

The Judicialization of Religion

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Tamir Moustafa

Throughout the second half of the twentieth century, one Muslim-majority country after another adopted constitutional provisions meant to incorporate Islam into the legal order. In what is now a familiar pattern, leaders sought to harness the legitimating power of Islamic symbolism. But rather than shore up state legitimacy, these provisions opened new avenues of contestation. In countries where judicial institutions are robust, religion of the state clauses have helped to catalyze a "judicialization of religion," wherein courts were made to authorize an "official" religion and/or render judgment on the appropriate place for religion in the political order. This study theorizes one aspect of the judicialization of religion through the illustrative case study of Malaysia. The study examines how shifting political context provided opportunities for activist lawyers to advance sweeping new interpretations of Malaysia's Religion of the Federation clause and, with it, a new vision for state and society.

Throughout the second half of the twentieth century, one Muslim-majority country after another adopted constitutional provisions meant to incorporate Islam into the legal order. The Malaysian Constitution declares that "Islam is the religion of the Federation..."¹ The Constitution of Pakistan requires that state law conform to "the injunctions of Islam as laid down in the Holy Quran..."² The Egyptian Constitution affirms that "Islam is the religion of the state ... and the principles of Islamic jurisprudence are the chief source of legislation."³ In all, over half of all Muslim-majority countries have constitutions that declare Islam the religion of state and a considerable number require that state law must be derived from, or come into conformity with, Islamic jurisprudence.⁴

Please direct all correspondence to Tamir Moustafa, School for International Studies, Simon Fraser University, 7200-515 West Hastings Street, Vancouver, British Columbia, Canada V6B 5K3; e-mail: tmoustafa@sfu.ca

¹ The full clause reads, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." Many regard Article 3 as merely symbolic, but Schedule 9 of the Malaysian Constitution also details specific areas of law that fall under the purview of state-level religious councils and shariah courts.

² Article 227. Article 2 also provides that "Islam shall be the state religion of Pakistan."

³ Article 2.

⁴ For a summary of analogous constitutional provisions in other Muslim-majority countries, see Moustafa (2018).

In what is now a familiar pattern, state leaders adopted these provisions to harness the legitimating power of Islamic symbolism. But far from consistently shoring up state legitimacy, these provisions sometimes open new avenues of contestation. In states where judicial institutions are robust, religion of the state clauses helped to catalyze a “judicialization of religion.”⁵ This phenomenon is not derivative of a more general “judicialization of politics.”⁶ Rather, the judicialization of religion has its own unique catalysts, dynamics, and political effects. I define the judicialization of religion as a circumstance wherein courts are made to adjudicate questions and controversies over religion, thereby authorizing an “official” religion and/or rendering judgment on the appropriate place for religion in the legal and political order.

This is not to say that religion is a distinct, monolithic, or stable object. Quite the opposite, religion is complex, fluid, and contested.⁷ Yet, as Winnifred Sullivan insightfully notes, “modern law wants an essentialized religion” (2005: 155).⁸ How courts work to square this circle is fraught with tensions and contradictions. On the one hand, courts are *jurispathic*. That is, by authorizing an official version of religion, they kill off the alternatives for the purpose of state law (Cover 1983: 40). And yet judicialization simultaneously stimulates *jurisgenesis* by way of the “radiating effects” of courts.⁹ In this infinite regress “the fecundity of the jurisgenerative principle ... creates the problem to which the court and the state are the solution” (Cover 1983: 40). The judicialization of religion therefore entails repeated cycles of legalization, reification, contestation, and yet more jurisgenesis – a process that goes well beyond the court of law to encompass broader sociolegal

⁵ The term “judicialization of religion” has been used in a few prior studies, including Sezgin and Künkler (2014) and Fokas (2015).

⁶ Tate (1995: 28) defines the judicialization of politics as “the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made...by other governmental agencies, especially legislatures and executives....”

⁷ This is assuming we accept the category of “religion.” For more on religion as a constructed category – one that is easily reified and essentialized by scholars and practitioners alike – see Asad (2009), Masuzawa (2005), Nongbri (2013) and Smith (1963).

⁸ As Cover explains, “Creating legal meaning [of religion] requires not only the movement of dedication and commitment, but also the objectification of that to which one is committed” (1983: 45).

⁹ Cover defines “jurisgenesis” as “the creation of legal meaning...through an essentially cultural medium” (Cover 1983: 11). Galanter coined the term “radiating effects” in his critique of doctrine-centric legal scholarship and judicial impact studies, which, he argues, assume that “the authoritative pronouncement of the highest courts penetrate automatically – swiftly, costlessly, without distortion – to all corners of the legal world.” Galanter explains that “such influence cannot be ascertained by attending only to the messages propounded by the courts. It depends on the resources and capacities of their various audiences and on the normative orderings indigenous to the various social locations where messages from the courts impinge” (1983: 188).

worlds. As a result, the legal and symbolic meaning of religion of the state provisions can change dramatically across time.

This study examines the judicialization of religion and its radiating effects through an illustrative case study of Malaysia. In this treatment, I focus on Article 3 of the Malaysian Constitution. Article 3 declares, in part, that “Islam is the religion of the Federation.” The clause received little attention for decades, and early case law determined that the clause carried ceremonial and symbolic significance only. More recently, however, litigation has increased around the meaning and intent of the passage, and recent court decisions have introduced a far more robust meaning, one that practically elevates Islamic law as a new *grundnorm* in the Malaysian legal system.¹⁰ Jurisprudence on the matter is still unfolding, but what is clear is the formation of two legal camps that hold radically divergent visions of religion and its appropriate place in the legal and political order.

