ARTICLE

Stealth Theocracy

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Theocracies are typically thought to be born through constitutional revolution, not evolution. This Article explores a subtler phenomenon of constitutional transformation involving the place of religion in a constitutional order through less transparent means of constitutional change. This Article offers an account of this phenomenon, which it calls "stealth theocracy." It focuses on the fundamental alteration of a constitution's religious or secular character through informal change by judicial and political actors, rather than through formal mechanisms like constitutional amendment or replacement. This Article explores this phenomenon by focusing on Malaysia as one of its clearest exemplars, before broadening its lens to consider its implications for other constitutional systems, as well as wider understandings on the place of religion and courts within a constitutional order. It examines how the elevation of Islam's constitutional position has moved the Malaysian state from its secular foundations to an increasingly religious order. Courts are the main agents of this phenomenon: judicial mechanisms—like jurisdictional deference to the religious courts and judicial Islamization of the secular courts—have fueled a profound shift toward a more theocratic constitutional order.

This Article fills a void in the existing scholarship, which has left the establishment and expansion of the place of religion outside of formal constitutional mechanisms underexplored, by providing an account of a more subtle transformation of a constitution's religious character by stealth. This Article also challenges the prevailing view of courts as secularizing institutions that constrain the rise of theocratic governance. It tells an inverse story of courts acting as theocratizing forces that expand religion's role in the public order. Finally, the account it provides has implications for broader understandings on constitutional change, constitutional design, and constitutional identity.

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I. INTRODUCTION

When theocracies are born, they are usually thought to emerge through constitutional revolution, not evolution. The global resurgence of religion is dominating the political discourse of polities the world over from Asia, to Europe, and to the Middle East. Constitution-writing efforts following the Arab Spring revolutions have also served to underscore the significance of questions regarding constitutional arrangements on the place of religion within a state. In many constitutional systems, the establishment of theocratic principles of governance has been deliberately carried out through the explicit incorporation of constitutional clauses referring to the status of religion or religious law.

This Article explores a subtler phenomenon of constitutional transformation involving the elevation of the place of religion through less transparent, primarily informal, means of constitutional change. It offers an account of this phenomenon, which I call "stealth theocracy." Stealth theocracy involves the fundamental alteration of a constitutional system's religious or secular character through less visible means of constitutional change. This transformation toward a more religious constitutional order occurs informally through the engagement of judicial and political actors, rather than through formal mechanisms of constitutional modification like amendment or replacement of the constitutional text. Courts are the main agents of this phenomenon: judges play a key role in expanding the place of religion in the legal and political order.

The Article examines the mechanics of the stealth theocracy phenomenon, focusing on Malaysia as one of its clearest exemplars,[1] before broadening the lens in order to analyze the implications for other countries and for wider understandings on the place of religion within a constitutional order. While Malaysia provides a richly illustrative case study to explore the development of stealth theocracy, manifestations of this phenomenon can be observed in other constitutional contexts. In Indonesia, for example, Islamist discourse has grown as a means of political mobilization,[2] while the

1. Malaysia presents a unique and underexplored case study to illustrate the phenomenon of stealth theocracy. As Ran Hirschl observes, Malaysia "features what is arguably one of the most fascinating and complex settings for studying the dynamic intersection of constitutional and religious law." RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 127 (2010).

2. The events surrounding the 2017 election for Jakarta's governor provide a recent example. Following public rallies driven by Islamic groups on the grounds that he had insulted Islam, Jakarta's Christian Governor was defeated in the gubernatorial election and subsequently imprisoned for blasphemy. *See* Joe Cochrane, *Jakarta Governor Concedes Defeat in Religiously Tinged Election*, N. Y. TIMES (April 19, 2017), https://www.nytimes.com/2017/04/19/world/asia/jakarta-election-ahok-anies-baswedan-indonesia.html; Krithika Varagur, *Blasphemy Conviction for Jakarta Governor Seen as Blow for Religious Freedom*, VOANEWS (May 10, 2017), https://www.voanews.com/a/blasphemy-conviction-jakarta-governor-religious-freedom/3845829.html. *See also* Ben Otto & Anita Rachman, *Islamic Conservatives Boost Candidate's Comeback in Indonesia Presidential Race*, WALL ST. J. (Apr. 11, 2018), https://www.wsj.com/articles/presidential-rematch-looms-in-indonesia-1523460866.

Indonesian Constitutional Court's adjudication in religion cases has exhibited a tendency to side with state-endorsed religious authorities and the sensitivities of the mainstream Muslim community.[3] Meanwhile, the Sri Lankan Constitution's protections for Buddhism have generated legal disputes and amplified the role of the courts over matters of religion, perpetuating existing religious divisions within the society.[4] Even in Turkey, whose constitution entrenches the principle of secularism, the constitutional amendments proposed by the Justice and Development Party (AKP) seeking to strengthen the presidency have been viewed as facilitating the pursuance of an Islamic agenda by an Erdoğan-led government.[5]

In this Article, I use Malaysia as a detailed example to explore the institutional mechanics of the phenomenon of stealth theocracy.[6] The elevation of Islam's position in the public sphere has fundamentally shifted the contemporary Malaysian state from its secular foundations to an increasingly religious public order, making religion the great fault line of its politics and adjudication. The politicization of religion over the past quarter-century, fueled by religion's intimate connection to ethnic identity and nationalism, has led to the rise of Islamization and polarization in public discourse over the Malaysian state's identity as secular or Islamic. At the heart of this debate is the Article 3(1) declaration in Malaysia's Federal Constitution: "Islam is the religion of the Federation; but other religions may be practised in peace and harmony." Judicial, political, and popular actors all feature prominently in the contestation over the state-religion relations in Malaysia. This Article focuses on the key role of the courts in expanding the place of Islam in the Malaysian legal and public order through the judicialization of religion.

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3. *See, e.g.*, Melissa Crouch, *Constitutionalism, Islam, and the Practice of Religious Deference: The Case of the Indonesian Constitutional Court*, 16 AUS. J. ASIAN L. (2016); *see also* Stewart Fenwick, *Faith and Freedom in Indonesian Law: Liberal Pluralism, Religion and the Democratic State, in* RELIGION, LAW AND INTOLERANCE IN INDONESIA 83 (Tim Lindsey & Helen Pausacker, eds., 2016); Simon Butt, *Between Control and Appeasement*, *in* RELIGION, LAW AND INTOLERANCE IN INDONESIA 62-63 (Tim Lindsey & Helen Pausacker, eds., 2016).

4. *See* BENJAMIN SCHONTHAL, BUDDHISM, POLITICS, AND THE LIMITS OF LAW: THE PYHRRIC CONSTITUTIONALISM OF SRI LANKA 11, 154 (2016).

5. Commentators have argued that Turkey's most recently proposed constitutional amendments following a 2017 national referendum, aimed at transforming Turkey from a parliamentary to a presidential system, is likely to move Turkey further away from its constitutionally secular foundations. *See, e.g.*, Andreas C. Chrysafis, *Recep Tayyip Erdogan's Theocratic Ambitions: What Implications for Cyprus*, GLOBAL RESEARCH: REVOLUTION OF THE MIND SERIES (May 7, 2017), https://www.globalresearch.ca/recep-tayyip-erdogans-theocratic-ambitions-what-implications-for-cyprus/5588975. Secularists made similar arguments about the package of constitutional amendments drafted by Turkey's Justice and Development Party (AKP) in 2010 as a means to "facilitate stealth Islamization of the constitutional order by limiting the ability of the judiciary to check the AKP's majoritarian policies." Aslı Ü Bâli & Hanna Lerner, *Constitutional Design without Constitutional Moments: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L L.J. 227, 285 (2016).

6. *See infra* Part III.

Courts have served to elevate Islam's position in the Malaysian constitutional order in two primary ways. First, civil courts tend to decline jurisdiction in favor of the religious Sharia courts using a mechanism I identify as "jurisdictional deference." By refusing to exercise jurisdiction over several contentious areas implicating constitutionally guaranteed rights, including religious liberty, secular courts avoid adjudicating these matters, which they defer instead to the religious courts. A second means has been through judicially expansionist reinterpretations of the Article 3(1) Islamic constitutional clause. The "judicial Islamization" of the civil courts is reflected in expansive readings of Article 3(1) resulting in the prioritization of Islamic norms vis-à-vis other constitutional norms. Taken together, these judicial means have helped fuel a profound shift in the broader Malaysian political-legal context toward a more theocratic constitutional order.[7]

This Article's account fills a lacuna in the existing scholarship.[8] A substantial amount of literature has focused primarily on questions relating to the constitutional drafting of religion-state clauses in specific countries or in the context of broader comparative case studies.[9] Scholars have been preoccupied with the constitutional design of clauses declaring Islam as the religion of the state or Islamic law as "a" or "the" source of legislation,[10] particularly in constitution-writing in the Middle East. These studies, however, have mainly been concerned with the initial incorporation and adoption of religion clauses in a constitution.

Scholarly accounts of post-drafting judicial engagement with religion and secularism clauses have examined subsequent judicial efforts to reconcile constitutional commitments to Islam and liberal

7. My use of the term "theocracy" does not refer to a pure theocracy, in which religious and political authority are combined entirely. My focus is on a constitutional theocracy, which Ran Hirschl describes as a modern governance system that adheres to principles of modern constitutionalism, such as the separation of powers and judicial review, and in which there exists constitutional enshrinement of a single religion and a nexus of religious bodies with jurisdictional autonomy. *Id.* at 2-3. *See infra* notes 192-94.

8. *See infra* Part II.

9. For single-country studies, *see, e.g.*, SCHONTHAL, *supra* note 4 (on Sri Lanka); Kristen Stilt, *Contextualizing constitutional Islam: The Malayan experience*, 13 INT'L J. CONST. L. 407 (2015) (on Malaysia); DONALD L. HOROWITZ, CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA (2013) (on Indonesia); OMER F. GENCKAYA & ERGUN OZBUDUN, DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY (2009) (on Turkey). For larger comparative studies, *see* CONSTITUTION WRITING, RELIGION AND DEMOCRACY, (Aslı Ü Bâli & Hanna Lerner eds., 2017) (focusing on a set of religiously-divided societies); NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD (2002) (for a regional study of the Middle East).

10. Clark B. Lombardi & Nathan J. Brown, *Islam in Egypt's New Constitution* (Dec. 13, 2012), http://mideastafrica.foreignpolicy.com/posts/2012/12/13/islam-in-egypts-new-constitution; Clark B. Lombardi, *Constitutional Provisions Making Sharia "A" or "The" Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?*, 28 AM. U. INT'L REV. 733 (2013); Dawood I. Ahmed & Moamen Gouda, *Measuring Constitutional Islamization: The Islamic Constitutions Index*, 38 HASTINGS INT'L COMP. REV. 1 (2015); Nathan J. Brown, *Islam and Constitutionalism in the Arab World: The Puzzling Course of Islamic Inflation, in* CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Ü Bâli & Hanna Lerner eds., 2017).

constitutionalism,[11] or the role of the courts in entrenching the principle of secularism, like in India[12] and Turkey.[13] Literature on authoritarianism, on the other hand, has focused on the use of formal constitutional or legal mechanisms to undermine constitutionalism.[14] However, the literature lacks an examination of the judicial role in expanding the place of religion in informal constitutionalist terms that shifts the constitution in the direction of a more theocratic constitutionalism. This Article provides a part of that missing account.

This Article also challenges the prevailing view in the literature that courts are institutions that play a secularizing role in defending liberal rights against the effects of incorporating religion in constitutions.[15] Ran Hirschl's prominent work on constitutional theocracies, for example, portrays constitutional courts as secular forces that constrain the impact of religious law and the spread of theocratic governance.[16] Hirschl argues that "constitutional law and courts in virtually all such polities 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."[17] The story this Article tells challenges that claim. It shows the inverse phenomenon: courts have acted to expand, not limit, religion's role in the public sphere, fueling the move toward a more religious order. Put another way, the account this Article provides is of the courts' role as key agents that actively contribute to the substantial transformation of the constitution's religious character through the judicialization of religion.

Manifestations of the stealth theocracy phenomenon can be seen in societies divided along religious and ethnic lines, where compromise during the constitution-making process has typically produced some form of accommodation for religion within a generally secular constitutional

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11. *See, e.g.*, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights-How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L REV. 379 (2005); CLARK LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT (2006). *But cf.* Intisar A. Rabb, *We the Jurists: Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527 (2007).

12. *See, e.g.*, GARY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONTEXT (2005); SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 159 (2010).

13. *See, e.g.*, Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment—The Turkish perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision*, 10 INT'L J. CONST. L. 175 (2012); Mehmet Cengiz Uzun, *The Protection of Laicism in Turkey and the Turkish Constitutional Court: The Example of the Prohibition on the Use of the Islamic Veil in Higher Education,* 28 PENN. ST. INT'L L. REV. 383, 399 (2010).

14. *See, e.g.*, David Landau, *Abusive Constitutionalism*, 47 U. C. DAVIS L. REV. 189 (2013); Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2014).

15. *See, e.g.*, Lombardi & Brown, *supra* note 11; LOMBARDI, *supra* note 11; Kristen Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System,* GEO. WASH. INT'L L. REV. 695 (2004).

16. HIRSCHL, *supra* note 1, at 105.

17. *Id.* at 13.

framework. Under conditions of religious and ethnic polarization, political actors and courts modify the understanding of the constitutional settlement over time, reversing the prioritization of religious principles over secular norms. In religiously polarized states like Malaysia, Indonesia, Sri Lanka, and Turkey,[18] particularly under conditions of ascendant illiberalism and nationalism in the political order, the constitutionalization of religion has resulted in the courts playing a constitutive role in religious contestations and in the expansion of religion in the public order.

More broadly, this Article has implications for wider theoretical understandings on constitutional change, constitutional design, and constitutional identity. It complicates accounts of constitutional change regarding arrangements that protect the state's religious or secular character from formal amendment—for example, through unamendable constitutional clauses[19]—by illustrating how religion's place in the constitutional order can undergo fundamental transformation through mechanisms other than amendment.[20] The Malaysian example is striking in terms of the procedure and substance of its constitutional change; compared to many other constitutional systems, like the United States,[21] formal amendment under the Malaysian Constitution is relatively easy.[22] Yet the constitutional alteration of Malaysia's religious character has taken place primarily through judicial and political means outside of the formal constitutional amendment process, underscoring the stealth nature of these changes. Nor have these modifications been minor or incidental; the stealth theocracy slide has effected a fundamental transformation to the nation's constitutional identity.[23]

Second, this account of the susceptibility of some constitutional arrangements on religion to drift toward theocracy has significant relevance for constitutional design.[24] Rather than cabining the spread of religion,[25] the formal constitutionalization of religion—particularly when crafted in general, framework terms—often invites further contestation and produces

18. *See infra* Part IV(B).

19. *See, e.g.*, Yaniv Roznai, *Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions*, MICH. ST. L. REV. 253 (2017).

20. *See infra* Part V(B).

21. *See, e.g.*, U.S. CONST. art. V (amendments to the United State Constitution must be proposed either by Congress with a two-thirds vote in both houses or by a convention of states called for two-thirds of the state legislatures, as well as ratification by three-quarters of the state legislatures). *See also* DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (presenting an index of cross-national data showing that the United States Constitution has the second most difficult amendment process in a list of countries across the world).

22. As a general rule, an amendment to the Malaysian Constitution requires a two-thirds majority in each House of Parliament. FED. CONST. (MALAY.), art. 159(3).

23. *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE INT'L L.J. 1 (2018).

24. *See infra* Part V(B).

25. *Compare* HIRSCHL, *supra* note 1, at 13-14 (arguing that the formal establishment of religion in a constitution "helps limit the potentially radical impact of religion by bringing it under state control").

consequences unintended by the framers. Notably, historical and originalist arguments in comparatively new democracies like Malaysia are typically employed by those advocating for recourse to the constitution's secular foundations. Moreover, ambivalently framed constitutional arrangements leave the place of religion open to being co-opted by nationalist or populist movements as a platform for advancing illiberal politics. The ascendency of illiberalism worldwide underscores the significance of the constitutional arrangements of state-religion relations: the implications of their constitutional design extend beyond the legal arena into the wider political sphere.

