The Judiciali ation of Religion

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

Throughout the second half of the twentieth century, one Muslim-majority country after another adopted constitutional provisions meant to incorporate Islam into the legal order. The Malaysian Constitution declares that "Islam is the religion of the Federation..."[1] The Constitution of Pakistan requires that state law conform to "the injunctions of Islam as laid down in the Holy Quran...."[2] The1

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

This is not to say that religion is a distinct, monolithic, or stable object. Quite the opposite, religion is complex, fluid, and contested.[7] Yet, as Winnifred Sullivan insightfully notes, "modern law wants an essentialized religion" (2005: 155).[8] How courts work to square this circle is fraught with tensions and contradictions. On the one hand, courts are . That is, by authoriz-

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

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

This study examines the evolving legal and political context of contemporary Malaysia to make sense of the increasing contestation over Article 3 and the federal judiciary's shifting jurisprudence on the matter. I argue that the shifting political context, which was in part the product of earlier rounds of legal mobilization, provided a unique opportunity for ideologically driven lawyers to push for sweeping new interpretations of Article 3. These new interpretations gained surprising traction in the federal judiciary, and they have shaped new understandings of the rightful place for religion

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

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

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

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

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

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

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal,

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

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

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

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[20] *C m C . u . u* [1988] 2 MLJ at 56.

In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word “Islam”

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

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

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

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[22] *L J v. M A m I m* [illegible] & *A* rel.0D[.51025reBgsqT/F21Tf125.493-45G

organized jointly by the IIUM and the Attorney General's Chambers, with the further participation of the Department of Syariah Judiciary, Malaysia (JKSM). So close was the "harmonization" project to the corridors of power, the Headquarters of the Attorney General's Chambers provided the physical venue for the 2007 event. The 2007 conference ended with several resolutions, all of which articulated the need to amend "laws that are not Shari'ah compliant."[27] The fact that the Attorney General's Chambers posted the document on its official website spoke volumes about the inroads that Islamist lawyers had made into the central functions of the federal government. Indeed, one need only examine the reports of the Advisory Division of the Attorney General's Chambers to see that the Shariah Section of the Attorney General's Chambers has an active agenda in sponsoring research on harmonization, which includes ongoing consultative meetings with prominent

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

> Any person who —.
> (a) prints, publishes, produces, records or disseminates in any manner any book or document or any other form of record containing anything which is contrary to Islamic law; or.
> (b) has in his possession any such book, document or other form of record for sale or for the purpose of otherwise disseminating it, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
> (2) The Court may order any book, document or other form of record referred to in subsection (1) to be forfeited and destroyed notwithstanding that no person may have been convicted of an offence in connection with such book, document or other form of record.

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

Meanwhile, Ezra Zaid sought a declaration that Article 16 of the Shariah Criminal Offences Enactment was invalid in

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

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

The court's reasoning carried significant implications for future of case law. Most important, the judges drew upon Article 3 to support the curtailment of fundamental rights. The Federal Court decision states, "…we are of the view that art 10 of the Federal Constitution must be read in particular with Arts 3 (1), 11, 74 (2) and 121. Article 3(1) declares Islam as the religion of the Federation…."[34] The Federal Court goes on to explain that it is not only the shariah courts that are charged with administering Islamic law in Malaysia. The civil courts also have a role to play because the Federal Constitution must be read "harmoniously." With this rea-

litigation over use of the word “Allah” in the Malaysian Catholic newspaper, the *H* . In this case, the publisher of the *H* , the Titular Roman Catholic Archbishop of Kuala Lumpur, received a letter from the Minister of Home Affairs forbidding use of the word “Allah” in the Bahasa Malaysia version of its publication. The Minister of Home Affairs claimed that the use of the word violated the prohibition on proselytization to Muslims and, therefore, it posed a threat to public order. The Titular Roman Catholic Archbishop decided to fight in the High Court, drawing attention to the passage in Article 3 (1) that states “…religions other than Islam may be practiced in peace and harmony in any part of the Federation.” Attorneys for the Church insisted that

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

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

Justice Abdul Aziz Ab Rahim acknowledges the learned counsel for citing and supplying Muhammad Imam's scholarship. The learned counsel in the case was none other than Haniff Khatri, the lawyer behind many of the strategic litigation efforts to expand the meaning of Article 3. Khatri had already relied on Muhammad Imam's article in his own manifesto titled, "Moving Forward to Strengthen the Position of Islam UNDER the Federal

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

Victory for *M N* rights in the Court of Appeal set the stage for a more dramatic face off in the Federal Court.[42] The State Government of Negeri Sembilan, including the Islamic Affairs Department, the Chief Religious Enforcement Officer, the Chief Shariah Prosecutor, and the Religious Council of Negeri Sembilan, focused their energies on overturning the Court of Appeal decision. Intervenors from other state governments soon joined, including representatives from the Islamic Religious Councils of Perak, Penang, Johor, and the Federal Territories. A slew of *amicus curiae* briefs came from the United Malay National Organization (UMNO), the Women's Aid Organization, Sisters in Islam, the All Women's Action Society, the AttorneyD2A's

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

Towards a Theor of the Judiciali ation of Religion

The Malaysian case illustrates how religion of the state clauses

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

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

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

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

[44] See Fox (2008) and http://www.religionandstate.org. Malaysia is also something of an archetype among Muslim-majority countries, which, as a group, regulate religion more than the global average. Consider, for example, that among the 23 countries in the

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

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