This study examines the evolving legal and political context of contemporary Malaysia to make sense of the increasing contestation over Article 3 and the federal judiciary’s shifting jurisprudence on the matter. I argue that the shifting political context, which was in part the product of earlier rounds of legal mobilization, provided a unique opportunity for ideologically driven lawyers to push for sweeping new interpretations of Article 3. These new interpretations gained surprising traction in the federal judiciary, and they have shaped new understandings of the rightful place for religion in the legal system and the broader political order. After a brief theoretical interlude and an extended illustration from the Malaysian case, the study closes with a more general consideration of additional factors, aside from religion of the state clauses, that drive the judicialization of religion in Malaysia and beyond.

Courts as Avenues for Ideological Mobilization

Over the past two decades, there has been robust scholarly output on Islamist political mobilization.¹¹ However, this work has focused almost exclusively on the electoral arena as a formal site of struggle.¹² This is surprising considering the stated goal of

¹⁰ *Grundnorm* (German: Basic norm) is a concept developed by the German legal scholar and jurist Hans Kelsen in his 1934 work “The Pure Theory of Law” (Kelsen 1967). The *Grundnorm* is the basic rule norm that serves as the bedrock and foundation of an entire legal order.

¹¹ This body of research is too large to cite in its entirety. Representative studies include Schwedler (2006), Brown (2012), Masoud (2014), and Mecham and Hwang (2014).

¹² There are exceptions, of course. But the volume of these studies pale in comparison to the volume of research on Islamist engagement in electoral politics.

many activists to transform the legal order. Litigation serves as a direct pathway to induce a change in the law. Moreover, there are a variety of pragmatic reasons why activists may choose to mobilize through the courts. Compared with electoral campaigns, litigation requires fewer fiscal and organizational resources. The work of a skilled lawyer paired with a like-minded judge can shift the law without having to overcome the collective action problems of broad-based social movements. Perhaps most important, litigation can serve as a focal point for political mobilization outside of the courts. Although activists may fight legal battles in the court of law, they know that ideological struggles are won or lost in the court of public opinion. This calculus helps to explain why litigation is initiated in circumstances where activists have every reason to expect that they will *lose* in court. An extrajudicial strategy is also suggested by the extensive press campaigns that often accompany litigation. The publicity generated by high-profile cases can be useful for a variety of purposes. Over and above the direct impact of court decisions, high profile cases serve as important focal points that can provoke national debates and advance new visions of state and society.

The Egyptian case provides an illustrative example. Islamist lawyers set their sights on Article 2 of the Egyptian Constitution, which declares, "...the principles of Islamic jurisprudence are the chief source of legislation."¹³ President Anwar Sadat introduced Article 2 as a symbolic gesture to bolster the religious credentials of his regime. However, activists called his bluff and engaged the courts to test those very credentials (Moustafa 2007, 2010). Islamist litigation yielded few legal victories, but the radiating effects were profound. A good example of this dynamic is the controversy that was generated by way of a lawsuit against Nasr Hamid Abu Zayd, a Cairo University professor who was accused of apostasy for some of his academic writings. Islamist lawyers found like-minded judges who were willing to consider a *hisba* lawsuit, wherein the litigants had no direct interest in the case. The court pronounced Abu Zayd an apostate, eventually precipitating his departure from the country after his appeals had been exhausted.

Public debate overshadowed the facts of the case itself and polemics raged in the press for years (Glicksberg 2003). The spectacle served as a powerful catalyst for a discursive shift that was already underway in Egyptian society. Secularists did not lose many such cases, but they had lost their footing in a "war of

¹³ The original text of Article 2 of Egypt's 1971 Constitution declared that "...the principles of Islamic jurisprudence are a chief source." But an amendment in 1980 changed the text to "*the*" chief source. For more on this and some of the most important Article 2 cases in Egypt, see Lombardi (2006) and Moustafa (2007).

position” (Gramsci 1971). It was widely recognized that the Abu Zayd case had become a crucial focal point in Egypt’s culture wars.¹⁴ Less frequently noted, but just as significant, is the fact that this political spectacle elevated *particular voices* – the most strident Islamist and secularist voices – above all the others. Given the prominence of this public platform, which was otherwise inaccessible in Egypt’s authoritarian political system, it is not surprising that Islamist lawyers continued to launch similar lawsuits by the hundreds, even when there was little promise of legal victory. Even when Islamist lawyers lost in court, they advanced their narrative in the court of public opinion. They claimed that legal defeats only confirmed that the government had failed to fulfill its stated commitment to Islam and Islamic law.

It is important to note that constitutional commitments to Islam do not automatically or inevitably produce illiberal litigation and illiberal outcomes. Islam and liberal rights are not inherently oppositional. To stay with the Egyptian example, litigants more frequently invoked Article 2 to challenge the constitutionality of *illiberal* laws, essentially voicing a liberal inflection of the Islamic legal tradition.¹⁵ Moreover, when illiberal interpretations of Article 2 were advanced in court, judges typically worked to interpret constitutional provisions in a manner that fortified liberal interpretations of the Islamic legal tradition (Lombardi and Brown 2005). Similar dynamics are noted in Pakistan (Lau 2005). When examining the concrete effect of religion-of-the-state clauses, one must therefore examine the socio-political context in which those provisions are interpreted.

A Brief Constitutional Ethnography of Malaysia’s “Religion of the Federation” Clause

Constitutions are meant to organize institutions of governance, entrench fundamental rights, and serve as important expressions of national identity. Agreement on foundational principles is considered crucial among experts in constitutional design. Yet even in the best of circumstances, constitutional texts will become both an *object* of struggle as well as an *instrument* of struggle. Conflict is inevitable because the objectives of political

¹⁴ For more on how the Abu Zayd case fits into a broader field of ideological contestation, see Mehrez (2008). For more on legal aspects of the case, see Agrama (2012: 42–68).