A third observation concerns the relationship between religion and constitutional identity.[26] The contestation over religion's place in a constitutional order reflects a broader struggle over competing visions of national identity that are often profoundly connected to ethnic identity and nationalism. Malaysia provides an example where ethnic and religious identity are perceived as inextricably intertwined; the Malaysian Constitution defines "Malay" as "a person who professes the Muslim religion."[27] The ascendency of Malay-Islamic nationalism in contemporary Malaysian political discourse has perpetuated an exclusivist conception of the nation's identity, which has polarized ethnic and religious minorities. Under such conditions of ethnic pluralism, religion may be the epiphenomenon arising from the ascendency of nationalist ethnic tendencies. Secularists and Islamists in Malaysia battle so deeply over religion's place in the constitutional order because it is, in essence, a contestation over the nation's foundational identity.

This Article unfolds in the following four parts. Part II describes the existing literature on the role of courts and the place of religion in modern constitutional democracies before situating the account of stealth theocracy as a response to the gap within this scholarship. Part III explores the detailed mechanics of the development of stealth theocracy in Malaysia, which provides an illustrative case study of the phenomenon. It begins by describing the constitution-making process and the subsequent politicization of religion in contemporary Malaysia. Focusing on the role of the courts, it shows how the judicialization of religion has taken place through jurisdictional deference to the Sharia courts and the judicial Islamization of the civil courts. Part IV begins to construct the outlines of the phenomenon I identify as stealth theocracy by sketching some of its general features. Drawing on examples from Indonesia, Sri Lanka, and Turkey, it then broadens the frame to illustrate the manifestations of the phenomenon across comparative contexts. It contrasts these examples with

26. *See infra* Part V(C).

27. FED. CONST. (MALAY.), art. 160(2) ("'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs . . .").

the experience of Bangladesh, where the struggle over the state's religious or secular character has centered on textual amendments to its constitution. Part V discusses the implications of this Article's account of the stealth theocracy phenomenon for broader understandings on constitutional change, constitutional design, and constitutional identity.

II. CONSTITUTIONS, RELIGION, AND COURTS

The birth of a theocratic constitution is usually thought of in revolutionary terms.[28] Constitution-writing efforts relating to the Afghan and Iraqi Constitutions at the beginning of the twenty-first century as well as those following the Arab Spring revolutions in Egypt, Libya, and Tunisia call to mind the explicit constitutionalization of the place of religion within a state. In many Muslim-majority nations, the constitutional incorporation of references to Islam or Islamic law has become ubiquitous.[29]

A substantial amount of scholarship on religion and law in comparative settings has focused on questions of constitutional design. Scholars have explored the constitution-making of religion-state relations in particular countries—such as Egypt,[30] Indonesia,[31] Malaysia,[32] Sri Lanka,[33] and Turkey[34]—as well as regionally, like in the Middle East.[35] Others have considered constitution-writing in religiously divided societies through a series of comparative case studies.[36]

Much scholarly attention has been devoted to the proliferation of Islamic constitutional clauses in the Muslim world in recent decades. Constitutional efforts to draft clauses declaring Islam as the state religion or Islamic law as "a" or "the" source of legislation, particularly in the Arab world, have spurred heated discourse. Scholars have debated whether constitutional commitments to Islam are compatible with principles of

28. Iran provides an example of a theocracy emerging through revolution. *See, e.g.*, SHAUL BAKHASH, THE REIGN OF THE AYATOLLAHS: IRAN AND THE ISLAMIC REVOLUTION (1984); MOHSEN M. MILANI, THE MAKING OF IRAN'S ISLAMIC REVOLUTION: FROM MONARCHY TO ISLAMIC REPUBLIC (1988); ROBIN WRIGHT, THE LAST GREAT REVOLUTION: TURMOIL AND TRANSFORMATION IN IRAN (2000); Neil Shevlin, Velayat-e Faqih *in the Constitution of Iran: The Implementation of Theocracy* 1 U. PA. J. CONS'T L. 358 (1998).

29. As Kristen Stilt observes: "More than thirty nations provide that Islam is the religion of the state," some others "declare that Islamic law or its principles are a source or the main source of legislation" or "that the nation is an 'Islamic state'," and "some make explicit the idea that laws that conflict with Islamic law, however that may be interpreted, are invalid." Stilt, *supra* note 9, at 407.

30. *See, e.g.*, Lombardi and Brown, *supra* note 10.

31. *See, e.g.*, HOROWITZ, *supra* note 9.

32. *See, e.g.*, Stilt, *supra* note 9.

33. *See, e.g.*, SCHONTHAL, *supra* note 4.

34. *See, e.g.*, GENCKAYA AND OZBUDUN, *supra* note 9.

35. *See, e.g.*, BROWN, *supra* note 9.

36. *See, e.g.*, Aslı Ü Bâli & Hanna Lerner, *Constitutional Design without Constitutional Moments: Lessons from Religiously Divided Societies*, 49 CORNELL INT'L L.J. 227 (2016); CONSTITUTION WRITING, RELIGION AND DEMOCRACY (Aslı Ü Bâli & Hanna Lerner eds., 2017).

democracy and human rights,[37] or sought to explore the possibility of a non-liberal form of Islamic constitutionalism.[38] This Article is not about that debate. Its focus is not on the compatibility of Islam with democracy or liberal constitutionalism nor is it concerned with the initial adoption of religious provisions in a constitution.

Scholars have also written extensively on judicial engagement with a constitution's secular character—for example, the Turkish Constitutional Court's role in entrenching Turkey's constitutional secularism[39] and the Indian Supreme Court's entrenchment of secularism through the basic structure doctrine.[40] These accounts have primarily explored the judicial role in expanding and protecting secularism within these constitutional systems.

The existing literature, however, suffers from a gap. It lacks an account of the role that courts play in expanding the place of religion in the constitutional and political order. The scholarship on law, courts, and religion has focused on judicial politics in authoritarian systems or courts as institutions that constrain the rise of religiosity. To be sure, there is a burgeoning literature on courts in authoritarian systems. These accounts tend to take an instrumental view of courts as empowered by authoritarian governments to achieve the regime's aims.[41] Some have considered the role of the courts in addressing political contestations,[42] but less attention has been paid to the judicialization of religion.[43] Scholarship on authoritarianism has focused on the use of formal constitutional or legal mechanisms to undermine a constitutional system,[44] rather than on informal political or judicial means of transforming a state's constitutional identity.

Much comparative constitutional law scholarship on courts in Muslim-majority societies has been preoccupied with judicial efforts to reconcile

37. *See, e.g.*, NOAH FELDMAN, AFTER JIHAD (2003); NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE (2008); ABDULLAH AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A (2008); Nimer Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, 28 EMORY INTL REV 345 (2014).

38. *See* ANTONI ABAT NINET & MARK TUSHNET, THE ARAB SPRING: AN ESSAY ON REVOLUTION AND CONSTITUTIONALISM (2017).

39. *See, e.g.*, Roznai & Yolcu, *supra* note 13; Uzun, *supra* note 13.

40. *See, e.g.*, GARY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONTEXT (2005); Deepa Das Acevedo, *Secularism in the Indian Context*, 38 LAW & SOC. INQUIRY 138 (2013).

41. For a survey of the literature on law and courts in authoritarian regimes, *see* Tamir Moustafa, *Law and courts in authoritarian regimes*, 10 ANNUAL REV. L. SOC. SCI. 281 (2014).

42. *See, e.g.*, TOM GINSBURG & TAMIR MOUSTAFA, RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2008); TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT (2007). The judicialization of politics has been defined as "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies." Ran Hirschl, *The Judicialization of Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253 (Robert E. Goodin ed., 2011).

43. Although for a recent work in this area, *see* TAMIR MOUSTAFA, CONSTITUTING RELIGION: ISLAM, LIBERAL RIGHTS, AND THE MALAYSIAN STATE (2018).

44. *See, e.g.*, David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673 (2014).

dual constitutional commitments to Islamic law and liberal constitutionalism.[45] According to the prevailing view, courts are institutions that serve to defend secular principles and safeguard fundamental liberties. For example, Nathan Brown and Clark Lombardi use the Egyptian Constitutional Court as an example to examine how a progressive court "interprets Islamic legal norms to be consistent with democracy, international human rights, and economic liberalism."[46]

Ran Hirschl offers a prominent account of courts as secularizing forces that constrain the effects of religious incorporation in constitutional theocracies.[47] In a constitutional theocracy, a state-endorsed religion and its principles are enshrined as "a" or "the" source of legislation; at the same time, these systems also adhere to core elements of modern constitutionalism, including a formal separation between political and religious authority and the existence of judicial review.[48] According to Hirschl, courts in these constitutional contexts serve an important secularizing function as bulwarks that shield against the spread of religiosity and principles of theocratic governance.[49] A constitutional theocracy enables political elites to delegate questions on state-and-religion to the judiciary, where secularly inclined judges constrain and limit the impact of religious law.[50] Hirschl draws on several case studies—including Egypt, Israel, Kuwait, Pakistan, Malaysia, Nigeria, and Turkey—to make his claim that courts in these contexts engage in "jurisprudential ingenuity to block the spread of religiosity."[51]

Hirschl sees the constitutional theocracy structure as a "rational secularist endeavor" designed to empower courts to curb the spread of religiosity.[52] Underlying this view is an assumption that the contestation in these contexts is between popular religious movements and secular ruling elites who are invested in using the state structure to constrain the spread of religiosity. Hirschl seems to assume that the modern state is able and inclined to assert secular constitutionalist principles over religious norms.[53] His claim underestimates the extent to which the state and its apparatuses,

45. *See, e.g.,* LOMBARDI, *supra* note 11; *cf.* Rabb, *supra* note 11.

46. Lombardi and Brown, *supra* note 11, at 380.

47. HIRSCHL, *supra* note 1. For other work on theocratic constitutionalism, *see* Larry Catá Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, 16 IND. J. GLOB. LEGAL STUD 85 (2009); FELDMAN, *supra* note 37.

48. HIRSCHL, *supra* note 1, at 3.

49. *Id.* at 105.

50. *Id.*

51. *Id.* at 103.

52. *Id.* at 14.

53. DIAN A. H. SHAH, CONSTITUTIONS, RELIGIONS AND POLITICS IN ASIA: INDONESIA, MALAYSIA, AND SRI LANKA 63 (2017).

including the judiciary, may themselves become a platform for advancing theocracy over constitutionalism.[54]

This Article offers a different account. It explores the courts' role in expanding the place of religion in the public order through the judicialization of religion. Drawing on Malaysia as a detailed example—as well as the experiences of Indonesia, Sri Lanka, and Turkey—it shows how courts have served as agents of transformative change to elevate religion's position in the constitutional order. In so doing, this Article challenges Hirschl's account of courts as secularizing agents that act to constrain theocratic principles of governance. The story it tells shows the inverse phenomenon of the courts acting as theocratizing forces that expand the role of religion in constitutional governance. As Part III describes, this expansion has occurred through two main mechanisms: the secular courts ceding jurisdictional authority to the religious courts and the judicial Islamization of the civil courts themselves. This judicial elevation of religion is part of a broader phenomenon I term "stealth theocracy," which is the subject of Part IV.

III. STEALTH THEOCRACY: THE CASE OF MALAYSIA

This Part takes a deep dive into the phenomenon of stealth theocracy in Malaysia, which provides a deeply illustrative exemplar of this phenomenon. It begins in Section III(A) by describing the constitution-making process leading up to the nation's independence over the constitutional arrangements on religion. Section III(B) charts the rise of the politicization of religion and religious nationalism in the contemporary Malaysian public order. But although politics matter, courts are a central part of the story. Malaysia's constitutional adjudication on religion forms the subject of Section III(C). Section III(D) describes how the judicialization of religion has taken place through jurisdictional deference to the Sharia courts and the Islamization of the secular courts' jurisprudence. The aim of this section is to paint a picture of the central role played by the courts in the stealth elevation of Islam's position in the constitutional order.

A. Constitutionalizing Religion

The 1957 Constitution of Malaya was conceived in the post-colonial climate of a nation on the cusp of independence.[55] The Independence—or *Merdeka*[56]—Constitution came into force when the Federation of Malaya

54. *See* Sadia Saeed, *A Review of Constitutional Theocracy by Ran Hirschl*, 18 IND. J. GLOB. LEGAL STUD. 961, 964 (2011).

55. *See generally* JOSEPH M. FERNANDO, THE MAKING OF THE MALAYAN CONSTITUTION (2002).

56. *Merdeka* is the Malay word for independence.

ceased to be a British colony and became an independent state on August 31, 1957, following negotiations between the newly elected local political leaders and the British colonial powers. It would later become the basis for the Federal Constitution of Malaysia, when Singapore and the North Borneo states of Sabah and Sarawak joined the Malayan Federation in 1963 to become a new nation: Malaysia.[57]

Five legal experts from the United Kingdom and the Commonwealth were appointed to form a constitutional commission chaired by Britain's Lord Reid, a Law Lord in the British House of Lords, to draft the constitution for the newly independent state. This was a deliberate decision by the local Alliance Party, a political coalition made up of three component parties: the United Malays National Organization (UMNO), the Malayan Chinese Association (MCA), and the Malayan Indian Congress (MIC).[58] The Malayan leaders gave the Reid Constitutional Commission specific terms of reference that the local representatives had negotiated and agreed on.[59] The Commission's task was essentially to translate into legal terms what had already been politically settled.[60]

The Constitution that was drafted established a federal system of government comprising of a legislative, executive, and judicial branch.[61] Malaysia's parliamentary system of government is modeled after the Westminster's, with a constitutional monarch—the *Yang di-Pertuan Agong*—as the head of the Federation.[62] Its Constitution contains an explicit bill of rights,[63] and the power of judicial review over legislation and executive action is assumed as a natural corollary of the constitutional supremacy clause.[64]

The *Merdeka* Constitution was fashioned at the birth of a new nation attempting to accommodate the competing demands of a pluralistic society made up of a Malay majority group and non-Malay—primarily Chinese and Indian—ethnic minorities. The document was founded on the basis of the constitutional bargain struck at independence. As the result of negotiations

57. Singapore would separate from the Federation two years later to form its own independent state. Sabah and Sarawak remain within the Malaysian Federation, which currently consists of thirteen states and the three federal territories of Kuala Lumpur, Labuan, and Putrajaya.

58. See JOSEPH M. FERNANDO, FEDERAL CONSTITUTIONS: A COMPARATIVE STUDY OF MALAYSIA AND THE UNITED STATES 12–13 (2007) (explaining that "the choice of an independent body made up of legal experts from the Commonwealth was a conscious choice of the ruling Alliance party and was intended to avoid local prejudices in the framing of the Constitution").

59. FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION, REPORT OF THE FEDERATION OF MALAYA CONSTITUTIONAL COMMISSION ¶ 3 (1957) [hereinafter REID REPORT].

60. ANDREW HARDING, THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL ANALYSIS 32 (2012).

61. FED. CONST. (MALAY.), arts. 39–65; arts. 121–31.

62. *Id.* arts. 32–37.

63. *Id.* arts. 5–13.

64. *Id.* art. 4(1) ("This Constitution is the supreme law of the Federation and any law . . . which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.").

and compromise between the ethnic and religious groups, the drafters eventually included the Article 3(1) constitutional clause declaring that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony."[65]

Understanding the text of Article 3(1) requires locating it in its historical and political context. The Reid Constitutional Commission initially rejected the suggestion that a provision declaring Islam as the religion of the Federation be included in the draft of the 1957 Independence Constitution.[66] The Malay state rulers, concerned that a clause establishing an official religion would encroach on their traditional positions as the head of Islam of their respective states, supported the drafting commission's decision not to include an Islamic establishment clause.

The main push for a declaration of Islam as the religion of the Federation came from the Alliance—the predecessor to the *Barisan Nasional* coalition, the dominant political power in Malaysia for over six decades.[67] UMNO, the Malay constituent party in the Alliance coalition, sought the inclusion of a state religion clause not because it had a particular vision of imposing Islamic law on the state but as part of a larger package of demands connected to Malay special privileges, language, and citizenship.[68] The Reid Commission rejected the Alliance's initial proposal; moreover, it emphasized that, even if such a provision were to be inserted, there was "universal agreement" that "it would not in any way affect the civil rights of non-Muslims."[69]

Significantly, there was no suggestion that the new nation would not be a secular state—not even from those pushing for a clause declaring Islam as the state religion. The Alliance's own memorandum stated: "The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practicing their own religions, and shall not imply that the State is not a secular State."[70] Only

65. FED. CONST. (MALAY.), art. 3(1). *See generally* Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SOUTHEAST ASIAN STUD. 249 (2006).

