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The Constitutive Power of Law and Courts

Why do courts frequently stand at the center of heated debates involving religion? According to many accounts, legal struggles over religion are a product of religious challenges to secular legal orders. In the most alarmist narratives, courts are depicted as front-line defenders in a virtual clash of civilizations. Consider, for example, the view of jurist and academic, András Sajó. In a 2008 article, Sajó warns his readers that "constitutional arrangements are now facing new forms of religiousness . . . that aspire to control or reclaim the public space" (2008: 605). What is required to meet this challenge, according to Sajó, is "a robust notion of secularism . . . capable of patrolling the borders of the public square" (605). This understanding of the problem ("strong religion") and what is at stake (liberty) is compelling because it affirms a nearly hegemonic assumption that courts play important roles in resolving conflict, defending fundamental freedoms, and sustaining secularism.[1]

In this chapter, I wish to argue that this conventional view offers an incomplete understanding of legal conflict involving religion because it fails to consider the constitutive power of law and courts. Building on frameworks from religious studies, socio-legal studies, and comparative judicial politics, I maintain that law and courts do not simply stand above politics. Instead, they *constitute* political struggle over religion in at least four important ways: by delineating categories of meaning (such as "secular" and "religious"), by shaping the identity of variously situated actors, by providing an institutional framework that enables and even encourages legal disputes, and by providing a focal point for political mobilization. Long before claims

[1] Lempert (1978: 99–100) summarizes the various ways that courts are thought to settle conflict: "(1) courts define norms that influence or control the private settlement of disputes; (2) courts ratify private settlements, providing guarantees of compliance without which one or both parties might have been unwilling to reach a private settlement; (3) courts enable parties to legitimately escalate the costs of disputing, thereby increasing the likelihood of private dispute settlement; (4) courts provide devices that enable parties to learn more about each other's cases, thus increasing the likelihood of private dispute settlement by decreasing mutual uncertainty; (5) court personnel act as mediators to encourage the consensual settlement of disputes; (6) courts resolve certain issues in the case, leading the parties to agree on others, and (7) courts authoritatively resolve disputes where parties cannot agree on a settlement."

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over religion emerge in the courtroom, law establishes the conditions that make legal contention possible. This is not immediately visible, it turns out, precisely because a secularist vision of law and courts is so hegemonic. Not only is religion cast as a perennial source of trouble, but other explanations for ideological polarization are obscured. A constitutive approach to law helps to uncover the various ways that law and courts catalyze ideological contestation.

THE SECULAR AND THE RELIGIOUS AS LEGAL CATEGORIES

An important step in appreciating the constitutive power of state law is to recognize the secular/religious binary as a construction. As Cady and Hurd (2010) note, a conventional view regards these categories as objective, neutral, ahistorical, and universal. Recent work questions these assumptions and shows that the secular and the religious are constructed categories that are historically specific and multivalent, with varied permutations across time and space (see, for instance, Agrama 2012; Cavanaugh 2009; Hurd 2008; Dressler and Mandair 2011; Mahmood 2016; Sullivan 2005). Talal Asad first problematized the twin categories by examining the historical context from which they first emerged in Western Europe.[2] He traces the development of a secular sensibility that generates identity *from what it is not* – the constructed category of religion.[3] For Asad and those who have followed his lead, the very idea that religion constitutes a distinct field of human activity is a notion that is socially and politically constructed. It is a conception that is unique to the contemporary world.[4]

To be sure, the twin categories of the secular and the religious are constructed both inside and outside state institutions, by state and non-state actors alike. However, modern law plays a particularly important role in delineating the secular/religious dichotomy in the machinery of the modern state. Demarcating categories is, after all, what law does best. But law does not merely discover preexisting boundaries between the secular and the religious. Rather, law is an instrument that constructs the twin categories in opposition to one another. As Hussein Agrama observes, the secular/religious binary is "an expression of the state's sovereign power" (2012: 26). As the administrative capacity of the state increases, so too does the centrality of the secular/religious binary to political life, and the role of state law

[2] Asad builds upon Wilfred Cantwell Smith's seminal book, *The Meaning and End of Religion* (1963), in which Smith argues that religion is a conceptually reified term that is estranged from personal faith. See Asad (2001) for his direct engagement with Smith.

[3] For more on religion as a constructed category, see Asad's *Genealogies of Religion* (2009), Harrison's *'Religion' and the Religions in the English Enlightenment* (1990), Masuzawa's *The Invention of World Religions* (2005), Cavanaugh's *The Myth of Religious Violence* (2009), and Nongbri's *Before Religion: A History of a Modern Concept* (2013).

[4] Recognizing that the secular and the religious are constructed categories does not require one to abandon a commitment to the secular (or to the religious for that matter). One should nonetheless be mindful that secularism is not a value-neutral space.

in delineating that binary. A central preoccupation of courts – whether in so-called secular states or self-proclaimed religious states – is to define the "religious" and, hence, to distinguish it from the "non-religious," if only to police those boundaries.[5] This is an undertaking without end, not only because competing claims are inevitable, but also because the "secular" and the "religious" are not stable and objective classifications that are waiting to be discovered.[6] Returning to Asad's central insight, these categories are constructed against one another, and they are in a constant state of flux.

These are important insights. However, the literature on the genealogies of secularism is often theorized at a high level of conceptual abstraction. Moreover, this literature is not as engaged as it should be with other bodies of relevant scholarship. This includes a growing body of research in comparative judicial politics, which offers valuable insights into how different judicial systems produce divergent legal and political outcomes. Similarly, a rich body of sociolegal scholarship has a good deal to say about legal consciousness – that is, how people come to understand concepts like secularism and religion in different legal and political contexts (e.g., Engel and Engel 2010). One of the hoped-for contributions of this book is to put these bodies of scholarship in conversation while taking the concerns and insights of each approach seriously.

