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The Politics of Religious Freedom in Malaysia

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For the past several decades, Malaysian courts have stood at the center of heated debates concerning freedom of religion. Conventional accounts trace these tensions to the rise of the *dakwah* (religious revival) movement, which has been the most dynamic social and political trend since the late 1970s. According to this understanding, legal controversies around religious freedom are the result of a clash between competing ideological trends—specifically, a standoff between an ascendant religious movement and a liberal legal order. In this view, conflict is understood as originating from *outside* the courts. And, framed this way, the question that naturally follows is whether the courts have the ability and resolve to uphold religious liberty, or if they will succumb to popular political pressure.[1] This understanding of the root problem (religious revival) and what is at stake (liberty) comes effortlessly because it matches our taken–for–granted understandings of the role of law and courts in defending fundamental liberties and sustaining secularism.

In general terms, courts are widely understood by scholars, practitioners, and the public at large as institutions that resolve conflict and safeguard fundamental rights such as freedom of religion.[2] But this functional understanding precludes deeper insight into how and why religious liberty cases continually crop up in the Malaysian courts. I

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1. For an expansive argument along these lines, *see generally* RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010) (discussing the interface of constitutionalism and increased religiosity worldwide); JOSEPH CHINYONG LIOW, PIETY AND POLITICS: ISLAMISM IN CONTEMPORARY MALAYSIA (2009) (providing an example of this framing in relation to Malaysia specifically).

2. *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1986) (explaining the function of courts in various political systems).

suggest that *far from resolving conflict, the judicial system is itself a primary source of tension*. Instead of resolving legal questions, the judicial system is hard-wired to produce legal controversies anew. Rather than simply arbitrating between contending parties, courts exacerbated ideological cleavages. And instead of assuaging uncertainties, courts in Malaysia repeatedly instill a tremendous degree of uncertainty, indeterminacy, and anxiety around the meaning and content of "religious freedom." Ironically, law and courts—the very instruments charged with resolving conflict and safeguarding rights—repeatedly deliver precisely the opposite result.

Comparative studies from diverse contexts suggest that the indeterminacy of freedom of religion is not a uniquely Malaysian phenomenon. Although "religious freedom" and "religious liberty" typically elicit enthusiastic support whenever they are invoked, they are devilishly ambiguous concepts.[3] Recent scholarship examines the many paradoxes that are embedded in the notion of religious freedom, which typically become visible only at the moment when law and legal institutions work to define, delimit, and give concrete meaning to the term on the ground.[4] A first clue that we need to search for deeper meaning in the Malaysian context is the fact that appeals to religious liberty are invoked by a variety of actors, each working at cross-purposes. Claims to religious liberty are made by religious minority groups (Buddhist, Christian, Hindu, Sikh, Taoist, and heterodox Muslims) vis-à-vis the Muslim majority. But so, too, do spokespersons for the Muslim majority deploy "rights talk" vis-à-vis religious minority groups. And claims to religious freedom are not only voiced *across* communal lines; they are also heard *within* religious communities, as individuals assert the right to religious liberty for their own persons, whereas spokespersons of religious communities simultaneously invoke religious liberty in their claim to defend collective norms from state interference.

3. This is to some extent a dynamic that is inherent with a broader set of fundamental rights. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5–9 (1974) (describing what he calls a "myth of rights").

4. *See*, *e.g.*, WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005). Additionally, see the work associated with the Politics of Religion Freedom project, directed by Peter Danchin, Elizabeth Shakman Hurd, Saba Mahmood, and Winnifred Sullivan. POLITICS OF RELIGIOUS FREEDOM: CONTESTED NORMS AND LOCAL PRACTICES, http://politics-of-religious-freedom.berkeley.edu/ (last visited May 12, 2014).

Take, for example, the most well-known Malaysian court case, *Lina Joy v. Religious Council of the Federal Territories*,[5] which lasted for nearly a decade and became a public spectacle at home and abroad.[6] The case concerned a woman who sought state recognition of her religious conversion.[7] In litigating Joy's right to religious freedom, her attorneys challenged the personal status laws in force in the Federal Territories, which provide no viable avenue for conversion out of Islam.[8] Joy's attorneys argued that the laws violated 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…."[9] But Joy's opponents invoked another clause from the same article, which states that "*Every religious group* has the right…to manage its own religious affairs…."[10] This second set of attorneys also claimed the right to religious freedom, but they argued that Article 11 is meant to safeguard the ability of religious communities to craft their own rules and regulations (including rules of entry and exit), free from outside interference.[11]

It is striking that protagonists on both sides of the controversy invoked "religious freedom" and that both sides called upon the state to secure these alternate visions of religious freedom. The frequency of such cases and the repeated appeal for state action by all parties suggest that these conundrums are perhaps inevitable whenever states attempt to adjudicate between a variety of groups and individuals, each of them raising the banner of religious freedom. Nonetheless, it is worth exploring whether particular legal arrangements exacerbate the

5. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain lain, [2007] 4 M.L.J. 585 (Malay.), aff'g Lina Joy v. Majlis Agama Islam Wilayah & Anor, [2004] 2 M.L.J. 119 (Malay.).

6. *See, e.g.*, Cris Prystay, *In Malaysia, a Test for Religious Freedom*, WALL ST. J. (Aug. 25, 2006), http://online.wsj.com/news/articles/SB115645160096844802.

7 *Lina Joy*, [2007] 4 M.L.J. at 592–93.

8. *See id*. at 593 (stating that Joy challenged "the constitutionality of the state and federal legislations that forbade conversion out of Islam").

9. *See* Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, [2005] 6 M.L.J. 193, 198 (Malay.) (arguing that Article 11 gave her the freedom to convert to Christianity, which was a freedom that could not be restricted by any law).

10. Lina Joy v. Majlis Agama Islam Wilayah & Anor., [2004] 2 M.L.J. 119, 126 (Malay.).

11. *See id*. (finding that there would be "chaos and confusion" if plaintiff did not address her renunciation of Islam with the religious authority who has a right to manage its own affairs under Article 11(3) prior to her conversion).

frequency and intensity of these sorts of legal dilemmas. In the case of Malaysia, two factors are particularly crucial. The first is that Malaysia regulates religion far more than most other countries. By one measure, Malaysia ranks sixth out of 175 countries worldwide in the degree of state regulation of religion.[12] As a result, one's official religious status is not a trivial matter—it has legal implications for who one can marry, whether or not (and how) one may worship, and myriad other rules and regulations. As I show in the analysis that follows, such extensive regulation tends to generate its own tensions, legal and otherwise. A second institutional factor that exacerbates these legal dilemmas is the bifurcation of the Malaysian judicial system into "civil" and "shariah" tracks. In theory, these two jurisdictions operate independent of one another, with the civil courts adjudicating family disputes among non-Muslims and "shariah" courts handling family law disputes for Muslims. In practice, however, there are cases in which the two jurisdictions collide.