66. For a comprehensive examination of the historical sources surrounding the drafting of this clause in the Constitution of Malaysia, *see* Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia,* 37(2) J. SOUTHEAST ASIAN STUD. 249 (2006). *See also* Andrew Harding, *Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia*, 6 SING. J. INT'L & COMP. L. (2002) [hereinafter Harding, *Keris*]. *See also* Stilt, *supra* note 9.

67. The Alliance's three component parties—the United Malays National Organization (UMNO), the Malayan Chinese Association (MCA), and the Malayan Indian Congress (MIC)—each represented one of the three major ethnic communities in Malaysia. The Alliance and its successor, *Barisan Nasional*, governed the country for sixty-one years consecutively until its historic upset in the 2018 Malaysian general elections when the *Pakatan Harapan* opposition coalition scored an unprecedented victory.

68. *See* Stilt, *supra* note 9, at 410, 430.

69. REID REPORT, *supra* note 59, at para. 169.

70. Tunku Abdul Rahman, Political Testament of the Alliance: Memorandum for the Reid Constitutional Commission (Sept. 25, 1956), *reprinted in* MALAYA: BRITISH DOCUMENTS ON THE END OF EMPIRE 307, 316 (A.J. Stockwell ed., 1995).

one member of the Reid Constitutional Commission—Justice Abdul Hamid from Pakistan—supported the inclusion of a constitutional provision establishing Islam as the religion of the state. Yet even he, too, thought that such a provision would be "innocuous," writing in the Reid Report that such a clause would neither "impose any disability on non-Muslim citizens" nor "prevent the State from being a secular State."[71] He argued that similar establishment clauses existed in many constitutions around the world including the "Christian countries" of Ireland, Norway, Denmark, Spain, Argentina, Bolivia, Panama, and Paraguay as well as the "Muslim countries" of Afghanistan, Iran, Iraq, Jordan, Saudi Arabia, and Syria.[72]

Negotiations between the Alliance Party and the Working Party tasked with reviewing the draft Constitution proceeded on the understanding that a provision declaring Islam as the official religion would not undermine the nation's secular basis. The Alliance coalition maintained that such a provision would serve a symbolic purpose, rather than have any practical effect.[73] Indeed, the Alliance's leader, Tunku Abdul Rahman, who would later become the country's first Prime Minister, declared that "the whole Constitution was framed on the basis that the Federation would be a secular state."[74]

The non-Malay political parties eventually accepted the religion clause on the basis of these explicit assurances that the declaration was merely symbolic and would not compromise non-Muslim rights.[75] Numerous historical sources document this common understanding shared by all the parties involved in the constitutional founding. When the London Colonial Office finally accepted the insertion of the Islamic establishment clause, it noted that the Alliance delegation had "stressed that they had no intention of creating a Muslim theocracy and that Malaya would be a secular State."[76]

Back in Malaya, the Alliance government tabled a White Paper on the draft Constitution in Parliament, which explained:

> There has been included in the proposed Federation Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular state, and every person will have the right to profess and practice his own religion and the right to propagate his religion…[77]

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71. REID REPORT, *supra* note 59, at para. 11.

72. *Id.* at para. 12.

73. Fernando, *supra* note 66, at 258.

74. *Id.* at 258 (citing Minutes of the 19th Meeting of the Working Party, Apr. 17, 1957, CO 941/87).

75. *Id.* at 258.

76. *Id.* at 260 (citing Memorandum by Jackson, Colonial Office, May 23, 1957, CO 1030/494 (20)).

77. White Paper on the Federation of Malaya Constitutional Proposals 1957 (Kuala Lumpur: Government Printer, 1957), Legislative Council Paper No. 42 of 1957 at 20.

Soon after, the British Parliament passed the Federation of Malaya Independence Bill, crystallizing the newly drafted Constitution into force and creating a sovereign state.

The final text of Article 3(1) included in the Federal Constitution read: "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." The intentions of those involved in the constitution-making process affirm a generally secular constitutional arrangement for the state. The text of Article 3 reflects this basic understanding. Not only does the Article 3(1) provision itself guarantees that "other religions may be practised in peace and harmony," but, importantly, Article 3(4) also specifies, "Nothing in this Article derogates from any other provision of this Constitution." Additionally, under the Constitution's chapter on fundamental rights, Article 11(1) guarantees that "every person has the right to profess and practice" his or her religion.[78]

* * *

Compared to many other countries,[79] the process of formal amendment under the Malaysian Constitution is relatively easy. As a general rule, an amendment must be supported by a two-thirds majority of the total membership of each House of Parliament.[80] There are a few exceptions to that general rule: for example, a number of constitutional provisions—like those affecting citizenship, the privileges and positions of the Rulers, the Malay national language, and the special position of the Malays—cannot be amended without the consent of the Conference of the Rulers.[81] Other exceptions include alterations to the provisions concerning safeguards for the constitutional position of Sabah and Sarawak, which require the consent of their respective State Governments.[82]

Islam's position under Article 3 of Malaysia's Constitution is not one of the provisions subject to more stringent amendment requirements. Like most of the other provisions in the Malaysian Constitution, Article 3 can be amended by a two-thirds legislative majority. Yet the text of Article 3 has remained unchanged since the Constitution's drafting.

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78. FED. CONST. (MALAY.), art. 11(1).

79. *See, e.g.*, U.S. CONST. art. V (amendments to the United States Constitution must be proposed either by Congress with a two-thirds vote in both houses or by a convention of states called for two-thirds of the state legislatures, as well as ratification by three-quarters of the state legislatures). *See also* Henry Paul Monaghan, *Doing Originalism,* 104 COLUM. L. REV. 32, 35 (2004) (describing the United States Constitution as "practically unamendable").

80. FED. CONST. (MALAY.), *Id.*, art. 159(3).

81. *Id.* art. 159(5). The Conference of Rulers is constituted of the Malay Rulers of individual states in Malaysia.

82. *Id.* art. 161E(2). Some other amendments—like those altering supplementary citizenship provisions, admitting a new state into the Federation, or concerning oaths and affirmations—only require a simple majority in Parliament. *Id.* art. 159(1), (4).

In practice, for much of the time, formal amendment rules have not posed an obstacle to the ruling coalition in power. Until its historic defeat in Malaysia's general elections in 2018,[83] the *Barisan Nasional* coalition had been in power, without a break, for more than sixty years. The dominant political alliance also controlled more than a two-thirds majority in Parliament for much of Malaysia's history, until the 2008 elections when it lost its legislative supermajority for the first time since 1969. For many years, the ruling coalition's two-thirds legislative majority meant that it could, and often did, amend the Constitution at will. In the six decades since the Constitution's enactment, the *Barisan Nasional* government in power passed more than fifty constitutional amendment acts, comprising approximately 700 individual textual amendments,[84] resulting in some significant constitutional changes.

B. Politicizing Religion

Growing Islamist political and social discourse in Malaysia over the past quarter century has challenged the established understanding of the Article 3 Islamic constitutional clause. The politicization of Islam was at the forefront of the battleground between UMNO, the Malay component party of the *Barisan Nasional* coalition, and the Pan-Malaysian Islamic Party (PAS), an Islamic opposition party. As part of its political platform, PAS projected itself as the authentic Islamic party and more Islamic than the ruling *Barisan Nasional* government. In response to PAS, UMNO expanded its own campaign of Islamization. This set the stage for an Islamization race between PAS and UMNO, beginning in the 1980s and intensifying in the 1990s, to secure the support of the Malay-Muslim electorate.

Against this backdrop of political competition between UMNO and PAS, in a speech given on September 29, 2001, then-Prime Minister Mahathir Mohamad declared that "UMNO wishes to state clearly that Malaysia is an Islamic state."[85] In 2007, then-Deputy Prime Minister Najib

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83. In the 2018 national elections, the *Barisan Nasional* ruling coalition was defeated for the first time in the nation's history since it gained independence in 1957. In an unprecedented election result, the *Pakatan Harapan* coalition won 121 of the 222 Parliamentary seats to assume power as the new government of Malaysia. *See After six decades in power, BN falls to 'Malaysian tsunami'*, MALAYSIAKINI (May 10, 2018), https://www.malaysiakini.com/news/423990; *Malaysia election: Opposition scores historic victory*, BBC (May 10, 2018), https://www.bbc.com/news/amp/world-asia-44036178; Paul Shinkman, *After Vote, Malaysia's Real Test Approaches*, U.S. NEWS (May 22, 2018), https://www.usnews.com/news/best-countries/articles/2018-05-22/malaysia-made-history-what-does-it-do-now.

84. Cindy Tham, *Major Changes to the Constitution*, THE SUN (July 17, 2007), http://www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html.

85. *See* Mahathir Mohamad, Prime Minister of Malaysia, Speech at the 30th Annual General Meeting of the Gerakan Party Malaysia, (Sept. 29, 2001), at para. 18, *available at* http://www.pmo.gov.my/ucapan/?m=p&p=mahathir&id=482 (translated from Malay by the author). *See also* CNN, *Mahathir: Malaysia is "fundamentalist state"*, (June 18, 2002), http://edition.cnn.com/2002/WORLD/asiapcf/southeast/06/18/malaysia.mahathir/.

Tun Razak, who would later become Malaysia's sixth Prime Minister, likewise asserted that "Islam is our official religion and we are an Islamic state."[86] As recently as 2017, government ministers in Najib Razak's administration maintained that the *Barisan Nasional* government was committed to an Islamic agenda.[87]

Growing Islamization in Malaysia's public discourse pushed Islam's position in the constitutional order into the spotlight. At the center of this debate is the Article 3(1) Islamic constitutional clause. Supporters of a position of Islamic supremacy argue that Article 3(1) justifies an elevated role for Islam in the public sphere.[88] Secularists, on the other hand, argue that the framers intended the establishment of Islam to be ceremonial and not to impact the secular foundations of the Malaysian Constitution.[89]

The movement toward prioritizing Islam's role in the state is further complicated by the broader social and political context of Malaysia's pluralistic society. In Malaysia, religious and ethnic identity are perceived as inextricably intertwined—not least because the Federal Constitution specifies that "a person who professes the religion of Islam" is one of the elements of being Malay.[90] Viewed against this context, the claim for Islamic supremacy adds a dimension of religiosity to an ethno-nationalist position, which seeks to protect the special position of the Malays. Religion's connection to Malay special privileges increases polarization in a society already divided along ethnic and religious lines. The politicization of Islam's position fuels tensions between the Malay community and the non-Malay

86. *Malaysia Not Secular State, Says Najib,* BERNAMA, (July 17, 2007), http://www.bernama.com/bernama/v3/news_lite.php?id=273699. *See also* Clarence Fernandez, *Islamic state label sparks controversy in Malaysia,* REUTERS, Jul. 25, 2007.

87. *BN government committed to make Malaysia an Islamic state,* MALAY MAIL ONLINE, (Oct. 14, 2017), http://www.themalaymailonline.com/malaysia/article/bn-government-committed-in-making-malaysia-an-islamic-state.

88. *See, e.g.*, Abdul Aziz Bari, *Islam in the Federal Constitution: A Commentary on the Decision of* Meor Atiqulrahman, 2 MALAYAN L.J. cxxix, cxxxv (2000) (arguing that "history and the essential character of the country" are the "most important" reasons supporting Islam's supremacy); Mohamed Ismail Shariff, *The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law*, 3 MALAYAN L.J. cv, cx (2005) ("There is nothing in Article 3 that restricts the natural meaning of the term 'Islam.' And there is no reason to circumscribe its meaning to rituals and ceremonies only…It is suggested that what the framers of the Constitution have in fact done is to resurrect the lost or hidden power relating to Islamic law, that which was taken away by the British, and entrenched it in Article 3.").

89. *See, e.g.*, ISMAIL MOHAMAD ABU HASSAN, INTRODUCTION TO MALAYSIAN LEGAL HISTORY, 147 (2004) (supporting the view that Islam is meant to be recognized formally in rituals and government ceremonies of the Federation, and not as the basis for the law of Malaysia); AHMAD F. YOUSIF, RELIGIOUS FREEDOM, MINORITIES AND ISLAM 171 (1998); Benjamin Dawson & Steven Thiru, *The Lina Joy Case and the Future of Religious Freedom in Malaysia* Lawasia J. 151 (2007); Tommy Thomas, *The Social Contract: Malaysia's Constitutional Covenant*, 1 MALAYAN L. J. cxxxii (2008). *See also* Andrew Harding, *The Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia* 6 Sing. J. Int'l & Comp. L. 154 (2002); Li-ann Thio, *Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation*, 2 Malayan L. J. i (2006); Jaclyn Ling-Chen Neo, *Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia*, 13 INT'L J. ON MINORITY & GROUP RTS. 95, 104 (2006).

90. FED. CONST. (MALAY.), art. 160.

ethnic minorities, who increasingly perceive themselves as being treated as second-class citizens.[91]

C. Adjudicating Religion

Initially, the Supreme Court of Malaysia affirmed the secular nature of the Federal Constitution in two apex appellate court decisions.[92] In the landmark 1988 decision of *Che Omar bin Che Soh v. Public Prosecutor*,[93] the Supreme Court declared Malaysia's constitutional foundations as based on secular law.[94] The Lord President of the Supreme Court, Mohamad Salleh Abas, held that Islam's position in the context of Article 3 of the Constitution "means only such acts as relate to rituals and ceremonies…."[95] As a result of British colonial rule and through the establishment of secular institutions, "Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only."[96] Writing for the Court, the chief justice determined that this was the sense in which "the framers of the Constitution understood the meaning of the word 'Islam' in the context of Article 3."[97]

In this case, the appellants, who faced the mandatory death penalty for drug trafficking and firearm offenses, had brought a challenge to the constitutionality of the death penalty arguing that crimes involving drugs and firearms did not require the death penalty under Islamic law. Since Islam is constitutionally declared as the religion of the Federation, they argued, Islamic precepts should be regarded as the source of all law; as such, the death penalty could not be imposed for offenses that were not in line with Islamic law.

The Supreme Court unanimously rejected the idea that laws could be struck down for incompatibility with Islamic principles. It dismissed the notion that "the law passed by Parliament must be imbued with Islamic and religious principles" as "contrary to the constitutional and legal history of

91. Take, for example, Member of Parliament Badruddin bin Amiruldin's declaration in a House of Representatives debate in 2005: "Malaysia is an Islamic state! You don't like it you get out of Malaysia!" (translated from Malay). Hansard, (July 11, 2005), at 34, *video clip available at* http://www.youtube.com/watch?v=pkqyhBDU5HM.

92. The Supreme Court (known as the Federal Court after 1994) is the highest court and final appellate court in Malaysia. The Malaysian appellate courts consist of the Federal Court, the Court of Appeal, and two High Courts (the High Court in Malaya and the High Court in Sabah and Sarawak). Judicial appointments to these superior appellate courts are made by the *Yang di-Pertuan Agong* (the King), acting on the advice of the Prime Minister, after consulting the Conference of Rulers as well as the Chief Justice (except in the case of the Chief Justice's appointment).

93. Che Omar bin Che Soh v. Public Prosecutor [1988] 2 MALAYAN L.J. 55.

94. *Id.* at 56.

95. *Id.* at 56-57 (sic).

96. *Id.* at 56.

97. *Id.*

the Federation."[98] Instead, the Court held the opposite to be the case: the Federal Constitution "purposely preserves the continuity of secular law prior to the Constitution . . . ."[99] The Lord President concluded, "[T]he law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law."[100]

Two years later, the Supreme Court reaffirmed the Constitution's secular basis in its decision in *Susie Teoh*.[101] Relying on the Constitution's secular founding principles and the framers' intent, the Court upheld the constitutionality of a statute that allowed a parent or guardian to decide the upbringing, education, and religion of a minor. [102] As the Supreme Court observed, historical documents written by the constitutional framers at the time of the Constitution's drafting made clear that the recognition of Islam as the state religion "would not in any way affect the civil rights of non-Muslims."[103] Since "under normal circumstances" a non-Muslim parent had the right to decide various issues affecting the life of a minor, the Supreme Court upheld the statute allowing a parent to determine a minor's religious upbringing until he or she reached the age of eighteen.[104] The new Lord President, Abdul Hamid Omar, emphasized that the Malaysian Constitution "was not the product of an overnight thought"; rather, it represented a settlement reached by "negotiations, discussions and consensus between the British government, the Malay rulers and the Alliance party representing various racial and religious groups."[105]

In these two early decisions, the Supreme Court explicitly affirmed the Malaysian Constitution's secular foundations, viewing Islam's position under Article 3(1) as serving a chiefly ceremonial role. This understanding would soon change. In the decades following these cases, judicial reasoning involving religion moved away from the Supreme Court's acknowledgement of the secular constitutional framework, taking a clear turn toward prioritizing Islam's supremacy in the public order.

