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Liberal Rights versus Islamic Law? The Construction of a Binary in Malaysian Politics

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Why are liberal rights and Islamic law understood in binary and exclusivist terms at some moments, but not others? In this study, I trace when, why, and how an Islamic law versus liberal rights binary emerged in Malaysian political discourse and popular legal consciousness. I find that Malaysian legal institutions were hardwired to produce vexing legal questions, which competing groups of activists transformed into compelling narratives of injustice. By tracing the development of this spectacle in the courtroom and beyond, I show how the dueling binaries of liberal rights versus Islamic law, individual rights versus collective rights, and secularism versus religion were contingent on institutional design and political agency, rather than irreconcilable tensions between liberal rights and the Islamic legal tradition in some intrinsic sense. More broadly, the research contributes to our understanding of how popular legal consciousness is shaped by legal mobilization and countermobilization beyond the court of law.

Malaysian political life is increasingly polarized between activists who position themselves as defenders of secularism and liberal rights on the one hand, and those who position themselves as guardians of Islam and Islamic law on the other. Although tensions between these groups have been rising for over three decades, conflict has been exacerbated by a series of controversial court cases that pit the jurisdiction of the shariah courts against the jurisdiction of the civil courts. Increasingly, Malaysians are told by secularists and religious conservatives alike that Islamic law and liberal rights

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are incompatible and that they must therefore stand for one or the other.

This binary understanding of Islamic law and liberal rights is not unique to Malaysia. A similar discourse is present, in different shades and to varying degrees, in other Muslim-majority countries. But the mere fact that public discourse varies so considerably across time and place suggests that these tensions are contingent on institutional and political circumstances rather than irreconcilable differences between the Islamic legal tradition and liberal rights in an intrinsic sense.[1] Acknowledging the politically constructed nature of this binary is not to minimize its significance. Indeed, this construction has profound implications. It directly shapes the terms of debate around a host of political issues, including the rights of women and religious minorities, and the perennial struggle over religious authority—that is, who speaks for Islam.

This study examines the construction of this binary in Malaysia by tracing a series of divisive court cases that concerned the jurisdiction of the Malaysian shariah courts vis-à-vis the civil courts over the last decade. Each of the cases—dealing with issues of religious conversion, divorce, and child custody—was significant in a legal sense, but I argue that their greatest collective impact was on political discourse and popular legal consciousness. Together, the cases generated a flood of media coverage and became the focal point for public debates over the secular versus religious foundations of the state, the rights of non-Muslim citizens, and individual versus collective rights.

Ironically, the crux of each case had little to do with the Islamic legal tradition. Instead, matters related to court jurisdiction, rules of standing, and other features of Malaysian judicial process were at issue. Each case began far from the media spotlight and concerned technical issues of jurisdiction between the two tracks of the Malaysian judiciary. But political activists raised the profile of the cases, framed their significance in the media, and situated their meanings in popular consciousness. Because the vast majority of the public does not have formal legal training, working knowledge of Islamic jurisprudence, or the opportunity to examine the intricacies of court rulings, these alternate framings had a powerful effect on the direction of public discourse.

[1] Numerous studies establish that there is no necessary or essential tension between the Islamic legal tradition and contemporary notions of liberal rights (Abou El Fadl 2004; Ali 2000; Baderin 2003; Kamali 2008; March 2009; Sachedina 2009). This is despite the fact that exclusivist claims are also made from within the Islamic legal tradition. The relationship between the Islamic legal tradition and liberal rights is therefore best understood as indeterminate and contested, but not fundamentally incompatible.

These dynamics are certainly not unique to Malaysian politics and society. As in any other setting, popular understandings of legal issues are mediated by prior political beliefs, the social networks in which individuals are situated, the frames of understanding crafted by political spokespersons, and media representations (Ewick & Silbey 1998; Haltom & McCann 2004; Merry 1990; Walsh 2004). It is the complexity of history, law, and, in this case, the Islamic legal tradition that gives political activists a great deal of power to define the terms of debate, and in so doing, make complicated issues legible for a popular audience. This sort of complexity also makes competing narratives inevitable. As Merry notes in her seminal study of legal consciousness, "the same event, person, action, and so forth can be named and interpreted in very different ways. The naming . . . is therefore an act of power. Each naming points to a solution" (1990: 111).

In the cases examined here, competing groups of lawyers, judges, politicians, media outlets, and civil society groups shaped public discourse along two competing frames. The first frame, advanced by liberal rights activists, characterized the cases as grave challenges to the authority and position of the civil courts, which were cast as a last bastion for the protection of liberal rights vis-à-vis the *dakwah* (religious revival) movement.[2] The second frame, put forward by conservative groups, was a mirror image of the first. Conservatives claimed that the cases represented grave threats to the authority and position of the shariah courts, which were cast as the last bastion of religious law vis-à-vis the secular state. These alternate "injustice frames" (Gamson 1992) were deployed in the public sphere and resonated with different constituencies. Ironically, neither side sustained the binary alone. As with the construction of any political spectacle, each side derived legitimacy, purpose, and power from their oppositional stance toward the other (Edelman 1988). Liberal rights activists rallied supporters, both domestically and internationally, by sounding the alarm that liberal rights were under siege and that Malaysia was on the way to becoming an Islamic state. On the other side of the divide, conservative organizations rallied support by contending that liberal rights groups wished to undermine the autonomy of the shariah courts and that they worked in cooperation with powerful foreign agents intent on weakening Islam.[3] Perhaps not surprisingly, these

[2] The term *dakwah* comes from the Arabic "*da'wah*," which carries the literal meaning of "making an invitation." In Islamic theology, *da'wah* is the practice of inviting people to dedicate themselves to a deeper level of piety. The term is used in contemporary Malaysian politics to stand in for the various manifestations, both social and political, of the piety movement.

[3] The dynamic interaction of liberal rights mobilization and conservative countermobilization remains relatively understudied. Prominent research in the American context

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frames proved effective because they resonated with a broader constellation of political struggles and long-standing grievances at the intersection of race, religion, and access to state resources.

In the analysis that follows, I trace the life cycle of these legal disputes to provide an empirically grounded study of how this binary is continually reinscribed in the Malaysian public imagination. I begin with a brief overview of how law and legal institutions are configured in Malaysia, focusing on the bifurcation of judicial institutions into civil and shariah court tracks. These institutional formations are products of the colonial era and both are distinctly *secular* formations of the modern state. Part two examines how these institutional configurations generated a series of legal disputes centered on the jurisdiction of the shariah courts vis-à-vis the civil courts. Part three traces how these cases provided a focal point for political mobilization and the construction of an Islamic law versus liberal rights binary in public discourse. Finally, interviews and survey data are used to examine how the cases were understood by the general public.

Institutional Roots of the Problem

Islam spread through the Malay Peninsula beginning in the fourteenth century, but the introduction of Islamic law in its present, institutionalized form is a far more recent development.[4] This is important to highlight at the outset because a central argument of this study is that the legal conundrums concerning shariah and civil court jurisdictions are not the result of an essential incompatibility between the Islamic legal tradition and liberal rights. Rather, I argue that they are the product of the specific ways that legal institutions were introduced in British Malaya, and later configured vis-à-vis one another in the independence period.

To the extent that Islamic law was practiced in the precolonial Malay Peninsula, it was socially embedded and marked by tremendous variability across time and place (Horowitz 1994). Religious leaders were not part of a centralized state apparatus.[5] Instead,

includes Dudas (2008), Goldberg-Hiller (2004), and Teles (2010), but there are even fewer studies from a law and society perspective that examine the dialectics of mobilization and countermobilization outside the North American context.

[4] "Despite the references to Islamic law that exist in fifteenth-century texts such as the *Undang-Undang Melaka*, there is little if any solid evidence to indicate widespread knowledge or implementation of such laws in the Malay Peninsula prior to the nineteenth century" (Peletz 2002: 62). Also see Horowitz (1994).

[5] "In the realm of religious belief, as in that of political organization, the Malay state as a rule lacked the resources necessary for centralization of authority" (Roff 1967: 67).

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they were "members of village communities who, for reasons of exceptional piety or other ability, had been chosen by the community to act as imam of the local mosque . . ." (Roff 1967: 67). As in other Muslim-majority areas (Hallaq 2009), the colonial period marked a key turning point for the institutionalization and centralization of religious authority (Hooker 1975; Horowitz 1994; Hussin 2007; Moustafa 2013a; Roff 1967).

