

## Introduction

### *Constituting Religion*

Over half of all Muslim-majority countries have constitutions that proclaim Islam the religion of state. Many also require that state law adhere to Islamic law.<sup>1</sup> For instance, the Malaysian Constitution declares that “Islam is the religion of the Federation. . . .”<sup>2</sup> The Constitution of Pakistan goes further by requiring that state law conform to “the injunctions of Islam as laid down in the Holy Quran . . . .”<sup>3</sup> And the Egyptian Constitution affirms that “Islam is the religion of the state . . . and the principles of Islamic jurisprudence are the chief source of legislation.”<sup>4</sup> These sorts of provisions are not likely to change anytime soon. In fact, all the constitutions written in Muslim-majority countries since the turn of the millennium – including those of Afghanistan (2004), Iraq (2005), Somalia (2012), Egypt (2012, 2014), Libya (2013), and Tunisia (2014) – declare Islam the religion of the state. Most of these countries also have substantive laws and regulations that claim fidelity to Islam (Otto 2010). This is most common in Muslim family law (An-Na‘im 2002), but state claims to Islam sometimes extend to other areas, such as criminal law (Peters 2005). Whether by way of constitutional proclamations or substantive laws, Muslim-majority states have endeavored to “constitute” Islam.

At the same time, most of these legal systems contain provisions that one expects to find in a liberal legal order, including constitutional guarantees for civil liberties, religious freedom, and equal rights before the law. These dual commitments to Islam and liberal rights are not necessarily at odds. With multiple schools of Islamic thought and jurisprudence, and an ever-expanding corpus of substantive legal opinions, the Islamic legal tradition is diverse, open-ended, and is by no means locked in an inevitable tug-of-war with liberal rights. Moreover, the Islamic legal tradition is only one facet of a complex and multi-layered religious tradition.

<sup>1</sup> An inventory of such provisions for all Muslim-majority countries is provided in Appendix A. See Stahnke and Blitt (2005) for an earlier iteration of this exercise.

<sup>2</sup> The full clause reads, “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.” Many regard Article 3 as symbolic, but Schedule 9 of the Malaysian Constitution also details specific areas of law that fall under the purview of state-level religious councils and shariah courts.

<sup>3</sup> Article 227. Article 2 also provides that “Islam shall be the state religion of Pakistan.” <sup>4</sup> Article 2.

Nevertheless, dual commitments to Islam and liberal rights provide vital resources – both legal and symbolic – for those who wish to advance contending visions for their states and societies. In diverse contexts, from Egypt to Malaysia to Pakistan, activists have seized upon state religion clauses to push for a more expansive role for Islam in the political order, even while other activists challenge the laws that are legislated in the name of Islam. The result is a “judicialization of religion,” which I define as a circumstance wherein courts increasingly adjudicate questions and controversies over religion.<sup>5</sup>

Academic and popular accounts tend to frame these struggles as the product of a collision between ascendant religious movements and liberal legal orders. In other words, conflict is understood as originating from *outside* the legal system. This conception of the problem (religion) and what is at stake (liberty) comes easily because it aligns with the prevailing notion that courts serve as defenders of fundamental liberties and strongholds of secularism.<sup>6</sup> This common assumption is made explicit in one of the most ambitious book-length studies on the topic, Ran Hirschl’s *Constitutional Theocracy*. Hirschl contends that constitutional review provides an important bulwark against a worldwide trend towards religiosity. He explains that “constitutional law and courts . . . have become bastions of relative secularism, pragmatism, and moderation, thereby emerging as effective shields against the spread of religiosity and increased popular support for principles of theocratic governance” (2011:13). Hirschl’s thesis reflects a conventional wisdom that courts safeguard secularism, resolve conflict, and protect fundamental rights.

In contrast with this expectation, a central argument of this book is that legal institutions play important roles in *constituting* struggle over religion. As suggested in the opening paragraph of this book, the leaders of most Muslim-majority states have sought to constitute Islam by way of state law to harness the legitimating power of Islamic symbolism. But rather than unequivocally shoring up state legitimacy, these provisions frequently open new avenues of contestation.