The case of *Shamala v. Jayaganesh*[13] underlines this problem. Shamala and Jayaganesh were married with children when Jayaganesh converted to Islam and initiated divorce from his wife.[14] Because husband and wife fell under the jurisdiction of different courts following Jayanganesh's conversion, they each secured custody orders from alternate jurisdictions.[15] Shamala's custody order came from the civil courts because she fell under civil court jurisdiction, whereas Jayanganesh secured his custody order from the shariah courts.[16] The two court orders came to different conclusions about the custody of the children and neither parent was able to contest the competing court order as the result of legal standing requirements in the civil and shariah courts. As with *Lina Joy*, *Shamala* produced a political crisis and became a focal point for competing politicians and civil society groups, each rallying around the banner of "religious liberty."

12. This is the ranking for 2002 according to the cross-national Government Involvement in Religion measure developed by Jonathan Fox. JONATHAN FOX, A WORLD SURVEY OF RELIGION AND THE STATE 184 (2008). It should be noted that Fox's study may underestimate the level of regulation in Malaysia, as several indicators appear to be miscoded, including the appointment and funding of clergy, forced observance, religious education, religious basis of personal status laws and restrictions on the publication of religious materials, among others.

13. Shamala Sathiyaseelan v. Jeyaganesh C. Mogarajah, [2004] 2 M.L.J. 648 (Malay.).

14. *Id*. at 648.

15. *Id*. at 653.

16. *Id*.

In the analysis that follows, I examine *Lina Joy* and *Shamala* to show that the politics of religious freedom in Malaysia has little to do with "religion" and far more to do with the inherent ambiguities of religious liberty, coupled with specific institutional features of the Malaysian judiciary. Through an examination of the juridification of religious law and the institutional development of the Malaysian judiciary, I show that the root causes of these controversies are not of recent vintage, but rather were set in motion under British colonial rule more than a century ago.

I. A LEGACY OF COLONIALISM: "RACE" AND "RELIGION" AS CATEGORIES OF GOVERNANCE

Malaysia is famously known for its vibrant multi-ethnic and multi-religious communities. The ethnic-Malay community is overwhelmingly Muslim and constitutes just over half of Malaysia's total population of 30 million.[17] The second largest ethnic community is Chinese, which stands at approximately 25% of the total population.[18] Most ethnic-Chinese identify as Buddhist (76%), with substantial numbers identifying as Taoist (11%) and Christian (10%).[19] The third largest ethnic group is Indian and stands at approximately 8% of the total population.[20] This community is also religiously diverse, with most Indian Malaysians following Hinduism (85%) and smaller numbers practicing Christianity (7.7%) and Islam (3.8%).[21] The overall breakdown of the population according to religion is approximately 60% Muslim, 19% Buddhist, 9% Christian, 6% Hindu, and 5% of other faiths. [22]

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17. *See* POPULATION PROJECTION, MALAYSIA 2010–2040: SUMMARY FINDINGS, DEP'T STATISTICS MALAY. 1, 3, *available at* http://www.statistics.gov.my/portal/images/stories/files/LatestReleases/population/Ringkasan_Penemuan-Summary_Findings_2010-2040.pdf (last updated Jan. 18, 2013). The ethnic-Malay community is legally (indeed constitutionally) defined as Muslim. MALAY. FED. CONST., Nov. 1, 2010, art. 160(2). According to Malaysian state law and official census figures, every ethnic-Malay, *to a person*, is Muslim.

18. POPULATION DISTRIBUTION AND BASIC DEMOGRAPHIC CHARACTERISTIC REPORT 2010, DEP'T STATISTICS MALAY. 5 (2011), *available at* http://www.statistics.gov.my/portal/download_Population/files/census2010/Taburan_Penduduk_dan_Ciri-ciri_Asas_Demografi.pdf.

19. *Id.* at 82–98.

20. *Id.* at 5.

21. *Id.* at 82–98.

22. *Id.* at 9.

This multi-ethnic and multi-religious composition is largely the result of British commercial and colonial domination that began in the nineteenth century.[23] Laborers were brought from China by the hundreds of thousands to work in the tin industry and the British turned to India for cheap labor to run vast rubber plantations.[24] Colonial policy tended to overlook the tremendous ethnic and linguistic diversity internal to these groupings and economic roles were assigned according to "race."[25]

The term "race" may raise eyebrows among some readers. It is used here for analytical rather than normative purposes to mark a distinct shift in the way that difference was encoded in state law beginning in the colonial period as a means to justify the social and economic hierarchies that were part and parcel of the colonial project. Laura Gomez explains the analytical utility of the term "race" with her observation that "both race and ethnicity are about socially constructed group difference in society [but] race is always about hierarchical social difference…."[26] The term "race" thus captures a power dimension that tends to fall out of the picture in discussions of "ethnicity." In using the term, it is important to be clear that I subscribe to the three components of the constructionist view of race outlined by Gomez: (1) a biological basis for race is rejected; (2) race is viewed as a social construct that changes along with political, economic, and other context; and, (3) "although race is socially constructed… [it] has real consequences."[27]

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23. Parts of the Malay Peninsula were multiethnic when British commercial interests first arrived on the scene, but economic forces accelerated the rate of demographic change.

24. While most accounts of migration to the Malay Peninsula focus on the influx of Chinese and Indian workers, there was also significant Malay migration through this period. By 1931, nearly half of Malays in the former protectorates "were either first generation arrivals from the Netherlands East Indies or descendants of Indonesian migrants who had arrived after 1891." BARBARA ANDAYA & LEONARD ANDAYA, A HISTORY OF MALAYSIA 184 (2001). And just as Chinese and Indian migrants were a mix of various ethnic and linguistic groups, the "Malay" community was similarly diverse.