Beginning with the Treaty of Pangkor in 1874, the British first established its system of "indirect rule" in the state of Perak.[6] Local rulers were left to oversee matters related to religion and custom (*adat*) while English law governed all other aspects of commercial and criminal law. A Muslim Marriage Enactment was issued to regulate Muslim family law in the Straits Settlements in 1880 and separate courts were established a decade later with jurisdiction limited to Muslim family law matters and decisions subject to review by the High Courts (Horowitz 1994: 256).

The term "Anglo-Muslim law" characterized this peculiar legal construct.[7] The law was "Anglo" in the sense that the concepts, categories, and modes of analysis followed English common law, and it was "Muslim" in the sense that it was applied to Muslims. Anglo-Muslim law incorporated some select fragments of *fiqh* (classical Islamic jurisprudence), but it carried epistemological assumptions and organizing principles that were entirely distinct from *usul al-fiqh*, the legal method undergirding classical Islamic jurisprudence (Moustafa 2013b).[8] Hooker explains that ". . . the classical syarî'ah is not the operative law and has not been since the colonial period. 'Islamic law' is really Anglo-Muslim law; that is, the law that the state makes applicable to Muslims" (2004: 218). By the beginning of the twentieth century, "a classically-trained Islamic jurist would be at a complete loss with this Anglo-Muslim law" whereas "a common lawyer with no knowledge of Islam would be perfectly comfortable" (Hooker 2004: 218).

[6] Prior to this, the British gained direct control of the port cities of Penang (1786), Singapore (1819), and Malacca (1824) for the purpose of trade and commerce. Together, the three outposts formed the Straits Settlements, which were later ruled directly as a Crown colony beginning in 1867. Separately, Britain established protectorates in what would come to be known as the Federated Malay States of Perak, Negeri Sembilan, Pahang, and Selangor, and the Unfederated Malay States of Johor, Kedah, Kelantan, Perlis, and Terengganu.

[7] Just as "Anglo-Muslim" law was applied to Muslim subjects, "Anglo-Hindu," "Chinese customary law," and other codes were applied to various religious and ethnic communities. For more on Anglo-Hindu and Chinese customary law in British Malaya, see Hooker (1975: 58–84; 158–81) and Siraj (1994).

[8] *Usul al-fiqh* carries the literal meaning "origins of the law" or "roots of the law" but it also carries the meaning "principles of understanding" or "Islamic legal theory." See Hallaq (2009) for more on *usul al-fiqh* and its subversion by modern state law.

Two aspects of these institutional changes are especially noteworthy for our purpose. First, Islamic law was transformed from being pluralistic and socially embedded to being codified and institutionalized (Horowitz 1994; Hussin 2007; Moustafa 2013b; Roff 1967). Islamic law was thus "secularized" in the sense that it became an instrument of the modern, regulatory state (Asad 2003). A second noteworthy aspect of this transformation is that the legal system was bifurcated into parallel jurisdictions, a configuration that would later be entrenched in the Federal Constitution.

Concurrent with these institutional transformations were profound demographic changes and the institutionalization of "race"[9] as a salient category of governance.[10] Laborers were brought from China by the hundreds of thousands to work in the tin industry and the British turned to India for cheap labor to run vast rubber plantations.[11] Colonial policy tended to overlook the tremendous ethnic and linguistic diversity internal to these groupings and economic roles were assigned according to race (Hirschman 1986: 353).[12] As in other times and places, the legal construction of racial boundaries tended to serve economic and political objectives (Mamdani 2012; Mawani 2009). For example, the Malay Reservations Act set land aside for Malays to use in "traditional" agricultural pursuits, first among them rice cultivation. Although the Reservations Act was made in the name of preserving "the Malay way of life," the reality had more to do with limiting the expansion of Chinese business interests, barring Malays from competing in

[9] I use the term "race" rather than "ethnicity" for two reasons. First, race is the term that is used among Malaysians themselves. But I also find myself in agreement with an important analytic distinction made by Bashi (1998) and Gomez (2010). They explain that "although both race and ethnicity are about socially constructed group difference in society, race is always about hierarchical social difference . . ." (Gomez 2010: 490). In other words, the term "race" captures a power dimension that tends to fall out of the picture in discussions of "ethnicity." In using the term race, I subscribe to the three components of the constructionist view outlined by Gomez (2010: 491): (1) a biological basis for race is rejected; (2) race is viewed as a social construct that changes along with political, economic, and other context; and (3) the view that "although race is socially constructed . . . [it] has real consequences."

[10] Parts of the Malay Peninsula were already multiethnic by the time the British arrived, but economic forces accelerated the rate of demographic change beginning in the middle of the nineteenth century.

[11] While most accounts of migration to the Malay Peninsula focus on the influx of Chinese and Indian workers, there was also significant Malay migration through this period. Andaya and Andaya (2001: 184) report that by 1931 nearly half of Malays in the former protectorates were either first-generation arrivals from the Netherlands East Indies or descendants of Indonesian migrants who had arrived after 1891. And just as Chinese and Indian migrants were a mix of various ethnic and linguistic groups, the "Malay" community was similarly diverse.

[12] Particularly revealing is how census categories merged over time, both during the colonial era and after, reflecting (and reinforcing) new political and social categories (Hirschman 1986).

the lucrative rubber industry, and preserving adequate food supplies in the colony. The official and unofficial basis for the legal definition of "Malay" was thus context specific and ultimately short lived, but the legal category lived on and acquired increasing political salience as Malays were granted exclusive access to positions in the civil service, special business permits, government scholarships, and lucrative government contracts under the late colonial administration.

Equally noteworthy for our purpose is how the racial category of "Malay" was legally fused with the religious designation, Muslim. The Malay Reservations Act defined a Malay as "any person belonging to the 'Malayan race' who habitually spoke Malay . . . and who professed Islam" (Andaya & Andaya 2001: 183). The fused racial/religious legal category, first borne in the colonial era, remains virtually unchanged until the present day, as enshrined in Article 160 (2) of the Malaysian Federal Constitution. Religious categories are thus defined and regulated by state law, and are thoroughly intertwined with the politics of race and access to state resources.[13]

Shariah versus Civil Court Jurisdictions

The bifurcation of the judicial system into separate tracks continued after independence in 1957. The federal civil courts continued to administer commercial, criminal, and administrative law in addition to personal status law for non-Muslims. State-level Muslim Courts (rebranded "Shariah Courts" in 1976) exercised jurisdiction over Muslims in the area of personal status law and certain defined aspects of criminal law.

Shariah court rulings were subject to review until the government amended the Federal Constitution in 1988.

This amendment, Article 121 (1A), should be understood in the broader context of the *dakwah* (religious revival) movement that had begun a decade earlier. The ruling party, the United Malays National Organization (UMNO), sought to bolster its religious

[13] The Malay/non-Malay cleavage largely maps onto the Muslim/non-Muslim cleavage. The Malay community, which is constitutionally defined as Muslim, constitutes just over half of Malaysia's total population of 28 million. The second largest ethnic group is Chinese, standing at approximately 26 percent of the total population. Most ethnic Chinese identify as Buddhist (76 percent), with substantial numbers identifying as Taoist (11 percent) and Christian (10 percent). The ethnic Indian community stands at approximately eight percent of the total population and is also religiously diverse, with most ethnic Indians following Hinduism (85 percent), and a significant number practicing Christianity (7.7 percent) and Islam (3.8 percent). The overall breakdown of the population according to religion is approximately 60 percent Muslim, 19 percent Buddhist, nine percent Christian, six percent Hindu, and five percent of other faiths.

credentials vis-à-vis the *dakwah* movement in general, and in relation to the leading Islamist opposition party, *Parti Islam Se-Malaysia* (PAS) in particular. UMNO's "Islamization" program was manifest beginning in the mid-1970s, but accelerated under the leadership of Mahathir Mohammad (1981–2003). During his 22 years as Prime Minister, Mahathir harnessed the legitimizing power of Islamic symbolism and discourse (Liow 2009; Nasr 2001). State-sponsored religious institutions were established, primary and secondary education curricula were revised to include more material on Islamic civilization, and radio and television content followed suit (Barr & Govindasamy 2010; Camroux 1996). But it was in the field of law and legal institutions that the most consequential innovations were made (Moustafa 2013b). As one of several initiatives in this area, the government formed a committee to examine "the unsatisfactory position of the Shariah Courts . . . and suggest measures to be taken to raise their status and position" (Ibrahim 2000: 136). One recommendation of the committee was to oust the civil courts from shariah court jurisdiction by way of a constitutional amendment. Mahathir adopted the recommendation and proposed a constitutional amendment declaring that the High Courts of the Federation "shall have no jurisdiction in any respect of any matter within the jurisdiction of the Shariah courts."