Malaysia provides a concrete example of how courts shape the secular/religious dichotomy in law, politics, and popular legal consciousness. The Malaysian case also illustrates how this dichotomy obscures its own institutional origins. Most Malaysians – even those who regard themselves as staunch secularists – take it for granted that the shariah courts apply religious law, whereas the civil courts apply secular law. This dichotomy is misleading because it sidesteps the way that state law constructs religious authority in the first place. The shariah courts did not drop from the heavens. Rather, they are creatures of state law, and the codes they apply are what the state declares Islamic law to be.[7] First introduced in the colonial era and further institutionalized after independence, "Anglo-Muslim law" imposed a state monopoly on religious interpretation.[8]

These legal constructions are not unique to Malaysia. Nor are they exclusive to Muslim-majority countries, or even to state-religion configurations more generally. As Mahmood Mamdani (1996, 2012) explains, efforts to "define and rule" were

[5] As Winnifred Sullivan insightfully notes, "modern law wants an essentialized religion" (2005: 155).

[6] Zeghal (2013) observes that these binaries were briefly disrupted in the Tunisian Revolution, only to reemerge with a vengeance once the state's lawmaking functions were reengaged.

[7] This is not to suggest that the state acts with a free hand, autonomous from social forces. This book embraces a "state-in-society" approach (Migdal 1998, 2001; Migdal et al. 1994). As the empirical chapters demonstrate, ongoing struggles continue to shape the content of family law codes. What I wish to highlight in this passage is not the autonomy of the state, but rather the fact that the codification of Muslim family law belies the deep pluralism and rich diversity of the Islamic legal tradition.

[8] As examined in Chapter 2, this state monopoly is in tension with the pluralism of *fiqh* (Islamic jurisprudence) and *usul al-fiqh* (Islamic legal theory).

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standard features of indirect rule in the late colonial era. Colonial authorities drew distinctions along what they considered "tribal" and "racial" lines in some contexts, just as they defined socio-political cleavages along religious lines in others.[9] In all cases, state law did not simply recognize preexisting realities of race, tribe, and religion. Rather, state law constituted those communities vis-à-vis one another by demarcating sharp boundaries that had been more porous, permeable, and ambiguous (if they existed at all) before state regulation. State law also defined and regulated norms and power relations *within* those respective communities, frequently authorizing and entrenching hierarchical, patriarchal, and authoritarian readings of culture.[10] In doing so, state law worked to replace the fluid, contradictory, and contentious impulses that are inherent in any cultural formation with the fixity and stability of codified law.[11]

There is now a considerable body of research on the formation of contemporary Muslim family law that affirms Mamdani's more general insights. In most Muslim-majority countries, the codification of laws governing marriage, divorce, and other aspects of Muslim family law provided women with fewer rights than men.[12] State law reflected the patriarchy built into Islamic jurisprudence (*fiqh*) as well as the patriarchal choices made in the codification process itself.[13] Far from uniformly advancing women's rights, codification more typically narrowed the range of rights that women could claim (at least in theory) in classical Islamic jurisprudence (Quraishi and Vogel 2008; Sonbol 2008). In place of the multiple positions that one might find in Islamic jurisprudence on any given matter, codification entrenched patriarchal understandings and elevated them above all other possibilities.

These legal constructions also situate the Islamic legal tradition above other normative practices that are equally integral to Islam. As Shahab Ahmed explains in his important book *What is Islam?* an excessive focus on the Islamic legal tradition "has the consequence of putting out of focus the central place of non-legal discourses in the historical constitution of normative Islam . . . " (2016: 124). Ahmed cites theology, philosophy, ethics, the arts, poetics, Sufism, the sciences, and the diverse lived traditions of Muslim communities around the world as some of the constitutive elements of Islam. The Islamic legal tradition, responsive as it is (or can be) to diverse Muslim communities across time, is but one component of Islam

[9] To be sure, many of the same trends were present outside of the colonial context, such as the efforts to streamline and codify Islamic law in the late Ottoman Empire.

[10] As Dirks observes, "much of what has been taken to be timeless tradition is, in fact, the paradoxical effect of colonial rule, where culture was carefully depoliticized and reified . . . " (Dirks 1992: 8; 2000).

[11] See Merry (2006) for an insightful discussion of "culture as contentious."

[12] This is not because Islam is inherently incompatible with women's rights or liberal rights more generally. See Wadud (1999); An-Na'im (2008); Souaiaia (2009). For more on state codification of Muslim family law, see Charrad (2001); Tucker (2008); An-Na'im (2002); Mir Hosseini (2000); Quraishi and Vogel (2008).

[13] Of course, the same can be said about codification in European family law.

among many others. Elevating select fragments of *fiqh* through state codification contributes to a "legal-supremacist" conceptualization of "Islam as law" (116).

To be sure, different norms and practices will continue to percolate despite the best efforts of the state.[14] Nonetheless, state institutions demonstrated a growing capacity to define, authorize, and enforce Anglo-Muslim law over other possible formations of Islamic law and other understandings of Islam more generally. Put simply, Anglo-Muslim law advanced an authoritarian and illiberal reading of the Islamic legal tradition: authoritarian in the sense that it "usurps and subjugates the mechanisms of producing meaning [from the Islamic legal tradition] . . . to a highly subjective and selective reading" (Abou El Fadl 2001: 5) and illiberal in the sense that it prescribes inequality and privileges collective duties over individual autonomy.

