Desecularising Malaysian Law?

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I Introduction

This chapter explores the question of Islamisation or desecularisation in contemporary Malaysia through an examination and contextualisation of three recent and highly controversial legal cases. These cases deal with the matter of conversion into Islam, and thereby involve contesting the jurisdictional boundaries between secular and religious courts. The three cases are *Moorthy*’s case, decided in December 2005,1 *Shamala*’s case, decided in 2003–2004,2 and *Subashini*’s case, decided in 2007.3 In all three cases, Malaysian Hindu women challenged the legal validity of conversion into Islam of members of their families. In *Moorthy*, the widow Kaliammal Sinnasamy contested the conversion of her deceased husband Moorthy Maniam, and resisted the claim of the Federal Territories Islamic Affairs Department (‘JAWI’) to custody of the body for burial according to Islamic rites. In the other two cases, the plaintiffs Shamala and Subashini asked the civil — that is, secular — courts to assume jurisdiction over their marriages (and so over the dissolution of the

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1 Kaliammal a/p Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain [2006] 1 MLJ 685 (High Court, Kuala Lumpur, Raus Sharif H) (‘*Moorthy*’s case’).
2 Shamala a/p Sathiyaaseelan v. Dr. Jeyaganesh a/l C. Mogarajah [2003] 6 MLJ 515 (High Court, Kuala Lumpur, Raus Sharif H, 26 April 2003), dismissing Shamala’s husband’s appeal against jurisdiction; *Shamala a/p Sathiyaaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2004] 2 MLJ 241 (High Court, Kuala Lumpur, Faiza Tamby Chik J, 11 September 2003), dealing with jurisdiction over marriage; *Shamala a/p Sathiyaaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2004] 2 MLJ 648 (High Court, Kuala Lumpur, Faiza Tamby Chik J, 13 April 2004), dealing with the conversion of Shamala’s children; and *Shamala a/p Sathiyaaseelan v. Dr. Jeyaganesh a/l C. Mogarajah* [2004] 3 CLJ 516 (High Court, Kuala Lumpur, Faiza Tamby Chik J, 20 July 2004), dealing with child custody.
3 Subashini a/p Rajasingam v. Saravanan a/l Thangathoray [2007] 2 MLJ 798 (Kuala Lumpur High Court, Aziah Ali JC, 9 October 2006); [2007] 2 MLJ 705 (Court of Appeal, Putrajaya, Gopal Sri Ram, Suryadi and Haslan Lab JJCA, 13 March 2007); [2007] 4 MLJ 97 (Court of Appeal, Putrajaya, Gopal Sri Ram, Suryadi and Haslan Lab JJCA, 2 April 2007). The apex (Federal Court) decision was handed down on 27 December 2007. Nik Hashim Nik Abdul Rahman FCJ wrote the majority decision, with Azmel Haji Maamor FCJ agreeing (‘*Subashini* Federal Court majority decision’); Abdul Aziz Mohamad FCJ wrote a separate decision, dissenting in part (‘*Subashini* Federal Court minority decision’). At the time of publication, the transcript was only available from the website of the Malaysian Bar, <http://www.malaysianbar.org.my>.
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marriages), even though their husbands had converted to Islam. Additionally they requested that the civil courts rule that their husbands’ unilateral conversion to Islam of their infant children was invalid and should be restrained, and that they, the Hindu mothers, should be given custody of the children.

The women’s claims fell in the space between the jurisdictions of the common law courts (usually referred to as civil courts in Malaysia) and the Islamic (syariah) courts. This is so for two interrelated reasons: first, because the civil courts declined to exercise jurisdiction over the question of conversion, deferring to the authority of the religious courts; secondly, because the syariah courts’ *ratione personae* jurisdiction over the Hindu women is doubtful, since that jurisdiction is confined to Muslims. The civil courts’ reluctance or refusal to exercise civil jurisdiction over all the legal issues and perceived deference to the syariah courts received much publicity in both mainstream (government influenced) and independent mass media. Summing up the situation at the end of 2007, legal academic Shad Saleem Faruqi wrote in the daily *Star* newspaper that “with the slightest whiff of Islamic jurisprudence, our superior court abdicates in favour of the syariah courts even though momentous issues of constitutionality may be at stake or even if one of the parties is a non-Muslim”. This apparent deference to Islam and demotion of the constitutional and political rights of non-Muslims animated political debate and civil society campaigns to preserve, or, on another view, reinstall, the supremacy of the secular *Federal Constitution* (‘FC’). The secularism campaign was met with strident — and in some instances, violent — demands to defend Islam from the secular onslaught.

These three cases have been selected because they have achieved notoriety in Malaysia, where their names are shorthand for a particular constellation of public issues. However it must be emphasised that they are only three of a large body of cases involving contested jurisdiction and constitutional rights, and dealing with similar themes of child custody in inter-faith marriages; religious burial; contested religious identity, including conversions into or out of Islam (apostasy); and the

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4 In *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708, 713, it was held that “[i]t would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction since the Syariah Courts do not have jurisdiction over non-Muslims”. This position has been affirmed by the Federal Court in the recent *Subashini* decision, see supra note 3.


9 Consider the case of Siti Fatimah who was born to Muslim parents but raised as a Hindu by her grandparents under the Hindu name Revathi Masoosai. She later married a Hindu. Malacca religious affairs officers claimed custody of her child and detained her in a religious rehabilitation centre: Bede...