Opening Parliamentary debate, Mahathir explained that the amendment was necessary to protect the jurisdiction of the shariah courts vis-à-vis the federal civil courts:

> One thing that has brought about dissatisfaction among the Islamic community in this country is the situation whereby any civil court is able to change or cancel a decision made by the Shariah court. For example, an incident happened where a person who was unhappy with the decision of the Shariah court regarding child custody brought her charges to the High Court and won a different decision. The government feels that a situation like this affects the sovereignty of the Shariah court and the execution of Shariah law among the Muslims of this country. It is very important to secure the sovereignty of the Shariah court to decide on matters involving its jurisdiction, what more if the matter involves Shariah law. Therefore, it is suggested that a new clause be added to Article 121, which is the Clause (1A) stating that the courts mentioned in the Article do not have any jurisdiction over any item of law under the control of the Shariah Court.[14]

There is little evidence by way of newspaper coverage or other primary source material to support Mahathir's contention that civil

[14] Minutes of the *Dewan Rakyat*, 17 March 1988, section 1364.

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court rulings had produced "a feeling of dissatisfaction among Muslims in the country." The civil courts rarely overturned shariah court rulings, and in cases where they had, the rulings were not covered extensively by the press.[15] Media coverage of the amendment's passage was also surprisingly thin.[16] As a result, Article 121 (1A) was incorporated into the Federal Constitution with little Parliamentary debate and no popular awareness outside a small number of lawmakers, legal scholars, and practitioners. Yet, as we will see below, the amendment introduced profound legal dilemmas.

Legal Conundrums

In theory, Article 121 (1A) of the Federal Constitution demarcated a clean division between the civil courts and the shariah courts. Muslims would henceforth be *exclusively* subject to the jurisdiction of the shariah courts in matters related to religion while non-Muslims would remain subject to the jurisdiction of the civil courts.[17] In practice, however, dozens of cases presented vexing legal questions. These cases—the "article 121 (1A) cases"—generated enormous political controversy and became the focal point for civil society mobilization once they came into public view. Below I present three examples of such cases, each of which became the object of heated political debate.[18]

Shamala v. Jeyaganesh

A case that commanded nationwide attention was *Shamala v. Jayaganesh*. Shamala Sathiyaseelan and Jeyaganesh Mogarajah, both Hindus, were married in 1998 according to the civil law

[15] Malay language newspapers did not mention the four cases that were cited by Ahmed Ibrahim as examples of civil court interference: *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265; *Boto'Binti Taha v. Jaafar Bin Muhamed* [1985] 2 MLJ 98; *Nafsiah v. Abdul Majid* [1969] 2 MLJ 174; and *Roberts v. Ummi Kalthom* [1966] 1 MLJ 163.

[16] This was likely due to the fact that parliamentary debate was overshadowed by a second constitutional amendment, introduced simultaneously, that weakened the independence of the federal courts vis-à-vis the executive. Seven Democratic Action Party (DAP) Members of Parliament were also held in detention at the time in the aftermath of Operation Lalang, limiting debate of the amendment.

[17] Schedule nine of the Federal Constitution sets out the areas of law that fall within the jurisdiction of state-level shariah courts.

[18] These three cases were selected because they represent the three distinct types of Article 121 (1A) related conflicts that emerged following the 1988 constitutional amendment. They were also among the most politicized cases once Article 121 (1A) cases entered the public spotlight beginning in 2004.

statute that governs marriages among non-Muslims in Malaysia.[19] Four years later, Jeyaganesh converted to Islam and subsequently converted their two children, ages two and four, to Islam without his wife's knowledge or consent. Shamala obtained an interim custody order for the children from the civil courts, the appropriate legal body for adjudicating family law disputes among non-Muslims. However, shortly thereafter, the father secured an interim custody order of his own from a shariah court on the grounds that he and the children were now Muslim and therefore under the jurisdiction of the shariah courts in matters of family law. The two court orders came to opposite conclusions.

Shamala v. Jeyaganesh begged the question of which court had the ultimate authority to determine the religious status and the custody of the children. According to the law, the shariah courts have jurisdiction over personal status questions involving individuals who are legally registered as Muslim. Moreover, Article 121 (1A) of the Federal Constitution prevents the civil courts from reviewing or overturning shariah court decisions.[20] Yet, it was undeniable that Shamala's rights were harmed. Married to a Hindu according to civil law, she now found herself in a custody battle that involved the shariah courts.

In the High Court proceedings that ensued, Shamala sought a court order declaring the conversions of the children null and void. However, the judge denied her petition, ruling that:

> by virtue of art. 121 (1A) of the Federal Constitution, the Shariah Court is the qualified forum to determine the status of the two minors. Only the Shariah Court has the legal expertise in *hukum syarak* [shariah law] to determine whether the conversion of the two minors is valid or not. Only the Shariah Court has the competency and expertise to determine the said issue. (*Shamala v. Jeyaganesh* 2004: 660)

The ruling put Shamala in a no-win situation. She had no remedy in the civil courts, nor did she have legal standing in the shariah courts because she was not a Muslim. Even if she had wished to approach the shariah courts for relief, it was not an avenue open to

[19] Act 164/1976, also known as the Law Reform (Marriage and Divorce) Act 1976.

[20] This is the standing interpretation provided by the Federal Court through case law. In contrast, prominent liberal rights attorneys Malik Imtiaz and Shanmuga Kanesalingam maintain that, if properly read, Article 121 (1A) should *not* preclude the civil courts from reviewing shariah court rulings when fundamental liberties are in jeopardy. They argue that the weakening of formal judicial independence made judges vulnerable to political pressures, particularly when they are working on politically sensitive cases. According to this view, the weak stance of the civil courts in cases involving Article 121 (1A) is ultimately the result of political pressure and insufficient judicial independence rather than express constitutional provisions. (Interviews with Shanmuga Kanesalingam, 9 July 2009, and Malik Imtiaz, 5 November 2009).

her. The presiding judge acknowledged the unsatisfactory result: "What then is for her to do? The answer [is that] it is not for this court to legislate and confer jurisdiction to the Civil Court but for Parliament to provide the remedy" (2004: 649). Fearing that her husband would deny her joint custody, Shamala moved to Australia with the children, never to return.[21] As we will soon see, *Shamala v. Jeyaganesh* was the spark that ignited a full throttled campaign between liberal and conservative activists.

Lina Joy v. Islamic Religious Council of the Federal Territories

Another controversial case that attracted national and international attention was that of Lina Joy, a woman from a Malay Muslim family who sought to change the religious designation on her National Registration Identity Card in order to marry a non-Muslim man.[22] The National Registration Department (NRD) refused to process Joy's application without her first obtaining a certificate from a shariah court validating her conversion. Rather than pursuing this avenue, which had been an administrative dead end for others before her, Joy initiated a lawsuit against the NRD and the Religious Council of the Federal Territories in the civil courts.

Joy pointed to Article 11 of the Malaysian Constitution, which states (in part) that "Every person has the right to profess and practice his religion. . . ." Joy argued that Article 11 gave her alone the freedom to declare her religious status and that she had no obligation to seek certification from a shariah court.[23] The High Court dismissed the petition based on the fact that Joy was a registered Muslim and that conversion out of Islam was a legal

[21] Shamala attempted to appeal the ruling, but the Federal Court dismissed the appeal without considering the constitutional questions on the grounds that she was in contempt of court for denying Jeyaganesh his visitation rights.

[22] Lina Joy's original name was Azlina bte Jailani. Prior to this case, Joy applied to change her official name from Azlina bte Jailani (a Muslim name) to Lina Lelani (a non-Muslim name) on her National Registration Identity Card so that she could marry a non-Muslim man. While marriage between Muslims and non-Muslims is not permitted in Malaysia, changing one's name was a way for star-crossed lovers to circumvent the letter of the law and have their marriages registered by the state. However, the National Registration Department (NRD), the administrative department charged with processing such requests, rejected the application. Undeterred, Azlina applied once again for a name change, this time to "Lina Joy." The National Registration Department approved the second name change request, but Joy's replacement identity card recorded her religion as "Islam." The statement of official religion on the identity card was the result of a new administrative procedure designed to close the loophole that had enabled Muslims to effectively sidestep the state's regulation of religion by way of a name change.