A further consequence of codification is that it invokes a sharp dichotomy. It presents law in a binary form: law is either Islamic, or it is not. As Ahmed explains, "How and when we use the word 'Islamic' is important because the act of naming is a *meaningful* act: the act of naming is an act of identification, designation, characterization, constitution, and valorization." Conversely, " . . . by *not* labeling something 'Islamic' (or by the stronger act of labeling it un-Islamic) we are excluding that thing from being representative of the normative values of 'Islam'" (107, emphasis added).[15]

It bears repeating that although Anglo-Muslim law in Malaysia (and most everywhere else) is illiberal, there is no necessary or essential tension between Islam and liberal rights. To be clear, this is not to say that those who work within (or draw upon) the Islamic legal tradition cannot make, or do not make, illiberal claims. They can, and they do. It is simply to suggest that illiberal constructions of Islamic law are not the only or inevitable products of the Islamic legal tradition. Indeed, the oft-cited bedrock principles of equality and justice in Islam comport well with contemporary notions of liberal rights.[16] Like all religious traditions, the Islamic legal tradition is complex and multivocal.[17] And, as with religion more generally, the relationship between Islamic law and liberal rights is best understood as indeterminate and contested, but not fundamentally incompatible. It follows, then, that when state actors choose to codify an illiberal formula, it does not represent Islam or the Islamic legal tradition in all its diversity. It only gives binding force to one among many possibilities. It is therefore inaccurate to characterize the parallel shariah and civil

[14] Elizabeth Shakman Hurd's (2017) distinction between "lived religion" and "governed religion" is useful for capturing this difference.

[15] For others, including some strident secularists, the act of naming is also an act of identification. Rather than valorization, however, naming may function as an act of identification, designation, characterization, constitution, and *demonization*.

[16] For compelling arguments on the compatibility of liberal rights and the Islamic legal tradition, see Abou El Fadl (2004); Baderin (2003); Kamali (2008); Sachedina (2009); Ali (2000); March (2009).

[17] Stated differently to recognize the centrality of human agency, it is Muslim legal scholars and Muslim communities that are complex and multivocal.

court jurisdictions in Malaysia as "religious" versus "secular." Rather, they are simply *two formations of state law*.[18]

LEGAL PLURALISM AND ITS DISCONTENTS

The formation of Anglo-Muslim law as a distinct field of state law necessarily entails parallel provisions for non-Muslim communities.[19] Some celebrate family law pluralism as an opportunity for communities to realize concrete expressions of "multiple modernities" (Eisenstadt 2000) in place of a uniform, homogenizing legal code applied to all citizens. But these institutional configurations can produce significant legal dilemmas. This is not only because separate family law provisions can entrench illiberal norms that are in tension with state commitments to equal citizenship. Additionally, courts are put in a position where they must "see like a state" (Scott 1998) and categorize individuals in order to apply the appropriate personal status and family law regime.

For the vast bulk of the population, the application of legal regulation is a straightforward exercise, as one's official religious status is "inherited" at birth and is usually uncontested. If one leads a conventional life, these legal arrangements are stable and coherent. However, various scenarios can complicate matters. For instance, consider the situation in which a person wishes to change his or her official religious status. How might a court determine whether the motivation springs from sincerely held religious conviction or an attempt to maneuver from one family law regime to another for strategic advantage in divorce proceedings? Or, consider another issue: in many plural family law systems, there is no legal avenue to register a cross-communal marriage. How, then, do courts address a situation in which a person wishes to marry a partner of a different religious status, and who is, therefore, subject to a different legal regime? To complicate matters further, what happens if this mixed couple has a child out of wedlock? What is the official religious

[18] Some readers might insist that the shariah courts nonetheless apply a legal code that has a religious basis. My point here is not that the civil courts and the shariah courts apply codes derived from comparable legal traditions. Rather, my point is that any legal code with a religious basis is, by definition, one possible formulation among myriad (perhaps infinite) possible permutations. What distinguishes Anglo-Muslim law in Malaysia is not its religious content, but the fact that it is enabled by the coercive power of the state.

[19] Plural-legal systems apply different personal status and family law codes to different (legally constituted) communities. A variety of institutional arrangements is possible. In some countries, various family law provisions are applied to distinct religious communities, using the same court system (as in Egypt). In other countries, there may be a separate court administration (as in Malaysia). In still other countries, family law pluralism operates outside of formal state institutions, with varying degrees of state recognition and enforcement (Sezgin 2015). Plural personal status laws are not unique or exclusive to Muslim-majority countries, although they are more common in those settings. The preponderance of plural family law systems in Muslim-majority countries is in part a legacy of the Millet system in the Ottoman Empire (Barkey 2008). For countries like Malaysia, which had not been part of the Ottoman legal order, British colonial rule played a formative role in the institutionalization of pluri-legal arrangements (Chapters 2 and 3).

status of the child and what are the legal rights and duties of the biological parents? And what happens if the parents register this child under one faith (making the child subject to the personal status and family law provisions applied to that community), but raise the child in a different faith tradition? Now consider a third dilemma: how do courts handle a situation where a woman wishes to contest patriarchal family laws by way of constitutional provisions that guarantee equality of citizenship? In this circumstance, collective and individual rights provisions may come into conflict, especially when the constitution authorizes both collective and individual rights, and both have the vocal support of entrenched constituencies. These circumstances are not hypothetical. They are examples of the sorts of legal dilemmas that plural family law and personal status systems produce in many contemporary contexts today.[20] And, as we will see in the chapters to come, these legal conundrums regularly crop up in contemporary Malaysia.

Some legal systems may offer creative solutions that can accommodate the complex, lived realities of the societies they regulate.[21] However, these scenarios can just as easily generate legal difficulties that courts are ill-equipped to handle. When individuals do not conform to the neat categories of race and religion envisioned by the law, they may attempt to evade state regulation. Others may challenge the rigid logic of the legal regime directly. Because such quandaries are inherently tied to identity politics, they can spark intense controversies well outside of the courts.

