

# CITING GENDER: CONSTITUTING THE MUSLIM WOMAN IN MALAYSIA

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## INTRODUCTION

In 2006, two Malaysian courts, making determinations in cases involving Muslim women leaving Islam, came to contradictory verdicts. One court was the civil federal jurisdiction of the Malaysian Court of Appeals, and the other a *syariah* state jurisdiction in Negri Sembilan, applying *hukum syara'* (the Malaysian version of Islamic law). The first of these cases, *Lina Joy*, is perhaps the best known Malaysian court case worldwide, involving a woman whose petition to have her conversion from Islam to Christianity recognised by the state, in order that she might marry her Christian fiancé, was denied on the grounds of her race. To be 'Malay', according to Article 160(2) of the Malaysian constitution, is to be 'a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom.'<sup>1</sup> The 2001 judgement on *Lina Joy* argued, 'a person as long as he/she is a Malay and by definition under Art. 160 cl. (2) is a Malay...cannot renounce his/her religion at all.'<sup>2</sup> In the second case, *Nyonya Tahir*, decided later that same year, a Malay woman was declared shortly after her death by the Syariah High Court of Negri Sembilan to have left Islam, allowing her body to be released to her family for burial beside her Chinese husband in a Buddhist cemetery.<sup>3</sup>

Studies of gender and justice have often shown that broad questions of constitutional law and the identity of the state tend to be fought over the lives and bodies of women. These cases about religious identity began as matters of the administration of everyday life – marriage, family life, death – then quickly became contests over a state's control of the religious identity of its subjects, emerging as matters of apostasy and test cases of the religious identity of the Malaysian state itself.<sup>4</sup> Yet explanations of these developments in

Malaysian law that emphasise the rise of Islam and Malay ethnocentrism often miss the ways in which institutional factors, in existence long before the putative ‘Islamic revival’, have functioned to construct particular visions of patriarchy in which ethnicity, gender and religion have intertwined to reinforce the ascendance of law as a vehicle for their enforcement.

Gender emerges as a critical connecting strand among these three elements of law – the everyday, the socio-political and the legal-institutional. The argument here is emphatically not that adherence to Islamic law or aspirations to an Islamic state place women at a disadvantage; scholars of Islam and gender have long argued that Islam alone is no more patriarchal or oppressive to women than other religious traditions, and that the modern nation state has long surpassed these traditions in its patriarchy and interventionism.<sup>5</sup> By tracing the process by which matters of personal status law became questions of apostasy in Malaysia, this article seeks to incorporate a discussion of the dynamics of gender within ongoing processes of legal and political transformation in South Asia. In particular, definitions of gender and their operationalisation in law emerge as particularly freighted by colonial baggage, in legal treatments of marriage and the family, but also in the ways in which courts reason the implications of categories such as personal status and their relation to other categories such as religion, race and custom. This article also seeks to question the way in which Malaysia might be properly understood as part of the South Asian legal landscape, through an emphasis on networks rather than on geography: on the one hand, the concept of personal status law, the common law citational practices of judges and lawyers, and the relationship between religion and state power might be understood to rely heavily on South Asian precedents, meaning that the treatment of gender in the courts of Malaysia needs to be understood in the context of South Asian constructions. On the other hand, judges and lawyers in Malaysia are increasingly referring to Islamic texts from the Arab world, and invoking legal discourses from the United States and United Kingdom, indicating a shift

away from South Asian legal and discursive frames. An awareness of these citational and referential shifts matters for research into the effects of a shared colonial past and legal system among the states of South and Southeast Asia; recognising the importance of citational networks may also help us consider how contemporary reconfigurations of educational, legal and professional networks in the Muslim world will shape the reasoning of courts and legal actors in decades to come.

This article traces the overlap of colonial legacies, legal pluralism, jurisdictional struggle, national politics and legal activism that produced the divergent cases with which we began. The paper trails of the cases discussed here stretch back into the 1980s and 1990s and are representative of a trajectory of changes in Malaysian treatments of the question of race, religion and gender. Yet they also map, through citation, an evolving network of reference points within Malaysian legal institutions for the arbitration of questions of Islamic and constitutional law. Against the backdrop of a historical discussion on the ways in which personal status laws have come to govern the limited realm of family law, these cases reveal the traces of new networks of training, scholarship and citational practice in Malaysia since the 2000s, indexing the changing meaning and place of gender, women and the family through an evolving global network of reference and citation, whose nodes no longer end in Calcutta and London, but stretch to Damascus, Cairo and Washington D.C., and whose appearance is mediated through the Malaysian experience. Through these citational practices, this article explores how Malaysian judges, lawyers and legal activists are re-constituting the Muslim woman, her place in the Malaysian family, and her importance in efforts to articulate Islam's place in Malaysian law.