Building on recent work from socio-legal studies, religious studies, and comparative judicial politics, *Constituting Religion* examines the judicialization of religion and, crucially, the radiating effects of judicialization on political life. *Constituting*

<sup>5</sup> This term has been used in a few prior studies, including Sezgin and Künkler (2014) and Fokas (2015). In this study, a judicialization of religion is not derivative of a more general “judicialization of politics,” which is defined by Tate (1995: 28) as “the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made . . . by other governmental agencies, especially legislatures and executives.” Instead, judicialization of religion, by contrast, is used in this study to describe a circumstance wherein courts assume the functions of religious authorities, thereby authorizing an “official” religion, and/or rendering judgment on the appropriate place for religion in the legal and political order. Activist litigation is one of several mechanisms that can produce a judicialization of religion. I examine others in the following chapters.

<sup>6</sup> This framing finds particular resonance in regard to Islam, specifically, due to the considerable baggage with which it is frequently associated these days.

*Religion* shows that, far from consistently resolving disputes and defending liberties, legal institutions can intensify controversy and augment ideological polarization. Explanations that start and end with the “problem” of religion, without examining the intervening work of law and courts, will fail to appreciate these conflict-generative functions. Simplified explanations that lay blame on a reified “religion” will fail to grasp the myriad ways that the state is itself implicated in the politics of religion and in modern constructions of religion more generally. Law and courts do not simply stand above religion and politics. Instead, they enable and catalyze ideological conflict. An important objective of this book is to make visible the role of courts in constituting the very ideological conflicts that they are charged with resolving. This objective encourages reflection on deeply held assumptions about religion as a perennial troublemaker, and deeply rooted expectations about the role of law vis-à-vis religion.<sup>7</sup> This focus on legal institutions is not meant to minimize the ideological cleavages that have gripped many Muslim-majority countries over the place of religion in the legal and political order. Rather, it is to better understand the role of modern law in catalyzing and fueling those struggles.

*Constituting Religion* departs from conventional accounts of the law-religion-politics nexus by theorizing the interface between courts and the broader social and political domains in which they operate. This focus on the “radiating effects” of courts (Galanter 1983) contributes to a number of research agendas at the intersection of law, religion, and politics.<sup>8</sup> Here I wish to highlight two bodies of work in particular: studies of Islamist mobilization and legal studies at the intersection of law and religion. Regarding studies of Islamist mobilization, the lion’s share of scholarly attention is focused on the electoral arena.<sup>9</sup> This attention to electoral politics may spring from a scholarly interest in the way that political participation shapes the trajectory of Islamist parties. And it likely reflects scholarly interest in challenging the “one-man, one-vote, one-time dilemma” that casts a shadow over policy discussions. The relative neglect of law may also stem from an assumption that courts serve as little more than window dressing in Muslim-majority contexts.<sup>10</sup> Whatever the reason, research

<sup>7</sup> Schonthal (2016) identifies striking parallels in the Sri Lankan context. These parallels immediately suggest that a reductive focus on an essentialized Islam as a perennial source of trouble is ill-conceived.

<sup>8</sup> Marc Galanter coined this term in his critique of doctrine-centric legal scholarship and judicial impact studies, which, he argues, assume that “the authoritative pronouncements of the highest courts penetrate automatically – swiftly, costlessly, without distortion – to all corners of the legal world.” Galanter explains that “such influence cannot be ascertained by attending only to the messages propounded by the courts. It 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).

<sup>9</sup> This body of research is too large to cite in its entirety. Representative studies include Schwedler (2006), Brown (2012), Masoud (2014), Nasr (2005), Mecham and Hwang (2014), and Rosefsky Wickham (2004).