[23] Joy's attorneys challenged the constitutionality of Article 2 of the Administration of Islamic Law (Federal Territories) Act of 1993 and related state enactments. They also claimed that the Shariah Criminal Offences Act of 1997 and related State Enactments were not applicable to the plaintiff who professes Christianity.

matter that lay within the exclusive jurisdiction of the shariah courts based on Article 121 (1A) of the Federal Constitution. The High Court also declared that Joy's fundamental freedoms were not violated if one understands that the true intent of Article 11 is to protect the freedom of various *religious communities* to practice their faith free of interference rather than for *individuals* to profess and practice the religion of their choice.[24] To support this interpretation, Judge Faiza Tamby Chik pointed to other clauses in Article 11 of the Federal Constitution, including clause 3, which states: "Every religious group has the right . . . to manage its own religious affairs. . . ." The true meaning of freedom of religion, Judge Faiza Tamby Chik argued, is that religious authorities must be left to regulate their own internal matters without interference from the state. According to the Court:

> When a Muslim wishes to renounce/leave the religion of Islam, his other rights and obligations as a Muslim will also be jeopardized and this is an affair of Muslim [sic] falling under the first defendant's jurisdiction. . . . Even though the first part [of article 11] provides that every person has the right to profess and practice his religion, this does not mean that the plaintiff can hide behind this provision without first settling the issue of renunciation of her religion (Islam) with the religious authority which has the right to manage its own religious affairs under art 11 (3) (a) of the FC. (*Joy v. Islamic Council of the Federal Territories* 2004: 126)

The High Court's ruling that Lina Joy must settle the matter with a shariah court failed to account for a glaring lacuna in the law: The Administration of Islamic Law Act contains provisions for registering conversions *into* Islam, but not *out* of Islam.[25] Others had previously sought legal recognition of their conversion by the shariah courts, only to find that in most states the shariah courts do not have administrative procedures for certifying conversion out of Islam (Adil 2007a, 2007b).[26]

[24] This decision departed from earlier rulings by the civil courts in *Ng Wan Chan v. Islamic Religious Council of the Federal Territories* and in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam*. In both cases, decided in 1991, the civil courts took the position that only issues expressly conferred to the jurisdiction of the shariah courts would remain in their jurisdiction. This principle changed just prior to *Joy v. Religious Council* in a decision involving a Sikh man (Soon Singh) who wished to change his religious designation after having converted to Islam as a teenager. In this case, the civil courts adopted a new doctrine of implied jurisdiction vis-à-vis the shariah courts, effectively providing the shariah courts with exclusive jurisdiction over such matters.

[25] The Administration of Islamic Law Act regulates the personal status law of Muslims in the Federal Territories, which includes the capital city of Kuala Lumpur where Lina Joy was a resident.

[26] Six of Malaysia's 13 states and the Federal Territories do not provide legal mechanisms for state recognition of conversion out of Islam. Five other states criminalize conver-

The ruling in April 2001 was not the final decision on the matter. The case went to the Court of Appeal and later to the Federal Court, the highest appellate court in Malaysia.[27] Amicus curiae briefs were submitted by nongovernmental organizations (NGOs) on both sides of the case. The Bar Council, HAKAM, and the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, and Sikhism held watching briefs on behalf of Lina Joy, while briefs from conservative Muslim organizations included the Malaysian Islamic Student Youth Movement (ABIM), the Muslim Lawyers Association, and the Shariah Lawyers Association of Malaysia. In a split 2-1 Federal Court decision, Chief Justice Ahmad Fairuz and Justice Alauddin affirmed the previous rulings. The dissenting judgment from Richard Malanjum, on the other hand, pointed to the gap in the law: "The insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This was because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy." By failing to attend to this lacuna, *Joy v. Religious Council of the Federal Territories* did little to address the legal conundrum that lay at the heart of all prior conversion cases.[28]

Kaliammal Sinnasamy v. Islamic Religious Affairs Council of the Federal Territories

The jurisdiction between the civil and shariah courts was also complicated by the death of individuals with contested religious affiliation. In these so-called "body-snatching" cases, state-level Religious Councils take possession of the deceased for a Muslim burial if they are registered as Muslim by the state. These situations stir particularly intense emotions if non-Muslim family members are unaware of the conversion, or suspect that the conversion was made under duress. In these situations, non-Muslim family members sometimes litigate for the right to bury the deceased.

A striking example of this type of dispute followed the death of Moorthy Maniam, a Malaysian national hero who had climbed

sion. Only one state (Negeri Sembilan) provides a formal avenue for conversion out of Islam, but the process is lengthy and requires mandatory counseling.

[27] In a split 2-1 decision, Joy lost in the Court of Appeal (*Lina Joy v Islamic Religious Council of the Federal Territories* 2005).

[28] To be sure, the absence of a viable path to conversion out of Islam is not simply an oversight in the law. Rather, it is a lacuna that persists by design, despite there being divergent positions in the Islamic legal tradition itself. For more, see Saeed and Saeed (2004).

Mount Everest with a national team. Although Moorthy's family and the public at large knew him to be a practicing Hindu, Moorthy's wife, Kaliammal, was informed that her husband had converted to Islam, requiring that he be provided with a Muslim burial by the religious authorities.[29] If Moorthy had converted to Islam, it was not done publicly; Moorthy had carried out Hindu rites in public just weeks before he fell into a coma. Upon Moorthy's death on December 20, 2005, his widow filed a lawsuit to prevent the Islamic Religious Affairs Council from taking her husband's body for burial. A hearing was scheduled for December 29, 2005, but in the meantime the Islamic Religious Affairs Council applied for and received an order from the Kuala Lumpur Shariah High Court to release the body for a Muslim burial. The Shariah Court order was served on the hospital, but the hospital director held the body until the civil courts could review the matter. Radio, television, and newspapers covered the unfolding drama intensively.

The High Court of Kuala Lumpur heard Kaliammal's appeal the following week, but the judge dismissed the suit on the grounds that the federal civil courts did not have the competence or the jurisdiction to decide on Moorthy's religious status as a result of Article 121 (1A). For all practical purposes, the High Court's dismissal denied Moorthy's widow recourse to *any legal forum* due to the fact that, as a non-Muslim, she did not have standing in the shariah courts. Moorthy's body was released to the religious authorities and buried on the same day, enraging the non-Muslim community.

These three cases illustrate the fact that any clean division between the shariah and civil court jurisdictions proved extremely illusive. Rather than simplifying jurisdiction, Article 121 (1A) presented new legal dilemmas. In cases concerning child custody when one parent converts (*Shamala v. Jeyaganesh*), or in cases concerning the right to convert out of Islam (*Joy v. Islamic Religious Council*), or in cases concerning burial rites for those with contested religious status (*Kaliammal v. Islamic Religious Affairs Council*), Article 121 (1A) presented vexing legal conundrums for the Malaysian judiciary. It bears repeating that these legal tensions were not rooted in the classical Islamic legal tradition, but were instead the product of codified state law and the institutional configuration of the civil courts vis-à-vis the shariah courts. In other words, these legal conundrums were the result of the institutional formations of the modern state. Nonetheless, the significance and meaning of the cases were framed in a very different manner.

[29] Moorthy spent the last six weeks of his life in a coma. It was at this time that his wife was informed of Moorthy's alleged religious conversion.

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Constructing the Political Spectacle

It is not difficult to understand why the rulings roused deep concern among secularists and non-Muslims. Each case provided a clear example that the civil courts were beginning to cede broad legal authority when issues around Islam were involved, even when it meant trampling on individual rights enshrined in the Federal Constitution and even when non-Muslims were involved. Within the broad context of the *dakwah* movement over the preceding three decades, liberal rights activists understood the rulings as the failure of this last bastion of secular law vis-à-vis religious authorities. But these cases evoked the worst fears among conservatives as well. Each case was understood not as the tyranny of Islamic law or as "creeping Islamization," but rather as an attack on the autonomy of the shariah courts. In the Lina Joy case, for example, the central focus of conservative discourse concerned the implications of an adverse ruling on the Muslim community's ability to manage its own religious affairs in multireligious Malaysia. If the civil courts affirmed Joy's individual right to freedom of religion, it would essentially constitute a breakdown in the autonomy of the shariah courts and a breach in the barrier that conservatives understood Article 121 (1A) to guarantee.

Conservative activists argued that human rights instruments are focused exclusively on the individual and, as such, they are unable to accommodate communal understandings of rights when they come in tension with individual rights claims.[30] Prominent Islamic Party of Malaysia (PAS) Parliament Member Dzulkifli Ahmad lamented that liberal rights activists could view the cases only from an individual rights perspective and not see that such a framework necessarily undermines the collective right of the Muslim community to govern its own affairs.[31] For Dzulkifli and others, adverse rulings in any of the cases involving Article 121 (1A) would be tantamount to "abolishing and dismantling the Shariah Court" (Ahmad 2007: 153). For conservatives, individual rights talk is marked by an expansionist and even an "imperialist" orientation. Just as discourse among liberal rights activists is marked by fear that individual rights faced an imminent threat, a deep anxiety set in among those who wished to protect what they viewed as the collective rights of the Muslim community.