For a concrete example of the difficulties that legal pluralist systems can produce, consider *Lina Joy v. Islamic Religious Council*, a case that continued in the Malaysian courts for nearly a decade and became a public spectacle at home and abroad. The case concerned a woman who had converted from Islam to Christianity and subsequently sought to change her official religious status so that she could marry a non-Muslim man. In litigating Joy's right to religious freedom, her attorney argued that the state failed to provide a viable avenue for official conversion out of Islam. Joy's legal team argued that this lacuna in the law restricted her right to religious freedom, a right enshrined in Article 11 of the Malaysian Constitution, which states (in part) that "*Every person* has the right to profess and practice his religion ...." [emphasis added]. However, Joy's opponents invoked another clause from the same article, which states, "*Every religious group* has the right . . . to manage its own religious affairs ..." [emphasis added]. This second set of attorneys also claimed the right to religious freedom, but they argued that Article 11 safeguards the ability of *religious groups* to craft their own rules and regulations (including rules of

[20] See Aks (2004), Maclean and Eekelaar (2013), Bottoni, et al. (2016), Ahmed (2015).

[21] I recognize that some institutional arrangements might avoid the impasses examined in this book. For more on the potential tensions between multicultural accommodation and liberal rights, as well as possible institutional solutions, see Shachar (2001). For a sanguine account of the "shared adjudication model" in India, see Solanki (2011). In contrast, Sezgin and Künkler (2014) find that the judicialization of religion exacerbated identity politics and deepened ethno-religious schisms in India.

entry and exit) free from outside interference. Ironically, advocates on both sides of the controversy invoked "religious freedom." Both sides grounded their claims in constitutional texts, and both sides called upon the state to secure their contrasting visions for Malaysian state and society. *Lina Joy v. Religious Council* is a complicated case that receives comprehensive treatment in the chapters to come. The point here is simply to highlight the fact that these legal tensions originate from the way that the Malaysian state regulates religion as a category of law.

Religious minorities (Buddhist, Christian, Hindu, Sikh, Taoist, and heterodox Muslims) regularly field claims to religious freedom vis-à-vis the state. However, state-appointed (and self-appointed) spokespersons for the Muslim majority deploy "rights talk" (Glendon 1991) of their own. Moreover, claims to religious freedom are not only voiced across communal lines. They are also heard *within* religious communities, as individuals assert their right to religious liberty for their own persons, whereas spokespersons of religious communities invoke religious freedom in their claims to defend collective norms from state interference. The frequency of these cases and the repeated appeals for state action by a variety of actors working at cross-purposes suggests that these sorts of pitfalls are inherent in legal systems like that of Malaysia. Conundrums of this kind are virtually inevitable when legal systems are premised upon idealized categories of race and religion. They have difficulty anticipating and accommodating the complex realities of the diverse and dynamic societies that they govern.

COURTS AS CATALYSTS

When individuals encounter the sorts of legal predicaments described above, their formal avenue for recourse is, ironically, the same legal system that produced the dilemma in the first place. And when the wheels of justice start to turn, the state's legal machinery is likely to crush them once more. This is because litigation tends to activate and further entrench the same problematic categories, identities, and competing interests. Cases such as *Lina Joy v. Religious Council* are never about the fate of one person alone. Litigation challenges the status and entitlements of whole groups, as well as the entrenched positions of state-appointed gatekeepers of those legally-constituted communities. Whether intended or not, these cases challenge the logic of the legal order and bring its contradictions into high relief.

Once these sorts of cases go to court, the dispute is transformed further. To better understand the legal (as opposed to religious) catalyst of conflict, I adapt Richard Alba's (2005) distinction between blurred and bright boundaries. Alba suggests that we can think of the boundaries between religious or ethnic communities as being sustained in two different ways. In the first, "blurred" boundaries are constructed in a dense web of social relations. As a result, they are porous and ambiguous, leaving them amenable to negotiation, compromise, and incremental change over time. In contrast, state law defines, demarcates, and regulates "bright" boundaries. Here,

sharp and institutionalized distinctions entrench religious or ethnic difference. Group membership takes on a dichotomous character: one is either a member of a religious group or not. Of course, social and legal constructions of community and difference are often linked. Here, I wish to draw attention to the way that legal institutions work to brighten social boundaries that would otherwise remain blurred, were they not regulated by way of state law.

A long-running tradition of law and society scholarship suggests that judicial process transforms the character of disputes in important ways. Mather and Yngvesson's (1980) model of the "narrowing" and "expansion" of grievances is particularly helpful.[22] Mather and Yngvesson observe that lawyers typically narrow the circumstances of their client's predicament in order to render claims justiciable by the courts. Legal claims assume specific forms, with specialized legal discourse. Mather and Yngvesson define narrowing as, " ... the process through which established categories for classifying events and relationships are imposed on an event or series of events [to make them] amenable to conventional management procedures" (783). In disputes involving religion, litigants typically invoke fundamental rights provisions. However, as this book demonstrates, advocates on both sides of freedom of religion cases can effectively ground their claims in constitutional texts. Even when judges strive to interpret constitutional texts in a harmonious manner, the law provides activists with a powerful vocabulary.[23] Law and legal institutions enable and even encourage the construction of rights claims in absolute terms, elevating and sharpening contention, rather than resolving the conflict. This is particularly true in contexts where institutions encourage formal legal contestation and litigant activism, the two components that define "adversarial legalism" (Kagan 2001: 9).

As Benjamin Schonthal explains, litigation also tends to preclude certain compromises that might otherwise take place outside of a legal context. In the case of Sri Lanka, he finds that " ... those who rely on the language of constitutional law tend to discard over time other idioms of difference (often with more flexible notions of religious identity) for a rigid grammar of discrete rights and fixed communities" (2016: 14). This privileging of singular and exclusive identities is generally associated with religious and ethnic conflict (Sen 2006; Chandra 2012). Indeed, when ethnic and religious communities are legally constituted, and conflict is adjudicated through courts, communal tensions are institutionally hardwired. Given the path dependence of judicial reasoning, courts are made to rehash the same antagonisms time and again, keeping controversy alive in the

[22] To be sure, Mather and Yngvesson built upon a good deal of law and society scholarship that had focused on dispute transformation.