<sup>10</sup> Even considering that there is a relative democracy deficit in Muslim-majority counties, recent work suggests that courts nonetheless serve as important sites of political contestation in many authoritarian or hybrid polities. For a theoretical framework and empirical treatment focused on the Egyptian case, see Moustafa (2007). For a series of comparative case studies that engage this framework, see Ginsburg

on Islamist mobilization has paid insufficient attention to courts as a political forum. Among the studies of Islamist litigation that do exist, ideological formation is typically assumed to occur prior to (and exogenous from) engagement with legal institutions.

There is a different lacuna in legal scholarship on the subject. Here, research examines the proliferation of “religion of the state” clauses, or the various ways that courts work to negotiate and reconcile constitutional commitments to both Islam and liberal rights.<sup>11</sup> These doctrine-centric and court-centric approaches are valuable. However, they leave the radiating effects of law almost entirely unexplored. In contrast, this book considers the ways that courts serve as important sites of ideological formation. Beyond the direct legal impact of judicial decisions, *Constituting Religion* examines the ways that courts provide a platform from which activists can challenge the status quo, attract public attention, and assert broad claims about Islam, liberal rights, and the role of the state.

The arguments developed here are relevant to the experience of many countries, but I ground a more general theory of the judicialization of religion through a detailed examination of the Malaysian case. Why? Because Malaysia has one of the most tightly regulated religious spheres in the world. The country offers a clear example of the way that leaders of many Muslim-majority states have sought to define and regulate religion through law, and it provides a cautionary tale of the unintended consequences of those efforts. Malaysia provides a striking example of how judicialization can construct religion and liberal rights as binary opposites.

#### CONSTITUTING RELIGION IN MALAYSIA: THE CONSTRUCTION OF A “RIGHTS-VERSUS-RITES BINARY”

Long defined by its ethnic cleavages, Malaysian politics is increasingly divided by questions and controversies over religion. Tensions have simmered for decades, but a series of high-profile court cases, beginning in 2004, pit the jurisdiction of state-level shariah courts against the federal civil courts. Each of these court cases – dealing with issues of religious conversion, divorce, and child custody – was significant in a legal sense, but their collective impact was felt most strongly outside the courts. The cases generated a flood of media coverage, and they became important focal points in a fierce national debate. Competing groups of lawyers, judges, politicians, media outlets, and civil society groups channeled public discourse into two competing frames. Liberals presented the cases as grave challenges to the authority and position of the civil courts, which they cast as the last bastion for the protection of liberal rights vis-à-vis the *dakwah*

and Moustafa (2008). For a more recent review of the literature on law and courts in authoritarian regimes, see Moustafa (2014b).

<sup>11</sup> Arjomand (2007); Stahnke and Blitt (2005); Stilt (2004, 2015); Rabb (2008); Redding (2003), Lombardi (2006), Lombardi and Brown (2005); Hirschl (2011).

(religious revival) movement.<sup>12</sup> Conservatives, on the other hand, framed the cases as grave threats to the authority and position of the shariah courts, which they cast as the last bastion of religious law vis-à-vis the secular state. Each claim was a mirror image of the other. These “injustice frames” (Gamson 1992) resonated with different constituencies and exacerbated longstanding grievances, even as they shifted political identities and loyalties in new directions.

Academic treatments of these developments (e.g., Liow 2009; Hirschl 2011) nearly always assume a liberal/secularist frame. That is, controversy is attributed to the *dakwah* movement, the most dynamic social and political trend in Malaysia since the 1970s. While the *dakwah* movement is certainly an important part of the story, this book suggests a different point of origin: the formulation of “Anglo-Muslim” law in British Malaya (Horowitz 1994; Hussin 2016).<sup>13</sup> A direct legacy of this legal regime is that state-level shariah courts administer Anglo-Muslim law for Muslims on select matters such as family law, whereas the federal civil courts administer the common law.<sup>14</sup> This bifurcated legal order is premised on a clear division of jurisdiction between federal civil courts and state-level shariah courts. But given the complex social realities of a multiethnic and multi-religious society, this legal framework began to produce vexing conundrums.