¹⁵ Yet it is notable that these are *not* the cases that come to mind in discussions of Egypt’s Article 2 jurisprudence. This is a telling indication that binary assertions of Islamic law versus liberal rights draw attention because of the spectacle that is generated around them.

actors evolve over time, and because constitutional provisions are frequently left vague or discordant to overcome divergent interests in the constitution-writing process (Lerner 2011; Bâli and Lerner 2016).

A key passage in Malaysia's Federal Constitution is Article 3 (1). It reads, "Islam is the religion of the Federation...." It is no surprise that Malay nationalists pressed for this clause in the lead-up to independence. It served as an expression of Malay identity vis-à-vis the (predominantly non-Muslim) ethnic-Chinese and ethnic-Indian communities, which constituted nearly half the population of British Malaya on the eve of independence. Colonial era legal frameworks had equated Malays with Islam as far back as the Malay Reservation Act of 1913. For the United Malays National Organization (*Pertubuhan Kebangsaan Melayu Bersatu*), the Malay nationalist party more popularly known by its acronym, UMNO, an Islam clause would serve as an expression of state identity that was synonymous with Malay identity. What is more remarkable is that UMNO gained the consent of its non-Muslim coalition partners, the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC). This cooperation reflected UMNO's dominant position within the coalition "Alliance." Equally important, the support of the MCA and the MIC was part of a complex political bargain struck between political elites in the critical years leading up to independence (Fernando 2002, 2006; Stilt 2015). The Alliance submitted a joint memorandum to the Reid Commission, the committee responsible for drafting the Federal Constitution before independence. The Alliance requested that "The religion of Malaysia shall be Islam." The memorandum further specified that "the observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions, and shall not imply that the State is not a secular State" (Fernando 2006: 253). There is little doubt that this proviso was necessary to secure agreement from the MCA and the MIC, the non-Muslim, non-Malay component parties of the Alliance.

Ironically, resistance to Article 3 came from those figures who were meant to be the guardians of Islam -- the Sultans, those local rulers who entered into agreements with the British to protect their power vis-à-vis their competitors (Hussin 2007, 2016). At the time of the drafting of the independence constitution, the Sultans were concerned that a religion clause would impinge on their mandate as the religious leaders of their respective states, an arrangement that had been struck with the British decades earlier. The fact that the Sultans opposed a religion clause while the non-Muslim MCA and MIC were willing to oblige suggests that the inclusion of Article 3 had little to do with religion *qua* religion,

and more to do with the complicated political bargains being negotiated.

The Reid Commission initially rejected the religion clause based on objections from the Sultans. However, the tide changed through UMNO's persistence, substantive compromises among stakeholders, and lobbying from within the Reid Commission by one of its members, Justice Abdul Hamid of Pakistan.¹⁶ The Sultans ultimately agreed to a constitutional provision stating that Islam is the religion of the federation in return for their own constitutionally entrenched right to administer Anglo-Muslim law at the state level. Article 3 of the Constitution was finally drafted to read, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." The second part of the clause was meant to safeguard the practice of religions other than Islam; Additional provisions were meant to ensure that Article 3 would not infringe on the rights of non-Muslims. For instance, Clause 4 of Article 3 guarantees that "Nothing in this Article derogates from any other provision of this Constitution." Article 8 (1) declares "all persons are equal before the law and entitled to equal protection of the law." Article 8 (2) expands on this guarantee by specifying "...there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law...." Article 11 directly addresses freedom of religion by further guaranteeing that "Every person has the right to profess and practice his religion...." These specifications were no doubt meant to underline the commitment that Article 3 would not deprive citizens of fundamental liberties provided for in the Constitution. Yet, despite these various guarantees, the clause would become the subject of contention decades later.

The Judicialization of Religion: Litigating the Meaning of Article 3

Che Omar bin Che Soh v. Public Prosecutor was the first case in which the Supreme Court (as it was named at the time) considered the meaning of Article 3.¹⁷ The occasion for the landmark 1988 decision was a constitutional challenge to the mandatory death penalty for the trafficking of drugs. The appellant claimed that the provision did not conform to Islamic jurisprudence and was therefore unconstitutional by virtue of Article 3 (1) of the

¹⁶ For details on how these negotiations evolved, see Stilt (2015) and Fernando (2002, 2006).

¹⁷ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55.

Federal Constitution. The Supreme Court decision in *Che Omar bin Che Soh v. Public Prosecutor* denied the appeal, affirmed the “secular” nature of the Malaysian state, and restricted the meaning of Article 3 (1) to matters of ritual and ceremony. However, the decision simultaneously validated a narrative that is now increasingly championed by Islamist attorneys and judges. Given the importance of *Che Omar bin Che Soh v. Public Prosecutor*, it worth examining the text and the reasoning of the decision in some detail.

In considering the meaning of Article 3 (1), the Lord President of the Supreme Court, Salleh Abas, articulated the significance of the constitutional challenge as follows:

If the religion of Islam ... means only such acts as relate to rituals and ceremonies, the argument has no basis whatsoever. On the other hand, if the religion of Islam or Islam itself is an all-embracing concept, as is normally understood, which consists not only the ritualistic aspect but also a comprehensive system of life, including its jurisprudence and moral standard, then the submission has a great implication in that every law has to be tested according to this yard-stick.¹⁸

With this framing of the case, the stakes were nothing short of monumental. Either Article 3 would be considered purely symbolic, with no legal effect, or it would carry the implication that *every* law on the books should be “tested” against Islam and Islamic law. Before indicating which of these two positions had legal merit, Salleh Abas avowed the all-embracing reach of Islam and the importance of Islamic law, regardless of what state law might say on the matter. Here, the Lord President references the writings of the Islamist thinker *par excellence*, Syed Abul A’la Maududi:

There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural moral or judicial. This way of ordering the life with all the precepts and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered. (See S. Abdul A’la Maududi, *The Islamic Law and Constitution*, 7th Ed., March 1980.)¹⁹

With Islam defined as “a complete way of life, covering all fields of human activities,” the Lord President Salleh Abas turned

¹⁸ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ at 55–56

¹⁹ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ at 56.

to the question of what the framers of the Federal Constitution meant by Article 3:

Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.