D. (Stealth) Elevation of Islam's Position

Islam's position has been vastly expanded in Malaysia's contemporary constitutional order. This elevation of Islam's role has not been brought about by any amendment to the text of the Article 3(1) constitutional clause, which has remained unchanged since the drafting of the Constitution. Much

98. *Id.* at 57.
99. *Id.* at 56.
100. *Id.* at 57.
101. Teoh Eng Huat v. Kadhi Pasir Mas (*Susie Teoh*) (1990) 2 MALAYAN L.J. 300.
102. *Id.*
103. *Id.* at 301–02 (citing the REID REPORT, *supra* note 59, at para. 169).
104. *Id.* at 302.
105. *Id.* at 279.

of the transformation to the place of religion in the state has occurred through less formal means by political and judicial actors in the legal and popular sphere.

Malaysian courts have expanded Islam's scope and reach in two main ways. The first has been through a mechanism of *jurisdictional deference* by the civil courts to the Sharia courts. In several major cases implicating religion and constitutional rights, the civil courts have avoided exercising jurisdiction, instead deferring these matters to the religious courts. Another means has been through the civil courts' expansive interpretation of the Article 3(1) Islamic constitutional clause. This expansionist process of *judicial Islamization* by the civil courts has led to prioritization of Islam's position vis-à-vis other constitutional norms.

i. Jurisdictional Deference to the Sharia Courts

Civil courts in Malaysia have refused to exercise jurisdiction over several key areas that implicate constitutionally guaranteed rights, such as religious freedom and equality. Secular court judges who avoid adjudicating disputed cases have justified their deference to the Sharia courts by relying on Article 121(1A) of the Malaysian Constitution. That clause, inserted following a constitutional amendment in 1988, provides that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."[106] On its face, there is nothing to suggest that Article 121(1A) ousts the jurisdiction of the civil courts to review decisions of Sharia courts.[107] Rather, the clause appears to have been enacted "for the avoidance of doubt," in order to ensure that decisions properly within the jurisdiction of the religious courts are not revised by the civil courts.[108]

However, civil courts have tended to claim that certain contentious matters belong exclusively to the jurisdiction of the Sharia courts, relying on Article 121(1A) in a legally distorted manner. Once the civil courts rule that a matter is within the domain of the Sharia courts, they cede authority to the religious courts to determine not only the case at hand but also any cases arising in the area in the future. By extensively deferring matters to the Sharia courts as the *sole* jurisdictional authority, the secular courts have expanded the scope of power of the religious courts.

Apostasy, involving cases dealing with the conversion out of Islam, is one major area of controversy. A prominent example is the high-profile case of *Lina Joy v. Majlis Agama Islam*.[109] Lina Joy, an ethnic Malay woman raised

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

107. ANDREW HARDING, LAW, GOVERNMENT, AND THE CONSTITUTION IN MALAYSIA 137 (1996).

108. *Id.*

109. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, (2007) 4 MALAYAN L.J. 585 (Fed. Ct. of Malay.).

in a Malay-Muslim family, later converted to Christianity as an adult and was baptized in the Catholic tradition. She met and wished to marry a Catholic man. Unable to marry her non-Muslim fiancé under the civil marriage statute while she was still recognized officially as a Muslim,[110] she applied to the National Registration Department to have the religion changed on her national identity card. The Department rejected her application. It refused to remove "Islam" as the religion on her identity card without a certificate of apostasy from the Sharia court confirming she was no longer a Muslim.

Obtaining a declaration of apostasy from the Sharia courts in Malaysia for a Malay-Muslim person is a practical impossibility. Apostasy is regarded as an offense in several states in Malaysia. In some of these states, Sharia courts have the power to impose fines, imprisonment, or whipping on apostates;[111] in others, individuals wishing to leave Islam can be ordered to undergo detention at Islamic faith centers for mandatory rehabilitation.[112]

Lina Joy brought a constitutional challenge before the civil courts arguing infringement of her right to religious freedom guaranteed by the Malaysian Constitution. This marked the beginning of a constitutional litigation through the civil court system from the High Court to the Court of Appeal and finally to the Federal Court, the highest appellate court. The High Court held that the constitutional right to "profess and practice" one's religion under Article 11 did not extend to individuals who wished to leave

110. Lina Joy could only have been able to marry her non-Muslim fiancé if she were legally recognized as non-Muslim. The Law Reform (Marriage & Divorce) Act of 1976 governs marriages between non-Muslim couples only. Muslims must contract their marriage under the Islamic Family Law (Federal Territories) Act of 1984, which prohibits marriage with non-Muslims. *Id.* § 10.2. HALSBURY'S LAWS OF MALAYSIA VOL. 14 163-64 (2006). *See also* Brief of Amicus Curiae on Behalf of the All Women's Action Society, Sisters in Islam, Women's Aid Organisation, Women's Centre for Change, and Women's Development Collective for *Lina Joy*, at para. 3.2; Julia E. Barry, Note, *Apostasy, Marriage, and Jurisdiction in Lina Joy: Where Was CEDAW?*, 41 N.Y.U. J. INT'L L. & POL. (2008).

111. *See, e.g.*, Administration of the Religion of Islam and the Malay Custom of Pahang Enactment of 1982 (amended 1989), § 185 ("Any Muslim who states that he has ceased to be a Muslim, whether orally, in writing or in any other manner whatsoever, commits an offence, and on conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and to whipping of not more than six strokes.") Similar penalties are specified in the states of Perak and Terengganu. *See* Jaclyn Ling-Chien Neo, *Competing Imperatives: Conflicts and Convergences in State and Islam in Pluralist Malaysia*, 4 OXFORD J.L. & RELIGION 1, 16-17 (2015) [hereinafter Neo, *Competing Imperatives*]; Mohammad Azam Mohamed Adil, *Law of Apostasy and Freedom of Religion in Malaysia* 2 ASIAN J. OF COMP. L. 29 (2007).

112. One case illustrating this is that of Revathi, an Indian Malaysian woman who converted to Hinduism. Following her application to renounce Islam, the Malacca Sharia Court ordered that she be detained for 100 days at an Islamic rehabilitation center. *See* Claudia Theophilus, *Malaysian Family Split by Faith,* AL JAZEERA (May 7, 2007), http://www.aljazeera.com/news/asia-pacific/2007/05/200852513390760277.html. Apostates in Sabah and Kelantan can be detained for up to thirty-six months. *See* Sabah Islamic Criminal Offences Enactment 1995, § 63(1); Kelantan Council for Muslim Religion and Malay Custom Enactment 1994, § 102(3). In Malacca, Sharia courts can order mandatory detention for rehabilitation as a precursor to conviction. *See* Melaka Sharia Offences Enactment 1991, § 66. In Negeri Sembilan, those who wish to leave the faith are not detained but are required to undergo a mandatory counseling session to urge the potential apostate to reconsider the change of religion. Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, § 119(4)(b).

Islam without the Sharia court's permission.[113] The judge ruled that Lina Joy's conversion from Islam was a matter for the religious court, not the civil court, to decide. The upshot of this approach, as High Court Judge Faiza Thamby Chik declared, is that "[a] Malay…remains in Islamic faith until his or her dying days."[114]

In 2007, the Federal Court dismissed Lina Joy's appeal.[115] According to the majority, "freedom of religion under Article 11 of the Federal Constitution requires [the individual] to comply with the practices or law of the Islamic religion in particular with regard to converting out of the religion."[116] In brief, the majority's decision prevents a Muslim from leaving Islam without obtaining authorization from the Sharia court.

According to the Federal Court majority, matters relating to apostasy are exclusively within the domain of the religious courts.[117] Since the Sharia courts "had expressly been granted jurisdiction to adjudge matters pertaining to embracing Islam," the majority stated that "it is also impliedly required to have jurisdiction to adjudge on matters pertaining to a Muslim converting out of Islam or being an apostate."[118] The ruling affirmed the Court's approach in an earlier decision,[119] in which it held that the Sharia court's jurisdiction over conversion *out* of Islam could be implied from state laws on conversion *to* Islam.[120] According to the *Lina Joy* majority, it was "evident" that "apostasy is a matter that relates to Islamic Law" and, as such, "lies within the jurisdiction of the Sharia Court."[121] The Court justified its deferral of jurisdiction to the Sharia courts on the grounds that, "by reason of Article 121(1A) of the Federal Constitution, the civil courts cannot interfere in this matter."[122]

In a robust dissent, Justice Richard Malanjum emphasized that when "constitutional issues are involved especially on questions 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 Article

113. Lina Joy v. Majlis Agama Islam Wilayah & Anor [2004] 2 MALAYAN L.J. 119, 142 (H.C.).

114. *Id.* at 143 [58]. *See* FED. CONST. (MALAY.), art. 160(2) ("'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs . . ."). The Court of Appeal, with one dissenting opinion, found the National Registry Department's requirement that Lina Joy obtain a certificate of apostasy from the Sharia Court to be reasonable. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan (2005) 6 MALAYAN L.J. 193, 208.

115. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, (2007) 4 MALAYAN L.J. 585.

116. *Id.* at [14].

117. *Id.* at [10]-[14].

118. *Id.* at [15.5].

119. Soon Singh v. Pertubuhan Kebajikan Islam Malaysia Kedah, (1999) 2 MALAYAN L.J. 489, at 501-02.

120. *Id.* at 501-02.

121. *Lina Joy*, (2007) 4 MALAYAN L.J. 585, at [16].

122. *Id.* Article 121(1A) provides that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

121(1A)."[123] Article 121(1A) "only protects the Syariah Court in matters within their jurisdiction, which does not include the interpretation of the provisions of the Constitution."[124] In contrast to the majority opinion, which made no mention of the impracticability of obtaining permission from the Sharia Court to convert out of Islam, Justice Malanjum recognized that it was unreasonable "to expect the appellant to apply for a certificate of apostasy when to do so would likely expose her to a range of offences under the Islamic law . . . ."[125] Emphasizing that the civil courts have a duty not to "abdicate their constitutional function" to adjudicate matters involving fundamental constitutional rights,[126] the dissent concluded that laws "criminalizing apostasy or limiting the scope of the provisions of the fundamental liberties as enshrined in the Constitution are constitutional issues in nature which only the civil courts have jurisdiction to determine."[127]

The 2016 case of Rooney Rebit signaled some judicial willingness to move away from the *Lina Joy* majority approach—at least on the part of the High Court of Sabah and Sarawak.[128] The applicant had been raised in an indigenous Bidayuh Christian community but had been converted to Islam as a child by his parents. He now wished to have the religious status of Islam removed from his identity card. In a decision hailed as a welcome defense of religious freedom by rights champions, including progressive Muslim associations,[129] the High Court of Sabah and Sarawak held that the exercise of the constitutional right to religious freedom is outside the bounds of the Sharia Court's jurisdiction,[130] declaring that the "right to choose his religion lies with the applicant himself and not the religious body."

The High Court's vigorous vindication of an individual's freedom of conscience, however, was not echoed by the apex appellate courts. In 2018, the Federal Court dismissed an appeal brought by four applicants wishing to leave Islam, ruling that matters of apostasy are within the jurisdiction of the Sharia Courts.[131] The Court of Appeal had similarly rejected the

123. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan (2007) 4 MALAYAN L.J. 585, at 631[85] (Fed. Ct. of Malay.) (Malanjum, J., dissenting).

124. *Id.*

125. *Id.* at 632.

126. *Id.* at 631.

127. *Id.*

128. *Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak and Others*, [2016] 6 CURRENT L.J. 562.

129. *See, e.g.*, Press Release, Sisters in Islam, Sarawak High Court judgment defends Freedom of Religion in Malaysia (Mar. 28, 2016), http://www.sistersinislam.org.my/news.php?item.1409.40.

130. *Azam, supra* note 128 at para. 38. The National Registration Department later withdrew its appeal against the High Court's decision. *See Najib gave his word to drop apostasy case against S'wakian, says Adenan,* MALAYSIAKINI (May 2, 2016), https://perma.cc/N3U3-YYTA.

131. Sulok Tawie, *Federal Court defers to Shariah courts in Sarawak apostasy cases*, (Feb. 27, 2018), https://www.malaymail.com/s/1586381/federal-court-defers-to-shariah-courts-in-sarawak-apostasy-cases#T0oU16GPfv0fDdUQ.99.

applicant's appeal, explicitly affirming the approach taken by the *Lina Joy* majority, holding that the authorities "had consistently held matters of apostasy are within the jurisdiction of the Sharia Courts and not the civil courts."[132]

Plus ça change, plus c'est la même chose.[133] The stark conclusion articulated by the Federal Court majority in *Lina Joy* remains the reality for those seeking to leave Islam in Malaysia: "one cannot renounce or embrace a religion at one's own whims and fancies."[134] By choosing to defer apostasy matters to the Sharia Court's exclusive jurisdiction, the civil courts have not only expanded the jurisdiction of the religious courts, but have also granted religious authorities the exclusive authority to act as gatekeepers with the power to control an individual's exit from the religious community.

Another major area of jurisdictional tension between the civil and religious courts involves disputes over child conversion and custody.[135] These cases arise when one parent (usually the father) converts to Islam, and then applies to the Sharia courts to convert and obtain custody of the children, without the knowledge of the other parent. The non-Muslim parent is left unable to contest the conversion or custody orders in the religious court, as non-Muslims have no standing to appear before the Sharia courts.

Consider, for example, Indira Gandhi's litigation saga. Indira Gandhi and her husband were both Hindus when they married under the general civil law. In 2009, Indira Gandhi's husband converted to Islam. He obtained certificates of conversion for all three of their children from the Registrar of Muslim converts,[136] registering the children as Muslims with the state's Islamic agency, without Indira Gandhi's knowledge or consent. He then proceeded to apply and obtain a custody order for all the children from the Sharia Court. Indira Gandhi brought her case to the civil courts challenging the unilateral conversion of the children without her consent and requesting custody.

In 2013, the High Court quashed the certificate of conversions issued by the registrar for the three children in a bold decision in which it held that

132. *Jenny bt Peter @ Nur Muzdhalifah Abdullah v Director of Jabatan Agama Islam Sarawak & Ors* [2017] 1 MALAYAN L.J. 340 at para. [24].

133. A French expression loosely translated as: "The more things change, the more they stay the same."

134. *Lina Joy*, (2007) 4 MALAYAN L.J. 585 at [14].

135. *See, e.g.*, Viran a/l/ Nagapan v. Deepa a/p Subramaniam, Civil Appeal No 02(f)-4-01-2015 (2016) (Federal Court); Shamala Sathiyaseelan v. Jeyaganesh Mogarajah (2004) 2 MALAYAN L.J. 241 (H.C.) [hereinafter *Shamala*]; Subashini Rajasingam v. Saravanan Thangothoray (2008) 2 MALAYAN L.J. 147 (F.C.) [hereinafter *Subashini*]; Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak (2013) 5 MALAYAN L.J. 552 (H.C.).

136. The Registrar of Muslim converts is known as the *Pendaftar Muallaf*.

the unilateral conversion of a child was unconstitutional.[137] In a separate decision, the High Court judge also granted Indira Gandhi custody of children.[138]

The Court of Appeal overruled the decision of the High Court in 2015, ruling that the civil courts had no jurisdiction over the conversion of Indira Gandhi's children to Islam.[139] The majority was explicit about its position: "It is beyond the shadow of a doubt [that] the issue of whether a person is a Muslim or not is a matter falling under the exclusive jurisdiction of the Syariah Court."[140]

In 2018, the Federal Court overturned the Court of Appeal, voiding the children's certificates of conversion to Islam that had been issued without Indira Gandhi's consent.[141] In a landmark decision for Malaysia's apex court, the Court unanimously concluded that the consent of both parents is required before such certificates of conversion can be issued.[142] The Federal Court employed a "purposive" interpretation of Article 12(4) to find that the word "parent" should be read as guaranteeing both parents equal rights in the children's religious upbringings. [143]

The Federal Court's clarification of the respective jurisdiction of the civil and Sharia courts is laudably robust. It explicitly affirmed that the civil courts have jurisdiction over matters relating to the Islamic law when constitutional issues are involved.[144] As the Court declared, "the effect of Article 121(1A) is not to oust the jurisdiction of civil courts as soon as a subject matter relates to the Islamic religion."[145]

However, it is important not to overstate *Indira Gandhi*'s impact. The Court's opinion exhibited a cautious approach toward the right to religious freedom, as demonstrated by its repeated emphasis that the case at hand did not involve the determination of the status of Muslim converts or questions of Islamic personal law.[146] The Court steered clear of the contentious matter of apostasy, taking pains to distinguish the case from *Lina Joy*.[147] It framed

137. Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak 5 MALAYAN L.J. 552 (2013) [hereinafter *Indira Gandhi* (HC)].

