

## Conclusion

In assessing the theoretical contribution of this book, one might ask whether the constitutive power of law and courts is as profound as the author claims. Stated as a counterfactual, one could query: Had Article 3 of the Malaysian constitution *not* specified that “Islam is the religion of the Federation . . .”; had there *not* been a bifurcated judicial structure and separate family law provisions for Muslims and non-Muslims, and had there *not* been robust judicial institutions with broad public access, would Malaysia have witnessed a judicialization of religion nonetheless? After all, courts are made to contend with questions around religion even in countries that do not have these specific legal and institutional features (Sullivan 2005; Berger 2015).

A related counterfactual is the following: Absent judicialization, would the same questions and debates simply shift to a different forum? After all, the Islamic Party of Malaysia (*Parti Islam se-Malaysia*, or PAS) has roots that stretch back to independence, and religion has always figured prominently in electoral campaigns. It stands to reason that debates around religion would have played out in other arenas, even if they were absent from the legal field. What, then, are the uniquely constitutive functions of law and courts?

To be sure, any country with robust judicial institutions is bound to produce an expansive body of case law on religion. However, the Malaysian case suggests that some legal and judicial configurations exacerbate judicialization more than others. As I have sought to show throughout this book, the intensity, trajectory, and dynamics of these struggles can be traced to identifiable legal configurations that hardwired legal tensions. Not only did judicialization affect state policy, but the cases electrified the national imagination. Each successive case became a new focal point for debate over the place of Islam in the legal and political order. High-profile cases catalyzed the formation of new NGOs on opposite sides of a rights-versus-rites binary. Claims and counter-claims were fielded by litigants, lawyers, judges, political activists, journalists, and government officials. Most of these actors had little or no specialized training in Islamic jurisprudence or Islamic legal reasoning. Yet their competing claims were consequential nonetheless. In fact, judicialization

positioned these players as central agents in the production of new religious knowledge. These actors overwhelmingly defined Islam vis-à-vis liberalism. More to the point, they defined Islam *against* liberalism (and vice-versa). The two sides found agreement only in the proposition that Malaysia faced a stark choice between secularism and Islam, between rights and rites. A zero-sum, winner-take-all struggle was constituted with courts taking center stage. For years, the press covered these cases daily, elevating the spectacle and keeping it fresh in people's minds. More than any other political forum, it was the courts that polarized public opinion and shaped a rights-versus-rites binary in legal and religious consciousness.

This is not to say that judicialization will provoke the same pattern of ideological polarization everywhere. In fact, the radiating effects of courts will vary according to different legal configurations and the broader sociopolitical ecosystems in which they are embedded. If we take Egypt as a comparative case, there are striking similarities as well as notable departures. Article 2 of the Egyptian Constitution affirms that "Islam is the religion of the state . . . and the principles of Islamic jurisprudence are the chief source of legislation." This is a much stronger formulation than Malaysia's Article 3 (1). However, most legal challenges that invoked Article 2 were, in fact, *liberal* in orientation (Moustafa 2007, 2010). That is, Article 2 was invoked to bolster liberal rights claims more often than an Islamist agenda.

It is telling that these liberal inflections of Article 2 received no mention in the Egyptian press, or in scholarly treatments of judicial politics in Egypt (except Moustafa 2007, 2010).<sup>1</sup> Why? Because these cases did not invoke a secular/religious binary. As a result, they did not generate a political spectacle. The Article 2 cases in the Egyptian Supreme Constitutional Court (SCC) that drew attention were invariably those cases with legal claims that positioned Islam and liberal rights as binary opposites (Moustafa 2007). Even here, however, Egyptian Constitutional Court judges worked to square the dual constitutional commitments to Islam and liberal rights through liberal interpretations of the *Qur'an* and *fiqh* (Lombardi and Brown 2005). No doubt, this approach had much to do with the ideological orientation of justices on the SCC. Egypt's unified court structure also facilitated bridging. Whereas paralysis gripped Malaysian courts as the result of contested shariah versus civil court jurisdictions, the Egyptian Constitutional Court experienced no similar intra-judicial dynamics, and the SCC developed an Article 2 jurisprudence that was relatively liberal.