[30] This specific point was made by several prominent conservative NGO leaders in personal interviews, including the head of *Jamaah Islah Malaysia*, Zaid Kamaruddin (Kuala Lumpur, 25 June 2009) and the head of ABIM, Yusri Mohammad (Kuala Lumpur, 30 June 2009).

[31] This view was summed up in the title of Dzulkifli Ahmed's book on the topic, *Blind Spot* (2007).

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Of course an understanding of the religious community as the legitimate bearer of rights obfuscates the issue of how religious authority was constructed in Malaysia in the first place. The legal dilemmas concerning the authority and jurisdiction of the shariah courts were *not* the result of an inherent or essential tension between the Islamic legal tradition and individual rights. Rather, these legal dilemmas were the result of the state's specific formalization and institutionalization of state law. The bifurcation of the legal system into parallel jurisdictions had hardwired the legal system to produce legal tensions. However, most Malaysians understood these legal problems as the product of an essential incompatibility between the requirements of civil law and the Islamic legal tradition. This (mis)understanding was promoted by many political activists who recognized that although legal battles are fought in the court of law, more significant ideological struggles are won or lost in the court of public opinion. Given the complexity and ambiguities of the legal issues at stake, political entrepreneurs were able to define the terms of debate and, in so doing, made complicated issues legible for a popular audience.

Two factors facilitated the efforts of activists to translate court rulings into compelling narratives of injustice. First, court rulings and the logics that supported them were not legible to those without legal training. Judicial decisions are "technical accounts" as opposed to "stories" (Tilly 2006) and, as such, they are not easily accessible to a lay audience by their very nature. This inaccessibility affords an opportunity for political entrepreneurs to recast technical matters along stylized and emotive frames, presenting competing narratives of injustice for public consumption. A second factor that enabled political actors to effectively convey strikingly different messages was media segmentation along ethnolinguistic lines. Simply put, media segmentation facilitated the compartmentalization of varied narratives. Although English is the common language for most educated and urbanized Malaysians, the vernacular press is divided between Chinese, Tamil, and Malay language media, each of which carried strikingly divergent coverage of the cases.

Before the Storm

The critical role of political activists in drawing the public's attention is underlined by the fact that there were dozens of Article 121 (1A) cases in the first 16 years following the amendment, but they received virtually no press coverage and they remained under the political radar until *Shamala v. Jeyaganesh*.[32]

[32] I examine the full body of Article 121 (1A) cases in other forthcoming work.

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Why did it take so long for these cases to reach the media spotlight and what precipitated such a stark change in 2004? There are several underlying contextual developments as well as key triggers that brought the court cases to the front of public consciousness.

Certainly one key development was the swiftly changing media environment. The print media was docile through the 1990s as the result of strict government controls.[33] But the rapid proliferation of digital media opened up new avenues for journalists and new forums for public debate and deliberation.[34] With one of the highest Internet penetration rates globally, and the highest of any Muslim-majority country, Malaysians increasingly took their political frustrations to the keyboard. Malaysian civil society groups had also become more numerous, organized, and active by the turn of the millennium (Weiss 2006). Women's groups included Sisters in Islam, the All Women's Action Society, the Women's Aid Organization (WAO), and the Women's Center for Change (WCC). Human rights groups included SUARAM. Religious organizations included ABIM, *Jamaah Islah Malaysia* (JIM), the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism, and Taoism (MCCBCHST), and a dozen others representing the different faith communities in Malaysia. The heady days of the *reformasi* movement also emboldened citizens to become more directly engaged in political life. Finally, the "Islamic state debate" was heating up between the ruling UMNO and its religious-oriented political rival, PAS. UMNO went to great lengths to harness the legitimating power of Islamic symbolism and discourse, but PAS also worked hard to undercut UMNO's position with constant charges that the government had not done enough to advance "real" Islam. Not to be outdone, Mahathir Mohammad declared that Malaysia was *already* an Islamic state in 2001, precipitating perhaps the fiercest round of one-upmanship between the ruling UMNO and PAS. For the next decade, political activists of all stripes debated whether Malaysia was meant to be an "Islamic state." Such was the political context when the Article 121 (1A) cases entered into popular political discourse.

[33] A central instrument of government control is the Printing Presses and Publications Act, which applies to all print media including newspapers, books, and pamphlets. Section 3 of the Act provides the Internal Security Minister absolute discretion to grant and revoke licenses, which are typically provided for only one year at a time and are subject to renewal. Malaysia was ranked at a dismal 110 of 139 countries in the 2002 Press Freedom Index, published by Reporters without Borders.

[34] Online media have not been subject to the Printing Presses and Publications Act, although the government has suggested that this may change.

The Trigger

Shamala v. Jeyaganesh was the immediate trigger that brought the Article 121 (1A) cases into national consciousness. The key difference in *Shamala v. Jeyaganesh* was that Shamala's attorney made a concerted effort to generate public attention—an effort that was facilitated by the rapidly changing environment of civil society activism and digital media. Shamala's attorney, Ravi Nekoo, was an active member in the legal aid community and he was well networked with a variety of rights organizations in Kuala Lumpur. When Ravi Nekoo discovered that *Shamala v. Jeyaganesh* was not a typical custody case, he turned to the most prominent women's rights groups in Kuala Lumpur: the WAO, the All Women's Action Society, the WCC, Sisters in Islam, and the Women Lawyers' Association. He also turned to religious organizations, most notably the Hindu Sangam, the Catholic Lawyers Society, and the MCCBCHST. These groups took an immediate interest in the case and they quickly gained formal observer status with the High Court. Subsequently, they filed amicus curiae briefs and mobilized their resources to bring public attention to the case.

The question of whether or not to "go public" posed a dilemma for the groups because they were uncertain whether or not public attention would work to their advantage. According to Ravi Nekoo, "The initial view was that if the case became too big, it would become a political issue and the courts would then succumb to political pressure."[35] But after extensive deliberation, a decision was made to go public, ". . . because prior to Shamala there were so many other cases that just went nowhere." Shortly thereafter, women's groups initiated a public awareness campaign and proposed amendments to the Marriage and Divorce Act to protect women's rights in such circumstances. The day after the ruling in *Shamala v. Jeyaganesh*, the Malaysia Hindu Sangam and the MCCBCHST also went public, issuing press statements condemning the ruling.[36] This was the first time that *any case* concerning the contested civil/shariah court jurisdiction was covered in the leading online news outlet, *Malaysiakini*. Several thousand more news stories would be published about these cases over the course of the next decade.

Liberal Rights Groups Mobilize

Liberal rights activists were increasingly alarmed at civil court rulings on issues related to religion. Far from acting as the guar-

[35] Interview with Ravi Nekoo, 18 February 2012.

[36] "Religious leaders irked by decision on conversion case," *Malaysiakini*, April 14, 2004.

antor of fundamental liberties, the civil courts began to cede jurisdiction to the shariah courts anytime that Islam was at issue, even when it was eminently clear that the fundamental rights of non-Muslims were being harmed. As a direct result of *Shamala v. Jeyaganesh*, liberal rights organizations formed a coalition named "Article 11," after the article of the Federal Constitution guaranteeing freedom of religion.[37] The objective of the Article 11 coalition was to focus public attention on the erosion of individual rights, particularly in matters related to religion, and to "ensure that Malaysia does not become a theocratic state."[38] Article 11 produced a website, short documentary videos providing firsthand interviews with non-Muslims who were adversely affected by Article 121 (1A), analysis and commentary from their attorneys, and recorded roundtables on the threat posed by Islamic law.

Liberal rights groups also proposed the establishment of an "Interfaith Commission" composed of representatives of various faith communities in Malaysia. Among other duties, the Commission would work to "advance, promote and protect every individual's freedom of thought, conscience and religion" by examining complaints and making formal recommendations to the government.[39] But the explicit focus on individual rights rather than communal rights immediately raised the ire of conservatives who feared that the Commission would be used as a platform from which the shariah courts would be challenged. These fears were compounded by the fact that the principal organizer of the two-day organizing conference was the Malaysian Bar Council, an organization that was hardly viewed as impartial in the disputes over court jurisdiction. Moreover, as an *Utusan Malaysia* article highlighted for its Malay readers, the main financial sponsor for the conference was the Konrad Adenauer Foundation, a German research foundation associated with the Christian Democratic Union Party of Germany.[40] Conservative NGOs spoke out loudly against the notion of an interfaith commission. Rather than participate, conservative groups went to the media to condemn the conference and to call on the government to stop the proceedings.[41] Media coverage only

[37] The coalition included the Bar Council of Malaysia, AWAM, the National Human Rights Society (HAKAM), Sisters in Islam, SUARAM, and the WAO. The Article 11 Coalition also included the MCCBCHST, the umbrella organization representing the concerns of non-Muslim religious communities in Malaysia.