138. Indira Gandhi v. Patmanathan a/l Krishnan, 7 MALAYAN L.J. 153 (2015) [hereinafter *Indira Gandhi (H.C.) (No.2)*].

139. Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho [2016] 4 MALAYAN L.J. 455 [hereinafter *Indira Gandhi* (CA)].

140. *Id.* at para. 33.

141. *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors.* [2018] 1 MALAYAN L.J. 545 (FC) [hereinafter *Indira Gandhi* (FC)].

142. *Id.* at 600-06.

143. *Id.* at para. 181. FED. CONST. (MALAY.) art. 12(4) ("[T]he religion of a person under the age of eighteen years shall be decided by his parent or guardian"). *Indira Gandhi* (FC), *supra* note 141, at paras. 150-80.

144. *Id.* at paras. 92-98.

145. *Id.* at para. 104.

146. *Id.* at para. 108.

147. *Id.* at paras. 101-108.

the issue as concerned instead with "the more prosaic questions" of the "legality and constitutionality of administrative action" taken by the registrar of Muslim converts in exercising a statutory function as a public authority.[148] As Jaclyn Neo observes: "The jurisdictional imbroglio continues."[149]

* * *

Cases involving apostasy and the unilateral conversion of children illustrate the jurisdictional fault line that runs through the Malaysian legal system. Individuals caught between the civil and Sharia courts are left in effect without access to a legal forum to adjudicate their issues. This jurisdictional gap has largely arisen because of the civil courts' willingness to cede wide jurisdictional authority to the Sharia courts. As H.P. Lee notes, these jurisdictional complications are "underscored by the readiness of the superior civil courts to abandon the field whenever the jurisdiction of the Syariah Court is claimed."[150]

Proponents of an expanded role for Islam in the public order often justify this deference to the religious courts by relying on Article 121(1A).[151] On this view, this constitutional clause inserted in 1988 restricts the civil courts from exercising traditional supervisory review over the Sharia courts, to keep the state religious courts from acting outside their constitutional boundaries.

This claim, however, is hardly obvious. All that the text of Article 121(1A) explicitly provides for is that civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts." This seems obvious when it involves issues that are properly within the religious courts' jurisdiction. So, for example, if two Muslim litigants resolved a personal law matter in the Sharia courts—such as an inheritance claim under Islamic law—the civil courts should not intervene to overturn a religious court's decision made according to Islamic law principles on a matter specified as within the jurisdiction of the religious courts. Under the Federal Constitution, Sharia courts have jurisdiction "only over persons professing the religion of Islam" and in respect only of matters relating to the "Islamic law and personal and family law of persons professing the religion of Islam."[152]

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148. *Id.* at para. 102.

149. Jaclyn Neo, *Return of Judicial Power: Religious Freedom and the Tussle over Jurisdictional Boundaries in Malaysia*, INT'L J. CONST. L. BLOG, Mar. 15, 2018, http://www.iconnectblog.com/2018/03/return-of-judicial-power-religious-freedom-and-the-tussle-over-jurisdictional-boundaries-in-malaysia-i-connect-column/.

150. H.P. LEE, CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA 143 (2017).

151. FED. CONST. (MALAY.) art. 121(1A) (stating that the civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts").

152. FED. CONST. (MALAY.), NINTH SCHEDULE, LIST II, art. 1 (specifying that states have jurisdiction over "Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce,

Issues involving apostasy or child conversion disputes are different. These matters are not expressly within the jurisdiction of the Sharia courts nor do they involve persons professing to be Muslim. Crucially, these types of cases implicate constitutional fundamental rights, most prominently the guarantees of religious freedom and equal protection under the Malaysian Constitution. Article 121(1A) does not prevent the civil courts' jurisdiction over areas when fundamental rights are at stake; doing so is simply an abdication of judicial responsibility.[153]

Cases like *Lina Joy* and *Indira Gandhi* have become focal points in an ideologically polarized national debate over religion's place in Malaysia's public order. The Federal Court's *Indira Gandhi* decision is a welcome affirmation that Article 121(1A) does not constitute a "blanket exclusion" of the civil courts' jurisdiction whenever a matter relating to Islam arises when constitutional rights are involved.[154] Yet it is indisputable that the civil courts' jurisdictional deference over the last two decades has vastly expanded the reach of the Sharia courts. It should also not escape notice that the Federal Court sidestepped entirely the issue of apostasy and religious freedom by distinguishing *Indira Gandhi* from *Lina Joy*. The Court's avoidance of this issue leaves the determination of whether an individual is able to convert out of Islam a matter solely for the religious courts to determine. For many years, the civil courts have exhibited a general willingness to grant the Sharia courts a wide berth of authority—a pattern which has contributed to the state religious courts being perceived as equal in status to the federal civil courts. Any reversal of this trend will take some time to be felt.

ii. Judicial Islamization of the Civil Courts

The secular courts' discourse has also shown a move toward prioritizing Islam—a process I identify as the *judicial Islamization* of the civil courts. Expansive interpretation of the Article 3(1) Islamic constitutional clause has led to judicial endorsement of Islam's supremacy over other constitutional principles. Proponents of this approach claim that Article 3(1) gives rise to

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dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; . . . creation and punishment of offences by persons professing the religion of Islam against precepts of that religion…; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph"). *See* Shanmuga Kanasalingam, *Article 121(1A)-what does it really mean?*, Loyar Burok, (Dec. 11, 2006), http://www.loyarburok.com/2007/03/14/article-1211a-of-the-malaysian-federal-constitution-what-does-it-really-mean/.

153. *See, e.g.*, Li-ann Thio, *Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution*, *in* CONSTITUTIONAL LANDMARKS IN MALAYSIA: THE FIRST 50 YEARS 197 (Andrew Harding & H.P. Lee eds., 2007); ANDREW HARDING, LAW, GOVERNMENT, AND THE CONSTITUTION IN MALAYSIA 136-37 (1996).

154. *Indira Gandhi* (FC) (2018), *supra* note 141, at para. 98.

an implication of Islam's primacy in the Malaysian constitutional order. In addition to broad interpretations of Article 3(1), judicial references to religious sources—such as Islamic texts and principles—have occasionally crept into the jurisprudence of the civil courts.

Perhaps the most marked effect of judicial Islamization in the civil courts has been to endorse Islam's position under Article 3(1) as an interpretive lens through which to view the rest of the Constitution. This prioritization of Islam's constitutional status is often used, in turn, to justify a restrictive interpretation of constitutional guarantees of religious freedom and other fundamental rights.

One recent example that illustrates the judicial expansion of Islam's position under Article 3(1) is the "Allah" case,[155] which involved a government prohibition against non-Muslim publications using the word "Allah." Christians in Malaysia have conventionally used the term "Allah" to refer to God in Malay-language Bibles, publications, sermons, and hymns.[156] In 2009, the Ministry of Home Affairs issued an order prohibiting the Catholic Church from using the term "Allah" in its the Malay language edition of its weekly newsletter, the *Herald*. The Catholic Church brought a constitutional challenge on the grounds that the prohibition violated the constitutional right to religious freedom as well as freedom of speech and expression.[157]

In 2013, the Malaysian Court of Appeal unanimously overturned a High Court decision,[158] upholding the prohibition on the use of "Allah" as constitutional. According to the bench of three Court of Appeal judges, the Catholic Church's constitutional right to religious liberty had not been infringed because the use of "the word or name 'Allah' is not an integral part of the faith and practice of Christianity."[159] The court agreed with the government that the usage of the term "Allah" by non-Muslim publications would "cause unnecessary confusion within the Islamic community" and "not [be] conducive to the peaceful and harmonious tempo of life in the country."[160]

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155. Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur (2013) MALAYAN L.J. 468 (Court of Appeal) [hereinafter *Allah* Case (CA)].

156. *See generally* Jaclyn L. Neo, *What's in a name? Malaysia's "Allah" controversy and the judicial intertwining of Islam with ethnic identity*, 12 INT'L J. CONST. L. 751 (2014).

157. FED. CONST. (MALAY.), art. 11(1) declares, "Every person has the right to profess and practise [*sic*] his religion, and, subject to Clause (4), to propagate it." FED. CONST. (MALAY.), art. 11(3) states, "Every religious group has the right—to manage its own religious affairs; to establish and maintain institutions for religious or charitable purposes; and to acquire and own property and hold and administer it in accordance with law."

158. *Allah* Case (CA) (2013) MALAYAN L.J. 468 (Court of Appeal), overruling Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor (2010) 2 MALAYAN L.J. 78 (High Court).

159. *Id.* at para. 51 (Mohamed Apandi Ali JCA). *See also* paras. 107-08 (Abdul Aziz Ab Rahim JCA), para. 140 (Mohd Zawawi JCA).

160. *Id.* at para. 53.

The Court of Appeal's reading of the Article 3(1) provision is highly expansionist of Islam's position.[161] Justice Mohamed Apandi Ali, for example, declared that the "purpose and intention" of the words "in peace and harmony" in Article 3(1) is "to protect the sanctity of Islam as the religion of the country and also to insulate against any threat faced or any possible and probable threat to the religion of Islam."[162] He also noted that "the most possible and probable threat to Islam, in the context of this country, is the propagation of other religions to the followers of Islam."[163] Justice Abdul Aziz Ab Rahim agreed, adding that Islam's status as the religion of the Federation "imposes certain obligations on the powers that be to promote and defend Islam as well [as] to protect its sanctity."[164] As such, the Court maintained that freedom of religion under Article 11(1), read together with the Article 3(1) declaration that "other religions may be practiced in peace and harmony" meant that "the welfare of an individual or group must yield to that of the community."[165] In 2014, the Federal Court rejected the Catholic Church's application for leave to appeal and later also dismissed an application to review its decision.[166]

The "Allah" case is emblematic of a general shift in civil courts' jurisprudence toward an expansionist interpretation of the Article 3(1) Islamic constitutional clause. A few other examples illustrate this phenomenon. Consider, for instance, the High Court's opinion in *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*.[167] Three Muslim schoolboys were expelled for wearing turbans to school in contravention of a state regulation prohibiting certain religious dress in schools. The High Court found the regulation prohibiting the wearing of the turbans (*serban*) unconstitutional because it infringed the right to religious freedom under Article 11(1). Strikingly, the High Court decision is not based on a robust reading of the religious freedom right but stems instead from a particular interpretation of Article 3(1) of the Constitution as establishing Islam's supreme position.[168] The High Court judge is explicit that Article 3(1) gives primacy to Islam over other religions:

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161. FED. CONST. (MALAY.), art. 3(1) ("Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.").

162. *Allah* Case (CA), *supra* note 155, at para. 33.

163. *Id.*

164. *Id.* at para. 104.

165. *Id.* at 495. Shortly after the Court of Appeal's decision, in 2014 the Islamic Religious Council of the Selangor state government raided the premises of the Bible Society of Malaysia and confiscated 320 Malay language Bibles.

166. Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors, 4 MALAYAN L.J. 765 (2014). *See also* Ida Lim & Shaun Tan, *Last nail in Catholic Church's "Allah" case as Federal Court again says no*, MALAY MAIL ONLINE, (Jan. 21, 2015), http://www.themalaymailonline.com/malaysia/article/last-nail-in-catholic-churchs-allah-case-as-federal-court-again-says-no.

167. Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi (2000) 5 MALAYAN L.J. 375.

168. Neo, *Competing Imperatives*, *supra* note 111, at 21.

> "Islam is the religion of the Federation, but other religions can be practised in peace and harmony," means that Islam is the dominant religion among the other religions that are professed in this country like Christianity, Buddhism, Hinduism and others. Islam is not of the same status as other religions; it does not sit shoulder to shoulder or stand at the same height. Islam sits at the top, it walks first…If this were not the case, Islam would not be the religion of the Federation but just one of the several religions practiced in the country and every person would be equally free to practice any religion he or she professes, no one better than the other.[169]

In several cases, this extensive reading of Article 3(1) has been used to justify restricting the Article 11(1) religious freedom guarantee.[170] Recall the *Lina Joy* apostasy case.[171] According to the High Court in that case: "Freedom of religion under art 11(1) must be read with art 3(1) which places Islam in a special position as the main and dominant religion" of the Malaysian Federation.[172] The High Court judge, Faiza Thamby Chik, maintained that Article 3(1) had "a far wider and meaningful purpose than a mere fixation of the official religion."[173] Accordingly, Lina Joy had interpreted the religious freedom right under Article 11(1) in a "limited and isolated manner" without due regard to other constitutional provisions relating to Islam.[174] In his view, religious liberty is necessarily restricted because of the "clear nexus" between the Article 3(1) Islamic clause and the Article 11(1) religious freedom guarantee.[175]

Echoes of this strand of reasoning are also evident in an earlier decision by the same High Court judge. In *Daud Mamat v. Majlis Agama Islam*,[176] Justice Faiza Thamby Chik held that to find that Article 11(1) included the right to profess and practice the religion of one's *choice* "would stretch the scope of [Article 11(1)] to ridiculous heights, and rebel against the canon of construction."[177]

The Federal Court majority in *Lina Joy* agreed with this reading of Islam's position in the Constitution. Writing for the majority, the Chief Justice stated:

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169. *Id.* at 375, 377 (translated from Malay by the author).

170. FED. CONST. (MALAY.), art. 3(1) ("Islam is the religion of the Federation …"); FED. CONST. (MALAY.), art. 11(1) ("Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it.").

171. Lina Joy v. Majlis Agama Islam Wilayah & Anor, (2004) 2 MALAYAN L.J. 119 (H.C.).

172. *Id.* at 142.

173. *Id.* at 127.

174. *Id.*

175. *Id.*

176. [2001] CURRENT L.J. 161.

177. *Id.* at 172.

> [W]ith regards to Islam…Article 11 cannot be construed or defined with such a wide meaning to the extent it annuls all laws that require a Muslim to perform an Islamic obligation or that restricts them from performing a matter that is prohibited by Islam or which prescribe the method of conducting a matter in relation to Islam. This is because the position of Islam in the Federal Constitution differs from the position of other religions…[O]nly Islam as a religion is mentioned by its name in the Federal Constitution i.e. "*as the religion of the Federation*"—article 3(1).[178]

The majority concluded: "If a person professes and practices Islam, it would definitely mean that he must comply with the Islamic law which has prescribed the way to embrace Islam and convert[] out of Islam."[179]

The overall tenor of these decisions has been to endorse Islam's supremacy in the Constitution at the expense of constitutionally guaranteed rights. Put another way, Article 3(1) is treated as an interpretive lens through which to read the rest of the Constitution, which, in turn, justifies curtailing constitutional rights to accommodate Islam's position.

What is striking is that these developments in Malaysian constitutional adjudication have not been confined to cases involving the boundaries between personal law and general civil law, like in the jurisdictional deference cases discussed earlier. The civil courts' expansion of Islam's position has not been limited only to issues involving individuals who are regulated by Islamic personal law or religious freedom cases. As the *Allah* case illustrates, this approach impacts non-Muslims and fundamental rights like freedom of expression.

The 2015 case of *ZI Publications v. Kerajaan Negeri Selangor*[180] offers an example involving a challenge based on freedom of expression. In 2012, the Islamic Religious Department of the state of Selangor raided the offices of ZI Publications, a publishing company, and confiscated 180 copies of the book "Allah, Love, and Liberty" by Canadian author Irshad Manji. The director of ZI Publications, Ezra Zaid, was charged under the state's Sharia legislation that made it a criminal offense to publish, distribute, or possess the books that the state religious authority had deemed "contrary to Islamic law."[181] The publisher brought a constitutional challenge against the state law arguing infringement of freedom of expression.

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178. *Lina Joy*, (2007) 4 MALAYAN L.J. 585 at [17.4] (emphasis in original).