Before the British came to Malaya, which was then known as Tanah Melayu, the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law....When the British came, however, through a series of treaties with the sultans beginning with the Treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, *viz.* the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, *i.e.* to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution.... Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only....²⁰

Whether the Lord President was aware or not, this stylized narrative legitimized the claim that the pre-colonial Malay Peninsula was "Islamic in the true sense of the word." The Court decision not only advanced the Islamist talking point that sovereignty belonged "to God alone" in the pre-colonial era, but also the implication that this historical schism can be corrected. The decision does not elaborate on how God's sovereignty was actualized in the pre-colonial era, nor does the decision provide clues as to how God's sovereignty might be restored so that Malaysia can once again be "Islamic in the true sense of the word." After affirming this narrative, the Lord President only explains that, as a strictly legal matter, Article 3 must be read narrowly:

²⁰ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ at 56.

In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word “Islam” in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void....

Important context is missing from this historical account, particularly concerning the intent of the framers of the Constitution. Missing is the irony that the most determined resistance to Article 3 came from those who were meant to be the guardians of Islam – the Sultans. Also missing is the story of how Justice Abdul Hamid came to play a pivotal role on the Reid Commission at the eleventh hour (Stilt 2015). Perhaps most crucial is the fact that the Alliance had agreed to the text of Article 3 only on the condition that, “the observance of this principle ... shall not imply that the State is not a secular State” (Fernando 2006: 253). Nonetheless, the Supreme Court decision constructed an account in which Malaysia had been subjected to a legal straightjacket imposed by the British, and that Malaysian judges, even if they wished to correct this historical injustice, were duty-bound to apply secular law. In the closing text of the decision, Salleh Abas explains that:

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. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.²¹

The seminars and other activities that Salleh Abas suggested in *Che Omar bin Che Soh* were, in fact, organized through the 1980s and 1990s. A series of workshops and conferences focused primarily on the administration of Muslim law and the formalization of the shariah judiciary. Within these forums and elsewhere, a few Islamist thinkers explored the possibilities for expanding the meaning and ambit of Article 3 beyond the constraints articulated by Lord President Salleh Abas in his 1988 landmark decision. One of the most influential thought-pieces is the law review article by Muhammad Imam (1994) that provides extensive argumentation for why Article 3 (1) must be understood to carry the broad meaning denied in *Che Omar bin Che Soh*.

²¹ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 56–57.

A few lawyers began to make these arguments in court. There, they found a receptive audience among a few civil court judges. One of the earliest such decisions was the 2001 High Court ruling in *Lina Joy v. Majlis Agama Islam*. In that case, Haji Sulaiman Abdullah represented the Islamic Religious Council of the Federal Territories. In oral arguments, he submitted to the court that “There is nothing which is outside the scope of Islamic law and adat because Islam ... is a complete way of life and, and controls all aspects of our life [sic]” (Dawson and Thinu 2007: 154). Justice Faiza Tamby Chik concurred, connecting these broad claims to Article 3 and the implications that this meaning holds for all facets of social and political life. Specifically citing the scholarship of Mohammad Imam and others, Justice Faiza advanced a “purposive interpretation” to Article 3 (1).²² He averred that “...the position of Islam in art 3(1) is that Islam is the main and dominant religion in the Federation. Being the main and dominant religion, the Federation has a duty to protect, defend and promote the religion of Islam.”²³

Justice Faiza took another page out of Mohammad Imam’s playbook with his focus on Article 11 (3) of the Federal Constitution, which states that “Every religious group has the right...to manage its own religious affairs....”²⁴ Justice Faiza argued that Article 11 (3) provides for the absolute supremacy of the shariah courts in any matter related to Islam, even in cases where individual rights are curtailed as a result. For Justice Faiza, the right of religious communities (as provided in Article 11 (3)), must supercede an individual’s rights (as provided in Article 11 (1)) when Islam is involved. Indeed, what emerges in Justice Faiza’s decision is a series of interlocking interpretations of select articles that collectively elevate the supremacy of Islam in the Federal Constitution. Justice Faiza’s 2001 decision in *Lina Joy* was an outlier at the time, but similar interpretations of Article 3 would find their way to the apex Federal Court as the decade progressed.

The Federal Court’s Article 3 jurisprudence was largely the result of a concerted effort among a small number of Islamist lawyers who were enabled by a constitutional amendment in 1988. The Mahathir administration introduced Article 121 (1A) to clarify matters of jurisdiction between the civil courts and the shariah courts. The clause states that the federal high courts “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.” However, rather than clarify matters of

²² *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ at 128.

²³ *Ibid*, 130.

²⁴ *Ibid*, 126.

jurisdiction, Article 121 (1A) exacerbated legal ambiguities and produced new legal tensions. As the legal system was made increasingly rigid, boundary maintenance between the federal civil courts and the state shariah courts was judicialized. The fact that one jurisdiction was meant to implement “Islamic law” and the other “secular law” made this jurisdictional fault line ripe for ideological polarization.