## **GENDER AND JUSTICE IN THE COMMON LAW: SOUTH ASIAN TRANSLATIONS**

The concept of ‘personal status’, its expression in common law, and its connection to the idea of a discrete Muslim community and identity, trace their origins to the British experiment in India. Both Malaysian cases have long personal genealogies – the *Nyonya Tahir* question, involving a woman whose status as a Muslim was determined after her death in 2006, first came to the attention of the Negri Sembilan authorities in the mid-1980s, and the *Lina Joy* matter, involving a woman who wished to register a change in her religious status from Muslim to Christian, began with the plaintiff’s conversion in the 1990s. Their institutional genealogies stretch far beyond these beginnings, to the imperial construction of personal status law and its application, in British imperial governance, based on newly rigidified categories of religion, and to the parallel construction of a domain of autonomy reserved for local Muslim authorities, based on newly reified understandings of Islamic law.<sup>6</sup> Through these constructions, the authority and independence of local Muslim elites would overlap with a newly constrained but increasingly symbolic domain allowed to Islam – marriage, family, and ritual observance. Generally, studies of family and religious law tend to take the category of ‘personal status’ for granted, as pertaining to matters of family, gender and religious observance, in which the personal laws of Hindus, Muslims and others would differ in their details but not their scope or arena of enforcement. This is an assumption that deserves more careful de-construction, since the category of personal status was itself a construction of imperial and colonial law, and the equivalence between Muslim, Hindu and other personal law jurisdictions an outcome of multiple colonial experiments in the nineteenth and early twentieth century.<sup>7</sup> Among the most influential experimental sites for the elaboration of personal law jurisdictions were the British courts in India, that helped determine the scope, content and logic of personal law for Muslims throughout territories under British direct and indirect rule.

British-trained Muslim lawyers and judges in India played a crucial role in the making of personal status law throughout the British imperial system. In the late nineteenth century, their activities in the courts of British India and in the political negotiations between Indian Muslim elites and the government of India helped to refashion a colonial legal construction – ‘personal law,’ whose application differed according to the religious status of a subject – into a site for the articulation of distinct Muslim and Hindu ‘community’ interests.<sup>8</sup> Assumptions made by East India Company officials in the Hastings Plan of 1772 – that ‘Muslim law’ would be applied to Muslims ‘in all suits regarding inheritance, marriage, caste, and other religious usages or institutions’<sup>9</sup> – would by the end of the nineteenth century become part of the construction of a domain of ‘Muslim personal law’ that Indian Muslims would defend as authentic and privileged. Throughout the Muslim world, Muslims grappling with the encroachment of European law and the intervention of colonial states would defend the territory of inheritance, marriage, and family as a sacrosanct domain, despite the lack of such precedent in earlier Muslim systems of law and governance. In Egypt, for example, the Arabic formulation of ‘personal status’ appeared in the title of a codification of Hanafi laws relating to the family, tying together the concept of personal status, family law, and the shari’ah, through the logic of modernising and reforming the law.<sup>10</sup> This project also involved the spatial and hierarchical reassignment of the family to the private sphere, a process not restricted to colonial sites: Foucault, speaking of legal reform in France, observed that ‘thanks to the civil code the family preserved the schemas of sovereignty: domination, membership, bonds of suzerainty, etcetera, but it limited them to the relationships between men and women and parents and children...It constituted an alveolus of sovereignty through the game by which individual singularities are fixed to disciplinary apparatuses.’<sup>11</sup> Talal Asad, tracing the ‘secularisation of Islamic law’ in Egypt in the nineteenth century, also pointed to the parallel privatisation of Islam and the family through the mechanisms of law:

‘the family is the unit of ‘society’ in which the individual is physically and morally reproduced, and has his or her primary experience as a ‘private’ being. The secular formula of privatizing ‘religion’ is adhered to by confining the *shari’a* to the family.’<sup>12</sup>

Indian Muslim judges working in the colonial legal system in the late nineteenth century sought to define Islam and Muslim practice in terms legible to the British; through court cases and the institution of precedent, articulated Islam in India in comparison to Anglican Christianity in ways that established their cognate character. By doing so, they helped to further an understanding of Islam as part of private life, and Islamic law as belonging to the domain of the ritual and the private.<sup>13</sup> Muslim elites in the same period, in Islamic as well as political organisations, articulated a distinct ‘Indian Muslim’ interest, in part based on an evolving understanding of a private sphere defined by Islam and Islamic law. In 1937, the Muslim Personal Law (Shariat) Application Act was passed in India, equating Muslim Personal Law with the *shari’ah*, and defining the domain of ‘personal law’ as ‘intestate succession, special property of females, including personal property...marriage, dissolution of marriage...maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs.’<sup>14</sup> In the 1950s, the Reid Commission, a multi-national group charged with drafting the Constitution of the Federation of Malaya, explicitly referred to India and Pakistan as models for Malaya, particularly with regard to the legal framing of religion in the newly independent state.<sup>15</sup> Political elites in Malaya, many of them trained in or familiar with British legal framings of Islam in India and the Malay states, drew upon these models as well. Debates about the character and composition of the Malaysian state revolved around the position of Islam and Muslims, and ended in a constitutional document in which Islam was explicitly tied to Malay ethnicity, and Malay ethnicity to a privileged share in the state, as articulated in Article 160(2) of the Federal Constitution of Malaysia.