*Shamala v. Jeyaganesh* provides a striking example of these difficulties.<sup>15</sup> This case, litigated between 2003 and 2010, concerned a Hindu couple who had been married under the Marriage and Divorce Act, the statute that regulates non-Muslim marriages in Malaysia. Shamala and Jeyaganesh had two children together, but a few years into the marriage Jeyaganesh left Shamala and converted to Islam. As a Muslim, Jeyaganesh was now subject to the jurisdiction of the shariah courts. As a non-Muslim, Shamala remained subject to the jurisdiction of the civil courts. Each managed to secure interim custody orders from these alternate jurisdictions, but the court orders came to opposite conclusions: the shariah court awarded custody of the children to Jeyaganesh, while the civil court awarded custody of the children to Shamala. To make matters worse, because official religious status determines which court one can use, neither parent could directly contest the competing court order. This absurd situation was the beginning of an epic legal battle that remained in the courts – and in the press – for years. The case turned on

<sup>12</sup> The term *dakwah* comes from the Arabic “*da’wah*,” which carries the literal meaning of “making an invitation.” In Islamic theology, *da’wah* is the practice of inviting people to dedicate themselves to a deeper level of piety. In contemporary Malaysian politics, the term stands in for the various manifestations, both social and political, of the piety movement.

<sup>13</sup> The term Anglo-Muslim law has fallen out of use in preference for the term Islamic law. I mostly use the term Anglo-Muslim law throughout this book because I believe it signals an important distinction between the diverse body of Islamic jurisprudence (*fiqh*) and efforts to codify and operationalize select fragments of *fiqh* through a common law or civil law framework. The term “Islamic law” tends to conflate the two.

<sup>14</sup> Malaysia is part of the common law tradition, but the federal courts are commonly referred to as the “civil courts” when contrasted with the shariah court administration.

<sup>15</sup> *Shamala Sathiyaseelan v. Jeyaganesh Mogarajah & Anor* [2004] 2 MLJ 648; [2011] 2 MLJ 281.

technical issues of court jurisdiction, rules of standing, and other features of Malaysian judicial process. When discussed by activists and politicians, however, the cases were presented as a zero-sum conflict between religious law and secular law.

As a direct result of *Shamala v. Jeyaganesh*, liberal rights groups formed a coalition to rally against the erosion of civil court jurisdiction and to “ensure that Malaysia does not become a theocratic state.”<sup>16</sup> Not long after, a broad array of over fifty conservative NGOs united in a countervailing coalition calling itself Muslim Organizations for the Defense of Islam (*Pertubuhan-Pertubuhan Pembela Islam*) or Defender (*Pembela*) for short. In its founding statement, *Pembela* announced that it was mobilizing to defend “the position of Islam in the Constitution and the legal system of this country.”<sup>17</sup> Both coalitions worked tirelessly to lobby the government and to shape public understanding of what was at stake in *Shamala v. Jeyaganesh* and in dozens of other cases. The two sides found agreement only in the proposition that Malaysia faced a stark choice between secularism and Islam, between rights and rites.

Each side derived legitimacy, purpose, and power from an oppositional stance vis-à-vis the other. Liberal rights activists rallied supporters by sounding the alarm that secularism was under siege and that Malaysia was on the way to becoming an Islamic state. On the other side, conservative organizations rallied support by contending that liberal rights groups wished to undermine the autonomy of the shariah courts and that they worked in cooperation with foreign interests that were intent on weakening Islam. Both groups told the public that Islam and liberal rights were incompatible, and that Malaysians must stand for one or the other. These efforts worked to (*re*)constitute popular understandings of Islam, liberal rights, and their imagined relationship to one another – this time in starkly adversarial terms.