[38] Article 11 | The Federal Constitution: Protection for All. Available at: [Last accessed March 2, 2011].

[39] Draft Interfaith Commission of Malaysia Bill, Article 4 (1) (a).

[40] *Utusan Malaysia*, Feb 28, 2005. "*Jangan Cetuskan Isu Agama Elak Perbalahan Kaum*" [Do Not Spark Religious Issues; Avoid Racial Disputes]

[41] See, for example, "*Majlis Peguam Tidak Sensitif Kepada Kesucian Islam*" [The Bar Council is not Sensitive to the Sanctity of Islam] *Harakah*, Jan. 16–31 2005; "*Pelbagai Pihak*

grew more intense after the conference, with conservatives drawing attention to the prominent position of international law and individual rights in the conference platform, and the implications that this would have for Islamic law.[42] In response to the furor, Prime Minister Abdullah Badawi called on the Bar Council to cease discussion of the Interfaith Commission proposal.

As if to underline the threat to individual liberties that liberal rights groups were concerned with, soon thereafter Lina Joy's case was rejected a second time in the Court of Appeals. Three months later, Kaliammal Sinnasamy lost the right to give her husband a Hindu burial. With both cases generating extensive news coverage, 9 out of 10 non-Muslim cabinet ministers in Prime Minister Badawi's government submitted a formal memorandum requesting the review and repeal of Article 121 (1A).[43] It was an unprecedented move that stirred immediate protest from Muslim NGOs and the Malay language press. Prime Minister Badawi responded to public pressure by publicly rejecting the memorandum.

Badawi's refusal to consider the problems generated by Article 121 (1A) did nothing to resolve the underlying legal conundrum. Lina Joy was granted permission to approach the Federal Court, the highest appeal court in Malaysia in April 2006, ensuring that controversy over her case would remain in the news. The following month, another conversion/child custody case hit the headlines.[44] And, in July 2006, Siti Fatimah Tan Abdullah applied to convert out of Islam. It had become painfully clear that each case would create considerable controversy. The judicial system was hardwired to continuously reproduce the same legal tensions. Worse still, pressure from civil society groups was now making it more difficult for the courts to solve the legal dilemmas by themselves.

The Article 11 coalition went on to organize a series of public forums across Malaysia. The first forum in Kuala Lumpur entitled, "The Federal Constitution: Protection for All" addressed the cases of Lina Joy, Moorthy Maniam, and Shamala Sathiyaseelan among others, highlighting the conflict of jurisdiction between the civil

Bantah Syor Tubuh Suruhanjaya Antara Agama" [Various Parties Oppose the Recommendation of the Establishment of an Inter-Religious Commission] *Utusan Malaysia*, Feb 24, 2005; "*Kerajaan Perlu Bertegas Tolak Penubuhan IRC*" [Government needs to be Firm in Rejecting the Establishment of the IRC *Harakah*, Feb. 16–28 2005].

[42] See, for example, "The IFC Bill: An Anti-Islam Wish List" Baharuddeen Abu Bakar, *Harakah Daily*, March 27, 2005.

[43] *New Straits Times*, January 20, 2006. Additionally, the MCCBCHST sent a private memo to the Prime Minister expressing grave concerns that the shariah courts were impinging on the rights of non-Muslims. This was published under the title, "Respect the Rights to Profess and Practice One's Religion (2007)." See MCCBCHST (2007a, 2007b).

[44] *Subashini v. Saravanan*.

courts and the shariah courts. The Article 11 coalition continued with a nationwide road show, hitting Malacca in April, Penang in May, and Johor Bahru in July 2006. The campaign submitted a petition to the Prime Minister, signed by 20,000 concerned Malaysians, calling on the government to affirm that "Malaysia shall not become a theocratic state."

But others saw it differently. Politicians and conservative NGOs also saw advantage in framing these court cases as rights problems—but not individual rights problems. Rather, the message from conservative activists was that the rights of the Muslim community, and Islam itself, were under attack. PAS president, Abdul Hadi Awang, used the Article 11 activities to his political advantage at the PAS annual party convention in 2006. Opening the conference, Awang told party delegates that "Never before in the history of this country has the position of Islam been as strongly challenged as it is today."[45] Awang urged the government, Muslim NGOs, and all Muslims to defend Islam in the face of Article 11 challenges. Similarly, at the 2006 UMNO general assembly, delegates used the issue as a way to brandish their religious credentials. Shabudin Yahaya, an UMNO Penang delegate, railed that "[t]here are NGOs like Interfaith Commission, Article 11 coalition, Sisters in Islam and Komas who are supported and funded by this foreign body called Konrad Adenauer Foundation."[46] Although the Article 11 forums had been tremendously successful in generating media attention, coverage in the Malay language press was not complementary.[47] The Article 11 forums were depicted as a fundamental challenge not only to the shariah courts, but to Islam itself. The Article 11 forum in Penang was disrupted by several hundred protesters with posters reading, "Fight Liberal Islam," "Don't Seize our Rights," and "Don't Insult God's Laws."[48] Mohd Azmi Abdul Hamid, the leader of *Teras Pengupayaan Melayu* and organizer of the protest against the Article 11 forum in Penang, explained that the true intent of liberal rights activists was to undermine the shariah courts: "Under the pretext of human rights, they condemned Islamic principles and the shariah courts. They have a hidden motive to place the shariah laws beneath the civil laws."[49] When another large protest gathered outside the next Article 11 forum in Johor Bahru, the forum was stopped halfway through by police seeking to maintain public order.

[45] "PAS to Muslims: Close Ranks, Defend Islam" *Malaysiakini*, 7 June 2006.

[46] "Muslims Face Threats from Within and Without," *Malaysiakini*, 17 November 2006.

[47] "Warning: Stop Questioning the Constitution" *Berita Harian*, July 25, 2006; "Never Question Article 121 (1A)" *Utusan Malaysia*, July 24, 2006.

[48] *Malaysiakini*, May 15, 2006.

[49] *Malaysiakini*, June 5, 2006.

Conservative NGOs Mobilize

Liberal rights groups were not the only organizations to mobilize. A more formidable countermobilization was underway in the name of defending Islam. A group of lawyers calling themselves "Lawyers in Defense of Islam" (*Peguam Pembela Islam*) held a press conference to announce their formation at the Federal Territory Shariah Court Building on 13 July 2006. Their explicit aim was to "take action to defend the position of Islam" in direct response to the activities of Article 11. A few days later, a broad array of Muslim NGOs united under a coalition calling itself, "Muslim Organizations for the Defense of Islam" (*Pertubuhan-Pertubuhan Pembela Islam*), or PEMBELA (Defenders) for short. PEMBELA brought together over 50 Islamic organizations including ABIM, JIM, the Shariah Lawyers' Association of Malaysia (PGSM), and the Muslim Professionals Forum.[50] Their founding statement explains that their immediate motivation for organizing was the Moorthy Maniam and Lina Joy cases as well as challenges to "the position of Islam in the Constitution and the legal system of this country" (PEMBELA 2006a). Underlining their extensive grassroots base, PEMBELA gathered a maximum-capacity crowd of 10,000 supporters at the federal mosque in Kuala Lumpur and issued a "Federal Mosque Resolution" outlining the threat posed by liberal rights activists (PEMBELA 2006b). The following day, PEMBELA sent an open letter to the Prime Minister and the press, reiterating the threat that recent court cases posed to Islam and to the shariah courts:

> Since Independence 49 years ago, Muslims have lived in religious harmony with other religions. Now certain groups and individuals have exploited the climate of tolerance and are interfering as to how we Muslims should practice our religion.
>
> They have used the Civil Courts to denigrate the status of Islam as guaranteed by the Constitution. There are concerted attempts to subject Islam to the Civil State with the single purpose of undermining the Shariah Courts. The interfaith groups and the current Article 11 groups are some of the unwarranted attempts to attack Islam in the name of universal human rights. (PEMBELA 2006c)

In nearly all of this heated rhetoric, conservatives charged that liberal rights posed a fundamental challenge to Islam and the Shariah. In response to PEMBELA's mobilization, Prime Minister Badawi issued an executive order that all Article 11 forums should be stopped.