These dynamics notwithstanding, there were clear attempts by Islamist activists to push a political agenda through the courts in Egypt, but their legal victories were few and far between. As in Malaysia, Islamists made far better use of the courts as a megaphone from which to challenge the status quo, attract public attention, and assert broad claims about Islam and the role of the state in advancing (a specific

<sup>1</sup> A few other studies, such as Lombardi and Brown (2005), examine the liberal bent of SCC judgments, but to my knowledge, no other studies systematically examine the liberal inflection of Article 2 litigation in the SCC.

vision of) Islam. In any case, the Egypt/Malaysia comparison underlines the fact that legal institutions matter to broader political debates, and that specific institutional structures produce different patterns of ideological polarization.

The Egypt/Malaysia comparison also affirms that the radiating effects of law and courts cannot be fully appreciated without considering the broader socio-political environment. A secularist/Islamist cleavage was judicialized in both countries. However, the multiethnic composition of Malaysia, coupled with media segmentation along ethno-linguistic lines, meant that media coverage of high-profile cases exacerbated the compartmentalization of starkly different narratives of what was at stake for the country. For many Malays, the cases triggered historically rooted anxieties about national identity (anxieties that were encouraged by most of the Malay political elite). For non-Muslims, on the other hand, the cases were tied up with a host of economic and political grievances around the increasingly ethnocratic character of the Malaysian state.

The Malaysian case illustrates how the radiating effects of courts can trigger more expansive political reverberations. Consider, for example, the fundamental realignment that appears to be well underway in the Malaysian political order. Since national independence, “race” provided the organizing logic of political life, from the founding Alliance Party coalition to the present-day *Barisan Nasional*. However, the ascendant political cleavage is articulated in terms of religion more than race, with the Muslim/non-Muslim cleavage dominating political discourse.

Looking back over the past three decades, one can see the central role of law and courts in nurturing the rights-versus-rites binary that now dominates political discourse in Malaysia. Although race and religion have long been intertwined, it is religion that is more deeply entrenched in the Federal Constitution, and in the logic of the legal system more broadly. The latent tensions between parallel tracks of state law are increasingly activated through litigation. The Article 121 (1A) cases, in particular, shifted the tone and emphasis of political discourse outside of the courts from race to religion. Religious cleavages have arguably eclipsed race, class, and other bases of political solidarity. In a broader political sense, Islam has been instrumentalized in the service of the Malay “race.”

The very concept of race, and the legal category of “Malay,” date back to the colonial era and they remain inextricably linked together by way of state law. What changed in recent years to produce a more intense judicialization of religion is the increasing rigidity of these official designations. Malaysians are regulated according to ascribed legal identities, never mind personal religious belief. This imposition creates difficult situations: lovers are unable to marry as the result of official religious status, individuals are unable to have conversions recognized; children are born out of wedlock and registered as such (with knock-on effects); and parents have lost custody of their children as a result of struggles over court jurisdiction. The thin

volume of cases representing these sorts of issues may give the impression that very few individuals are affected. After all, the full universe of reported Article 121 (1A) cases does not total more than a few dozen. However, one must keep in mind that those who litigate represent only a tiny fraction of those Malaysians who face such legal conundrums. Gaining access to the High Courts is exceedingly difficult when the law is considered settled by way of a Federal Court decision. Even if a claimant has the financial and emotional fortitude to engage the legal system, they require legal standing to have their case heard. Reported cases therefore represent only the rare instances when a question of law has not been settled, opening the door for individuals to have their day in court. It is impossible to know the number of individuals who are negatively impacted by their official religious status. But surely the number is in the tens of thousands, if not hundreds of thousands.

Shachar (2001) is right to note that there is no inevitable conflict between multicultural accommodation and liberal rights. Creative institutional solutions can be found to protect individual rights while accommodating religious communities. But this can-do optimism may underestimate the path dependency of problematic institutional arrangements once they are forged. Working against the logic of Malaysia's pluri-legal system is something like attempting to break free from the children's toy, the "Chinese finger trap." The moment a person attempts to remove her fingers from the trap, the bamboo spiral contracts around her fingers, and grows tighter still the more she tries to break free.

Malaysia has been constructing such a finger trap for well over a century, from the initial formulation of Anglo-Muhammadan law in the colonial period, to the tightly regulated pluri-legal system of today. At each juncture – from British Malaya to contemporary Malaysia – the basic structure and logic of this pluri-legal system has remained remarkably stable, in part because entrenched interests have worked to preserve their mandate. And yet the increasing rigidity of official religious designations has, in recent years, catalyzed tensions within the legal system. The tensions between rights and rites are not inevitable. But one should not underestimate the capacity of institutions and individuals alike to construct them as binary opposites. Indeed, a supreme tragedy is that once this process starts, it tends to feed upon itself, reinforcing a false choice between Islam and liberal rights.