*Constituting Religion* drills deep into the Malaysian experience to trace *when*, *why*, and *how* a sharp rights-versus-religion binary emerged, first within the legal system, and subsequently radiating outwards through political discourse and popular legal consciousness. By tracing the development of this spectacle, the book shows that the dichotomies of liberal rights versus Islamic law, individual rights versus collective rights, and secularism versus religion are contingent on institutional design and political agency. Malaysian law and legal institutions produced vexing legal questions, which competing groups of activists transformed into compelling narratives of injustice. Examining the legal, political, and social construction of these binaries is not to minimize their significance. On the contrary, this book aims to show how these constructions facilitate the political agenda of some actors while they disempower others, shaping the terms of debate around a host of important substantive issues.

<sup>16</sup> Founding statement of the Article 11 Coalition. <http://www.article11.org/> (last accessed March 2, 2010). The website has since closed.

<sup>17</sup> *Pembela* (2006a).

## WHY MALAYSIA?

There are good reasons why Malaysia is the primary focus of this book. As suggested above, Malaysia provides a striking example of the judicialization of religion and the emergence of what I call a “rights-versus-rites binary.”<sup>18</sup> More broadly, the Malaysian case also sheds light on diverse contexts beyond Malaysia. Before specifying the more detailed causal argument in Chapter 1, let us briefly consider the most salient features of the Malaysian legal order and situate those features within a broader comparative context.

First, Malaysia regulates religion far more than the global average. The Pew Government Restrictions on Religion Index places Malaysia at number five among 198 countries (Pew Research Center 2017). In the more detailed Government Involvement in Religion Index, which examines 175 countries worldwide, there are only ten countries with a higher ranking than Malaysia.<sup>19</sup> Malaysia is also something of an archetype among Muslim-majority countries, which, as a group, regulate religion more than the global average. Consider, for example, that among the twenty-three countries in the “very high” category of the Pew Government Restrictions on Religion Index, eighteen (78 percent) are Muslim-majority countries. Likewise, a full 66 percent of countries in the “very high” and “high” categories are Muslim-majority countries, whereas Muslim-majority countries comprise only 12 percent of those in the “moderate” and “low” categories. The Malaysian experience is therefore particularly relevant to this subset of countries.

A second and related feature of the Malaysian legal system is that religious difference is regulated by way of state law. Distinct personal status laws for different religious communities govern a range of life events from the cradle to the grave, including whom one can marry, how one can worship, and how one must bury the dead. Malays, who constitute just over half of the country’s population of 31 million, are defined as Muslim by way of the Federal Constitution. This official religious designation imposes distinct legal rights and duties. The second-largest ethnic group is Chinese, which stands at approximately 25 percent of the total population. Most ethnic Chinese are Buddhist (76 percent), with substantial numbers identifying as Taoist (11 percent) and Christian (10 percent), while less than 1 percent are Muslim. The third-largest ethnic group is Indian, which stands at approximately 8 percent of the total population.<sup>20</sup> This community is also diverse in regard to religion, with most ethnic Indian Malaysians identifying as Hindu (85 percent) and smaller numbers identifying as Christian (7.7 percent) and Muslim (3.8 percent). The overall breakdown of the population by religion is approximately 60 percent

<sup>18</sup> This term was inspired, in part, by John Comaroff’s (2009) reflections on the rise of “theo-legality.”

<sup>19</sup> See Fox (2008) and <http://www.religionandstate.org>

<sup>20</sup> There is considerable ethnic and linguistic diversity within each of these groupings. This is detailed with further precision and historical context in Chapter 3.



Muslim, 19 percent Buddhist, 9 percent Christian, 6 percent Hindu, and 5 percent of other faiths. In Malaysia's bifurcated legal order, the federal civil courts administer family and personal status law for non-Muslims, while state-level shariah courts manage a separate legal framework for Muslims.<sup>21</sup> While some of these institutional configurations are distinctive, segmented personal status laws are by no means unique to Malaysia. Roughly one-third of all countries have plural family law arrangements (Sezgin 2013: 3; Ahmed 2015). To the extent that segmented personal status laws fuel legal quandaries and political polarization, Malaysia offers valuable insights for the sorts of legal conundrums that emerge in many other countries.