For a handful of activist lawyers, Article 121 (1A) became part of a long-term strategy motivated by specific ideological commitments to build an “Islamic” legal order. They invoked Article 121 (1A) at every opportunity to challenge civil court jurisdiction and to expand the ambit of the shariah courts.²⁵ A lead attorney in many of the Article 121 (1A) cases, Haniff Khatri Abdulla, was frank about this strategy as a means to expand the purview of the shariah courts and the place of Islam in the legal system more generally.²⁶ Equally important, once cases became politically salient, they provided opportunities for activists outside of the courts to mobilize (Moustafa 2013). Beginning in 2004, Article 121 (1A) cases were covered more intensively than any other issue. This audience expansion is directly attributable to the efforts of liberal rights groups to bring the cases to the public’s attention. Thirteen liberal rights groups formed a working coalition in the wake of the *Shamala v. Jeyaganesh* decision. This was subsequently surpassed by a coalition of over 50 conservative organizations mobilizing in the opposite direction. Together, this spectacle turned up the political heat for civil court judges.

Polarization also provided an opportunity for Islamist activists to introduce and amplify what I call the “harmonization trope.” Although the term harmonization connotes an amicable reckoning, the clear objective in operational terms has been the transformation of the of the legal system beyond the ambit of the shariah court judiciary. Beginning in 2003, the Ahmad Ibrahim School of Law at the International Islamic University of Malaysia (IIUM) began to organize biennial conferences on the “Harmonization of Civil Law and Shariah.” The 2005 conference gained further endorsement when Justice Abdul Hamid Mohamad (soon to be Chief Justice of the Federal Court) officiated the function. The 2007 conference was

²⁵ Islamist lawyers explain that were it not for Schedule 9 of the Federal Constitution (which provides the states with authority to administer Anglo-Muslim law) Article 121 (1A) would be *the* main vehicle for “Islamizing” civil law. This is because, in their vision, Islamic law provides the basis for every aspect of state law, with the only exception being family law for non-Muslims.

²⁶ For a detailed presentation of this legal agenda, see Khatri, et al. (2009). Haniff Khatri has been frank in private and public settings. He presented similar views publicly at the “Strategic Litigation Conference,” 3 October 2015, organized by the MCCHR and the Malaysian Bar Council. The author also had the opportunity to discuss these with Haniff Khatri and Abdul Rahim Sinwan in 2009, 2010, and 2014.

organized jointly by the IIUM and the Attorney General's Chambers, with the further participation of the Department of Syariah Judiciary, Malaysia (JKSM). So close was the "harmonization" project to the corridors of power, the Headquarters of the Attorney General's Chambers provided the physical venue for the 2007 event. The 2007 conference ended with several resolutions, all of which articulated the need to amend "laws that are not Shari'ah compliant."²⁷ The fact that the Attorney General's Chambers posted the document on its official website spoke volumes about the inroads that Islamist lawyers had made into the central functions of the federal government. Indeed, one need only examine the reports of the Advisory Division of the Attorney General's Chambers to see that the Shariah Section of the Attorney General's Chambers has an active agenda in sponsoring research on harmonization, which includes ongoing consultative meetings with prominent Islamist civil society organizations.²⁸ Such access to state authority is over and above the concerted efforts of the Attorney General's Chambers to litigate Article 121 (1A) cases in the same manner as freelance Islamist lawyers. This documentary evidence matches my observations from meetings with the head (at the time) of the Shariah Section of the Advisory Division of the Attorney General's Chambers, Nasir Bin Disa, and highly placed judges, such as former Chief Justice Abdul Hamid Mohamad. Given these ideological strains within the Malaysian legal community and the polarized discourse more broadly, it is not surprising that revisionist readings of Article 3 gained traction outside the domain of personal status law.

Three recent cases underline this trend.

The Borders Bookstore Case

On 23 May 2012, religious authorities raided and seized the book "Allah, Liberty and Love" by Canadian author Irshad Manji from a Borders bookstore in Kuala Lumpur. Enforcement officers from the Federal Territories Islamic Religious Affairs Department (JAWI) raided the store with reporters in tow, seized copies of the book, and eventually charged the bookstore manager, a Muslim, under Article 13 of the Shariah Criminal Offenses Act. One week later, the Enforcement Division of the Selangor Department of Islamic Affairs raided the office of ZI Publications, the translator and publisher of the book, and seized additional copies. Later, the owner of the publishing company, Ezra Zaid (son of Zaid

²⁷ The resolutions are detailed in the document "*Projek Harmonisasi Antara Undang-Undang Syariah Dan Undang-Undang-Sivil*" (On file with the author).

²⁸ See the 2005–2006 report of the Advisory Division of the Attorney General's Chambers (on file with author).

Ibrahim), was charged under Article 16 of the Shariah Criminal Offences Enactment (Selangor), which states:

Any person who —

(a) prints, publishes, produces, records or disseminates in any manner any book or document or any other form of record containing anything which is contrary to Islamic law; or

(b) has in his possession any such book, document or other form of record for sale or for the purpose of otherwise disseminating it, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) The Court may order any book, document or other form of record referred to in subsection (1) to be forfeited and destroyed notwithstanding that no person may have been convicted of an offence in connection with such book, document or other form of record.

Lawyers contested the first set of charges against Borders bookstore, and the bookstore manager in the Kuala Lumpur High Court. The High Court decided to exercise jurisdiction despite the Article 121 (1A) objections raised by JAWI.²⁹ In considering the case, the Court found that Borders could not be punished because it is a corporate entity (and hence “non-Muslim”) and that it would be unjust to punish the Muslim bookstore manager because she worked under the direction of a non-Muslim supervisor. JAWI appealed the decision, but the Court of Appeal affirmed the High Court’s reasoning in stronger wording yet.³⁰

Meanwhile, Ezra Zaid sought a declaration that Article 16 of the Shariah Criminal Offences Enactment was invalid in *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor*.³¹ Ezra’s attorneys argued that the Selangor State Legislative Assembly did not have the power to legislate restrictions on freedom of expression. The Federal Court dismissed the request and explained that:

... a Muslim in Malaysia is not only subjected [sic] to the general laws enacted by Parliament but also to the state laws of religious nature enacted by [the] Legislature of a state to legislate and enact offenses against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also

²⁹ *Berjaya Books Sdn Bhd & Ors v. Jabatan Agama Islam Wilayah Persekutuan & Ors* [2013] MLJU 758.