[50] Pembela later grew to encompass the activities of over 70 Muslim NGOs.

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The International Dimension

By 2006, the Lina Joy case was not only a national issue. It received widespread coverage in the international press. Prominent outlets such as the *New York Times*, the *Wall Street Journal*, the *Washington Post*, the *Guardian*, the BBC, the *International Herald Tribune*, *The Economist*, *Time* magazine, and dozens of others covered the Joy case. Liberal rights activists were eager to share the story with the international press in the hope that outside pressure on the Malaysian government would work where domestic activism had failed. Hungry for such stories, the international press was happy to oblige.[51]

Liberal rights activists also leveraged international pressure in other ways. In litigation, lawyers for Lina Joy made extensive reference to international law and the international human rights conventions signed by the Malaysian government. Moreover, they accepted legal assistance from a U.S.-based NGO, the Becket Fund for Religious Liberty. Not only did the Becket Fund submit an amicus curiae brief to the Federal Court of Malaysia, but they testified before the U.S. Congressional Human Rights Caucus about the Lina Joy case and the threat to individual rights in Malaysia (Becket Fund 2005).[52] The United States Department of State also focused attention on Lina Joy and other cases in their International Religious Freedom Report (2000–2010). Likewise, the United Nations Commission on Human Rights made multiple inquiries at the request of Malaysian rights organizations (2006, 2008, 2009). The Commission repeatedly reminded the Malaysian government of their obligations under international law.

This internationalization of the Lina Joy case proved to be a strategic misstep for liberal rights activists. Although liberal rights supporters viewed their strategies as entirely legitimate and compelling, they fit perfectly with the opposing narrative that Western powers seek to undermine Islam in Malaysia. What better proof of Western interference in Malaysian affairs could be offered than the hundreds of Western newspaper articles that covered the plight of Lina Joy at the hands of the shariah courts? And what better proof of Western interference could be offered than regular criticisms in the annual U.S. State Department Human Rights Reports and the U.S. State Department International Religious Freedom Reports regarding infringements on religious liberty in Malaysia? Liberal

[51] And thus the shariah versus individual rights binary was circulated internationally, affirming popular understandings abroad that liberal rights and Islam are fundamentally at odds with one another.

[52] The Becket Fund's involvement was noted and criticized in a *Harakah* article "*Agensi Amerika didakwa beri sokongan sepenuhnya kepada Lina Joy*" [American Agency Accused of Giving Full Support to Lina Joy] *Harakahdaily*, 15 August 2006.

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rights activists were slow to realize that all three of their primary strategies (litigation, consciousness-raising public events, and appeals to international support and international law) provided conservatives with more ammunition to claim that Islam was under siege.

In the lead-up to the final Federal Court judgment in *Joy v. Islamic Religious Council of the Federal Territories*, conservative NGOs organized dozens of public forums and flooded the Malay language press with hundred more articles and opinion pieces on the need to defend Islam and to confront liberal rights activists, particularly those "liberal Muslims" who posed an insidious threat to the *ummah* from within.[53] Demonstrating their grassroots support, PEMBELA submitted a 700,000-signature petition to the Prime Minister on 29 September 2006, dwarfing the 20,000 signatures that Article 11 was able to muster. No doubt, the two-hour meeting between conservative NGO leaders and the Prime Minister a few months later was the result of this ability to mobilize such broad-based support.

The Federal Court of Malaysia issued its highly anticipated ruling on 30 May 2007, dismissing Joy's petition. Conservative NGOs were satisfied with the decision, but liberal rights groups[54] and organizations representing non-Muslim communities in Malaysia were outraged.[55] Rather than resolving the liberal rights versus Islamic law binary, the Lina Joy ruling simply confirmed the popular understanding that Islam and liberal rights could not coexist; instead, one would inevitably dominate the other. Not only did popular discourse continue along the same lines in the aftermath of the ruling, but brand-new cases emerged along the lines of the three cases examined in this article, ensuring that the binary is constantly reproduced in public discourse.[56]

[53] *Harakah Daily*, for example, ran an article with the headline "Lina Joy's Case is a Planned Effort to Undermine Islam." "*Kes Lina Joy Usaha Terancang Hapuskan Islam*" *Harakahdaily*, 15 July 2006.

[54] See Aliran media statement, "Lina Joy Verdict: No Freedom, No Compassion" (30 May 2007); Women's Aid Organization, All Women's Action Society, and Sisters in Islam statement, "Constitutional Right to Freedom of Belief Made Illusory" (31 May 2007); Malaysian Bar Council press statement, "Federal Constitution Must Remain Supreme" (31 May 2007); and SUARAM press statement (31 May 2007).

[55] See Malaysia Hindu Sangam press statement (30 May 2007); Christian Federation of Malaysia press statement (30 May 2007); Council of Churches of Malaysia press statement (30 May 2007); Catholic Lawyer's Society Press statement (6 June 2007); Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism, and Taoism press release (19 June 2007).

[56] A new conversion/custody case involving a woman by the name of Indira Gandhi mirrors the circumstances of *Shamala v. Jeyaganesh*. Similarly, a new "bodysnatching" case over the burial of Mohan Singh mirrored the circumstances of the Moorthy Maniam case. Finally, the Priyathaseny case, currently in the courts, mirrors many of the circumstances in the Lina Joy case.

This chain of events clearly illustrates the radiating effect that the court rulings had on civil society activism. The rulings gave new energy and focus to variously situated civil society groups, both liberal and conservative, and even catalyzed the formation of entirely new NGOs and coalitions of NGOs—most notably, Article 11 and PEMBELA. The work of these NGOs, in turn, played a direct role in shaping a political context that increasingly constrained the courts and government. Without a doubt, the dynamic was one of polarization, making it harder for both the government and the courts to find pragmatic solutions.

The power of the resulting binary is illustrated by the fact that Sisters in Islam, a women's rights organization that explicitly works to advance women's rights (and liberal rights more generally) through the framework of Islamic law, proved unable to negotiate a "middle way." Instead, Sisters in Islam assumed a leadership position in the Article 11 coalition and was portrayed by conservative detractors as "Sisters against Islam." Similarly, on the other side of the spectrum, conservative NGOs that occupied a wide range of positions on various issues—from ABIM to the Muslim Professionals Forum—found themselves working in cooperation under PEMBELA.

The Binary in Popular Legal Consciousness

In order to examine the extent to which this binary discourse shaped popular legal consciousness, I assembled a multiethnic Malaysian research team to conduct 100 semi-structured interviews with "everyday Malaysians" in the summer and fall of 2009.[57] These interviews were further supplemented by a national survey.[58] Both sets of data suggest that public understandings of the court cases were conditioned by the intense political spectacle that accompanied them.

The controversies surrounding the Article 121 (1A) cases were not understood by most in the Malay community as the result of

[57] Interviews were conducted by the author and the team of research assistants at a variety of locales in Kuala Lumpur. Interviews were conducted in Bahasa Malaysia, Chinese, English, and Tamil in the neighborhoods of Kampung Baru, Kampung Kirinchi, Subang Jaya, Brickfields, Seri Kembangan, Shah Alam, and Bangsar, each of which represent different ethnic composition and varying levels of socioeconomic affluence. While this set of interviews does not provide a statistically representative sample of the Malaysian public, they were supplemented by a cross-national survey.

[58] The national survey used a sampling frame that ensured the respondents represented the Malaysian Muslim community across relevant demographic variables including region, sex, and urban-rural divides. The random stratified sample of 1043 Malaysian Muslims ensured a maximum error margin of ± 3.03 percent at a 95% confidence level. For more on the survey methodology, see Moustafa (2013a: 179).

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institutional problems related to legal standing or lacunas in the law. Nor were the legal conundrums understood as a product of the state's strict regulation of racial and religious difference. On the contrary, the controversies were understood by most Malay Muslims as the result of *too little* regulation of religion and bold attempts by non-Muslims to undermine Islam. Muslim respondents almost all spoke of Islam being "the religion of the country" and expressed the view that the Muslim community must be allowed to govern its own affairs without interference from the civil courts. Sixty-two percent of Muslim respondents agreed with the statement that the cases were "examples of efforts by some individuals and groups to undermine Islam and the Shariah Courts in Malaysia" as compared with only eight percent of non-Muslims who shared that view.