Finally, as previously noted, the Malaysian Constitution contains provisions for both liberal rights and Islamic law. While this is also the case in most other Muslim-majority countries, what sets Malaysia apart from most of its peers is that the country also enjoys a relatively robust legal system, with broad public access to the courts. The relative strength of the legal system is suggested by Malaysia's rank at 39 of 102 countries in the 2015 Rule of Law Index of the World Justice Project.<sup>22</sup> To be sure, the Malaysian judiciary has its problems, but the legal profession and the courts are undeniably strong in comparison with other countries that tightly regulate religion. I shall argue that religion is easily judicialized in these circumstances. What is more, with its vocal NGOs and vibrant online media, Malaysia provides fertile soil for legal controversies to move swiftly from the court of law to the court of public opinion. Countries with similar legal and institutional features can expect a vigorous judicialization of religion and, with it, the politicization of religion via the radiating effects of courts. A careful study of the judicialization of religion in Malaysia offers valuable insights into how law and courts can catalyze the emergence of a rights-versus-rites binary.

#### DATA AND METHOD

Fieldwork for the project was conducted in the summer and fall of 2009, in the fall of 2010, and over several subsequent stretches between 2012 and 2015. A total of 170 semi-structured interviews were conducted, seventy with lawyers, judges, activists, politicians, and journalists, and an additional 100 with "everyday Malaysians." Findings also rest on an extensive textual analysis of court decisions and press coverage of prominent cases.<sup>23</sup> I examined the full universe of cases where there was a question of jurisdiction between the civil courts and the shariah courts.<sup>24</sup>

<sup>21</sup> Until the 1980s, Malaysia had five distinct laws governing marriage and divorce for different ethnic and religious communities. These were repealed and replaced with a new marriage and divorce law for non-Muslims, leaving Anglo-Muslim law as the only distinct personal status and family law system.

<sup>22</sup> For a contextual analysis of the Malaysian legal system, see Harding (2012) and Harding and Whiting (2011).

<sup>23</sup> To gain a more general sense of the daily operations of both the shariah and civil courts, I attended court hearings in Kuala Lumpur, Putrajaya, and Selangor.

<sup>24</sup> To be more precise, I examined the full universe of Article 121 (1A) cases reported in the *Current Law Journal* and the *Malayan Law Journal*, two of the major databases that report Malaysian court decisions.



A context-rich, process-tracing method (Bennett and Checkel 2014) was adopted to map the development of legal institutions over time, as well as the flow of individual cases through the courts. This two-level (institutional and case-specific) process-tracing approach facilitated careful consideration of the continuities and critical junctures where legal/institutional change produced new patterns of contention inside and outside the courts. I examined the full life cycle of each case, from its first appearance in court through to the public spectacle that emerged around certain of those cases. I considered the origin of each case and the legal logics invoked, as civil court judges navigated complex entanglements and contending claims concerning shariah court jurisdiction. Next, I noted whether cases became subjects of popular debate. For those cases that did gain political salience, I examined *how* they came into the public spotlight. I then studied the contending frames of understanding that were crafted for consumption in the court of public opinion. Here, I examined the public statements issued by non-governmental organizations, political parties, and various state officials (including the religious establishment) to understand the role of different actors in the construction of a rights-versus-rites binary. With the assistance of a research team, I also compared press coverage of select court cases across Malaysia's diverse media landscape, from the Malay-language newspapers *Utusan Malaysia*, *Berita Harian*, and *Harakah*, to the Tamil-language papers *Makkal Osai* and *Malaysia Nanban*, to the Chinese-language *Sin Chew*, and the English-language press. This comparison suggested the extent to which Malaysia's segmented ethnolinguistic media environment further refracts competing frames of understanding across variously situated communities. Finally, I circled back to examine the extent to which these frames differed from the logics that were at work in court. Studying the full life cycle of these disputes provided an empirically grounded examination of how the rights-versus-rites binary is continually inscribed in the Malaysian public imagination.