[23] The promise and pathologies of "rights talk" were first observed in the American political context, but the shift towards rights consciousness is now seen as a global phenomenon. For early works focused on the dynamics of rights claims and rights consciousness in American politics, see Scheingold (1974) and McCann (1994). For an early work on the pathologies of rights talk, see Glendon (1991).

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public imagination.[24] When communal boundaries are socially constructed and informally mediated, on the other hand, episodes of communal conflict may very well have shorter half-lives. The specifics of conflict fade with time.

Returning to Mather and Yngvesson's model of dispute transformation, courts can likewise fuel an "expansion" of audience. Mather and Yngvesson define expansion as the widening of issues that are associated with a dispute, along with a broadening of the audience. Expansion can come about as the result of concerted efforts of litigants and lawyers to draw public attention to the immediate case at hand. However, it is often third-party actors, such as advocacy groups, political parties, and the media, that expand the audience and the grievances that come to be associated with a case. These third-party actors need not have the same goals as the litigants. In fact, their objectives are frequently misaligned. For instance, media outlets are usually not concerned with the legal outcomes of cases so much as they are interested in finding compelling stories that will titillate their audiences. Advocacy groups and political parties also have strong incentives to raise the profile of cases that promise to advance the long-term objectives of their organizations. Even when a case is loosely related to an advocacy group's long-term goals, careful framing can induce resonance with a target audience. Unlike the narrowing of a dispute to a specialized legal form, which requires technical legal knowledge, the expansion of grievances to the political realm is driven by an entirely different skillset.

Activists and the media provide interpretive frames that link specific cases with broader constellations of grievances, controversies, and political positions.[25] In the most extreme form, cases serve as metonyms for the most pressing social and political issues of the day, including fundamental questions of state identity. In such a circumstance, the audience for a case can extend to the entire nation, with most everyone invested in the outcome. It is important to note that the broadening of grievances and the expansion of audience is not inevitable. Rather, cases will remain out of public view unless and until the media or activists bring them into the public spotlight. It is, therefore, incumbent on the researcher to explain *why* certain cases become linked to broader grievances and *how* they come to command an expanded audience, while others do not.

Disputes involving religion may be particularly prone to narrowing and expansion due to the inherent multivocality and indeterminacy of religious traditions themselves. Even seemingly straightforward claims to religious freedom are inextricably linked to questions about religion itself (what does a given religious tradition *really* prescribe?) and religious authority (whose version is *really* correct?). Here, Winnifred Sullivan's (2005) focus on indeterminacy is particularly illuminating.

[24] This may be especially true in common law systems where judges engage established case law.

[25] Gamson and Modigliani (1987: 143) define a frame as "a central organizing idea or story line that provides meaning to an unfolding strip of events . . . The frame suggests what the controversy is about, the essence of the issue."

She shows that, even in so-called secular legal systems such as that of the United States, "the instability of religion as a category ... limits the capacity of law to enforce rights to religious freedom" (154–55). To be sure, the United States is not unique in this regard. Religious freedom carries multiple and contested meanings across a variety of legal systems (Sullivan et al. 2015). However, competing claims over religion gain traction in constitutional orders that entrench commitments to religion.

In these circumstances, competing claims about religion and religious liberty can quickly assume a binary form: Islam is pit against liberal rights; individual rights are pit against collective rights; religion against secularism, and so on. These binaries further elevate the "legal-supremacist" conceptualization of "Islam as law" (Ahmed 2016: 116), and they further position Anglo-Muslim law as the full and exclusive embodiment of the Islamic legal tradition. Likewise, these binaries elevate "secularism" and "liberalism" as monolithic ideological formations of their own, which appear as inherently inimical to religion. Given the ease with which state law constructs these binaries, it is crucial to remain mindful that they are, in fact, *constructions*. That is, they appear in this binary form as a function of the institutional environment through which they emerge.

For these reasons and more, we should not consider Islam and liberal rights as pure, coherent, and autonomous formations. People understand Islam and liberal rights in relation to one another *in specific political contexts*. Given that courts are key institutional sites where the proverbial rubber hits the road, they play an important constitutive role in this process. They help constitute the identities and interests of variously situated actors. And they facilitate ideological conflict, even as they paper over their critical role in "hardwiring" legal and political struggle. As will become clear in the chapters to come, these legal tensions become entirely predictable, because they originate from the same legal/institutional source.[26] All of this underlines the fact that legal institutions do not sit above the fray of religion and politics.[27] Rather, they constitute the fray from start to finish. The binary formations of Islam versus liberal rights, religion versus secularism, and collective versus individual rights encourage binary claims-making. Cases like *Lina Joy* and *Shamala* work to destabilize the fragile equilibrium,

[26] This is perhaps especially the case in common law systems, where judges often follow established legal precedent.

[27] Working in the North American context, Benjamin Berger (2015: 13) puts it well. He observes that "[t]he cultural pluralism imagined by legal multiculturalism never includes the constitutional rule of law itself; rather, law sits in a managerial role above the realm of culture ... This positioning ... is essential to prevailing public stories about the interaction of law and religion." An earlier analog of this argument is found in *The Mythology of Modern Law*, wherein Fitzpatrick (1992) argues that we should not take modern law to be a system that stands apart from, or above religion. Rather, Fitzpatrick strives to show that contemporary law and legal thought embody all the hallmark characteristics of religion itself. One among many is the myth that modern law occupies " ... a transcendent position where it has no specific connection with society but nonetheless exercises a general domination over it" (6).

and they provide openings for partisans to go for broke and to press for a new *Grundnorm*.[28]

COURTS AS AVENUES FOR IDEOLOGICAL MOBILIZATION

Given the volume of scholarship on Islamist mobilization, it is striking how few studies examine courts as sites of ideological mobilization. Most research on Islamist mobilization is focused on the electoral arena. This near-exclusive focus on the ballot box is surprising considering the stated goal of many activists is to transform the legal order. Litigation serves as a direct pathway to induce a change in the law. Moreover, Islamist activists are not the only actors who strategically engage the legal system. In Malaysia and elsewhere, self-styled liberals and secularists also mobilize through courts to advance their own visions for state and society.[29] Dual constitutional commitments to Islam and liberal rights facilitate these divergent claims.