179. *Id.* at [17.2].

180. ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor (2016) 1 MALAYAN L.J. 153 [hereinafter *ZI Publications*].

181. "Any person who—prints, publishes, produces, records, or disseminates in any manner any book or document or any other form of record containing anything which is contrary to Islamic Law; or has in his possession any such book, document or other form of record for sale or for the purpose of otherwise disseminating it, shall be guilty of an offence and shall be liable to a fine not exceeding

Unanimously dismissing the challenge, the Federal Court held that the constitutional freedom of expression guarantee "must be read in particular with arts 3(1), 11, 74(2) and 121," since "Article 3(1) declares Islam as the religion of the Federation."[182] Ruling that there had been no infringement of freedom of expression, the Court concluded that "a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament, but also to the state laws of religious nature enacted by Legislature of a state."[183] The Court's hortatory declaration is in service of an expansionist interpretation of Article 3(1).

In addition to expansive interpretations of the Islamic constitutional clause, the use of Islamic texts and legal scholarship has crept into the rhetoric of civil court judges.[184] That these religious sources are referenced in judicial opinions of the secular *civil* courts is especially noteworthy. While Islamic sources may be regarded as properly within the domain of the Sharia court judges, who are tasked with administering Islamic law, civil court judges are responsible for applying the general, secular law.

Consider, for example, the High Court's opinion in the case of *Shamala*.[185] In interpreting a civil statutory provision that provides the spouse of someone who converts to Islam with a ground to elect for divorce, the civil court judge cited a verse from the Qur'an regarding polygamy:

> [T]he defendant husband, now a Muslim though [he] cannot file a petition for divorce against his plaintiff Hindu wife, can take another wife—a Muslim wife because the defendant husband being a Muslim is now practising a polygamous marriage…The word used in the Section is 'may', i.e. to maintain the status of the civil marriage (Hindu marriage) if the unconverted wife wishes to remain the wife of her converted husband although the converted husband can take another wife if he can do justice as the Holy Quran *Al-Nisa* (IV) Ayat 3 states and which reads, "if ye fear that ye shall not Be able to deal justly With the orphans, Marry women of your choice, Two, Three, or Four; But if ye fear that ye shall not Be able to deal justly (with them), Then only one or two (a captive)."[186]

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three thousand ringgit or to imprisonment for a term not exceeding two years or both." Syariah Criminal Offences (Selangor) Enactment 1995, § 16.

182. *ZI Publications*, *supra* note 180, at para. 17.

183. *Id.* at para. 31.

184. *See* Amanda Whiting, *Desecularising Malaysian Law?*, *in* EXAMINING PRACTICE, INTERROGATING THEORY: COMPARATIVE LEGAL STUDIES IN ASIA 229, 249-52 (Sarah Biddulph & Penelope Nicholson eds., 2008).

185. Shamala Sathiyaseelan v. Jeyaganesh Mogarajah (2004) 2 MALAYAN L.J. 241 (H.C.).

186. *Id.* at [13].

Such Islamic rhetorical references were also on display in *Subashini*.[187] This case, like *Indira Gandhi*, involved the issue on the unilateral conversion of children by a spouse who has converted to Islam. Here, Subashini sought an injunction to restrain her husband from applying to the religious courts for the conversion of their children and dissolution of the marriage. Rebuking Subashini as "brazen" for attempting to "shackle" the Sharia court through an injunction,[188] Court of Appeal Justice Suriyadi went on to state that:

> Surely that Syariah judge must be more than equipped to be given the confidence to deal with subject matters promulgated by Parliament. [The Sharia Court judge's] position would squarely fall under these Quranic revelations: "And We have set you on a road of Our Commandment (a Syariah, or a Sacred Law of Our Commandment, *Syaria'tin min al-amr*); so follow it, and follow not the whims of those who know not (45:18) . . . ."[189]

The Islamization of the civil courts' discourse is additionally fraught because of the intimate connection between religion and ethnicity in Malaysia. In Malaysia's socio-political context, Islam's position is viewed as intertwined with the protection of the Malays' special position. Cases involving religious conversion—particularly apostasy—bring these tensions to the fore: they are complicated by the perceived inextricability of religious and ethnic identity and resonate with those who fear the Malay-Muslim majority losing its dominant position. These tensions are exacerbated by the use of judicial rhetoric that appears primarily concerned with the interests of the religious majority. In *Lina Joy*, for example, the High Court declared that "[a] Malay . . . remains in Islamic faith until his or her dying days,"[190] while a majority in the Court of Appeal asserted that "[r]enunciation of Islam is generally regarded by the Muslim community as a very grave matter."[191] Such rhetoric serves to legitimize the protection of the interests of religious majority and has a polarizing effect in a society with religious and ethnic divisions.

187. *Subashini*, (2008) 2 MALAYAN L.J. 147.

188. *Id.* at [57], [59].

189. *Id.*

190. *Id.* at 143 [58]. *See* FED. CONST. (MALAY.), art. 160(2) ("'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs…").

191. *Lina Joy*, (2005) 5 ALL MALAY. REP. 663, at 690[29]. The dissenting judges in the Court of Appeal and Federal Court, both non-Muslims, ruled in favor of allowing Lina Joy to convert out of Islam.

IV. THEORIZING STEALTH THEOCRACY

This Part describes the features of the stealth theocracy phenomenon and its global ascendency. It begins in Section A by outlining several main characteristics of stealth theocracy. Section B broadens the frame to show how the phenomenon, in various forms, is of global significance. I provide examples drawn from Indonesia, Sri Lanka, and Turkey to illustrate manifestations of the phenomenon across comparative contexts, contrasting these experiences with the use of formal amendment mechanisms in Bangladesh.

A. Features of Stealth Theocracy

One primary characteristic of stealth theocracy is it involves a fundamental constitutional change in the state's character toward a more theocratic constitutional order. To be clear, my use of the term "theocracy" does not refer to a pure, or an absolute, theocracy, in which religious and political authority are entirely conflated.[192] My focus is on constitutional theocracy: a system of governance based on the principle of separation of power in which there exists judicial review and a written constitution, which accords state endorsement to a particular religion.[193] As Hirschl describes, theocratic constitutions adhere to principles of modern constitutionalism, while enshrining religion as a main source of law and enabling a nexus of religious bodies and tribunals with jurisdictional autonomy.[194]

In the contexts I discuss, the constitution-making process typically involved some form of constitutional compromise resulting in accommodation for the place of religion within a generally secular constitutional arrangement. Political and legal developments over time, however, have resulted in a flip in the prioritization of secular norms over religious principles. Manifestations of the state's shift in the direction of theocratic constitutionalism include increased reliance on religious norms as a basis for imposing legal obligations and an expanded role for religious authorities within the state.

Consider, for example, the substantial expansion of religious principles as a source of law and the establishment of a network of religious tribunals—two aspects of Hirschl's definition of a constitutional theocracy—in contemporary Malaysia. Unlike many explicitly theocratic

192. *See* HIRSCHL, *supra* note 1, at 2. Hirschl offers as an example of a "pure theocracy" the Islamic state envisioned by the Prophet Muhammad in the early seventh century. As Hader al-Hamoudi notes, a "pure theocracy" would also presumably include regimes like the Taliban, which do not separate political and religious authority. Haider Ala Hamoudi, Book Review, 49 OSGOODE HALL L. J. 151, 153 (2011).

193. HIRSCHL, *supra* note 1, at 3.

194. *Id.*

constitutions, the Malaysian Constitution does not provide for Islam as "a" or "the" source of law,[195] which underscores that "Malaysia was not envisaged or designed as a theocracy where political and religious leadership is fused."[196] Those involved in drafting the Article 3(1) Islamic constitutional provision were clearly in agreement that it was not meant to detract from the nation's secular foundations.[197]

As discussed in Part III, over time there has been a distinct shift away from the original historical understanding of Article 3(1) toward a more theocratic constitution. Religious courts, which have been ceded wide jurisdictional autonomy, have come to be perceived as equal in status to the federal civil courts, even though Sharia courts are constitutionally designated as a matter of state law.[198] Nor are these developments confined to religious law being considered a limited or special source of law carved out of the general legal system. Although Islamic personal law is meant to apply only to "persons professing the religion of Islam,"[199] the civil courts' expansive interpretations of Islam's position have increasingly implicated the constitutionally guaranteed rights of non-Muslims as well as Muslims.[200] The past three decades in Malaysia have witnessed a movement "to reverse the priority of secular (non-Islamic) over Islamic norms."[201] Such has been the ascendency of the Islamization movement that Farish Noor has observed: "The idea of a secular state is dead in Malaysia. An Islamic society is already on the cards. The question is what kind of Islamic society this will be."[202]

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195. *But see, e.g.*, CONST. OF THE ISLAMIC REP. OF IRAN Dec. 3, 1979, arts. 1 and 2; BASIC LAW OF SAUDI ARABIA [CONSTITUTION] Jan. 31, 1992, art. 1. *See also* Lombardi, *supra* note 10; Ahmed & Gouda, *supra* note 10; Brown, *supra* note 10.

196. Neo, *Competing Imperatives*, *supra* note 111, at 3.

197. FED. CONST. (MALAY), art. 3(1) ("Islam is the religion of the Federation but other religions may be practiced in peace and harmony"). *See* Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia,* 37(2) J. SOUTHEAST ASIAN STUD. 249 (2006). *See also* Andrew Harding, *Keris, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia*, 6 SING. J. INT'L & COMP. L. (2002). *See supra* Part II(A).

198. FED. CONST. OF MALAY. Aug. 27, 1957, Ninth Schedule, List II, art. 1. Malaysia is a federation comprising thirteen state governments and three federal territories. The state government is responsible for Islamic laws, including the personal and family law of Muslims and state Sharia courts have limited jurisdiction over these matters under state Islamic law. Judges to the Sharia courts are appointed by the *Yang di-Pertuan Agong* (the King) on the advice of the minister after consultation with the Religious Council.

199. *Id.*

200. *See supra* Part III(D). *See, e.g.*, *Allah* Case, *supra* note 155 (the Court of Appeal affirmation of a government ban on the use of the term "Allah" by non-Muslim publications implicates the constitutional guarantee of freedom of expression to non-Muslims); *ZI Publications*, *supra* note 180 (the Federal Court's decision upholding a state Sharia law criminalizing the publication, distribution, and possession of any books deemed "contrary to Islamic law" implicates the right to freedom of expression of Muslims and non-Muslims).

201. Neo, *Competing Imperatives*, *supra* note 111, at 18.

202. Thomas Fuller, *Malaysia's secular vision vs. "writing on the wall" - Asia - Pacific - International Herald Tribune*, N.Y. TIMES, August 28, 2006, http://www.nytimes.com/2006/08/28/world/asia/28iht-letter.2619095.html (last visited Apr. 7, 2017).

The second feature concerns the element of constitutional change by stealth. We are used to thinking of constitutional theocracy in formal terms, but theocratic constitutionalism can also emerge in informal terms. The conventional account of the birth of a constitutional theocracy calls to mind a revolutionary origin story connected to the constitutionalization of religion. Stealth theocracy, however, concerns a more gradual, creeping transformation of a constitutional order. Unlike the "rapid verbal inflation of Islamic provisions" that Nathan Brown describes with regard to the drafting of the Arab world constitutions,[203] the ascendency of religion in Malaysia—as well as in Indonesia, Sri Lanka, and Turkey—has not been driven primarily by any explicit textual amendment to their constitutions. The shift toward theocratic constitutionalism in these contexts has occurred through the politicization or judicialization of religion in an incremental but nonetheless transformative manner.

Stealth theocracy arises when the modification to the constitution's secular or religious character is obscured under the appearance of neutral legal mechanisms that appear unrelated to religious questions. For example, Malaysian civil courts commonly cite jurisdictional grounds to refuse adjudicating certain controversial matters, like apostasy or disputes involving the conversion of children to Islam. The civil courts' reliance on seemingly neutral doctrines like jurisdictional competence to delegate key matters to the Sharia courts has extensively expanded the religious courts' scope of power. Constitutional modification has occurred surreptitiously under the pretext of either institutional deference or interpretation by political and judicial actors, even though amendment is a normal—even ubiquitous—mechanism of constitutional change in the Malaysian political system.

The stealth aspect of the phenomenon is further complicated under conditions of ethnic pluralism, where religion has a strong connection with ethnic identity. In societies with religious, ethnic, and political divisions, religious nationalism adds a further dimension to the phenomenon of theocratic constitutionalism by stealth. In circumstances of growing polarization along religious and ethnic lines, religion becomes a powerful force for political and social mobilization.[204]

To wit, the process of Islamization in Malaysia was driven, at least initially, in large part by competition between political parties for the Malay-Muslim vote.[205] In attempting to maintain its political dominance, UMNO competed with PAS, an opposition Islamic party, by perpetuating a discourse linking Islam's position to the protection of the Malay majority's

203. Brown, *supra* note 10, at 289.

204. DIAN A.H. SHAH, CONSTITUTIONS, RELIGION AND POLITICS IN ASIA: INDONESIA, MALAYSIA AND SRI LANKA 3 (2017).

205. JOSEPH CHINYONG LIOW, RELIGION AND NATIONALISM IN SOUTHEAST ASIA 150 (2016).

dominant position.[206] Political actors have deliberately endorsed a narrative of Malay-Islamic primacy in political practice, yet have generally shied away from resolving contentious religious questions through legislation or constitutional amendment.[207] By leaving these hotly contested issues to the judiciary to resolve, under the guise of institutional deference, politicians have been able to deflect much of the public attention that overt legislative attempts would be likely to attract.[208] But what seems clear is that the political actors' self-conscious efforts to escalate Islamist discourse fueled the impetus for Islam's elevation in public discourse. This has seeped in turn into the legal sphere, resulting in the courts assuming a central role in determining fundamental questions on the state's religious character.

Under conditions of increasing polarization between majority and minority groups along religious lines, a comparative perspective suggests that the rise of religiosity has a strong relationship with the ascendency of illiberalism fueled by ethno-religious nationalism. In Malaysia, the government's position toward Islam reflects its political calculations in relation to the majority Malay-Muslim group as well as its increasing tendency toward illiberalism. We see a similar dynamic at play in other contexts; for instance, in the rising influence of Islamic conservative groups in the political discourse of Indonesia, the world's largest Muslim-majority country.[209] We see it also in Sri Lanka, with the political actors' majority-centric approach toward the religious sensitivities of the Sinhalese-Buddhist majority.[210] In societies polarized along ethnic as well as religious lines,

206. SHAH, *supra* note 204, at 214.

207. Consider, for example, the private member's bill brought by the leader of the Islamist opposition party PAS in 2016, which proposes to amend the Syariah Courts (Criminal Jurisdiction) Act of 1965. The bill, which has been the subject of heated public outcry, seeks to increase the Sharia courts' current maximum sentencing limits to empower the religious courts to impose imprisonment of up to thirty years, fines up to RM 100,000 ($23,270 approx.), and whipping of up to 100 strokes. The *Barisan Nasional* government has deferred parliamentary debate of the controversial bill on several occasions. Ashley Tang, *RUU355 reappears on Parliament order paper*, THE STAR ONLINE, Jul. 24, 2017, http://www.thestar.com.my/news/nation/2017/07/24/ruu355-reappears-on-parliament-order-paper/ (last visited Jul. 30, 2017); *see also* Martin Carvalho, Rahimi Rahim, Loshana K. Shagar, Akil Yunus, and D. Kanyakumari, *Debate on RUU355 postponed again*, THE STAR ONLINE, Aug. 11, 2017, http://www.thestar.com.my/news/nation/2017/08/11/debate-on-ruu355-postponed-again-bill-deferred-to-next-sitting-in-october/ (last visited Aug. 12, 2017); Aiezat Fadzell, *Tabling of four bills postponed to next Dewan Rakyat meeting*, THE SUN DAILY, Aug. 10, 2017, http://www.thesundaily.my/news/2017/08/10/tabling-four-bills-postponed-next-dewan-rakyat-meeting (last visited Aug. 12, 2017).

208. In August 2017, the Malaysian Government withdrew, for the second time, a proposed bill aimed at prohibiting the unilateral conversion of children by one parent. Aiezat Fadzell, *Bill on unilateral conversion of children withdrawn by govt again*, THE SUN DAILY (Aug. 7, 2017), https://perma.cc/CPD9-D2R5. The issue was ultimately resolved by the Federal Court in its *Indira Gandhi* decision in January 2018. *See Indira Gandhi* (FC), *supra* note 141.