Elite-level interviews enabled a deeper understanding of the various positions and strategies of civil society organizations, which had mobilized around controversial cases, both inside and outside formal legal intuitions. I was mindful of the need to seek out views from across the political and ideological spectrum to consider the full range of thinking about the cases and the controversies they produced. I therefore interviewed lawyers litigating on opposite sides of the same cases, as well as activists from the most prominent liberal rights and conservative NGOs who had staked out opposite sides of public lobbying efforts. (The absence of a middle ground was striking, and it speaks to the ways that judicial institutions frame a binary logic that is hard to escape.) I found it relatively easy to empathize with the views and positions of liberal rights lawyers and activists, as their frames of understanding aligned closely with my own. Yet I was cognizant that a better understanding of the concerns, anxieties, and aims of conservative groups and their audiences is essential for a deeper appreciation of the legal entanglements and their polarizing effects on popular legal consciousness. Many of the lawyers, activists, and journalists whom

I interviewed became key sources of information. The lawyers among them provided access to case files and legal briefs. Repeated discussions with all key actors helped to round out my understanding of important cases and controversies beyond what was available through official court records and press archives.

To assess the radiating effect of courts on popular legal consciousness, I organized a multiethnic research team to conduct semi-structured interviews with “everyday Malaysians.” The aim of these informal interviews was to study popular understandings of court cases and legal controversies. I was interested in assessing whether popular understandings of prominent cases matched the legal logics that are deployed in court, or if they matched the frames that political activists constructed for media consumption. I supplemented these semi-structured interviews with several structured focus groups and a nationwide, stratified survey of popular understandings of the Islamic legal tradition.<sup>25</sup>

Given that this is a single-country case study, with only brief reference to the experiences of other cases, this book serves primarily as an exercise in theory generation. I acknowledge the limitations of the study in terms of theory testing and establishing wider generalizability. Nonetheless, the diachronic, context-rich, process-tracing approach I embrace here generates important insights into the judicialization of religion and the construction of a rights-versus-rites binary that might otherwise go unanalyzed with a different research design.

#### OVERVIEW OF THE BOOK

Chapter 1, *The Constitutive Power of Law and Legal Institutions*, details the central theoretical claims and situates the comparative significance of the book. Building on recent work from the fields of socio-legal studies, religious studies, and comparative judicial politics, I challenge the conventional view that the judicialization of religion is the result of a straightforward collision between ascendant religious movements and liberal legal orders. Instead, I suggest that law and courts constitute these struggles in at least four important ways: by establishing categories of meaning (such as “secular” and “religious”), by shaping the identity of variously situated actors, by opening an institutional framework that enables and even encourages legal conflict, and by providing a focal point for political mobilization outside the courts. While contention over religion can be expected as a matter of course in any legal system, I argue that judicialization is exacerbated when religion is tightly regulated (particularly along religious lines, as it is in Malaysia) and when dual constitutional commitments are made to religion and liberal rights. Working inductively through comparative examples and deductively through the institutional logic of segmented legal regimes, I theorize the ways that legal institutions catalyze ideological contestation.

<sup>25</sup> The research methods for this part of the study are detailed in Chapter 6.

Chapter 2, *The Secular Roots of Islamic Law in Malaysia*, moves to the empirical analysis, tracing the construction of religious authority by way of state law from the colonial era to the present. The chapter presents a brief primer on Islamic legal theory, focusing on core features of the Islamic legal tradition, including the place of human agency, mechanisms of evolution, and a pluralist orientation. Against this backdrop, I examine the way that religious authority is configured by way of state law in contemporary Malaysia. I argue that the state monopoly on religious authority should not be understood as the achievement of an “Islamic state” or the “implementation” of Islamic law. Instead, I examine significant tensions between the state monopoly on religious interpretation and core epistemological commitments in the Islamic legal tradition. I argue that we should not view the parallel shariah and civil court jurisdictions as “religious” versus “secular,” but rather, as parallel formations of state law.