There are a variety of pragmatic reasons why activists might choose litigation. Compared with electoral campaigns, litigation typically requires fewer fiscal and organizational resources. The work of one skilled lawyer paired with a like-minded judge can shift the law without having to overcome the collective action problems of broad-based social movements.[30] Perhaps more important, litigation can spur change in popular discourse. Although litigants may fight legal battles in the court of law, political activists know that they can win or lose ideological struggles in the court of public opinion. This calculation explains why litigation is initiated even when activists have every reason to expect that they will *lose* in court. The fact that extensive press campaigns frequently accompany litigation also suggests an extrajudicial strategy. Publicity generated by high-profile cases can be useful for a variety of purposes, from raising the salience of an issue, to publicly discrediting the government for not living up to its stated commitments. Litigation can also attract international media and bring external pressure to bear on government. Over and above the direct impact of court rulings, high-profile cases serve as important focal points that can provoke and exacerbate national debates.

The "radiating effects" of litigation can reach far beyond the courtroom. Here, I draw on Mark Galanter's seminal observation that the impact of litigation "cannot be ascertained by attending only to the messages propounded by the courts." Rather, Galanter suggests that the resonance of court decisions "depends on the resources and capacities of their various audiences and on the normative orderings indigenous to the various social locations where messages from the courts impinge" (1983: 118). From this, we can understand that the same court decision can be understood in

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

[29] To be sure, liberal and secular activism is no less "political."

[30] Tarrow (1998) provides a useful introduction to the fundamentals of social movement theory.

radically different ways. McCann (1994) develops the concept of radiating effects in his study of the pay equity movement in the United States. He shows that even when litigation failed to produce change in the law, it nonetheless raised legal consciousness of actors inside and outside the movement.

Similar radiating effects have been noted in litigation involving questions of religion. In Egypt, for example, Islamist lawyers set their sights on Article 2 of the Egyptian Constitution, which declares, " . . . the principles of Islamic jurisprudence are the chief source of legislation."[31] President Anwar Sadat introduced Article 2 as a symbolic gesture to bolster the religious credentials of his government. However, activists called his bluff and engaged the courts as a new political forum to test those very credentials (Moustafa 2007, 2010). Islamist litigation yielded few legal victories, but the radiating effects were profound.

For a specific illustration of this dynamic, consider the controversy that arose from the infamous lawsuit against Nasr Hamid Abu Zayd, a Cairo University professor who was accused of apostasy. Islamist lawyers found allies in court who were willing to accept a *hisba* lawsuit, wherein the litigants had no direct interest in the case. The court pronounced Abu Zayd an apostate, precipitating his departure from the country after his appeals were exhausted. The public debate overshadowed the facts of the case and polemics raged in the press for years (Glicksberg 2003). The spectacle acted as a powerful catalyst for a discursive shift that was already underway in Egyptian society. Secularists did not lose many such cases, but they had lost their footing in a "war of position" (Gramsci 1971).[32] It was widely recognized that the Abu Zayd case had become a crucial focal point in Egypt's culture wars.[33] Less frequently noted, but just as significant is that the political spectacle elevated *particular voices* – the most strident Islamist and secularist voices – above all the others. Given this prominent public platform, which was otherwise inaccessible in Egypt's authoritarian political system (Moustafa 2007), it is not surprising that Islamist lawyers continued to launch *hisba* lawsuits by the hundreds, even when the cases held little promise of legal victory. Even when Islamist lawyers lost in court, they advanced their narrative in the court of public

[31] The original text of Article 2 of Egypt's 1971 Constitution declared that " . . . the principles of Islamic jurisprudence are a chief source." But an amendment in 1980 changed the text to "*the*" chief source.

[32] It is important to note that dual constitutional commitments do not automatically result in legal tension. Islam and liberal rights are not inherently oppositional, and judges typically work to interpret constitutional provisions in a harmonious manner (Lombardi and Brown 2005). Moreover, legal claims invoking religion are not always illiberal claims. For example, litigants frequently invoked Article 2 in Egypt to challenge the constitutionality of illiberal laws, essentially invoking a liberal inflection of the Islamic legal tradition. Yet it is notable that these are *not* the cases that come to mind in discussions of Egypt's Article 2 jurisprudence. This is a telling indication that binary assertions of Islamic law versus liberal rights draw attention because of the spectacle that is often generated around them.

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

opinion. They claimed that their defeat in court was further confirmation that the government had failed to fulfill its stated commitment to Islam and Islamic law.

The Abu Zayd case illustrates the radiating effects of litigation and the powerful dynamic of discursive polarization. The likeness with the Malaysian case suggests that we need to pay attention to the indirect and radiating effects of the judicialization, and the strategic use of litigation to facilitate the claims that are made outside of courts.