209. *See* Otto & Rachman, *Islamic Conservatives Boost Candidate's Comeback in Indonesia Presidential Race*, WALL ST. J. (ONLINE) (April 11, 2018); *see supra* note 2. *See infra* Part IV(B)(i).

210. *See* SHAH, *supra* note 204, at 205, 227-35. *See infra* Part IV(B)(ii).

religion is sometimes be used as an insidious means of signaling support for preserving the dominant majority's position within the state.

The third feature relates to the role of the courts as key forces in the expansion of religion in the constitutional order. Ran Hirschl argues that judicial institutions are "guardians of secularism" that act to contain the spread of theocratic principles in constitutional theocracies.[211] Strikingly, Hirschl offers Malaysia as a "secularizing" example of the judicial response to growing Islamism,[212] arguing that the Malaysian Federal Court has acted to "block attempts to expand the ambit of Sharia law."[213] Yet even the cases that Hirschl himself uses illustrate the Court's inconsistent approach. Although the Federal Court has occasionally asserted its interpretive authority in cases involving fairly straightforward matters of inheritance and distribution of marital assets like the ones Hirschl discusses,[214] it has refused to exercise jurisdiction over more contentious issues—as apostasy cases like *Lina Joy* illustrate—when fundamental constitutional rights are at stake.

Contrary to Hirschl's claim, courts in Malaysia have not served as bulwarks against Islamization; if anything, they have contributed to the rise of religion in the constitutional order. Civil courts—although constitutionally designated to apply the general law of the land—have contributed to Islam's ascendency by ceding broad jurisdiction to the Sharia courts and endorsing a judicially transformative reinterpretation of the Islamic constitutional clause. The pattern emerging from the jurisprudence of the higher appellate courts over recent decades has been of increasing deference to state Sharia courts and religious authorities.[215]

One of my central claims is that courts have played a key role in the ascendency of religion in constitutional settings susceptible to such elevation. To be sure, part of the reason for the rise of religiosity in Malaysia has to do with the politicization of Islam by political parties competing for the Malay-Muslim vote. And courts have become catalysts for religious contestation undoubtedly in part because of the willingness of the political branches to push contentious religious issues to the judiciary. Yet political forces are only part of the story.

Ultimately, the narrative must account for the role of the courts. In countries where religion has been formally or symbolically accommodated as a means of constitutional compromise over the place of religion—from Malaysia and Indonesia to Sri Lanka—courts have come to possess constitutive power in matters relating to religion and the constitution.

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211. HIRSCHL, *supra* note 1, at 102.

212. *Id.* at 127–39.

213. *Id.* at 136.

214. *See id.* at 132-36.

215. *See infra* Part III(D) (discussing jurisdictional deference to the religious courts and the judicial Islamization of the civil courts).

Citizens have come to view courts as sites of not only legal conflict but also popular appeal; viewed this way, disputes over religion are a means of using constitutional language for political mobilization and the formation of collective identity.[216] As Benjamin Schonthal observes, the Sri Lankan constitutional protections for Buddhism have not contained the spread of Buddhist claims in public life. Rather, the Buddhism provisions have incentivized Sri Lanka's citizens to "translate specific disagreements and political concerns into formal contests" over religion and the state.[217]

There is of course an element of strategic judicial behavior in politically contentious cases on religion, especially in dominant party systems where courts often seem to accede to the preferences of the ruling government.[218] But in societies polarized ethnically as well as religiously, constitutional contestations over religion take on an additional dimension: framed, as they often are, in terms of majority-minority group battles.[219] In these fraught contexts, judges who make decisions in line with protecting the interests of the dominant religious and ethnic group may appear influenced by their own religious inclinations. Consider the *Lina Joy* litigation in Malaysia, where all the Malay-Muslim judges aligned with prioritizing Islam's position over the individual's choice to leave the religion, while the dissenting judges in favor of a robust assertion of religious freedom protection were both non-Muslims.[220] Some judges view themselves as "Muslims first, judges second."[221] Under these conditions, the judicial response has not been to contain the spread of religiosity. Rather, the courts have acted to affirm the role of religion in the state as linked to the preservation of the majority religious group.

B. Comparative Examples

While Malaysia provides an in-depth look into the mechanics of the development of stealth theocracy, it is not the only example. In this section, I describe the global manifestations of the stealth theocracy phenomenon in contexts as diverse as Indonesia, Sri Lanka, and Turkey. The experiences of these case studies can be contrasted with that of Bangladesh, where the

216. *See* SCHONTHAL (2016), *supra* note 4, at 152 (arguing that constitutional practice can be viewed as a "process of popular mobilization whereby people appeal to constitutional language in order to elevate the status and legitimacy of their concerns").

217. *Id.* at 154.

218. SHAH, *supra* note 53, at 184-93.

219. SHAH, *supra* note 53, at 202.

220. *Lina Joy,* [2004] 2 MALAYAN L.J. 119 (H.C.); [2005] 6 MALAYAN L.J. 193 (C.A.); Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, (2007) 4 MALAYAN L.J. 585 (F.C.). Justice Gopal Sri Ram dissented in the Court of Appeal. Justice Richard Malanjum, Chief Justice of Sabah and Sarawak, dissented in the Federal Court.

221. SHAH, *supra* note 53, at 196.

contention over the state's religious or secular character has largely played out through formal amendments to the constitutional text.

Manifestations of the phenomenon can be observed in constitutional systems with societies divided along religious and ethnic lines where the constitutional arrangements for religion are the product of constitutional compromise within a generally secular framework. Over time, often in tandem with the ascendency of nationalist movements, religious principles have increasingly been prioritized over secular norms, resulting in the expansion of the role of religion in the public order.

i. Indonesia

During the first constitution-making process in Indonesia—the largest Muslim-majority country in the world[222]—Islamists and nationalists disputed over the role of religion in the 1945 Constitution.[223] The religionists wished to establish an Islamic state, while the nationalists sought a unitary Indonesian state based on an all-inclusive national identity with neutrality toward all religions. In an attempt to bridge the divide between the competing factions, on June 1, 1945, Sukarno introduced the *Pancasila*, the foundational ideology of the Indonesian state, which includes "a belief in the one and only God" as one of its five founding principles.[224]

In addition to the *Pancasila* principles, the draft preamble to the constitution—known as the Jakarta Charter—included a seven-word statement that the state would be obliged to carry out Islamic law for its adherents as well as a requirement that the president be Muslim. When Indonesia's constitution was enacted, however, the seven words imposing Sharia law on Muslims and the stipulation that the president must be Muslim were removed from the final version.[225] Ultimately, the 1945 Constitution included the *Pancasila* in its preamble and an Article 29 provision that "the state is based upon belief in one supreme God." Efforts between 1956 and 1959 to draft a new constitution eventually faltered, prompting a return to

222. Approximately 87.2% of Indonesia's roughly 260 million population identify as Muslim. World Factbook, Central Intelligence Agency. https://www.cia.gov/library/publications/the-world-factbook/geos/id.html.

223. *See generally* SHAH, supra note 204, at 29-32, 37-40; Bâli & Lerner, *supra* note 36, at 259-63.

224. UNDANG-UNDANG DASAR REPUBLIK INDONESIA 1945 [UDD '45] [CONSTITUTION] preamble (as translated by CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Indonesia_2002?lang=en). *See generally* Robert W. Hefner, *Where Have All the Abangan Gone? Religionization and the Decline of Non-standard Islam in Contemporary Indonesia*, *in* THE POLITICS OF RELIGION IN INDONESIA: SYNCRETISM, ORTHODOXY, AND RELIGIOUS CONTENTION IN JAVA AND BALI 71, 85 (Michel Picard & Remy Madinier, eds. 2011).

225. The removal of both statements appears to have been driven in part by secession threats from the Christian nationalists in East Indonesia over the inclusion of the Islamic-oriented constitutional commitments. *See* SHAH, *supra* note 204, at 38; Bâli & Lerner, *supra* note 36, at 261; Robin Bush, *Islam and Constitutionalism in Indonesia*, *in* LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED 173, 177-78 (David K. Linnan ed., 2016).

the 1945 Constitution and leaving the *Pancasila* and Article 29 in their original form.

The constitutional arrangement on the place of religion reached during Indonesia's constitution-making period has continued to be a source of contention. In the post-Suharto period of constitutional reforms carried out from 1999 to 2002, several Islamic parties pushed for the seven-word statement from the Jakarta Charter to be incorporated in Article 29 in order to implement Sharia law in the constitution.[226] Nationalists strongly opposed these proposals to amend Article 29 and remained committed to the *Pancasila,* which they viewed as a guarantee against the establishment of an Islamic state. In 2002, the Indonesian national parliament ultimately rejected the proposed amendment to Article 29.[227] However, Article 28J(2) of the amended Indonesian Constitution provides that restrictions may be placed on the exercise of constitutional rights based on considerations of "morality, religious values, security and public order in a democratic society."[228]

Unlike Malaysia's political system, which, for a long time, was dominated by a single ruling coalition, Indonesia's political party dynamics are highly fractionalized with multiple political parties contesting in national parliamentary elections.[229] Religion has emerged in the political discourse as a strategy for appealing to a broader base of the Muslim electorate and for mobilizing supporters on religious grounds.[230] The 2017 election for Jakarta's governor provides an example of the religiously sensitized political dynamics. Islamist groups organized several large rallies against Jakarta's Christian Governor Basuki Tjahaja Purnama following accusations that the Governor had insulted Islam by citing a verse from the Quran during an

226. *See* Nadirsyah Hosen, *Religion and the Indonesian Constitution: A Recent Debate*, 36 J. SOUTHEAST ASIAN STUD. 419, 424, 427-35 (2005); NADIRSYAH HOSEN, SHARIA & CONSTITUTIONAL REFORM IN INDONESIA 188-215 (2007).

227. *See* HOSEN, *supra* note 226, at 86-89.

228. Article 28J(2) states: "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands base upon considerations of morality, religious values, security and public order in a democratic society." UNDANG-UNDANG DASAR REPUBLIK INDONESIA 1945 [UDD '45] [CONSTITUTION] art. 28J(2) (as translated by CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Indonesia_2002?lang=en).

229. *See generally* DONALD HOROWITZ, CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA 178-80, 270-78 (2013). For example, twelve parties competed in the 2014 national legislative elections, and thirty-eight parties competed in the 2009 national elections. Edward Aspinall & Mada Sukmajati, *Patronage and Clientelism in Indonesian Electoral Politics*, *in* ELECTORAL DYNAMICS IN INDONESIA: MONEY POLITICS, PATRONAGE AND CLIENTELISM AT THE GRASSROOTS 1, 15 (Edward Aspinall & Mada Sukmajati eds., 2016).

230. SHAH, *supra* note 204, at 205.

election campaign speech.[231] Governor Basuki eventually lost the election and was later sentenced to imprisonment for blasphemy.[232]

Blasphemy cases have featured prominently in the Indonesian Constitution Court's engagement with religion.[233] Enacted through a presidential decree in 1965,[234] Indonesia's controversial Blasphemy Law has been used frequently to prosecute members of non-mainstream religious groups and Muslim sects deemed "deviant" from Islamic teachings.[235] In 2010, the Constitutional Court considered a constitutional challenge to the Blasphemy Law brought by a coalition of non-governmental organizations arguing that the law violated constitutional guarantees of religious freedom and equality.[236] The Court upheld the law's constitutionality. Referring to the *Pancasila* principle of "belief in one and only God" and the consideration of "religious values" in the Constitution, the Constitutional Court ruled that the Constitution does not protect liberty from religion nor the freedom to promote ideas that are anti-religious or desecrate religious teachings.[237] The Court deferred to the state's determination of "religious values" and "public order" considerations,[238] and held that the law's limitations on religious freedom were permissible.

In 2013, the Constitutional Court again dismissed a constitutional challenge to the Blasphemy Law, this time focused on the Article 4 criminalization of blasphemy.[239] The Court rejected arguments that the law was vague and uncertain, quoting from its 2010 decision to reiterate that the

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231. Governor Basuki was accused of insulting Islam for referencing a verse from the Quran in a speech to argue that there were no restrictions on Muslims voting for non-Muslim politicians during a campaign speech. Yenni Kwok, *Conservative Islam has Scored Disquieting Victory in Indonesia's Normally Secular Politics*, TIME: WORLD (Apr. 20, 2017), http://time.com/4747709/indonesia-jakarta-election-governor-islam-christianity-ahok-anies/; Joe Cochrane, *Jakarta Governor Concedes Defeat in Religiously Tinged Election,* N. Y. TIMES (April 19, 2017), https://www.nytimes.com/2017/04/19/world/asia/jakarta-election-ahok-anies-baswedan-indonesia.html.

232. The North Jakarta District Court issued a heavier sentence of two years imprisonment than the prosecutors' recommendation of two years' probation on a lesser charge. Joe Cochrane, *Governor of Jakarta Withdraws Appeal of Blasphemy Sentence,* N. Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/world/asia/indonesia-ahok-blasphemy-appeal.html; Callistasia Anggun Wijaya, *Ahok guilty of blasphemy, sentenced to two years*, JAKARTA POST (May 9, 2017), http://www.thejakartapost.com/news/2017/05/09/ahok-guilty-of-blasphemy-sentenced-to-two-years.html.

233. *See* Simon Butt, *Islam and the Indonesian Constitutional Court*, 19 PAC. RIM L. & POL'Y J. 279, 282-83 (2010); Fenwick, *supra* note 3, at 76-77.

234. Presidential Decree No. 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion (made into a law by Law No. 5/1969).

235. Melissa Crouch notes that "[b]etween 1965 and 2000 there were as few as 10 blasphemy court cases. Since 2000, over 50 court cases or 130 people have been convicted." Crouch *supra* note 3, at 3. *See* Butt, *supra* note 3, at 62.

236. Constitutional Court Decision No. 140/PUU-VII/2009 (Indonesia).

237. *Id.* at paras. 3.34.8-.11.

238. *Id.* at paras. 3.51-.55. For an overview of the Court's decision, *see* Tim Lindsey & Simon Butt, *State Power to Restrict Religious Freedom*, *in* RELIGION, LAW AND INTOLERANCE IN INDONESIA 19, 24-26.

239. Constitutional Court Decision No. 84/PUU-X/2012 (Indonesia).

basic teachings of a religion are decided by the internal authorities of the religion[240]—although it did not clarify which religious institution possessed such internal authority.[241] More generally, the Court supported the government's argument that the blasphemy law is necessary to protect public order and religious harmony. Melissa Crouch observes that the Indonesian Constitutional Court's decisions on the Blasphemy Law appear to be an effort "to leave the fragile yet negotiable practice of religious deference, and therefore the authority of religious leaders, unchallenged."[242]

The Indonesian Constitutional Court's adjudication in religion cases exhibits a tendency to side with the sensitivities of the mainstream Muslim religious community. Judicial endorsement of the views of internal religious authorities regarding acceptable religious teachings and practices has contributed to the dominance of a particular conception of Islam,[243] which has led to the repression of alternative voices like the *Ahmadiya* minority.[244] The Court has also referred to Quranic provisions and Islamic concepts in some of its decisions on polygamy and divorce,[245] even when Islamic law appears irrelevant to the constitutional issues at hand.[246] The upshot of the Indonesian Constitutional Court's jurisprudence is an increasing deviation from the *Pancasila's* founding vision, which was viewed by its framers, as Dian Shah writes, "as a common national ideology that 'does not unite itself with the dominant religious group in the country.'"[247]

ii. Sri Lanka

On May 22, 1972, the country previously known as Ceylon cut its final ties with its British colonial past and the new Republic of Sri Lanka was

240. *Id.* at para. 3.16.

241. SHAH, *supra* note 204, at 140.

242. Crouch, *supra* note 3, at 2.

243. This has contributed to the entrenchment of the *Majelis Ulama Indonesia* (MUI) as a major voice in national law and policymaking. STEWART FENWICK, BLASPHEMY, ISLAM AND THE STATE: PLURALISM AND LIBERALISM IN INDONESIA 102, 182-85 (2016); *see also* Butt, *supra* note 3, at 62 (observing that the "MUI's view about Islam became the yardstick against which the state measures different interpretations").