25. Particularly revealing is how census categories merged over time, both during the colonial era and after, reflecting (and reinforcing) new political and social categories. *See* Charles Hirschman, *The Making of Race in Colonial Malaya: Political Economy and Racial Ideology*, 1 SOC. F. 330 (1986).

26. Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. R. L. & SOC. SCI. 487, 490 (2010).

27. *Id.* at 491.

As in other times and places, the legal construction of "race" tended to serve economic and political objectives. For example, the Malay Reservations Act set land aside for ethnic-Malays to use in "traditional" agricultural pursuits, first among them rice cultivation. Although the Act was made in the name of preserving "the Malay way of life," its underlying objective was to limit the expansion of ethnic-Chinese business interests, to bar ethnic-Malays from competing in the lucrative rubber industry, and to preserve adequate food supplies in the colony. The official and unofficial basis for the legal definition of "Malay" was thus context-specific, but the legal category acquired increasing political salience as Malays were granted exclusive access to positions in the civil service, special business permits, government scholarships, and lucrative government contracts under the late colonial administration. The Malay Reservations Act defined a Malay as "any person belonging to the 'Malayan race' who habitually spoke Malay … and who professed Islam."[28] The racial category of "Malayan" or "Malay" was therefore *legally* fused with the religious designation, "Muslim." The fused racial/religious category, first borne in the colonial era, remains virtually unchanged until the present day, as enshrined in Article 160(2) of the Malaysian Federal Constitution.[29] Religious categories are thus defined and regulated by state law and thoroughly intertwined with the politics of race and access to state resources.

Often in tacit cooperation or coordination with indigenous elites, the British developed personal status laws for the various ethnic and religious communities under its control. "Anglo-Hindu law" was developed and applied to Hindu subjects; "Chinese customary law" was developed and applied to Chinese subjects; and "Anglo-Muslim law" was developed and applied to Muslim subjects in matters of family law.[30] While these legal regimes had *some* basis in local religious and customary norms, codification and application by a centralized state was a significant departure from local practice. To underline this point and provide essential context for the cases

28. ANDAYA & ANDAYA, *supra* note 24, at 183.

29. Article 160 (2) defines "Malay" as "a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom." MALAY. FED. CONST., art. 160 (2).

30. *See generally* M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975) (discussing Anglo–Hindu law, Chinese customary law, and Anglo–Muslim law in British Malaysia and elsewhere).

examined later in this study, it is worth exploring the development of "Anglo-Muslim law" in British Malaya in further detail.

First, it is important to note that to the extent that the Islamic legal tradition was practiced in the pre-colonial Malay Peninsula, it was socially embedded and marked by tremendous variability across time and place.[31] Religious leaders were not part of a centralized state apparatus.[32] Instead, they were "members of village communities who, for reasons of exceptional piety or other ability, had been chosen by the community to act as imam of the local mosque…."[33] As in other Muslim-majority areas, the colonial period marked a key turning point for the institutionalization and centralization of religious authority.[34]

The British first issued a "Muhammadan Marriage Ordinance" to regulate Muslim family law in the Straits Settlements in 1880.[35] And with British assistance and encouragement, similar Muhammadan marriage and divorce enactments went into force in Perak (1885), Kedah (1913), Kelantan (1915), and most other states of British Malaya. "Anglo-Muslim law" incorporated select fragments of *fiqh* (classical Islamic jurisprudence), but carried epistemological assumptions and organizing principles that were based on English common law and entirely distinct from *usul al-fiqh*, the legal method undergirding classical Islamic jurisprudence.[36] As M.B. Hooker

31. *See generally* Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233, 236–37 (1994).

32. *See* WILLIAM R. ROFF, THE ORIGINS OF MALAY NATIONALISM 67 (1967) ("In the realm of religious belief, as in that of political organization, the Malay state as a rule lacked the resources necessary for centralization of authority.").

33. *Id.*

34. Key studies of this transformation include ROFF, *supra* note 32; Horowitz, *supra* note 31; M.B. HOOKER, *supra* note 30.

35. The British first gained control of port cities for the purpose of trade and commerce in Penang (1786), Singapore (1819), and Malacca (1824). Together, the three outposts formed the Straits Settlements, which were later ruled directly as a formal Crown colony beginning in 1867. Separately, Britain established protectorates in what would come to be known as the Federated Malay States of Perak, Negeri Sembilan, Pahang, and Selangor, and the Unfederated Malay States of Johor, Kedah, Kelantan, Perlis, and Terengganu. By the early twentieth century, all of the territory of the Malay Peninsula was brought under similar agreements as Britain sought to extend its control and local rulers sought accommodation as a means to consolidate their own power vis-à-vis local competitors.

36. *See* WAEL HALLAQ, SHARIA: THEORY, PRACTICE, TRANSFORMATIONS (2009) (providing a comprehensive study of usul al-fiqh and its subversion by modern state law); Tamir Moustafa, *Judging in God's Name: State Power,*

explains, "the classical syarî'ah is not the operative law and has not been since the colonial period. 'Islamic law' is really Anglo-Muslim law; that is, the law that the state makes applicable to Muslims."[37] The Islamic legal tradition was thus "secularized" in the sense that it was formalized, codified, and institutionalized as an instrument of the modern state. By the beginning of the twentieth century, "a classically-trained Islamic jurist would be at a complete loss with this Anglo-Muslim law" whereas "a common lawyer with no knowledge of Islam would be perfectly comfortable."[38]

Separate courts for Muslim subjects were established as a subordinate part of the judicial system with jurisdiction limited to family law matters and rulings subject to appeal before the High Courts, which functioned according to English common law. As in its other colonial holdings, the British thus shaped the emergence of a bifurcated legal system. This bifurcation of the judicial system continued after independence in 1957. The federal civil courts continued to administer commercial, criminal, and administrative law, and personal status law for non-Muslims. State-level Muslim Courts (rebranded "Shariah Courts" in 1976) exercised jurisdiction over Muslims in the area of personal status law and certain defined aspects of criminal law. Shariah court rulings were subject to review by the federal civil courts, but the civil courts exercised this jurisdiction only on occasion. Nonetheless, the government amended the Federal Constitution in 1988 to bar the federal civil courts from overturning state level shariah court rulings. Article 121(1A) declared that the High Courts of the Federation "shall have no jurisdiction in any respect of any matter within the jurisdiction of the Shariah courts."[39] In theory, Article 121(1A) of the Federal Constitution demarcated a clean division between the civil courts and the shariah courts. Muslims would henceforth be *exclusively* subject to the jurisdiction of the shariah courts in matters related to religion while non-Muslims would

Secularism, and the Politics of Islamic Law in Malaysia, 3 OXFORD J. L. AND RELIGION 152 (2014) (examining these developments in contemporary Malaysia).