## **GENDER AND JUSTICE IN THE COMMON LAW: MALAYSIAN TRANSLATIONS**

In the moment of founding of the Malaysian state, therefore, Malay ethnicity, Muslim religious identity, and the domain of personal law were already co-constitutive, but local articulations and elaborations of the law in Malaya and then Malaysia introduced a number of important divergences from both India and the British system. The British set up a system of indirect rule based upon rule of British Residents in the Malay states, beginning in 1874, whose advice the Sultans were to seek in all matters except religion and custom, providing a basis for the articulation of Malay ruler autonomy.<sup>16</sup> This autonomy was now centred on areas not previously the sole jurisdiction of the Sultans, and occasioned the elaboration of religion and custom in new ways – the matriarchal and matrilineal practices of some Malay communities were increasingly replaced with more patriarchal customs, overlaid with the patriarchy of Victorian assumptions about gender, economy and society. In addition to changes in the content and practice of custom and religion were changes to their scope and symbolic importance – even though religion and custom became increasingly limited to the domains of family law, inheritance, child custody and ritual observance, these domains became invested with increasing symbolic and performative importance. The position of the Malay Sultans as guardians of Malay religion and custom became their protected domain, and this protected domain came to be articulated, by the last years of the nineteenth century, as the domain of Islam. States such as Johor and Terengganu promulgated constitutions in which Islam was proclaimed to be the state religion, the final arbiter of Islam in each state the Sultan, and Islam allied to the privilege and political legitimacy of ethnic Malays as the indigenous majority in Malaya. State bureaucracies for the administration of Islam were developed with these understandings of the jurisdiction of personal status at their core, and the majority of cases coming before the shari’ah judges of the Malay peninsula were cases of

divorce, child custody, and maintenance. The family, constituted according to the limited domain of Muslim personal status; the shari'ah, constituted according to the limited domain of the family: both institutions deeply intertwined with the politics of indigeneity and national belonging.

By the time of the Reid Commission in the 1950s, the Sultans and Malay nationalist groups were able to articulate this position as a matter of constitutional necessity for the Federation of Malaya. In addition to tying Islam to the politics of ethnicity and indigeneity in Malaysia, constitutional formulations located authority over Islam to the Sultans, making Islam an issue over which the Federal government and the states of the Federation would continue to struggle. The formulation of Article 160(2) of the Federal Constitution of 1957 defined a Malay as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom. We will come to the question of the profession of Islam later in this article. The speaking of Malay, given that it is now the national language of Malaysia, served far more as a barrier to entry at the beginning of Federation than it does as an indicator of Malayness today. What about Malay custom? It is, of course, both a complex and problematic thing to define, but here the Nyonya Tahir case provides one window into the way that Malay custom was understood by state authorities in the 1980s and 1990s, and court documents reveal that the entanglement of ethnicity, religion and gender have been negotiated by women in Malaysia well before the constitutional debates.

In the Nyonya Tahir case, court documents show that Nyonya Tahir first came to the attention of the syariah bureaucracy in 1986, in a report entitled 'Cohabitation with Chinese Man, Nyonya Bt Tahir/Chiang Meng.'<sup>17</sup> The Islamic Religious Affairs department and court of Alor Gajah Melaka investigated the matter, and issued a report based on an interview with Nyonya Tahir. The report began by stating that Tahir was born in 1918, and had lived in the village of Ulu Sungai Buluh for fifty years with a Chinese man named Chiang Meng. She



was raised by her Malay grandmother, who married a Chinese (from Hainan) convert to Islam, and he raised and educated her in the Chinese way. She married a Chinese man with the consent of her grandfather when she was 18, and had 13 children. She lived in the Chinese way, worshipped *Tok Kong* (local earth deities) and ate pork.<sup>18</sup> The report continued to note that she lived in an isolated place with her husband, far from Malay community, that she had an altar in her house and venerated it, and that all her children had married Chinese people. It concluded that ‘Nyonya Tahir has no intention of returning to Islam and has made a declaration that she will continue to live as a Chinese and if she dies wishes to be buried as a Chinese person. Her Identity Card is in a Malay name, Nyonya Binte Tahir.’<sup>19</sup> The report makes no determination of fact or recommendations for action; it seems merely to have reported a series of sociological facts based on mixed indicators of race and religion – not least of which was her ‘Malay name’, Nyonya, usually used in Malay referred to a woman of Chinese ancestry. Having spent her life in a small village in the racially diverse state of Melaka, Nyonya Tahir appears in this record to have made her way of life and desires clear to the Religious Affairs Department, and they appear to have understood her to have definitively left Islam and the Malay community.<sup>20</sup> The local Islamic bureaucracy seems to have been content to leave things as they stood in 1986, and in 1991, Nyonya Tahir signed an official declaration repeating the facts of the report before a Melaka Commissioner of Oaths, and it was to these documents that the syariah judge referred when deciding after her death in 2006 that Nyonya Tahir had indeed been apostate. The fact-finding, documentary and adjudicative mechanisms of the state all used reasoning that navigated the complex racial, religious and cultural landscape of Malaysia to make a determination about Nyonya’s religious status.