MOBILIZING IN THE COURT OF PUBLIC OPINION

The radiating effects of courts are facilitated by the technical nature of law and legal institutions. The vast bulk of the population in every country does not have the legal training that is necessary to understand legal argumentation. The work of courts is, therefore, anything but self-evident to the lay public. In the more general typology provided by Charles Tilly, judicial decisions have the characteristics of "technical accounts" as opposed to "stories" (2006). According to Tilly, technical accounts are not accessible to lay audiences, by their very nature. This inaccessibility provides opportunities for political entrepreneurs to recast court decisions along stylized and emotive frames for public consumption. The technical aspects of legal process and legal decisions lend themselves to being transformed into compelling political narratives in the court of public opinion. Complexity not only makes competing narratives possible; it virtually guarantees that they will proliferate. As Merry (1990: 111) 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." In translating technical accounts into stories, political entrepreneurs define the terms of debate. And in doing so, they make complicated issues legible for a general audience. Complexity gives political entrepreneurs the opportunity to frame legal problems in ways that advance their competing political agendas.[34]

The media is the primary avenue through which political actors work to broaden their audience. Efforts to draw the public's attention come in the form of "impromptu" statements on courthouse steps, press conferences at NGO headquarters, extended interviews with journalists, appearances on television and radio, open letters to the government that run in the newspapers, and more. Given the fact that a dispute typically involves multiple hearings and appeals, a single conflict has the potential to generate fresh press stories for upwards of a decade. For instance, a child custody/conversion dispute that first went to court when I began fieldwork for this project in 2009 is still working its way through the courts after the better part of a decade. *Indira Gandhi v. Muhammad Ridzuan Abdullah* has, by the time of writing, produced eighteen separate court decisions and thirty-five

[34] See Benford and Snow (2010) for more on the importance of framing processes to social movements.

"newsworthy" court appearances. The dispute advanced through multiple hearings in the Shariah Court, the High Court, the Court of Appeal, and the Federal Court of Malaysia. Each hearing was covered as a distinct media event – the next installment in a politically charged and emotive drama. With each court decision, dozens of NGOs mobilized on opposite sides of a rights-versus-rites binary. Conservative Muslim organizations and liberal rights groups held watching briefs, submitted *amicus curia* briefs, and worked overtime outside the courts to frame the significance of the cases through public statements and media events.

The profound effect of the mass media on popular legal consciousness is underlined in Haltom and McCann's (2004) *Distorting the Law*. In their study of US tort litigation, they find that the American media played a central role in shaping popular (mis)conceptions of tort law, and attitudes towards the law more generally. Haltom and McCann help us make sense of the disconnect between popular legal consciousness and the actual work of courts. They also show us that skewed media representations tend to reflect and perpetuate existing power relations and ideological formations. Although Haltom and McCann examine popular legal knowledge rather than *competing* legal knowledges, they recognize that "a wide variety of legal knowledges and narratives circulates in modern society" and they suggest that even the same narrative can " ... mean different things to different people in different situations" (12).

I embrace this nod to rival narratives and competing legal knowledges in this study. In that vein, I wish to draw the reader's attention to the ways that ethnolinguistic media segmentation amplifies distinct media narratives. In the flurry of coverage in Malaysia, media outlets frame court decisions differently in distinct ethnolinguistic markets, further refracting the radiating effects of judicialization across ethnolinguistic communities. Coverage of cases in the Malay-language newspapers *Utusan Malaysia*, *Berita Harian*, and *Harakah* is thus radically different from the Tamil-language newspapers *Makkal Osai* and *Malaysia Nanban*, which are different again from the Chinese *Sin Chew*, which in turn diverges from the English-language press. Over and above the ethnolinguistic diversity of the traditional media, social media platforms and a variety of other digital media tools increasingly empower advocacy groups by enabling them to operate outside the legal and fiscal constraints that saddle traditional media outlets. These digital platforms provide opportunities to engage the public directly and to build specific constituencies with targeted narratives of the law. Social media also provide spaces where everyday citizens actively participate in the production of divergent polemics and narratives of injustice.

(RE)CONSTITUTING RELIGION?

The opening pages of this book note that many Muslim-majority states have adopted constitutional provisions and substantive regulations in an effort to constitute Islam

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by way of state law. But rather than providing fixity to the amorphous category of religion, efforts to legislate Islam open new fields of contestation that draw new participants into the production of religious knowledge. If we accept the Asadian position that " . . . religion is produced discursively rather than objectively found . . . " (Dressler and Mandair 2011: 19) as many scholars have come to argue, then we should direct our attention to the specific institutional spaces where binary frames are produced, circulated, and sustained.[35] Courts are not the only settings where binary frames are constructed, but they are among the most important.[36]

What is remarkable about judicialization is that it draws in (and provides a platform for) a variety of actors who have little or no expertise in matters of religion. Claims and counter-claims are fielded by litigants, lawyers, judges, political activists, journalists, and government officials. Most of these actors have little (if any) specialized knowledge of Islamic law or the Islamic legal tradition. Yet their competing claims are nonetheless consequential. In fact, judicialization positions these actors as central agents in the production of new religious knowledge – often displacing, or at least competing alongside "traditional" religious authorities. What is so striking in the Malaysian case is that these actors increasingly define Islam *vis-à-vis* liberalism, or, more to the point, *against* liberalism.[37] As Murray Edelman (1988: 69) observes, "In polarizing public opinion, enemies paradoxically cooperate with each other, though the cooperation may be unintentional." The goals of self-positioned secularists and Islamists were enabled by the stance of the other. Each is an "enemy in the mirror" (Euben 1999).

We have already noted that claims in the court of law and in the court of public opinion construct Islam and liberalism as binary opposites. But do these elite-level claims shape popular religious knowledge and popular legal consciousness? This question receives extensive attention in the empirical chapters to come, but the answer may already be apparent. Increasingly in Malaysia, Islam is understood as being in fundamental tension with liberal rights. The binaries that are advanced by political activists and circulated in the media elevate the "legal-supremacist" conceptualization of "Islam as law" (Ahmed 2016: 116) and they position Anglo-Muslim law as the full and exclusive embodiment of the Islamic legal tradition. Likewise, these binaries elevate secularism and liberalism as monolithic ideological formations of their own and position them as inherently inimical to religion. As illustrated

[35] This approach answers Talal Asad's call for an "anthropology of Islam." In his seminal 1986 paper, Asad explains that "The variety of traditional Muslim practices in different times, places, and populations indicate the different Islamic reasonings that different social and historical conditions can or cannot sustain . . .. An anthropology of Islam will therefore seek to understand the historical conditions that enable the production and maintenance of specific discursive traditions or their transformation . . . " (Asad 1986: 23).