As one interviewee explained, the legal controversies came about, "because we don't have full implementation of the shariah law here in Malaysia." The same interviewee further explained that, "we claim that we are an Islamic country but our shariah law is still not that strong. If we don't strengthen shariah law we will be weakened and they [non-Muslims] will be able to overrule us [Muslims] using the civil court." This view, which reflected the mind-set of many in the Malay community, pointed to: (1) an immediate threat, (2) a diagnosis of the problem, and (3) a solution. The immediate threat was that non-Muslims "will be able to overrule us," the diagnosis of the problem was that "shariah law is still not that strong," and the solution: "full implementation of shariah law." The claim by conservative NGOs that the cases were deliberate strategies designed to undermine Islam and the shariah courts appears to have been an effective frame. These understandings had little to do with the legal conundrums that generated the cases, but they matched the frames of meaning provided by conservative groups almost one to one.

It is important to note, however, that Malays were not uniform in their understanding of these cases. Thirty percent of Malay respondents held that converts to Islam should *not* be able to convert children without spousal approval and the same portion of Malay respondents believed that the civil court (not the shariah court) was the proper legal forum to address such disputes. Similarly, 20 percent of Muslim respondents argued that Lina Joy should not have to seek permission or certification from a shariah court to change her official religious status. These respondents tended to have a better understanding of the details and ambiguities of the court cases. They also tended not to view the cases as efforts by groups and individuals to challenge Islam and the shariah courts.

Whereas the majority of Muslims tended to understand the cases as bold attempts by non-Muslims to undermine Islam in

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Malaysia, the starting point for non-Muslims was their rights vis-à-vis the Malay community and a sense of powerlessness vis-à-vis the government. Not surprisingly, every non-Muslim who was interviewed believed that an injustice had befallen Shamala, Gandhi, and other women in the same predicament when their husbands converted their children and claimed custody in the shariah courts. Like their Malay counterparts, Indian and Chinese Malaysians tended not to attribute the cases to ambiguities and contradictions built into the Malaysian legal system. But unlike their Malay counterparts, they attributed the outcome to a broader trend of institutional discrimination against non-Muslims in Malaysia. The cases were understood in relation to a whole array of long-standing political and economic grievances in the Indian and Chinese communities. In discussions of the conversion/custody cases, for example, respondents frequently commented on the *economic* advantages that Malays enjoyed at the expense of non-Muslim Indians and Chinese. Without prompting, respondents vented their frustration that Malays enjoyed access to lucrative government contracts, reduced prices for housing, government scholarships for study at home and abroad, reserved spaces at universities, and many other benefits. So while Malays viewed the significance of the cases as an attack on Islam and the jurisdiction of the shariah courts, non-Malays viewed the cases as a further manifestation of Malay Muslim dominance over religious and ethnic minorities. And just as most Muslim respondents understood the cases as constituting a threat to the Muslim community, Chinese and Indian Malaysians viewed these cases as constituting a fundamental(ist) threat to their own communities. The cases were clearly at the front of people's minds.

Not only were most Indian and Chinese respondents familiar with the cases, but interviewees frequently cited the cases as evidence of discrimination *before we had the opportunity to initiate discussion*. The first substantive interview question was "how do you see the state of religious and race relations in the country today?" But before proceeding to the next question, respondents offered detailed descriptions of the injustice meted out to Shamala, Gandhi, and others as examples to support their assessment of poor ethnic and religious relations in Malaysia. Similarly, when we initiated discussion of specific cases such as *Gandhi v. Pathamanathan* and *Joy v. Islamic Religious Council* midway through the interview, respondents frequently referenced analogous cases that had been covered heavily in the press, including *Kaliammal v. Islamic Religious Council*, *Subashini v. Saravanan*, and others.[59] The frequency in

[59] Typically, respondents could not recall the names of the cases, but they were nonetheless eager to explain that there were many similar cases.

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which this occurred suggests that the Article 121 (1A) cases were highly salient among "everyday Malaysians."

Despite these alternate understandings across ethnic and religious lines, the vast majority of respondents, Muslim and non-Muslim alike, agreed that the cases were deeply consequential for the future of Malaysia. Eighty-five percent of Muslim respondents and 80 percent of non-Muslim respondents reported that they had strong views about the outcome of the cases. Another shared assumption was that the legal tensions reflected a basic incompatibility between Islam and liberal rights.[60] One of the most troubling findings from the nationwide survey was the response to the question, "Are the Malaysian Constitution and the Shariah compatible or incompatible with one another?" Nearly half of Muslim respondents (45.5 percent) replied that they are incompatible.[61] And among the respondents who believed the Constitution and the Shariah to be incompatible, an overwhelming 80.2 percent believed that the Shariah should be the final authority above the Constitution. Although no comparable data exist from the 1990s, I suspect that not nearly as large a segment of the Malaysian public would have understood the Federal Constitution and the Shariah as incompatible prior to the Article 121 (1A) cases.

The liberal rights versus shariah binary clearly exacerbated political cleavages in Malaysia and, to some degree, shifted the principal political cleavage from race to religion. Malaysian politics, long defined by Malay, Chinese, and Indian parties, became increasingly polarized along its main religious cleavage, between its Muslim and non-Muslim communities. A second major outcome, after the first, was a marked decline in perceptions of state legitimacy among non-Muslims. For the first time in 50 years, the *Barisan Nasional* ruling coalition lost its supermajority in the 2008 parliamentary elections. Most telling was dwindling support from the Chinese and Indian (primarily non-Muslim) communities as reflected in the poor performance of the Chinese and Indian component parties of the ruling coalition. Compared with the 2004 parliamentary elections, the Malaysian Chinese Association lost over half of its parliamentary seats and the Malaysian Indian

[60] It is important to note, however, that a significant number of Malay, Indian, and Chinese respondents were cynical about how legal conundrums were used to advance political agendas. One respondent explained, "You know how they say that sex always sells in the business world? Well, it's religion that sells when it comes to politics [in Malaysia]." Yet, despite such political savvy among some respondents, the interviews strongly suggest that the majority of the Malaysian public had internalized the frames of reference that had reduced complex legal issues to the simple liberal rights versus Islamic law binary.

[61] An almost equal portion of Muslim respondents, 44.9 percent, replied that the Constitution and the Shariah are compatible and the remaining nine percent responded, "Do not know."

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Congress lost a stunning two-thirds of its seats.[62] This was in no small part due to the grave concerns about the legal rights of the non-Muslim community.

Conclusions

Tracing the full life cycle of these cases, both in the courts and beyond, reveals how the binary understanding of liberal rights versus Islamic law is constantly inscribed in Malaysian political discourse and in popular legal consciousness. Ironically, the legal conundrums in each of the cases had little to do with the Islamic legal tradition. Rather, matters related to court jurisdictions and rules of standing generated legal dilemmas that the courts were unable to resolve by themselves and that the government was unwilling to address. The long string of Article 121 (1A) cases remained unknown to the Malaysian public for a full 16 years, until they were brought into the media spotlight by political activists—liberals and conservatives alike—who advanced competing frames of understanding. Taken from the court of law and deployed in the court of public opinion, these legal controversies assumed a different character altogether. Political entrepreneurs, particularly those on the conservative side of the divide, were not interested in the technical details of the cases. Quite the opposite, they mobilized around the cases to advance much more expansive rights claims and narratives of injury. Complex legal problems were thus transformed into compelling narratives of injustice and redeployed in the public sphere. The 121 (1A) rulings gave new energy and focus to variously situated civil society groups, catalyzed the formation of entirely new NGOs, and provided a focal point for political mobilization outside of the courts. In turn, this mobilization increasingly constrained both the courts and the government.

These dueling injustice frames were mutually constitutive. Both sides derived power, legitimacy, and purpose from their oppositional stance vis-à-vis the other. Liberal activists were blind or indifferent to the fact that the rights conceptions they deployed could not accommodate communal conceptions of rights. Nor did conservative activists care to consider the way that religious authority had been legally constructed in Malaysia and what a significant departure those institutional formations are from the classical Islamic legal tradition. The dueling binaries of liberal rights versus the shariah, individual rights versus collective rights, and the

[62] The MCA dropped from 31 seats in the 2004 election to 15 in 2008. The MIC dropped from nine seats in the 2004 election to three seats in 2008. In terms of the popular vote, the MCA lost 33 percent and the popular vote for the MIC fell 31 percent.

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secular versus religious nature of the state were all constructed and contingent on particular institutional and political circumstances. Yet, the power of this construction, as with all others, is that its own starting point is obfuscated. The construct diverts attention away from its institutional source and, to the extent that it becomes enmeshed in wider political struggles, it becomes further rooted in popular legal consciousness.

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