The Lina Joy case, too had a beginning and a documentary trail well preceding its appearance in the formal records of the courts. Born to Malay Muslim parents, Azlina Jailani

converted to Christianity as an adult and thereafter went to the National Registration Department (NRD) in February 1997 to Lina Lelani, stating in her application that she wished to marry a Christian.<sup>21</sup> The NRD denied her application, and she applied again in March 1999, this time to change her name to Lina Joy. In her suit, Joy claims that she went to the branch office of the NRD in Petaling Jaya, and reported that she was advised by an employee of the NRD to remove mention of her conversion in her application, which she did, and submitted new applications based on this advice in August 1999. She was informed on 22 October 1999 that her name change application had been approved and that she was to apply for a new identity card to reflect her name change, which she submitted on 25 October 1999, stating her name as Lina Joy, and her religion as Christian. New regulations were inserted into the NRD procedures which came into force on October 1 1999 that identity cards should, in the case of Muslims, state their religious status. When Lina Joy's new identity card was issued, the card reflected her new name, but indicated that her religion was Islam. She returned to the NRD office with her solicitor to apply for 'Islam' to be removed from her new identity card, and an employee of the NRD refused to accept the application because she needed an order from the Syariah Court.

Joy applied to the federal courts in a series of cases beginning in 2001, and ending only in 2007 with the dismissal of her case by the Court of Appeal, first arguing the case on grounds of religious freedom as guaranteed by the Malaysian Constitution, and then on administrative law grounds, that the NRD acted incorrectly in processing her applications. The two defendants, the Islamic Religious Council of the Federal Territories and the National Registration Department, argued that since she was Muslim, the civil courts had no jurisdiction; Joy argued that, since she was no longer Muslim, but Christian, she was no longer subject to the jurisdiction of the Islamic Religious Council or Syariah Courts. The 2001 decision from the High Court stated: 'the issue of apostasy is an issue coming under the

category of religious affairs...and therefore it ought to be determined by eminent jurists who are properly qualified in the field of Islamic jurisprudence and definitely not by the civil court.’ (257) However, the constitutional test was ‘Malayness’: ‘a person as long as he/she is a Malay and by definition under Art. 160 cl. (2) is a Malay...cannot renounce his/her religion at all.’<sup>22</sup> In this case, the law on marriage registration, the bureaucracy of the National Registration Department, the regulation of national identity cards and the court decisions all seemed to be working in unison to enforce a unitary understanding of Malayness and its relationship to Islam.

### **CITATIONAL PRACTICES AND NEW NETWORKS OF LAW**

The proliferation of cases in the area of Islam, constitutional law and jurisdiction have provided an opportunity for scholars to look more closely at the ways in which Islamic law is being understood and elaborated in Malaysia. Scholars have discussed developments in the Malaysian legal system in recent years as charting a trajectory towards greater insistence on the Islamic character of the state and increasingly formalistic applications of Islamic legal content.<sup>23</sup> In 1988, an amendment was passed to the Federal Constitution reserving jurisdiction over syariah matters to the state syariah courts, part of political and administrative moves by the ruling government to raise the status and prominence of Islam in Malaysian public life.<sup>24</sup> It was not until the 2000s that these issues became matters of open legal contestation and national judicial debate. From 2000 on, in debates about high-profile court cases such as those of Lina Joy (2001-2007), Shamala v Jeyaganesh (2004), Kaliammal Sinnasamy (2005), Revathi Massosai (2007) and Siti Fatimah Tan Abdullah (2008), that general trend has proven strong, and the national political climate and tone of public discourse seems in keeping with this analysis.

However, the long trajectory of legal reasoning and ruling in Malaysia since Independence does not tell a unidirectional story: syariah courts are, under some circumstances, permitting Muslims exit from Islam under some circumstances, some with penalty and others without; judgements in federal courts, on the other hand, have tended consistently to adhere to a strict interpretation of Article 121(1a) of the Constitution regarding the jurisdiction of the syariah courts over Muslims, even at the expense of other constitutional considerations. Further examination of the discourses and citations deployed in adjudication of cases on the proper jurisdiction over Islam at both the syariah and civil courts indicates a number of patterns emerging: while fiercely protective of their jurisdiction in cases involving Islam, the syariah courts have also been converging with civil courts in their reference to civil law concepts and methods; Muslim judges in the civil courts of the Federation undertake varying degrees of Islamic reasoning and proof-texting in even their denials of jurisdiction over cases involving Islam; the field of citation for judicial reasoning has widened since the 2000s, from a reliance on common law precedents and principles in UK and South Asian cases, to broader references to Arab Islamic legal scholarship, US constitutional and rights activism language, and beyond. These citations point to the need to investigate in more granular detail the thesis of Islamisation in Malaysia, its intellectual and legal foundations, and its changing network of references, to the horizons they describe.<sup>25</sup>

