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Tamir Moustafa

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

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,

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.

Islamic Law in Malaysia

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).

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

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

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.

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.

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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]

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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.

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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:

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 o6TD857(7(every01t3nlhiky01t38(ofsiky01t3ight)e)]x18.sslhiky01t3conf(wde1tiondiky01t3profe*

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]

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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

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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).

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.

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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.

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.

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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

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

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, "F010N5(veral)-263.8(9(a)i9.5("[te,.)-439.1(ne(reF(at)-Seizee,.)

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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.

The Lina Joy Case

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

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.

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

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

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 inter-

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.

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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. Ratherseaand

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

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