37. M.B. Hooker, *Introduction: Islamic Law in South–East Asia*, 4 AUSTL. J. ASIAN L. 213, 218 (2002).

38. *Id*.

39. MALAY. FED. CONST., art. 121 (1A).

remain subject to the jurisdiction of the civil courts.[40] In practice, however, dozens of cases presented vexing legal questions.

II. *LINA JOY V. RELIGIOUS COUNCIL OF THE FEDERAL TERRITORIES*

Perhaps the most controversial Malaysian court case of all time concerned a Malay woman who sought state recognition of her conversion to Christianity so that she could marry a non-Muslim. The reader will recall that different personal status laws had been developed for various ethnic and religious communities in British Malaya. The separate family law regimes for non-Muslim communities were repealed and folded into a single Marriage and Reform Act in 1976, leaving Muslim family law as the only distinct body of family law, institutionally entrenched in state-level Muslim courts. These separate jurisdictions for Muslim and non-Muslim family law left no official route for marriage between Muslims and non-Muslims.[41] The only route to marriage was for the non-Muslim partner to convert to Islam or for the Muslim partner to change his or her legal name. A name change served as a way for star-crossed lovers to circumvent the letter of the law because a person's religion was simply assumed by the legally registered name.

In 1997, the woman who would eventually come to be known as Lina Joy applied to change her name from Azlina bte Jailani (a Muslim name) to Lina Lelani (a non-Muslim name) so that she could enter into marriage with her non-Muslim partner.[42] However, the administrative unit charged with processing such requests, the National Registration Department (NRD), rejected her application.[43] Azlina filed a second application, this time to change the name on her National Identity Card to "Lina Joy."[44] The National Registration Department approved the second request, but Joy's replacement identity card now recorded her

40. Schedule Nine of the Federal Constitution sets out the areas of law that fall within the jurisdiction of state-level shariah courts. *Id.*

41. It should be observed that these legal restrictions *do not* conform to classical Islamic jurisprudence, which holds that marriage between a Muslim man and a non-Muslim woman (Christian or Jewish) is permissible. It is the bifurcated structure of the legal system rather than religious prohibition that is the source of tension.

42. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain, [2007] 4 M.L.J. 585, 592 (Malay.).

43. *Id*. (providing no reason for the rejection of her application).

44. *Id.* She explained in both applications that she had converted to Christianity and that she intended to marry a Christian man. *Id.* at 593. It is likely that this statement raised alarms among those in the NRD.

official religion as "Islam."[45] The statement of official religion was the result of a new administrative procedure designed to close the loophole that had enabled Muslims to effectively sidestep the state's regulation of religion by way of a name change.[46] Lina Joy filed a third application, this time to remove the word "Islam" from her identity card, but the NRD refused to accept her application without certification from a shariah court that she was no longer a Muslim.[47]

Joy chose not to pursue this avenue because it had been an administrative dead-end for others before her.[48] Instead, Joy initiated a lawsuit against the National Registration Department and the Religious Council of the Federal Territories.[49] Joy's attorney, Benjamin Dawson, pointed to Article 11(1) of the Malaysian Constitution, which states, "Every person has the right to profess and practice his religion…." Dawson argued that Article 11 gave Joy alone the freedom to declare her religion and that she had no obligation to seek certification from a third party.[50] The counsel for the government argued that the court should dismiss the petition because conversion out of Islam was a legal matter that lay within the exclusive jurisdiction of the shariah courts as opposed to the civil courts. They argued that Article 121(1A) clearly provided that the civil courts "shall have no jurisdiction in any respect of any matter within the jurisdiction of the Shariah courts."[51]

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45. *Id.* at 593.

46. P.U. (A) 70/2000 came into force retroactively on Oct. 1, 1999. *Id.* Although it is impossible to know with certainty, the timing of the rule change and their retroactive effect suggests that these regulations were issued as a direct result of Lina Joy's application, and that the new regulations were intended to close the loophole that had enabled conversion by way of name change.

47. *Id.*

48. *See, e.g.*, Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1994] 1 M.L.J. 690, 693–94 (Malay.) (holding that plaintiff was still a Muslim until a declaration was made by a shariah court that he was not); Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur, [1998] 1 M.L.J. 681 (Malay.).

49. *Lina Joy*, [2007] 4 M.L.J. at 593.

50. Joy's attorneys challenged the constitutionality of Article 2 of the Administration of Islamic Law (Federal Territories) Act of 1993 and related state enactments. They also claimed that the Shariah Criminal Offences Act of 1997 and related State Enactments were not applicable to the plaintiff who was now a Christian. *Id.*

51. MALAY. FED. CONST. art. 121(1A).

Relying on court precedent, Judge Faiza Tamby Chik agreed that the matter lay within the jurisdiction of the shariah courts.[52] Furthermore, he addressed the constitutional provisions on freedom of religion, explaining that Joy's fundamental freedoms were *not* violated if one understands that the true intent of Article 11 is to protect the freedom of *religious communities* rather than for *individuals* to profess and practice the religion of their choice.[53] To support this interpretation, Judge Tamby Chik pointed to other clauses in Article 11 of the Federal Constitution, including clause 3, which states: "Every religious group has the right…to manage its own religious affairs…."[54] The true meaning of freedom of religion, the judge explained, is that religious authorities should be left to regulate their own internal matters without outside interference.[55] Judge Tamby Chik explained in his ruling that:

> When a Muslim wishes to renounce/leave the religion of Islam, his other rights and obligations as a Muslim will also be jeopardized and this is an affair of Muslim [sic] falling under the first defendant's jurisdiction…. Even though the first part [of article 11] provides that every person has the right to profess and practice his religion, this does not mean that the plaintiff can hide behind this provision without first settling the issue of renunciation of her religion (Islam) with the religious authority which has the right to

52. Lina Joy v. Majlis Agama Islam Wilayah & Anor, [2004] 2 M.L.J. 119, 129. (Malay.) ("Her purported renunciation of Islam can only be determined by the Shariah Courts and not the Civil Courts pursuant to art. 121(1A).").