Chapter 3, *Islam and Liberal Rights in the Federal Constitution*, examines key provisions in the Malaysian Constitution. This constitutional ethnography (Scheppele 2004) provides essential historical background for understanding (a) the legal construction of race and religion in British Malaya, (b) the dual constitutional provisions for liberal rights and Anglo-Muslim law, and (c) the formation of separate jurisdictions for Muslims and non-Muslims in areas of personal status and family law. Each of these arrangements is the product of past political struggles, even as they continue to structure legal and political contention in the present. The chapter closes with an examination of an important constitutional amendment, Article 121 (1A). Introduced in 1988, the clause became a central flashpoint of contention around civil versus shariah court jurisdictions.

Chapter 4, *The Judicialization of Religion*, moves from the legal-institutional structure to a series of controversial cases that concerned the jurisdiction of the federal civil courts vis-à-vis the state-level shariah courts from the 1980s to the present. Tracing the cases from their inception, I examine how Malaysia’s bifurcated legal system and tightly regulated religious sphere hardwired legal struggles. I show that the cases had little to do with religion (as a practice of faith) and everything to do with the regulation of religion (as a state project). I also examine how legal conundrums provided openings for a handful of legal activists to challenge the status quo and to advance new visions of religion and its role in the legal order.

Chapter 5, *Constructing the Political Spectacle*, moves from the court of law to the court of public opinion. Through extensive analysis of newspaper archives, press releases, and interviews with activists, I show that legal disputes concerning court jurisdiction were virtually unknown to the public until they were brought into the media spotlight, beginning in 2004. Political activists – liberals and conservatives alike – advanced competing frames of understanding for popular consumption. Taken from the court of law and deployed in the court of public opinion, the controversies assumed a different character altogether. I examine how the cases gave new energy to variously situated civil society groups, catalyzed the

formation of entirely new NGOs, and provided a focal point for political mobilization outside the courts. I trace how self-positioned secularists and Islamists both derived power, legitimacy, and purpose from their oppositional stance vis-à-vis the other. Finally, I examine how these efforts constructed and affirmed a series of “rights-versus-rites” binaries, helping to shift the inflection of longstanding political cleavages from ethnicity (Malay, Chinese, Indian) to religion (Muslim, non-Muslim).

Chapter 6, *The Rights-versus-Rites Binary in Popular Legal Consciousness*, turns from the political spectacle to popular understanding of the cases. I draw upon open-ended interviews, focus group discussions, and original national survey data to explore the various ways that the cases were understood across religious and ethnic communities. The data suggest that the political spectacle conditioned popular understandings of the cases. More consequentially, the sharp binary frames reinforced a popular understanding that Islam and liberal rights are in fundamental tension with one another. The second half of the chapter turns to the efforts of Sisters in Islam, a Malaysian NGO that works to deactivate these binaries and expand women’s rights *from within* the framework of the Islamic legal tradition. I examine the challenges they face and the strategies they pursue to overcome the rights-versus-rites binary that is now deeply entrenched in the popular imagination.

Chapter 7 turns to recent litigation involving Article 3(1) of the Federal Constitution, which declares, in part, that “Islam is the religion of the Federation.” The clause received little attention for decades. The federal judiciary had understood the clause to carry ceremonial and symbolic meaning only. However, recent years have seen increasing litigation around the meaning and intent of the clause. More significantly, recent Federal Court decisions introduce a far more robust meaning, one that practically elevates the role of Islamic law in the Malaysian legal system to a new *grundnorm*. Jurisprudence on the matter is still unfolding, but what is clear is the formation of two legal camps that hold radically divergent visions of the appropriate place for Islamic law and liberal rights in the legal and political order. I argue that the Article 121 (1A) cases provided a unique opportunity for a handful of Islamist lawyers to push for a sweeping new interpretation of Article 3, one that has gained surprising traction in the civil courts.