The Nyonya Tahir judgement demonstrated, in its references to Malaysian case law and constitutional questions, that the syariah court saw itself as participating in a legal discourse about the issue of apostasy ranging beyond the confines of Islamic jurisprudence. The judge made use of common law terminology, at times in English, indicating increasing convergence between the training and professionalisation of members of the syariah judiciary in Malaysia with their civil law colleagues.<sup>26</sup> By taking the unprecedented step of allowing the testimony of Nyonya Tahir's non-Muslim children in his court, the judge also gave these

witnesses standing through the Islamic jurisprudential principle of *qarinah*, which he defined as ‘any matter, whatever matter, that can illuminate the circumstances of something,’<sup>27</sup> a broad gateway for the inclusion of non-Muslim witnesses. Yet its permissiveness in matters in evidence and witnessing was accompanied by a definition of apostasy (*riddah*) that included intention, speech, belief, or ‘words that ridicule,’ citing popular contemporary Syrian jurist Wahbah al-Zuhaili.<sup>28</sup> He went further to emphasise – surely for audiences beyond the court – that the penalty for apostasy was death, in this case citing hadith (the authoritative compiled sayings of the Prophet and his early followers) and going on to delineate the Qur’anic verses describing consequences after death.

The Lina Joy judgement, taking place in a different jurisdiction, clearly referred to a different set of logics and cases, yet these too delivered a somewhat mixed set of messages. Given that the plaintiff’s arguments revolved around provisions in the Constitution for religious freedom, the judge paid a significant amount of attention to contextualising the right to religious freedom in the Malaysian case. Citing the doctrine of ‘harmonious construction’ from M.P. Jain’s *Indian Constitutional Law*, [1962] the judge argued that this principle required reading the provision for religious freedom in light of other constitutional provisions regarding the religion of the state and the jurisdiction of the syariah courts over Islam, ‘so as to give effect to the intention of the framers of our constitution.’<sup>29</sup> By this, the Judge referred to the Reid Commission, which he interpreted in the language of ‘our founding fathers’, as having recognised Islam to be the religion of the state in the period of the drafting, and well before. ‘Therefore from the inception of the Constitution the religion of Islam has been given the special status of being the main and dominant religion of the Federation,’<sup>30</sup> and ‘when construed harmoniously, the inevitable conclusion is that the freedom to convert out of Islam in respect of a Muslim is subject to qualifications, namely the syariah laws on those matters. Only such construction would support the ‘smooth workings of the system’, namely the

implementation of the syariah law on the Muslims as provided by the constitution.’<sup>31</sup>

Similarly to the Nyonya Tahir judgement, the judgement in Lina Joy devoted a reasonably significant amount of space to quotations from the Qur’an, on freedom of conscience (2:256, 29:46, 109:1-6, 2:62, 10:99, 9:6), and then on penalties for unbelief (4:137, 18:29), with little commentary to justify their inclusion or break down their significance.

Having lost the case on constitutional grounds, Lina Joy appealed on administrative law grounds, in particular questioning the conduct of the bureaucracy administering the provision of identity cards. Her lawyers cited the principle of ‘Wednesbury unreasonableness’ (Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 All ER 680), a standard for judicial review of public authority action ‘so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.’<sup>32</sup> The test of unreasonableness or irrationality according to the Wednesbury decision, made in the UK courts in 1947, has since been applied to review the actions of public bodies in Canada, Singapore, Malaysia and other common law jurisdictions, but not only have different standards for unreasonableness been applied in these jurisdictions, since the 1980s and 1990s, the standards for such review in the UK have shifted, in particular to allow judicial review on human rights cases.<sup>33</sup> The majority judgement at appeal determined that the National Registration Department had acted reasonably according to Wednesbury.<sup>34</sup> However, a dissenting opinion written by Judge Richard Malanjum argued that the constitutional rights issues preceded the issue of reasonableness, and that constitutional issues precede jurisdictional ones: ‘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.’<sup>35</sup> Here, the dissenting judge’s arguments closely track an evolving discourse in which common law courts around the world

are deciding standards for reasonableness in reference to the UK but also according to national debates about human rights, constitutional law and the power of the courts to check public decisions.

Cases from *Lina Joy* (2001) to *Siti Fatimah Tan Abdullah* (2008) have shown that granting state syariah courts sole jurisdiction over Muslims assumes a level of homogeneity of Muslim identity and practice that has not historically existed in Malaysia, as the Nyonya Tahir documents show.<sup>36</sup> Further, in each case – even those involving the conversion of men in and out of Islam – the burden appears to rest most heavily on women.<sup>37</sup> In both the *Shamala* and *Kaliammal* cases, the conversion of men into Islam had effects on their non-Muslim wives: when Jeyaganesh, a Hindu man, converted himself and his young children to Islam, the Syariah High Court of the state of Selangor granted him custody of his children; when Moorthy Maniam, born a Hindu man, passed away, his wife Kaliammal was denied access to his body because he had reportedly converted to Islam. *Lina Joy* and *Revathi*, both women born into Muslim families, sought to have the state recognise that they did not consider themselves to be Muslim, and were refused. In the last case, that of *Siti Fatimah Tan Abdullah*, a woman born Chinese and Buddhist, was allowed by the Penang Syariah High Court in 2008 to leave Islam, but only when it was determined that she had converted to Islam to marry an Iranian Muslim man who then abandoned her and could not be found. As *De* (2010), *Sharafi* (2010), *Mallampali* (2010) and *Stilt* (2015), among others, have argued, conversion provides both courts and litigants numerous opportunities to redefine the law with regard to religion and gender; notwithstanding these opportunities, the burdens have seemed to fall heavily on women, many of them non-Muslims who would not ordinarily be subject to Islamic courts.<sup>38</sup>