³⁰ *Jabatan Agama Islam Wilayah Persekutuan & Ors v. Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65.

³¹ *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state. For the above reasons, we hold that the impugned section as enacted by the SSLA is valid and not ultra vires the Federal Constitution.³²

The Federal Court decision underlined the reality that, despite the many financial advantages of being an ethnic Malay, Muslims enjoy fewer rights and freedoms compared with their non-Muslim counterparts. The decision also underscored a class dimension to the enforcement of most shariah criminal offences. Most of the punitive measures meted out by the shariah courts disproportionately affect those of more modest economic means. Moreover, they do so with far higher frequency.³³ The ZI Publications case was exceptional in that it drew the attention of the Malaysian elite to the chilling effect of shariah criminal offenses on freedom of expression.

The court's reasoning carried significant implications for future of case law. Most important, the judges drew upon Article 3 to support the curtailment of fundamental rights. The Federal Court decision states, "...we are of the view that art 10 of the Federal Constitution must be read in particular with Arts 3 (1), 11, 74 (2) and 121. Article 3(1) declares Islam as the religion of the Federation..."³⁴ The Federal Court goes on to explain that it is not only the shariah courts that are charged with administering Islamic law in Malaysia. The civil courts also have a role to play because the Federal Constitution must be read "harmoniously." With this reasoning, Article 3 takes a different legal meaning, one that is no longer tied to "rituals and ceremonies," as had been established by the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor*. Instead, Article 3 assumes an expansive meaning that provides a rationale for curtailing fundamental rights. In this upside-down world, fundamental rights provisions must bend to accommodate a new, expansive meaning for Article 3. Moreover, Islam is assumed to be in fundamental tension with liberal rights, although the Court provides no clear explanation as to why this must be the case.

The Catholic Herald ("Allah") Case

The ZI Publications case is not the only decision where the meaning of Article 3 shifted. This change is also apparent in

³² *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ at 164.

³³ One of many examples that can be offered here are the periodic and highly publicized raids on lower-end hotels to combat *khalwat* ("close proximity") infractions.

³⁴ *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ at 160.

litigation over use of the word “Allah” in the Malaysian Catholic newspaper, the *Herald*. In this case, the publisher of the *Herald*, the Titular Roman Catholic Archbishop of Kuala Lumpur, received a letter from the Minister of Home Affairs forbidding use of the word “Allah” in the Bahasa Malaysia version of its publication. The Minister of Home Affairs claimed that the use of the word violated the prohibition on proselytization to Muslims and, therefore, it posed a threat to public order. The Titular Roman Catholic Archbishop decided to fight in the High Court, drawing attention to the passage in Article 3 (1) that states “...religions other than Islam may be practiced in peace and harmony in any part of the Federation.” Attorneys for the Church insisted that Catholics had long used the word “Allah.” Moreover, attorneys argued that word is from Arabic and it is used by Christians and Muslims alike to refer to God. Finally, attorneys submitted that use of the word had nothing to do with proselytization. The High Court agreed with the Archbishop and issued a decision in favor of the *Herald*.³⁵ However, the Ministry of Home Affairs appealed the decision and managed to secure a more expansive interpretation for Article 3 from the Court of Appeal.³⁶

The Court of Appeal decision hammered on what it claimed was the inescapable implication of the *first part* of Article 3 (1), which states that “Islam is the religion of the Federation.” The main line of reasoning in the Court of Appeal decision is that Article 3 (1) is meant to secure the position of Islam in the country. This interpretation of Article 3 (1), coupled with the prohibition on proselytization in Article 11 (4), provided the rationale for the Court to declare that the Ministry of Home Affairs had acted within its appropriate powers to ban the use of the word “Allah.” The decision explains that:

...the fundamental liberties of the respondent in this case, has to be read with Art 3(1) of the Federal Constitution...The article places the religion of Islam at par with the other basic structures of the Constitution, as it is the third in the order of precedence of the articles that were within the confines of Part I of the Constitution. It is pertinent to note that the fundamental liberties articles were grouped together subsequently under Part II of the Constitution.³⁷

³⁵ *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor* [2010] 2 CLJ 208. The Court also reasoned that the Church had the right to use the word “Allah” in accordance with Articles 10, 11, and 12 of the Federal Constitution.

³⁶ *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468. For a more extensive treatment of the Court of Appeal judgment, with emphasis on the ethnocentric inflection of the legal reasoning, see Neo (2014).

³⁷ *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 489–490.

The reasoning that the sequencing of constitutional provisions reflects their relative importance in the Malaysian constitutional order was dubious to say the least. More significantly, this reading contradicted the clear text of Article 3 (4) of the Federal Constitution, which specifies that “nothing in this Article derogates from any other provision in the Constitution.” The Court of Appeal decision contained even stronger and more direct language about the character of Article 3 and its meaning for the Malaysian legal order. In a passage penned by Justice Abdul Aziz Ab Rahim, the decision explains:

[t]he position of Islam as the religion of the Federation, to my mind imposes certain obligation on the power[s] that be to promote and defend Islam as well to protect its sanctity. In one article written by Muhammad Imam, entitled *Freedom of Religion under Federal Constitution of Malaysia — A Reappraisal*...it was said that: ‘Article 3 is not a mere declaration. But it imposes positive obligation on the Federation to protect, defend, promote Islam and to give effect by appropriate state action, to the injunction of Islam and able to facilitate and encourage people to hold their life according to the Islamic injunction spiritual and daily life.’³⁸

