the federal government has not chosen to adopt any procedure at all; this is the statutory gap that produced such a difficult situation for Lina Joy. And, yet, crucially, the Federal Court refrained from any attempt to fill this gap by legislating from the bench. Instead, the Court maintained that the administrative procedures required to 'recognize' and 'formalize' Lina Joy's religious identity could only be defined by Malaysia's federal parliament.

The second contextual issue involves the broader political dynamics within which Malaysia's federal parliament is situated. For decades, Malaysia's federal government has been controlled by a centre-right coalition known as the Barisan Nasional led by the United Malays National Organization (UMNO). This coalition often seeks to shore up its religious legitimacy by 'out-Islamizing' its leading political opponents—above all, an 'Islamist' party known as the Parti Islam se-Malaysia (PAS). PAS controls the northern state of Kelantan, where the state legislature has sought to ensure that Muslim apostasy is subject to capital punishment. This punishment, however, has been thwarted by federal restrictions within which the punitive reach of any state-level syariah court is restricted: fines up to MYR5000, imprisonment up to three years, and six strokes of the cane. Other states, like Negeri Sembilan, adopt a very different approach to Muslim apostasy. In Negeri Sembilan, would-be apostates are sent for three months of 'rehabilitative counseling' (followed by a one-year cooling-off period) before their conversion can be—at least ostensibly—certified by the state's syariah courts.

The last time state-level apostasy laws were enacted was 2003, both in then PAS-controlled Terengganu and in BN-controlled Negeri Sembilan.[3] There were, however, other efforts to introduce apostasy regulations, including earlier efforts by the federal government and the state of Perlis in 2000.[4] In these two cases, however, the relevant bills fell through; the federal government's proposal (which resembled the relatively 'permissive' procedures in Negeri Sembilan) never reached the floor of parliament for debate, and in BN-controlled Perlis, a similar bill (specifying one year of rehabilitative detention) was passed only to be withdrawn shortly thereafter on orders from the federal government. [5] A deeper understanding of the federal government's approach to apostasy legislation—precisely the sort of legislation needed to fill the statutory and administrative lacuna faced by Lina Joy—requires some appreciation for the larger political and electoral contexts within which it is situated. So far the federal government has hesitated to pursue covering legislation; some felt that, in a context framed by ongoing efforts to 'out-Islamize' PAS,

this hesitation was framed by concerns that its earlier proposals (resembling those in Negeri Sembilan) would be seen, politically, as 'too soft'.

To conclude, we emphasize the underlying *political* issues that framed the *legal* questions surrounding Joy's religious freedom as an explicitly *administrative* matter. Malaysia's federal courts have consistently refused to legislate from the bench. In fact they have repeatedly dismissed the view that a commitment to institutional centralisation is necessary to ensure a legal defence of fundamental rights. Reinforcing common-law norms of judicial restraint, in other words, the Federal Court adopted a posture of deference vis-à-vis the government's legislative and administrative powers.

Turning to the specific actions of the NRD, however, the Court sought to determine whether, within the context of Malaysia, its administrative actions were so perverse that no 'reasonable' authority *in Malaysia* could ever be expected to perform them. This is, of course, the famous *Wednesbury* 'reasonableness test' underpinning so much of British administrative law. In fact this was the test that allowed the Malaysian Federal Court to describe, as 'reasonable', the actions of a bureaucrat who refused to provide state recognition for Lina Joy's self-identification (as an 'ex-Muslim') without additional evidence from a Malaysian shari'ah court.

Clearly, when faced with this intersection between fundamental rights and administrative law, one could be forgiven for asking how a fundamental right to religious freedom might serve as a *check* on state power if, in practice, the *operationalization* of that right is tied to politically contextualized decisions regarding the 'reasonableness' of discretionary administrative action. This is, we argue, an issue that deserves far more attention in the literature.

[1] *Lina Joy v. Majlis Agama Islam Wilayah & Another* [2007] 4 Malayan Law Journal 585, 616-18.

[2] *Id.* at 604.

[3] *See* Section 26 of the Syariah Criminal Offence (*Hudud and Qisas*) Enactment 2003 (Terengganu); and, before this, Section 23 of the Syariah Criminal Code (II) Enactment 1993 (Kelantan).

[4] Mohd Azam Mohd Adil, *Punishment for Apostasy: Conflict Between the Right to Freedom of Religion and Criminal Sentence, A Case study in Malaysia, 1 (2)* Jurnal CITU 177, 189-90 (2005).

[5] *Id.* at 190. The federal "Restoration of Faith Bill" required shari'ah court judges to advise would-be converts to repent, failing which they would be detained at a rehabilitation

centre for up to thirty days. (If this failed, the judge would issue a declaration that the individual was no longer a Muslim.) *See* Santha Oorjitham, *A Matter of Personal Faith? Concern Grows Over an "Islamizing" Trend*, Asiaweek.com, http://edition.cnn.com/ASIANOW/asiaweek/magazine/2000/1013/nat.malaysia.html (accessed August 31, 2015).

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