53. *See id.* at 133 (stating that Article 11 was "created for the harmony and well-being of the multi-racial and multi-religious communities of this country"). This decision departed from earlier rulings by the civil courts in Ng Wan Chan v. Islamic Religious Council of the Federal Territories, [1991] 3 M.L.J. 487 (Malay.) and Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam, [1992] 1 M.L.J. 1 (Malay.). In both cases, the civil courts took the position that only issues expressly conferred to the jurisdiction of the shariah courts would remain in their jurisdiction. *Lina Joy*, [2004] 2 M.L.J. at 133. This principle changed just prior to *Lina Joy* in a decision involving a Sikh man (Soon Singh) who wished to change his religious designation after having converted to Islam as a teenager. Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah, [1994] 1 M.L.J. 690 (Malay.). In this case, the civil courts adopted a new doctrine of implied jurisdiction vis-à-vis the shariah courts, effectively providing the shariah courts with exclusive jurisdiction over such matters. *Id.* at 693.

54. *Lina Joy*, [2004] 2 M.L.J. at 126 (citing MALAY. FED. CONST. art. 11(3)(a)).

55. *Id.* at 126.

> manage its own religious affairs under art 11 (3) (a) of the FC.[56]

What is most striking for our purpose is the fact that "freedom of religion" was invoked by advocates on both sides of this legal struggle. Joy and her supporters insisted on her right to individual religious freedom while her opponents insisted on religious liberty of another sort: freedom of the Muslim community to maintain its own norms (including rules of entry and exit) without state interference.

Having lost the battle in the High Court, Joy's attorneys changed their strategy and focused on the narrow administrative question of whether the Director General of the National Registration Department had overstepped his bounds by requiring certification from a Shariah Court.[57] It did not go unnoticed that the 2-1 split decision mirrored the emerging religious divide in Malaysian society. Two Muslim justices, Abdul Aziz Mohamad and Arifin Zakaria, wrote the majority opinion while Gopal Sri Ram, a non-Muslim, wrote the dissenting opinion.[58] Judges Abdul Aziz Mohamad and Arifin Zakaria took the position that whether or not a person had renounced Islam is "a question of Islamic law that was not within the jurisdiction of the NRD and that the NRD was not equipped or qualified to decide."[59] The dissenting judgment from Judge Gopal Sri Ram took the position that "an order or certificate from the Syariah Court was not a relevant document for the processing of the appellant's application. It was not a document prescribed by the 1990 Regulations."[60] Judge Sri Ram concluded that, "[w]here a public decision-maker takes extraneous matters into account, his or her decision is null and void and of no effect."[61]

Having lost in the Court of Appeal, Joy and her attorneys had one final opportunity in the highest appellate court, the Federal Court of Malaysia. Watching briefs were held by NGOs on both sides of the case. The Bar Council, the National Human Rights Society (HAKAM), and the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, and Sikhism held watching briefs on behalf of Lina Joy,

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56. *Id.* at 125.

57. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, [2005] 6 M.L.J. 193, 199 (Malay.).

58. *Id.* at 198, 214.

59. *Id.* at 208–09.

60. *Id.* at 219 (Gopal Sri Ram, J., dissenting).

61. *Id.* at 220.

while conservative Muslim organizations submitted watching briefs of their own.[62] In a 2-1 split decision, the 53-page ruling reproduced the same fault lines that were present in the Court of Appeal.[63] Chief Justice Ahmad Fairuz and Justice Alauddin presented a technical rationale for the NRD's actions.[64] The dissenting judgment from Richard Malanjum, on the other hand, pointed once again to the glaring lacuna in the law: "The insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This was because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy."[65] In other words, there was a lacuna in the law. Judge Malanjum explained that, regardless of this lacuna in the law, in such a situation the federal courts have a constitutional duty to protect fundamental rights, regardless of Article 121(1A):

> Since constitutional issues are involved especially on the question of fundamental rights as enshrined in the Constitution, it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing art 121 (1A). The article only protects the Shariah Court in matters within their jurisdiction, which does not include interpretation of the provisions of the Constitution. Hence, when jurisdictional issues arise civil courts are not required to abdicate their constitutional function. Legislation criminalizing apostasy or limiting the scope of fundamental liberties…are constitutional issues in nature which only the civil courts have jurisdiction to determine.[66]

By failing to address these issues head on, the majority decision in *Lina Joy* did little to address the underlying legal conundrums that lay at the heart of all prior conversion cases. *Lina Joy* was a painful reminder that the Malaysian judicial system was hard-wired to produce these sorts of legal tensions.

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62. *See* Tamir Moustafa, *Liberal Rights Versus Islamic Law? The Construction of a Binary in Malaysian Politics*, 47 LAW & SOC'Y REV. 771, 776–77, 783 (2013).

63. Lina Joy lwn v. Majlis Agama Islam Wilayah Persekutuan dan lain-lain, [2007] 4 M.L.J. 585, 594, 596 (Malay.).

64. *See id.* at 594–96.

65. *Id.* at 598 (Malanjum, C.J., dissenting).

66. *Id.* at 597–98.

The case followed a similar fact pattern to many other conversion cases that preceded it, but carried one unique aspect: Joy was an ethnic Malay, whereas all prior conversion cases concerned non-Malays who had converted to Islam and subsequently sought to change their religious status back to their original faith. Lina Joy's case thus exposed a racial dimension in the equation. As part of its ruling, the court relied on Article 160 of the Federal Constitution, which defines Malay as "a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom…."[67] Citing Article 160, the Court explained that Lina Joy's "race" carried legal consequences that could not be abandoned:

> In her affidavit affirmed on 8 May 2000, the plaintiff stated that her father is a Malay. His name is Jailani bin Shariff. All his life, the father has been professing and practising the Islamic religion. So is the mother. Her name is Kalthum bte Omar, a Malay. Both of the parents are still professing and practising the Islamic religion. And being Malays they habitually speaks the Malay language and conform to Malay custom. The plaintiff also stated that she is raised, and grew up in a household of Islamic belief although her belief in Islam is shallow. In exh C, she stated that her original name is Azlina bte Jailani as is stated in her I/C No 7220456. I therefore conclude that the plaintiff is a Malay. By art 160 of the FC, the plaintiff is a Malay and therefore as long as she is a Malay by that definition she cannot renounce her Islamic religion at all. *As a Malay, the plaintiff remains in the Islamic faith until her dying days* [emphasis added].[68]

The ruling was a clear exposition of the conflation of Malay racial and religious identity, both in the legal system and in the social imaginary of contemporary Malaysia, which, as we have seen, goes all the way back to the origins of the modern Malaysian state under British rule. *Lina Joy* suggests that the state's extensive regulation of religion and race gave rise to festering legal conundrums.