The division of jurisdiction between state syariah courts and national civil courts has an added dimension here, in that with very few exceptions, non-Muslims cannot be

recognised in the syariah courts. In the case of *Shamala v Jeyaganesh*, Shamala contended that her children were converted to Islam without her knowledge and consent, and that the High Court should declare that conversion (with its implications for custody to the Muslim convert father) null and void. The Judge in the case pointed out that the jurisdiction for determining this matter was the Syariah Court for the Federal Territories and the relevant law Section 92 of the Administration of Islamic Law (Federal Territories Act (1993)). ‘However, in the present case, the wife is not a Muslim. Being a non-Muslim, she could not take advantage of section 92. Being a non-Muslim, the Syariah Court has no jurisdiction to hear her. What then is for her to do?’<sup>39</sup>

These cases attracted widespread media and public attention at a time when the primacy of Islam and Malayness in Malaysia was a matter of open debate and concern. Their appearance in the courts, one after another, and their treatment in the media as issues not only of human interest but of conflicts of jurisdiction between the syariah and civil courts, between the states and the Federation, played a crucial part in raising the problem of Islam and ethnic identity when it came to the fate of Muslim women in the Malaysian justice system. Scholars such as Norani Othman (2005), Tamir Moustafa (2013) and others have observed that the Malaysian legal system itself has diverged in its treatment of laws relating to Muslims and non-Muslims, unifying the family codes applied to other ethnic and religious communities in 1976 (Marriage and Divorce Act) while concurrently consolidating and elaborating a system of laws specifically for Muslims.<sup>40</sup> Paradoxically, perhaps, the privileging of Malay and Muslim identity over the last few decades in Malaysia has led to increasing strictures on Muslims through the law of the states and the Federation, but as the list of cases above show, these strictures appear to fall particularly heavily, and disproportionately, upon non-Malay women subject – indirectly or directly – to syariah legislation.<sup>41</sup>



## **GENDER, RECOGNITION AND THE PARADOX OF PRIVILEGE**

The discourse of common law, its institutions and authorities, has dominated Malaysian law-making and development through colonisation and into the moment of founding, and continues to play an important role in the formation of concepts such as personal status, and of religion itself as located in the private lives of individuals and their families. Yet at the moment of founding, a particular relationship between Islam and the Malaysian state and its subjects was given primacy in law, through the formulation of Islam as the religion of the state, and through the coupling of Malay ethnic identity to Muslim religious identity – a coupling unique to Malaysia. This unique relationship has been further elaborated in the system of Malaysian courts and their bifurcation, as well as in the language of legislation and the work of lawyers, judges and social actors attempting to make sense of contradictions and tradeoffs in the law between the equality of citizens and the privileged status of Islam. This bifurcation has itself been made visible and relevant through the training, aspirations and judicial reasoning of legal institutions and training through which the syariah courts have taken on the organisational and educational structures of the civil system, while the civil systems have attempted to draw upon the legitimacy and authority of Islamic legal discourse and sources. Tensions between the federal government and the states, the ruling party and the Sultans, have also fuelled the continuing productivity of jurisdictional disagreements over the meaning of Islam vis-à-vis the Malaysian constitution and the scope of the sovereignty of the Sultans of each state. Through their language, their chosen audience, and their citations, these cases link to a changing landscape in which Malaysian lawyers, judges, scholars and activists are attempting to position their arguments,

Lawyers and judges working to define the scope of protection for rights defined by the Malaysian constitution have also invoked a wider universe of citation, primarily from UK

sources, but increasingly articulated in language inflected with US rights discourse. We do not yet know how upheavals in the educational and judicial institutions of Syria and Egypt will affect the networks that have in the past few decades proven so significant for the training, authority and upward mobility of judges, lawyers and other actors within the Malaysian syariah system. Changes in rights discourse and legal activism emerging from British and US politics are also likely to have some impact on the ways in which Malaysian lawyers and litigants think and talk about law's promise, and its pitfalls. An analytic concern for citational practices, therefore, also points us to the need to contextualise local and national legal developments within networks whose importance may wax and wane with time.

## NOTES

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<sup>1</sup> Federal Constitution of Malaysia; I. Hussin, 'Islam, Ethnicity and the Problem of Mixed Legality: Two Malaysian Cases,' *Yearbook of Islamic and Middle Eastern Law* (2010). Portions of this discussion are also referenced in Iza Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority and the Making of the Muslim State* (Chicago, 2016).

<sup>2</sup> *Lina Joy v Majlis Agama Islam Persekutuan & Anor*, High Court Malaya, 18 April 2001, *Current Law Journal*, 6 (2004), p. 271.