Justice Abdul Aziz Ab Rahim acknowledges the learned counsel for citing and supplying Muhammad Imam’s scholarship. The learned counsel in the case was none other than Haniff Khatri, the lawyer behind many of the strategic litigation efforts to expand the meaning of Article 3. Khatri had already relied on Muhammad Imam’s article in his own manifesto titled, “Moving Forward to Strengthen the Position of Islam UNDER the Federal Constitution” (Khatri et al., 2009). Moreover, Muhammad Imam’s scholarship had already made an earlier appearance in none other than *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*. In that decision, Justice Faiza Tamby Chik relied on Imam’s scholarship to support broad and sweeping claims about the meaning of Article 3 in the Malaysian legal order. Justice Faiza’s High Court decision had shaped one of the most important Federal Court decisions on religious conversion.³⁹

The confluence of Islamist legal scholarship, Islamist strategic litigation, and the welcome reception by like-minded judges such as Justice Faiza demonstrates that “public interest litigation” and

³⁸ *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ at 511.

³⁹ Another decision of Justice Faiza started the Islamist ball rolling in the High Court judgment of *Shamala v. Jeyaganesh. Shamala Sathiyaseelan v. Jeyaganesh Mogarajah & Anor* [2004] 2 MLJ 648.

“cause lawyering” are not inevitably liberal in orientation (Sarat and Scheingold 2006; Teles 2012; Bennett 2017). My interviews with Islamist-oriented lawyers, highly-placed attorneys in the Attorney General’s Chambers, and retired Federal Court judges affirmed what is apparent in the court records themselves: strategic litigation occurs on both sides of the rights-versus-rites binary.

A striking dynamic in the *Catholic Herald* case is that it drew in the religious bureaucracy from across Malaysia. Religious councils from Terengganu, Melaka, Kedah, Selangor, Johor and the Federal Territories intervened as formal parties to the dispute. Moreover, well-known Islamist lawyers, including Zainul Rijal, Mohamed Haniff Khatri Abdullah, and Abdul Rahim Sinwan represented these religious councils. On the other side were prominent liberal rights attorneys Cyrus Das, Philip Koh, Benjamin Dawson, and Leonard Teoh among others. In total, 14 NGOs gained official (watching brief) status.

The Transgender Rights Case

Another high-profile case concerned transgender (*Mak Nyah*) rights in Negeri Sembilan. Section 66 of the Shariah Criminal Enactment of Negeri Sembilan forbids Muslim men from wearing women’s attire or posing as a woman in public. The offense is subject to a fine of up to RM 1,000 and a prison term of up to six months. By 2010, activists in *Mak Nyah* community had become vocal about periodic abuse at the hands of the religious authorities in the state of Negeri Sembilan. In 2012, four individuals from the *Mak Nyah* community initiated a case challenging Section 66 of the Shariah Criminal Enactment.⁴⁰ Each litigant had repeatedly been detained, arrested, and prosecuted by the authorities. They sought protection from the civil courts from further punishment and harassment.⁴¹ They filed a case in the High Court of Seremban, requesting a declaration that Section 66 of the Shariah Criminal Enactment is inconsistent with the Federal Constitution’s provisions for the right to live with dignity (guaranteed by Article 5), the right to equal protection under the law (guaranteed by Article 8), the right to freedom of movement (guaranteed by Article 9), and the right to freedom of expression (guaranteed by Article 10). The lead attorney in the case was Aston Paiva, who was later accompanied by Fahri Azzat. Both attorneys were cause

⁴⁰ For more on the background to the case, activism around the case, and related issues of concern to the *Mak Nyah* community of Malaysia, see the website, Justice for Sisters, at: <https://justiceforsisters.wordpress.com> [website last visited 4 May 2017].

⁴¹ *Muhamad Juzaili Mohd Khamis & Ors v. State Government of Negeri Sembilan & Ors* [2015] 1 CLJ 954.

lawyers embedded in liberal rights activist circles. Aston Paiva worked in the offices of Shanmuga Kanesalingam, and Fahri Azzat was one of the founding members of the Malaysian Centre for Constitutionalism and Human Rights. They won their bid for constitutional review in the High Court but lost this the first constitutional challenge. They subsequently secured leave to approach the Court of Appeal. At this point, the case was attracting national attention. Watching briefs were held by the Women's Aid Organization, Sisters in Islam, the All Women's Action Society, the Malaysian Centre for Constitutionalism and Human Rights, and others. *Amicus Curiae* briefs came from Human Rights Watch and the Malaysian Bar Council. In a landmark ruling, the Court of Appeal, led by Justice Hishamudin Mohd Yunus, agreed to all the constitutional challenges put before them.

Victory for *Mak Nyah* rights in the Court of Appeal set the stage for a more dramatic face off in the Federal Court.⁴² The State Government of Negeri Sembilan, including the Islamic Affairs Department, the Chief Religious Enforcement Officer, the Chief Shariah Prosecutor, and the Religious Council of Negeri Sembilan, focused their energies on overturning the Court of Appeal decision. Intervenors from other state governments soon joined, including representatives from the Islamic Religious Councils of Perak, Penang, Johor, and the Federal Territories. A slew of *amicus curiae* briefs came from the United Malay National Organization (UMNO), the Women's Aid Organization, Sisters in Islam, the All Women's Action Society, the Attorney General's Chambers, the Shariah Lawyer's Association of Malaysia, the International Commission of Jurists, a relatively new Islamist lawyer's group calling themselves Concerned Lawyers for Justice (*Persatuan Penguam Muslim Malaysia*), and others. Leading Islamist lawyers either litigated or submitted *amicus curiae* briefs, including Haniff Khatri, Zainul Rijal bin Abu Bakar, Abdul Rahim Sinwan, and others. In an anti-climactic decision, the Federal Court voided the Court of Appeal decision on a technicality. The Federal Court claimed that the specific procedures for approaching the High Court and the Court of Appeal were not followed, which therefore invalidated the Court of Appeal decision. The Federal Court did not address the constitutional issues at stake whatsoever.