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67. Lina Joy v. Majlis Agama Islam Wilayah & Anor, [2004] 2 M.L.J. 119, 132 (Malay.); MALAY. FED. CONST., art. 160.

68. *Lina Joy*, [2004] 2 M.L.J. at 144.

Lina Joy is widely understood as a freedom of religion case. In one sense, this is absolutely accurate. Joy was fighting for state recognition of her conversion. The case was understood as a freedom of religion case by many in the Muslim community, too, although this camp viewed the case as a test of shariah court autonomy vis-à-vis the civil courts in multi-religious Malaysia. Yet the source of repeated institutional friction was not merely the result of individual versus collectivist visions of "freedom of religion." The cases were rooted in the institutional features of Malaysian judiciary. To gain further traction, it is worthwhile examining another landmark case that exposes the same institutional source of legal friction.

III. *SHAMALA V. JAYAGANESH*

Shamala v. Jayaganesh[69] is another case that commanded nation-wide attention. Shamala Sathiyaseelan and Jeyaganesh Mogarajah, both Hindus, were married in 1998 under the Marriage and Divorce Act, which governs family law for non-Muslims in Malaysia.[70] They had two children, who were considered Hindu as a result of their parents' religious status.[71] Four years into their marriage, Jeyanganesh converted to Islam.[72] Six days after his conversion, he registered their two children, ages two and three, as new converts to Islam without his wife's knowledge or consent.[73] When Shamala learned of the development, she took the children to her parents' home and filed a petition to secure their custody.[74] Shamala obtained an interim custody order from the civil courts, the appropriate legal body for adjudicating family law disputes among non-Muslims.[75] But shortly thereafter, her husband secured an interim custody order of his own from a shariah court on the grounds that he and the children were now legally Muslim and therefore under the jurisdiction of the shariah courts in matters of family law.[76] The two custody orders thus came to opposite conclusions over who had the right to take possession of the children, yet neither husband nor wife was able to contest the competing court order as the result of legal standing requirements.

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69. Shamala Sathiyaseelan v. Jeyaganesh C. Mogarajah, [2004] 2 M.L.J. 648 (Malay.).

70. *Id.* at 653.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

Shamala begged the question of which court had the ultimate authority to determine the religious status and the custody of the children. According to the law, the shariah courts have jurisdiction over personal status questions involving individuals who are legally registered as Muslim.[77] Moreover, Article 121(1A) of the Federal Constitution prevents the civil courts from reviewing shariah court decisions.[78] Yet it was undeniable that Shamala's rights were harmed. Married to a Hindu according to civil law, she now found herself in a custody battle that involved the shariah courts. As with the *Lina Joy*, *Shamala* produced a political crisis and became a focal point for competing politicians and civil society groups, each rallying around the banner of "religious liberty." The case provided the spark that ignited a full throttled campaign between liberal and conservative activists.

Shamala's attorney, Ravi Nekoo, made a concerted effort to attract public attention—an effort that was facilitated by the rapidly changing environment of civil society activism and digital media. Nekoo was an active member in the legal aid community, and he was well networked with a variety of rights organizations in Kuala Lumpur. Nekoo turned to the most prominent women's rights groups in Kuala Lumpur: the Women's Aid Organization, the All Women Action Movement, the Women's Centre for Change, Sisters in Islam, and the Women Lawyers' Association.[79] He also turned to religious organizations, most notably the Hindu Sangam, the Catholic Lawyers Society, and the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST).[80] These

77. *Id.* at 660.

78. *Id.* at 658. This is the standing interpretation provided by the Federal Court through case law. In contrast, prominent liberal rights attorneys Malik Imtiaz and Shanmuga Kanesalingam maintain that, if properly read, Article 121(1A) should *not* preclude the civil courts from reviewing shariah court rulings when fundamental liberties are in jeopardy. They argue that the weakening of formal judicial independence made judges vulnerable to political pressures, particularly when they are working on politically sensitive cases. According to this view, the weak stance of the civil courts in cases involving Article 121(1A) is ultimately the result of political pressure and insufficient judicial independence rather than express constitutional provisions. Interview with Shanmuga Kanesalingam, in Kuala Lumpur, Malay. (July 9, 2009); Interview with Malik Imtiaz, in Kuala Lumpur, Malay. (Nov. 5, 2009).

79. Telephone interview with Ravi Nekoo (Feb. 18, 2012).

80. *Id.*

groups took an immediate interest in the case and they quickly gained formal observer status with the High Court.[81] Subsequently, they filed *amicus curiae* briefs and mobilized their resources to bring public attention to the case.[82]

In the High Court proceedings that ensued, Shamala sought a court order declaring the conversions of the children null and void.[83] She claimed the equal right to decide the religion of the children and objected to the unilateral conversions. However, Judge Faiza Tamby Chik (the same judge who had issued the High Court ruling in *Lina Joy*) ruled that Article 12(4) of the Constitution provides that "the religion of a person under the age of 18 shall be decided by his parent or guardian."[84] Judge Faiza explained that the use of the singular—"parent"—should be taken to mean that unilateral conversion of a minor, without the consent or even knowledge of the other parent, was legal.[85]

Finding that the conversion of the children conformed to the law, Judge Faiza moved onto the question of whether Shamala could further challenge the new religious status of the children through the civil courts. Here, Judge Faiza relied upon Article 121(1A) of the Federal Constitution to argue that the civil courts did not have jurisdiction to consider the matter:

> I have come to the conclusion that by virtue of art. 121(1A) of the Federal Constitution, the Shariah Court is the qualified forum to determine the status of the two minors. Only the Shariah Court has the legal expertise in hukum syarak [shariah law] to determine whether the

81. *Id.* Malik Imtiaz also held a watching brief for the Malaysian Bar Council.

82. *Id.*

83. Shamala Sathiyaseelan v. Jeyaganesh C. Mogarajah, [2004] 2 M.L.J. 648, 652 (Malay.).

84. *Id.* at 649. Judge Faiza, who had served as a language instructor before he began his legal career, devoted several pages of his ruling to explain the grammar and meaning of words in the singular and plural. According to Judge Faiza, we must accept the plain meaning of the word "parent" in Article 12(4) of the Federal Constitution. The article "uses the word 'parent.' It is spelt 'p-a-r-e-n-t' without the [letter] 's.' It is used in the singular sense." *Id.* at 655.