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- <sup>3</sup> 'Dalam Perkara Nyonya binti Tahir, *Ex P Majlis Agama Islam Negeri Sembilan dan Yang Lain; Syariah High Court Seremban Negeri Sembilan; Judge Mohamad Shukor Sabudin. 23 January 2006.*'
- <sup>1</sup> *Current Law Journal* (Syariah Reports), 1, (2006): 335-354. Author's translation.
- <sup>4</sup> T. Moustafa, 'Judging in God's Name: State Power, Secularism and the Politics of Islamic law in Malaysia,' *Oxford Journal of Law and Religion* (2013) pp. 1-16.
- <sup>5</sup> Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, 1992); Joan Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, 1997); Lila Abu-Lughod, *Remaking Women* (Princeton, 1998); Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, 2003).
- <sup>6</sup> Iza Hussin, 'Making Legibility Between Colony and Empire: Translation, Conflation, and the Making of the Muslim State,' in Ann Orloff and Kimberly Morgan, eds. *The Many Hands of the State* (New York, 2017); Hussin 2016.
- <sup>7</sup> See, for example, Eleanor Newbigin, *The Hindu family and the emergence of modern India: law, citizenship and community.* (Cambridge, 2013); Eleanor Newbigin, Leigh Denault, and Rohit De, (2009) 'Personal law, identity politics and civil society in colonial South Asia,' *Indian Economic and Social History Review*, 46:1 pp. 1-4.
- <sup>8</sup> Alan Guenther, 'A Colonial Court Defines a Muslim,' in Barbara Metcalf (ed.), *Islam in South Asia in Practice*, (Princeton, 2009): pp. 293-304; Scott Alan Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia,' *Modern Asian Studies*, Vol. 35, No. 2, (May 2001): pp. 257-313; also see David Washbrook, 'Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India', *Modern Asian Studies*, 15: 3 (1981), pp. 649-721.
- <sup>9</sup> 'Letter from Governor-General and Council to Court of Directors, Fort William, 3 November 1772', in *Reports from Committees of the House of Commons*, vol. 4, (East Indies, 1772-3); Bernard S. Cohn, 'The Command of Language and the Language of Command' in *Subaltern Studies*, Vol. IV (1985), p. 289.

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<sup>10</sup> Muhammad Qadri Pasha, *Kitab al-ahkam al-shar'iyya fi al-ahwal al-shakhsiyya wa al-mawarith* [The Book of Laws of the Shari'ah in Matters of Personal Status and Inheritance] (1893), in Rushdi al-Sarraj, *Kitab Majmu'at al-Qawanin al-Shar'iyya* [The Book of Shari'a Legislation] (Jaffa 1944), pp. 80-182; Muhammad Qadri Pasha, 'Code du statut personnel et des successions d'après le rite Hanafite' in: *Codes Egyptiens et lois usuelles en vigueur en Egypte* (Cairo 1939); Lama Abu-Odeh, 'Modernizing Muslim Family Law: The case of Egypt,' *Vanderbilt Journal of Transnational Law* 37.4 (Oct 2004): p. 1043.

<sup>11</sup> Michel Foucault, *Psychiatric Power: Lectures at the College de France, 1973-74*, Jacques Lagrange (ed) (New York 2006), pp. 82-84. Continued thanks to Bernard Harcourt for his guidance on Foucault and family law.

<sup>12</sup> Talal Asad, 'Thinking About Secularism and Law in Egypt,' Vol. 2, *International Institute for the Study of Islam in the Modern World Occasional Paper* (2001), p. 8.

<sup>13</sup> Also see Gauri Viswanathan, *Outside the Fold: Conversion, Modernity, and Belief* (Princeton, 1998) and Arun Shourie, *Indian Controversies: Essays on Religion in Politics* (Delhi, 1993).

<sup>14</sup> The Muslim Personal Law (Shariat) Application Act, 1937, Section 2.

<sup>15</sup> Kristen Stilt, 'Contextualizing Constitutional Islam: The Malayan experience,' *ICON* Vol. No. 2 (2015): pp. 407-433; Joseph M. Fernando, 'The Position of Islam in the Constitution of Malaysia,' *Journal of Southeast Asia Studies* 37(2) (2006), p. 265.

<sup>16</sup> Pangkor Engagement 1874.

<sup>17</sup> 'Dalam Perkara Nyonya binti Tahir, Ex P Majlis Agama Islam Negeri Sembilan dan Yang Lain; Syariah High Court Seremban Negeri Sembilan; Judge Mohamad Shukor Sabudin. 23 January 2006,' *Current Law Journal* (Syariah Reports) (2006): pp. 335-354. Author's translation from Malay.

<sup>18</sup> 'Tok Kong' refers to 'Na Tuk Kong' or Datuk Gong, local earth spirits venerated in Malaysia, Singapore and Indonesia, largely among the Chinese. Cheu Hock Tong, 'The Datuk Gong Spirit Cult Movement in Penang: Being and Belonging in Multi-ethnic Malaysia,' *Journal of Southeast Asian Studies*, vol. 23, no. 2 (September 1992): pp. 381-404.