The three cases reviewed here – the Borders bookstore case, the Catholic *Herald* case, and the *Mak Nyah* transgender rights case – all represented efforts to challenge the reach of the religious establishment. However, litigation may have had the unintended effect of facilitating the efforts of a small handful of

⁴² *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Bin Mohd Khamis & Ors* [2015] MLJU 597.

Islamist legal activists to field more expansive interpretations of Article 3. Litigation provided opportunities for like-minded judges to build new case law. These precedents shaped the trajectory of the law by narrowing the range of legal claims that could be fielded by liberal activists and broadening the ground on which future litigants could make expansive Article 3 claims. The observation that liberal litigation may have paradoxically facilitated Islamist-oriented case law is not meant to blame liberal activists for their own plight. Instead, this observation underlines the predicament that they face.

Towards a Theory of the Judicialization of Religion

The Malaysian case illustrates how religion of the state clauses can take center stage in a judicialization of religion. But a comparative perspective suggests that the underlying drivers of judicialization are more complex than the simple presence of such provisions. After all, many constitutional orders with similar provisions *do not* experience the sort of judicialization that we observe in Malaysia.⁴³ And conversely, questions about religion regularly *do* go to court in countries without such constitutional provisions (Sullivan 2005, Berger 2015). This suggests that religion of the state clauses can serve as focal points for controversies, but that they are neither necessary nor sufficient conditions.

The Malaysian case suggests that judicialization may be most acute where: (a) different legal regimes are applied to different (legally constituted) communities, (b) the state tightly regulates religion, (c) constitutional commitments are made to both religion and liberal rights, and (d) courts afford broad public access. These are salient features of the Malaysian legal system, but they are by no means unique to Malaysia. It makes sense, therefore, to briefly detail these factors and situate them within a more comparative perspective.

In Malaysia, distinct personal status laws for different (legally constituted) religious communities govern a range of life events from the cradle to the grave, including whom one can marry, how one can worship, and how one must bury the dead. Some of the most heated cases in Malaysia suggest that these legal configurations fuel the legal quandaries that give rise to judicialization (Moustafa 2018). Segmented personal status laws are by no means

⁴³ Egypt and Pakistan are two other Muslim-majority countries with religion of the state clauses, but they have experienced different patterns of judicialization (Lau 2005; Lombardi and Brown 2005; Moustafa 2007). Casting our net wider, religion of the state clauses are also present in non-Muslim majority settings (Schonthal 2014, 2016; Shah 2017), including Western Europe (Stepan 2000).

unique to Malaysia. Roughly one-third of all countries have plural family law arrangements (Sezgin 2013: 3; Ahmed 2015) and anecdotal evidence from across a range of countries suggests that these legal configurations invite judicialization.

A second and related feature of the Malaysian legal system is that religion is regulated far more than the global average. The Pew Government Restrictions on Religion Index places Malaysia at number five among 198 countries (Pew Research Center 2017). In the more detailed Government Involvement in Religion Index, which examines 175 countries worldwide, there are only ten countries with a higher ranking than Malaysia.⁴⁴

The heavy role of state in regulating religion means that questions and controversies are rapidly judicialized. This is especially so when dual constitutional commitments to both liberal rights and religion provide openings for litigation. Dual commitments to religion and liberal rights are common in many other countries, but what sets Malaysia apart from many of its peers is that Malaysia also has a relatively robust legal system with broad public access to the courts.⁴⁵ What is more, with its vocal NGOs and vibrant online media, Malaysia provides fertile soil for legal controversies to move swiftly from the court of law to the court of public opinion. Countries with similar legal and institutional features can expect a vigorous judicialization of religion, and with it, the politicization of religion via the radiating effects of courts.

The judicialization of religion catalyzed profound shifts in the broader political climate of Malaysia. Each successive case became a new focal point for debate over the place of Islam in the legal and political order. Litigation inspired the formation of new NGOs as well as coalitions of civil society groups on opposite sides of a rights-versus-rites binary (Moustafa 2013). Equally significant, judicialization drew in and gave a platform to a variety of actors who had little or no expertise in matters of religion. Claims and counter-claims were fielded by litigants, lawyers, judges, political activists, journalists, and government officials. Despite having little specialized knowledge, their competing claims were

⁴⁴ See Fox (2008) and <http://www.religionandstate.org>. Malaysia is also something of an archetype among Muslim-majority countries, which, as a group, regulate religion more than the global average. Consider, for example, that among the 23 countries in the “very high” category of the Pew Government Restrictions on Religion Index, 18 (78 percent) are Muslim-majority countries. Likewise, a full 66 percent of countries in the “very high” and “high” categories are Muslim-majority countries, whereas Muslim-majority countries comprise only 12 percent of those in the “moderate” and “low” categories. The Malaysian experience is therefore particularly relevant to this subset of countries.

⁴⁵ To be sure, the Malaysian judiciary has its problems, but the legal profession and the courts are strong in comparison with other countries that tightly regulate religion. The relative strength of the legal system is suggested by Malaysia’s rank at 39 of 102 countries in the 2015 Rule of Law Index of the World Justice Project.

consequential. In fact, judicialization positioned these actors as central agents in the production of new religious knowledge (Moustafa 2018).

This is not to say that judicialization will provoke the same pattern of ideological polarization everywhere. The radiating effects of judicialization will vary according to different legal configurations and the broader sociopolitical ecosystems in which they are embedded. Future research should examine how the judicialization of religion differs from country to country, and why.

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