[36] See Bayat (2007) for an empirically grounded example of how contestation shapes and reshapes religious knowledge outside the bounds of judicial institutions.

[37] This is the mirror image of Joseph Massad's (2015) *Islam in Liberalism*, wherein he works to show that liberalism is often defined against Islam.

throughout this book, self-positioned Islamists frequently claim that liberalism, secularism, and pluralism are inimical to Islam. Rather than challenge the basis of these claims, liberal rights activists more frequently reinforce and validate this Manichean worldview by emphasizing the incompatibility of Islamic law with liberal rights and secularism. This binary then underwrites the rationale of each side, and it consolidates the rhetorical position of individuals and groups who embrace the dichotomy. Given the ease with which these polarities emerge and the degree to which these binaries are normalized in popular legal consciousness, we must remain mindful that they are not inevitable. These binaries emerge as a function of the institutional environment through which Islam and liberal rights are enacted, and as a function of how they are situated vis-à-vis one another. Islam and liberal rights are not autonomous, pure, and coherent formations. What is more, in contexts like that of Malaysia, Islam and liberal rights are increasingly co-constitutive. Vernacular associations between Islam and liberalism are shaped by the political environment in which actors are situated.[38]

These binary constructions are not unique to Malaysia or Muslim-majority countries.[39] In the United States, conservative activists shifted away from promoting "traditional values" to a rights-oriented discourse (Dudas 2008). This move has long been evident in the adoption of a "right to life" frame among anti-abortion activists (Jelen 2005). More recently, there has been a shift towards a "religious liberty" frame (Jelen 2005; Djupe et al. 2014). The Religious Freedom Restoration Acts, which were proposed or signed into law in dozens of US states in 2015, illustrate this shift. The Acts reengineered the logic of federal legislation that Congress had intended as a shield for the *rites* of religious minorities into a *rights*-based rationale for denial of service to same-sex couples in the name of religious liberty. While criticism of religion-based exemptions turned around the implications for civil rights, these controversies also provided openings for conservatives to field assertions *about religion itself*. That is, the spectacle provides opportunities for groups and individuals to advance claims about the requirements of the faith. So, when a bakery-owner refuses to sell a wedding cake to a gay couple, there is more at stake than the legal question of religious liberty versus civil rights. The case also provides an occasion for social conservatives to amplify their position that homosexuality is inimical to Christianity. Similarly, when the United States Supreme Court adjudicated *Burwell v. Hobby Lobby Stores Inc.*, there was more at stake than the reproductive rights of employees versus the faith-based exemptions sought by their employers.[40]

[38] Menchik (2016: 8) puts it well when he explains that "actors' interests and beliefs are rooted in local history rather than universal models of rationality or deterministic applications of theology. Religious actors' interests originate in a specific place, time, and set of discourses; their behavior cannot be understood without understanding that context." For more on the constructivist approach to religion, see Menchik (2017).

[39] Indeed, "the social construction of reality" (Berger and Luckman 1991) is a foundational concept in the sociology of knowledge.

[40] The case concerned whether Hobby Lobby Inc. must comply with provisions in the Affordable Care Act, which covered birth control for company employees.

The case also provided an opportunity for the store owners and their socially conservative allies to amplify their view that the "morning-after pill" is a form of abortion that is forbidden in Christianity.

As in the Malaysian case, the rights-versus-rites frame tends to advance one or the other visions of liberalism (as a *shield from* religion, or as a *threat to* religion), while it fortifies the notion that religion is monolithic, fixed, and illiberal. Survey research conducted by Goidel et al. (2016) suggests that this sort of rhetorical positioning has a measurable effect on threat perception. The conservatives in their study who were more attentive to the news tended to believe that liberalism constituted a threat to religious liberty, and to Christianity itself. Although the study focused specifically on news consumption among socially conservative viewers, one can reasonably infer that the same television coverage may very well affirm the prejudice of an audience with a different political persuasion of the inverse proposition: that religion imperils liberalism, secularism, and equal rights.

There will always be voices that resist these binary constructions. In Malaysia, public intellectuals affirm that religion and liberal rights are not mutually exclusive, and that one can be both a committed liberal *and* a devout Muslim. However, the blare of binary polemics that engulf the media typically drowns these voices out. The lion's share of political messaging is constant, and that message is this: Malaysians need to choose once and for all whether religion or liberalism will reign supreme in the legal and political order. This binary constitutes religion as the opposite of liberalism, and vice-versa. Of course, mass publics do not passively absorb this dichotomous mindset wholesale. As in other settings, national-level polemics sit alongside the more complex social networks within which individuals are embedded.[41] Identity, belonging, and sense of political community develop through these everyday interactions, in the shadow of national-level political spectacle (Bowen 2003; Walsh 2004; Kendhammer 2016). The mundane reality of everyday social worlds runs parallel to the polarizing spectacle of the national stage.

A rights-versus-rites binary is increasingly evident in other national contexts, in different shades and to varying degrees. Rather than associate these tensions with the "problem" of religion, the variability of these constructions invites a deeper inquiry into the political and institutional contexts that feed their emergence. In pursuit of that end, this book moves from this more general theorizing to a context-rich study of the rights-versus-rites binary in Malaysian law, politics, and popular legal consciousness. The first step in this path is a more precise understanding of the legal and institutional frameworks that activate these constructions in Malaysia. Chapter 2 therefore moves to an empirical analysis, where I trace the legal construction of religious authority in Malaysia, from the colonial era to the present.

[41] It has long been noted that the cultural production of law takes place in the everyday social networks within which individuals are situated (Merry 1990; Ewick and Silbey 1998).