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<sup>19</sup> See note 3.

<sup>20</sup> The state of Melaka is one of the four states of the Malaysian Federation not to have a Sultan, and its head of state, the Yang di-Pertua Negeri, is not the head of Islam – this role is assumed by the head of state of the Federation, a hereditary sultan who is the Yang di-Pertuan Agong.

<sup>21</sup> Dissenting opinion by Gopal Sri Ram JCA, *Lina Joy v Majlis Agama Islam Persekutuan & Ors*, Court of Appeal Putrajaya, 19 September 2004, *Current Law Journal* 4 (2005): pp. 666-699, 674-6.

<sup>22</sup> *Lina Joy v Majlis Agama Islam Persekutuan & Anor*, High Court Malaya, 18 April 2001, *Current Law Journal* (2004), p. 271.

<sup>23</sup> Joseph Neoh, 'Islamic State and the Common Law in Malaysia: A Case Study of Lina Joy,' *Global Jurist* Issue 2 (2008); Moustafa 2013.

<sup>24</sup> Article 121(1A).

<sup>25</sup> Iza Hussin, 'The Politics of Religious Freedom,' *Journal of Religious and Political Practice*, forthcoming.

<sup>26</sup> Donald L. Horowitz, 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change,' *The American Journal of Comparative Law* 42, no. 3 (1994): pp. 543-80; Moustafa 2013.

<sup>27</sup> Nyonya Tahir 2006, pp. 30-31.

<sup>28</sup> 'Al Fiqh al Islami wa Adillatuhu, Juz 6, Dar al Fikr, Syria, Damascus, 1989, 173,' Nyonya Tahir 2006.

<sup>29</sup> *Lina Joy v Majlis Agama Wilayah Persekutuan & Anor*, High Court Malaya Kuala Lumpur, Judge Faiza Tamby Chik. *Current Law Journal* (2004): pp. 242-273, 253.

<sup>30</sup> Ibid 251.

<sup>31</sup> Ibid 257.

<sup>32</sup> Lord Diplock, 'Council of Civil Service Unions v Minister for the Civil Service,' [1983] United Kingdom House of Lords 6 at para. 410, [1984] 3 All ER 935.

<sup>33</sup> *R. v. Secretary of State for the Home Department, ex parte Bugdaycay* [1986] UKHL 3, [1987] A.C. 514, H.L. (UK); Lord Carnwath, 'From Rationality to Proportionality in the Modern Law,' 2014.

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<https://www.supremecourt.uk/docs/speech-140414.pdf>; Gordon Anthony, ‘Wednesbury

Unreasonableness, Proportionality, and Equality’, *Textbook on Administrative Law* (Oxford 2006): pp. 284–312.

<sup>34</sup> Lina Joy v Majlis Agama Islam Persekutuan & Ors, Court of Appeal Putrajaya, 19 September 2004, *Current Law Journal* 4 (2005): pp. 666-699.

<sup>35</sup> Lina Joy Case: Dissenting Judgment of Justice Richard Malanjum, 2004.

<sup>36</sup> Also see: Charles Hirschman, ‘The Making of Race in Colonial Malaya: Political Economy and Racial Ideology,’ *Sociological Forum*, Vol 1 Issue 2 (Spring 1986); Aihwa Ong and Michael G. Peletz, *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia* (Berkeley 1995); Joel Kahn, *Other Malays: Nationalism and Cosmopolitanism in the Modern Malay World* (Honolulu 2006).

<sup>37</sup> Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia*, Princeton Studies in Muslim Politics (Princeton 2002).

<sup>38</sup> Rohit De, ‘The Two Husbands of Vera Tischenko: Apostasy, Conversion and Divorce in Late Colonial India,’ *Law and History Review*, Vol. 28 No. 4 (November 2010): pp 1011-1041; Chandra Mallampali, ‘Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness,’ *Law and History Review*, Vol. 28 No. 4 (November 2010): pp 1043-1065; Mitra Sharafi, ‘The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda,’ *Law and History Review*, Vol. 28 No. 4 (November 2010): pp. 979-1009; Kristen Stilt, ‘Contextualizing Constitutional Islam: The Malayan experience,’ *ICON* Vol. No. 2 (2015): pp. 407–433.

<sup>39</sup> Judge Faiza Tamby Chik, ‘Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajath & Anor,’ High Court of Kuala Lumpur 13 April 2004. *Malayan Law Journal* 2 (2004): pp. 648-660.

<sup>40</sup> Norani Othman, *Muslim Women and the Challenge of Islamic Extremism* (Kuala Lumpur 2005); Tamir Moustafa, ‘Judging in God’s Name: State Power, Secularism and the Politics of Islamic law in Malaysia,’ *Oxford Journal of Law and Religion* (2013): pp. 1-16.

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<sup>41</sup> ‘Shariah laws already affect non-Muslims, SIS says,’ *The Malay Mail Online*, 26th November 2016. Available at: <http://www.sistersinislam.org.my/news.php?item.1454.27>, accessed Jan 1 2017.