85. *Id.* at 656. Other cases concerning the unilateral conversion of minors include Teoh Eng Huat v. Kadhi, Pasir Mas, Kelantan, [1990] 2 M.L.J. 300 (Malay.); Subashini Rajasingam v. Saravanan Thangathoray, [2007] 4 M.L.J. 97 (Malay.); Indira Gandhi v. Muhammad Riduan bin Abdullah, [2013] High Court of Malay. in Ipoh, *available at* http://www.loyarburok.com/wp-content/uploads/2013/07/Indira-Gandhi-Lee-Swee-Seng-Judgment.pdf.

> conversion of the two minors is valid or not. Only the Shariah Court has the competency and expertise to determine the said issue.[86]

The ruling put Shamala in a no-win situation. She had no remedy in the civil courts nor did she have legal standing in the shariah courts because she was not a Muslim. Even if she had wished to approach the shariah courts for relief, it was not an avenue open to her. Judge Faiza acknowledged the unsatisfactory result: "What then is for her to do? The answer [is that] it is not for this court to legislate and confer jurisdiction to the Civil Court but for Parliament to provide the remedy."[87] Fearing that her husband would deny her joint custody, Shamala moved to Australia with the children, never to return.[88]

IV. TWO VIEWS OF RELIGIOUS FREEDOM

As a direct result of the *Shamala* ruling in April 2004, liberal rights groups formed a coalition named "Article 11" after the article of the Federal Constitution guaranteeing freedom of religion. The coalition included such prominent organizations as the All Women's Action Society (AWAM), the Bar Council of Malaysia, the National Human Rights Society (HAKAM), the Malaysian Civil Liberties Society, Sisters in Islam, Suara Rakyat Malaysia (SUARAM), and the Women's Aid Organisation (WAO). The Article 11 Coalition also included the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST), an umbrella organization representing the concerns of non-Muslim communities in Malaysia. The objective of the Article 11 coalition was to focus public attention on the erosion of individual rights and to "ensure that Malaysia does not become a theocratic state."[89] The Article 11 coalition produced a website, short documentary videos providing firsthand interviews with non-Muslims who were adversely affected by Article 121(1A), analysis and commentary from their attorneys, and recorded roundtables on the threat posed by Islamic

86. *Shamala Sathiyaseelan*, [2004] 2 M.L.J. at 660.

87. *Id.* at 659.

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

89. ARTICLE 11 COALITION, http://www.article11.org/ (last visited Mar. 2, 2010). The website has since been closed.

law.[90] The Article 11 coalition and the Malaysian Bar Council went on to organize a series of public forums across Malaysia. The road show campaign was coupled with a petition to the Prime Minister, signed by 20,000 concerned Malaysians, calling on the government to affirm "Malaysia shall not become a theocratic state."[91]

It is not difficult to understand why the rulings roused deep concern for some. Each case provided a clear example that the civil courts were beginning to cede broad legal authority when issues around Islam were involved, even when it meant trampling on individual rights enshrined in the Federal Constitution and even when non-Muslims were involved. Within the broad context of the *dakwah* movement over the preceding three decades, liberal rights activists understood the rulings as the failure of this last bastion of secular law.

However, these cases evoked the worst fears among conservatives as well. For conservatives, the cases were understood as an attack on the autonomy of the shariah courts. In the *Lina Joy* case, for example, the central focus of conservative discourse concerned the implications of an adverse ruling on the Muslim community's ability to manage its own religious affairs in multi-religious Malaysia. If the civil courts affirmed Joy's individual right to freedom of religion, it would essentially constitute a breakdown in the autonomy of the shariah courts and a breach in the barrier that conservatives understood Article 121(1A) to guarantee.

Conservative activists argued that human rights instruments are focused exclusively on the individual and, as such, they are unable to accommodate communal understandings of rights when they come in tension with individual rights claims.[92] Prominent Islamic Party of Malaysia (PAS) Parliament Member Dzulkifli Ahmad lamented that liberal activists could view the cases only from an individual rights perspective and not see that such a framework necessarily undermines

90. *See The Coalition Called Article 11: Myth and Facts*, ALIRAN (Mar. 27, 2007), http://aliran.com/aliran-monthly/2006/200611/the-coalition-called-article-11-myths-and-facts/ (discussing how the Article 11 coalition has also sent an open letter to the Prime Minister, organized public forums, and provided interviews and press releases).

91. *Id.*; Open Letter: Reaffirming the Supremacy of the Federal Constitution, PETITION ONLINE, http://www.petitiononline.com/constsup/petition.html (last visited Apr. 22, 2014).

92. This specific point was made by several prominent Islamic NGO leaders in personal interviews. Interview with Zaid Kamaruddin, Head of Jamaah Islah Malaysia, in Kuala Lumpur, Malay. (June 25, 2009); Interview with Yusri Mohammad, Head of ABIM, in Kuala Lumpur, Malay. (June 30, 2009).

the collective right of the Muslim community to govern its own affairs.[93] For Dzulkifli and others, adverse rulings in any of the cases involving Article 121(1A) would be tantamount to "abolishing and dismantling the Shariah Court."[94] For conservatives, individual rights talk is marked by an expansionist and even an "imperialist" orientation. Just as discourse among liberal rights activists is marked by fear that individual rights faced an imminent threat, a deep anxiety set in among those who wished to protect what they viewed as the collective rights of the Muslim community.

Of course an understanding of the religious community as the legitimate bearer of rights obfuscates the issue of how religious authority was constructed in Malaysia in the first place. As we have seen, the legal dilemmas concerning the authority and jurisdiction of the shariah courts were *not* the result of an inherent or essential tension between the Islamic legal tradition and individual rights. Rather, these legal dilemmas were the result of the state's specific formalization and institutionalization of state law. The bifurcation of the legal system into parallel jurisdictions had hard-wired the legal system to produce legal tensions.

