Religious Conversion and Custody – Important New Decision by the Malaysian Federal Court

A saga that has kept Malaysians engaged for years has finally founds its conclusion. A woman, named (rather improbably, at least for European observers) Indira Gandhi, was fighting with her ex husband over custody. The ex-husband had converted to Islam and had extended the conversion to their three children, with the consequence that the Syariah courts gave him sole custody. What followed was a whole series of court decisions by civil courts on the one hand and Syariah courts on the other, focusing mainly on the jurisdictional question which set of courts gets to decide matters of religious status and which law—Islamic law or civil law—determines the question. The Malaysian Federal Court now quashed the conversion as regards the children, thereby claiming, at least for children, a priority of the Constitution and the jurisdiction of civil courts.

Although the case is mostly discussed in the context of religious freedom and (civil) judicial review, it also raises core issues of conflict of laws. Malaysia is a country with an interpersonal legal system, which leaves jurisdiction over certain matters of Islamic law to the Syariah courts. Indira Gandhi's ex-husband here used this system, effectively, for a form of forum shopping: converting to Islam enabled him, ostentatiously, to opt into a system more favorable to his own situation. The background, from the perspective of conflict of laws, is that the decisive connecting factor, namely a person's religion, is open to manipulation in a way in which other connecting factors are not. According to Article 121 of the Federal Constitution, the civil courts have no jurisdiction over matters of the Syariah Courts. On the other hand, Art. 12(4) of the Constitution provides that a minor's religion is determined by his parent or guardian, a provision the Syariah Courts neglected here. Letting the Constitution trump leads to a desirable result in this case, but it does not, by itself, resolve the underlying conflict-of-laws issues. Here, as in comparable situations, the doctrinal problem appears to lie first in the issue of unilateral determination of personal status and second in a conflation of issues of jurisdiction and applicable law.

The case is *Indira Gandhi v. Pengarah Jabatan Agama Islam Perak u.a.,* [2018] 1

LNS 86 (Federal Court of Malaysia); it is available here. A short summary is here, another one, including a useful timeline of events, is here. For a very helpful analysis of the case and its background and implications by Jaclyn L. Neo, focusing especially on questions of jurisdiction and judicial review, see here. A longer discussion by Dian A.H. Shah focuses also on two other cases and more broadly on the issues of religious freedom: Dian A.H. Shah, *Religion, conversions, and custody: battles in the Malaysian appellate courts*, in Law and Society in Malaysia: Pluralism, Religion and Ethnicity (Andrew Harding/Dian A.H. Shah eds., 2018). The affair is also discussed in Yvonne Tew's article '*Stealth Theocracy*,' which is forthcoming with the Virginia Journal of International Law.