Liberal rights groups were not the only organizations to mobilize in the name of freedom of religion. A group of lawyers calling themselves Lawyers in Defense of Islam (*Peguam Pembela Islam*) held a press conference to announce their formation at the Federal Territories Shariah Court Building on July 13, 2006. Their explicit aim was to "take action to defend the position of Islam" in direct response to the activities of the Article 11 coalition. A few days later, a broad array of conservative Muslim NGOs united in a coalition calling itself Muslim Organizations for the Defense of Islam (*Pertubuhan-Pertubuhan Pembela Islam*), or Defenders (PEMBELA) for short. PEMBELA brought together over fifty Muslim organizations including ABIM, *Jamaah Islah Malaysia* (JIM), the Shariah Lawyers' Association of Malaysia (PGSM), and the Muslim Professionals Forum. The founding statement for *Pertubuhan-Pertubuhan Pembela Islam* explains that the immediate motivation for organizing were the

93. This view was summed up in the title of Dzulkifli Ahmed's book on the topic, *Blind Spot*. DZULKIFLI AHMAD, BLIND SPOT: THE ISLAMIC STATE DEBATE, NEP, AND OTHER ISSUES (2007).

94. *Id.* at 153.

Article 121(1A) cases which, in their view, challenged "the position of Islam in the Constitution and the legal system of this country."[95]

Conservative NGOs organized dozens of public forums and flooded the Malay language press with hundreds more articles and opinion pieces on the need to defend the autonomy of the shariah courts from outside interference. Demonstrating their grassroots support, PEMBELA submitted a 700,000-signature petition to the Prime Minister, dwarfing the 20,000 signatures that Article 11 coalition was able to muster.

Civil society groups fundamentally shaped popular understandings of what was at stake for the future of Malaysia.[96] Rather than understanding these conundrums as the result of Malaysian positive law and the institutional structure of the Malaysian judiciary, the vast majority of Malaysians came to understand the cases as reflecting inherent and unavoidable tensions of liberal rights versus Islamic law, individual rights versus collective rights, and secularism versus religion.

V. THE PARADOX AND POLITICS OF RELIGIOUS FREEDOM IN MALAYSIA

The political spectacle accompanying these cases exacerbated the dilemmas that attorneys, judges, and everyday citizens encountered in their efforts to maneuver through the Malaysian legal system. In the past, attorneys had found pragmatic ways of helping Malaysians change their official legal status, in spite of lacunas in the law. Malaysians had been able to secure state recognition of conversion by affirming a statutory declaration before a commissioner of oaths and registering a new name in the civil court registry through a deed poll.[97] With these two documents, an individual could then secure a new identity card reflecting the name change, which signified one's new, non-Muslim status.[98] For most purposes, including marriage, one

95. Press Release, PEMBELA, "*Pertubuhan-Pertubuhan Pembela Islam Desak Masalah Murtad Ditangani Secara Serius"* [Defenders of Islam Urge More Seriousness in Handling the Apostasy Problem] (July 17, 2006) (on file with author).

96. For a more detailed examination of these dynamics, see Moustafa, *supra* note 62. For more on lay understandings of Islamic law in Malaysia, see Tamir Moustafa, *Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia*, 38 LAW & SOC. INQUIRY 168 (2013).

97. A statutory declaration is the equivalent of an affidavit. A deed poll is a legal statement to express an intention.

98. Salbiah Ahmad, *Islam in Malaysia: Constitutional and Human Rights Perspectives*, 2 MUSLIM WORLD J. HUM. RTS. 10–11 (2005).

could then go on with life as one wished. The compartmentalization of different personal status laws for Muslims and non-Muslims and their entrenchment in parallel civil and shariah court jurisdictions still afforded workable solutions for individuals and couples attempting to negotiate their way between the two legal regimes.

Early Article 121(1A) cases percolated up through the civil courts beginning soon after the 1988 constitutional amendment, but cases did not command popular attention until the *Lina Joy* and *Shamala* cases. Attorneys recount that, prior to *Lina Joy* and *Shamala*, shariah court judges had regularly facilitated the official recognition of conversion out of Islam when they were called upon.[99] But once the cases became a focal point of public debate, intense pressures engulfed both the shariah and the civil courts. This politicized environment made it difficult even for sympathetic shariah court judges to facilitate state recognition of conversion out of Islam.[100] Likewise, intense political pressure made it difficult for civil court judges to adopt different interpretations of Article 121(1A) that might enable the civil courts to intervene when fundamental liberties were in jeopardy. Instead, the civil courts ceded authority to the shariah courts in virtually all the subsequent cases that involved the fact patterns of *Lina Joy* and *Shamala*.

Shamala and *Lina Joy* underline some of the paradoxes, ambiguities, and indeterminacies of "religious freedom" that fuel a politics of religious freedom. The first and most apparent paradox is that both sides emphatically demanded *freedom from state interference* in religious life, yet both sides were also *reliant on state power* to enforce diametrically opposed visions of religious freedom. This apparent contradiction underlines the fact that both the concept of religious freedom and the politics of religious freedom are fundamentally rooted in the legal and judicial mechanisms of the modern state. Absent the power and reach of the modern state, there would be no strident debate over how to order and regulate society. A closer look at the origins of the cases further reveals that the legal conundrums are rooted in complex, interlocking dilemmas that involve the juridification of race and religion and competing state and federal

99. Interviews with Latheefa Koya and Fadiah Nadwa Fikri, Attorneys, in Kuala Lumpur, Malay. (June 29, 2009).

100. This was true even for Chinese and Indian Malaysians who had converted to Islam for marriage, but wished to change their legal status back to their original faith after the death of a spouse or the failure of a marriage.

jurisdictions, both of which were part of the state building process and both of which are direct legacies of the British colonial project. The fact that these dilemmas are interlocking, and each backed by entrenched political and economic interests, suggests that these quandaries are not going away anytime soon.

Ironically, the tools and institutions that we instinctively turn to for justice—law and courts—are, in fact, principal sources of tension in the politics of religious liberty in Malaysia. Instead of resolving legal questions, the court system is hard-wired to produce legal controversies anew. Rather than simply arbitrate between contending parties, the courts exacerbate ideological cleavages.[101] And instead of assuaging uncertainties, courts in Malaysia repeatedly instill a tremendous degree of uncertainty, indeterminacy, and anxiety around the meaning and content of "religious freedom."

101. As discussed, many of the civil society groups that had mobilized around *Lina Joy* formed as a direct result of the cases themselves. These include the Article 11 Coalition, PEMBELA, and several of their constituent organizations. *See supra* text accompanying notes 90, 95.