244. *See* Ahmad Najib Burhani, *Hating the Ahmaddiya: The Place of 'Heretics' in Contemporary Indonesian Muslim Society,* 8(2) CONTEMPORARY ISLAM (2014); JEREMY MENCHIK, ISLAM AND DEMOCRACY IN INDONESIA: TOLERANCE WITHOUT LIBERALISM (2016).

245. FENWICK, *supra* note 243, at 68 (noting "clear consensus on the primacy of religion as a leading source of guidance" in Constitutional Court jurisprudence).

246. *See* Butt, *supra* note 3, at 62 (noting that "some of the Court's decisions contain references to Qur'anic provisions, *hadith* and a variety of Islamic terms and concepts" such that some cases "read like sermons about the Islamic law and philosophy of marriage . . . even though Islamic law might be entirely irrelevant to the constitutional law issues before it").

247. SHAH, *supra* note 204, at 162 (quoting R.M. KUSUMA, LAHIRNYA UNDANG-UNDANG DASAR 1945 (MEMUAT SALINAN DOKUMEN OTENTIK BADAN OENTOEK MENYELIDIKI OESAHA-OESAHA PERSIAPAN KEMERDEKAAN) (The Birth of the 1945 Constitution Containing Copies of Authentic Documents of the Investigating Committee for Preparatory Work for Indonesian Independence) 127 (2009)).

established with the enactment of the 1972 Sri Lankan Constitution. Drafted by a Constituent Assembly headed by Dr. Colvin De Silva, the 1972 Constitution proclaimed Buddhism as the religion with "the foremost place" and provided that the state must "protect and foster" Buddhism while also assuring fundamental rights for all religions.[248] Notably, earlier drafts of the 1972 Constitution had not included any references to Buddhism.[249] The proposed draft resolutions on the religion provisions were subject to considerable debate in the Constituent Assembly.[250]

Sri Lanka's constitutional drafters were faced with mediating competing demands from various groups: those who demanded stronger protections for Buddhism, those who favored a secular state, and those who wanted equal protection for all religions.[251] In order to reach a compromise solution that would reconcile the interests of the multiple stakeholders, the drafters' final formulation of the religion clause was deliberately ambivalent regarding the relationship between the protection for Buddhism and the fundamental right of religious freedom.[252] As Benjamin Schonthal notes, the Sri Lankan framers viewed the Buddhism provision as a "successful constitutional settlement…that leveraged the power of ambiguity and 'incompleteness' to produce a multivalent language of compromise over religion."[253]

In 1978, the Sri Lankan Constitution was subject to major constitutional revisions led by the United National Party. The sole change to the religion clause was the replacement of the word "Buddhism" with "Buddha *Sasana*."[254] Article 9 of the 1978 Sri Lankan Constitution provides that the state "shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana,* while assuring all religions the rights granted by Articles 10 and 14(1)(2)" to freedom of thought, conscience and religion and to manifest religious belief. Following the 2015 presidential elections, Sri Lanka has been in the midst of a constitutional reform process initiated by the new President, Maithripala Sirisena. Buddhism's foremost place in the Constitution seems likely to remain intact, along with the current formulation of Article 9.[255]

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248. THE CONST. OF SRI LANKA (1972) art. 6.

249. *See* SHAH, *supra* note 204, at 47.

250. SCHONTHAL, *supra* note 4, at 98-145.

251. SHAH, *supra* note 204, at 48-49.

252. *Id.* at 50.

253. SCHONTHAL, *supra* note 4, at 145. *See also* COLVIN R. DE SILVA, SAFEGUARDS FOR THE MINORITIES IN THE 1972 CONSTITUTION: A LECTURE DELIVERED BY COLVIN R. DE SILVA AT THE MARGA INSTITUTE (SRI LANKA CENTRE FOR DEVELOPMENT STUDIES) ON 20TH NOV. 1986 10-12 (1987).

254. Commentators have noted that "Buddha *Sasana*" refers to a wide range of Buddhist phenomena including its institutional aspects relating to monks, temples, relics, and the like. Benjamin Schonthal, *Constitutionalizing Religion: The Pyrrhic Success of Religious Rights in Postcolonial Sri Lanka*, 29 J.L. & RELIGION 470, 482 (2014).

255. SRI LANKAN CONSTITUTIONAL ASSEMBLY, THE INTERIM REPORT OF THE STEERING COMMITTEE OF THE SRI LANKAN CONSTITUTIONAL ASSEMBLY 3 (Sept. 21, 2017), *available at*

The Sri Lankan Supreme Court's constitutional jurisprudence on religion, while at times equivocal, has moved in the direction of protecting Buddhism's place and regulating religious practice in line with the dominant religion.[256] In three cases on anti-conversion laws, the Sri Lankan Supreme Court upheld all of the challenges brought by Buddhist petitioners to the constitutionality of three parliamentary bills seeking to incorporate Christian charities in Sri Lanka.[257] In the third incorporation case, the Court agreed with the petitioners that the Christian organization's stated aim to engage in religious propagation would violate the rights of non-Christians to freedom of religion and conscience under Article 10. Significantly, the Court went beyond its reasoning in the previous two incorporation cases, holding that the activities of conversion that the Christian organization might carry out would "impair the very existence of Buddhism" in violation of Article 9.[258]

The Supreme Court's invocation of Article 9 is revealing of how it conceives of Buddhism's special position in Sri Lanka's constitutional order. Over the course of the three incorporation cases, the Court has gradually asserted a particular interpretation of Article 9, which appears to favor Buddhist prerogatives over fundamental religious rights in a manner that "permits the Sri Lankan state to legitimately limit the activities of non-Buddhists in order to protect the interests of Buddhism."[259]

The Supreme Court has delivered mixed messages in its treatment of secularism and the protection of Buddhism. In 2004, the Jathika Hela Urumaya (JHU), a nationalist Sinhalese party, proposed a bill that sought to amend Article 9 in order to make Buddhism the official religion of the state.[260] The Court held that such a bill would be unconstitutional for violating fundamental rights to freedom of religion and equality,[261] emphasizing that Buddhism's special position under Article 9 is balanced by

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http://www.constitutionnet.org/sites/default/files/2017-09/Interim%20Report%20of%20the%20Steering%20Commmittee%20of%20the%20Constitutional%20Assembly%20of%20Sri%20Lanka_21%20September%202017.pdf. According to the Interim Report of the Steering Committee of the Constitutional Assembly released in September 2017, strengthening the second part of the clause to provide for equality and non-discrimination for all religions is a possibility.

256. *See* Rehan Abeyratne, *Rethinking Judicial Independence in India and Sri Lanka*, 10 ASIAN J. COMP. L. 99, 128 (2015).

257. In re Christian Sahanaye Doratuwa Prayer Centre (Incorporation) Bill (SC Special Determination No. 2/2001); In re New Wine Harvest Ministries (Incorporation) Bill (SC Special Determination No. 2/2003); Provincial of the Teaching Sisters of the Holy Cross of the Third Order of St. Francis in Menzingen of Sri Lanka (SC Special Determination No. 19/2003) [hereinafter *Menzingen*].

258. *Menzingen* at 7.

259. Benjamin Schonthal, *The Legal Regulation of Buddhism in Contemporary Sri Lanka*, in BUDDHISM AND LAW: AN INTRODUCTION 150, 161 (Rebecca Redwood French & Mark A. Nathan eds., 2014).

260. *See* Nineteenth Amendment to the Constitution (Private Member's Bill), Gazette of the Democratic Socialist Republic of Sri Lanka (Oct. 29, 2004), Supplement, art. 9.1.

261. In re Bill titled "Nineteenth Amendment to the Constitution" (SC Special Determination No. 32/2004), 8.

the guarantee of equal protection for the rights of non-Buddhist citizens.[262] However, in a 2007 challenge involving a mosque that had been refused a loudspeaker permit to broadcast the call to prayer,[263] the Supreme Court approached secularism and the appropriate regulation of religious practices in a manner in line with a Buddhist worldview.[264] Ruling that Sri Lanka's secularism was compatible with restricting Muslim religious practices that produce noise pollution, the Chief Justice made references to Buddhist teachings on the proper practice of religious worship, observing that "disturbing the stillness of the environment" and "forcing it on ears of persons who do not invite such chant(s)" to be the "antithesis of the Buddha's teaching."[265] The implication of the Court's reasoning is that Buddhism—Sri Lanka's dominant religion—defines the contours of acceptable religious practice imposed on minority faiths.

In a speech given during the Constituent Assembly debates over the 1972 Constitution, De Silva, the chief drafter of the religion provision, made a plea for "a very carefully expressed," "very balanced"[266] constitutional settlement that simultaneously sought to accommodate twin guarantees of protection for Buddhism's place and fundamental rights to religious freedom. Yet over time, contrary to the framers' intended meanings for the religion provision, the constitutional protection for Buddhism's position has been prioritized over secular norms and the rights of those who adhere to minority religions.[267] Viewed in this way, the constitutionalization of Buddhism in Sri Lanka has "served less as 'shields against the spread of religiosity,' as Ran Hirschl might have it, than as powerful vehicles for making religion public."[268]

iii. Turkey

Even in a context where the principle of secularism is constitutionally entrenched, we can see resonances of the stealth theocracy phenomenon. Since 1937, Article 2 of the Turkish Constitution has declared the principle of secularism an unamendable characteristic of the Republic of Turkey.[269] Modern Turkish history, however, has witnessed the rise of political Islam

262. *Id.* at 2-3.

263. Ashik v. Bandula and Others (2007) 1 SRI LANKA L. REP. 191.

264. *See* SHAH, *supra* note 204, at 157.

265. *Ashik*, at 199.

266. *See* SHAH, *supra* note 213, at 48 (quoting Constituent Assembly Official Report (March 29, 1971) at 644).

267. *Id.* at 63.

268. SCHONTHAL, *supra* note 4, at 187.

269. Turkish Constitution of 1982, art. 2 ("The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble."); *See* Roznai, *Negotiating the Eternal*, *supra* note 19, at 271.

and pro-Islamic parties in Turkish public discourse. Turkey's recent trajectory has been associated with the ascendency of the ruling party, the pro-Islamic Justice and Development Party (AKP), led by Recep Tayyip Erdoğan. Throughout his tenure, first as Prime Minister and now as President, Erdoğan has shown demonstrable interest in promoting a pro-Islamist agenda for Turkish society.[270] As Asli Bâli and Hanna Lerner observe, "the state's orientation on matters of religion has been transformed by means of regulatory and legislative change even as the constitutional text defining the state as secular has remained static."[271]

Over the last decade, the AKP government has pushed several constitutional amendments which have been seen by some as reflecting the Turkish state's increasing authoritarianism.[272] While the contents of these amendments have not been aimed at formally changing the state-religion relations contained in the Turkish Constitution, they have been viewed by some as part of the AKP's attempt to pursue an Islamist agenda. For example, the package of constitutional amendments introduced by the AKP in 2010, accused of packing the Turkish Constitution Court, was viewed by the secularist opposition as "a Trojan horse to facilitate stealth Islamization of the constitutional order by limiting the ability of the judiciary to check the AKP's majoritarian policies."[273]

In April 2017, Turkey held a national referendum over a new set of constitutional amendments, which seek to replace Turkey's existing parliamentary system of government with a presidential system.[274] On their face, these constitutional changes appear primarily concerned with government structures and do not purport to alter the constitutionally entrenched secularism principle. However, commentators have argued that Turkey's transition to a strong executive presidency under President Erdoğan is likely to move the country further away from its secular constitutional foundations.[275]

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270. *See* Elliot Ackerman, *Atatürk versus Erdoğan: Turkey's Long Struggle*, NEW YORKER, Jul 16, 2016, https://www.newyorker.com/news/news-desk/ataturk-versus-erdogan-turkeys-long-struggle.

271. Bâli & Lerner, *supra* note 36, at 280.

272. *See* Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1715-17 (2014).

273. Bâli & Lerner, *Religiously Divided Societies, supra* note 36, at 285.

274. Dominique Soguel, *Turkey constitutional changes: what are they, how did they come about and how are they different?*, THE INDEPENDENT, Jan. 21, 2017, http://www.independent.co.uk/news/world/europe/turkey-president-recep-tayyip-Erdoğan-referendum-constitutional-reform-a7539286.html (last visited Jul. 20, 2017); *see also* Kareem Shaheen, *Erdoğan clinches victory in Turkish constitutional referendum*, THE GUARDIAN (April 16, 2017), https://www.theguardian.com/world/2017/apr/16/Erdoğan-claims-victory-in-turkish-constitutional-referendum (last visited Jul. 20, 2017); Sinan Ekim and Kemal Kirişci, *Order from Chaos: The Turkish constitutional referendum, explained*, BROOKINGS INSTITUTION (Apr. 13, 2017), https://www.brookings.edu/blog/order-from-chaos/2017/04/13/the-turkish-constitutional-referendum-explained/ (last visited Jul. 20, 2017).

275. *See, e.g.*, Shadi Hamid, *How Much Can One Strongman Change a Country?*, THE ATLANTIC (June 26, 2017), https://www.theatlantic.com/international/archive/2017/06/erdogan-turkey-islamist/531609/; Nilüfer Göle, *Turkey Is Undergoing A Radical Shift, From Pluralism To Islamic Populism,*

Whether—or to what extent—the Turkish constitutional amendments approved in the 2017 referendum will result in a more theocratic constitutional order remains to be seen. What is clear is that the proposed package of constitutional changes will considerably strengthen the Turkish presidency, giving the President more power to achieve his aims. In addition to abolishing the office of the prime minister and transferring its responsibilities to the presidency, the amendments will empower the president with broad authority over the council responsible for the appointment of judges and prosecutors.[276] Constitutional scholars have criticized the proposed amendments for seeking to undermine the separation of powers in Turkey.[277]

For those alarmed about the consequences of Turkey's constitutional direction for judicial independence, developments involving the Turkish courts in early 2018 did little to assuage such concerns. In January 2018, Turkey's lower courts defied the Turkish Constitutional Court's order to release two imprisoned journalists after the Constitutional Court had ruled that the pre-trial detention of the journalists infringed their rights to freedom of expression and personal liberty.[278] The full impact of the 2017 package of constitutional amendments remains to be seen, but it seems clear that their implementation will only serve to strengthen the presidency with greater powers.

iv. Bangladesh

Bangladesh provides a counterpoint case study. In contrast to the examples provided by the case studies discussed earlier, Bangladesh illustrates the experiences of a democracy where the struggle over the place of secularism and religion has largely revolved around changes to the

HUFFINGTON POST, Jul. 21, 2017, https://www.huffingtonpost.com/entry/turkey-coup-erdogan_us_596fcfcfe4b062ea5f8efa0f.

276. The proposed constitutional amendments put forward by the AKP, and supported by the Nationalist Movement Party (MHP), at the 2017 referendum include eliminating the Prime Ministry and transferring its responsibilities to the executive branch as well as authorizing the president to issue decrees regarding its executive power. *See* Sinam Ekim & Kemal Kirişci, *The Turkish constitutional referendum, explained*, BROOKINGS INSTITUTION (Apr. 13, 2017), https://www.brookings.edu/blog/order-from-chaos/2017/04/13/the-turkish-constitutional-referendum-explained/; *See also* 2017 Amendment Proposal to the Constitution (translated by Zeynep Yanasmayan and Canan Pour-Norouz, *available at* https://politicsandlawinturkey.wordpress.com/publications/contributions-of-fellows/2017-amendment-proposal-to-the-turkish-constitution/.

277. *See, e.g.*, Birce Bora, *Turkey's constitutional reform: All you need to know*, AL JAZEERA (Jan. 17, 2017), https://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html (noting critics, including constitutional law professors, believe the proposed changes may "lead to a one-man rule").

278. *See, e.g.*, Tuvan Gumrukcu, *Turkish courts reject jailed journalists' request to be released,* REUTERS (Jan. 11, 2018), https://www.reuters.com/article/us-turkey-security-journalists/turkish-courts-reject-jailed-journalists-request-to-be-released-anadolu-idUSKBN1F01UT?ref=hvper.com; Laura Pitel, *Turkey warned of judicial crisis over jailed journalists*, FINANCIAL TIMES (Jan. 14, 2018), https://www.ft.com/content/048dc200-f932-11e7-9b32-d7d59aace167.

constitutional text. After seceding from Pakistan, Bangladesh became an independent state in 1972 with a new constitution that declared secularism as one of its fundamental principles.[279]

In 1979, the Fifth Amendment to the Bangladesh Constitution—which was ratified after General Ziaur Rahman assumed power—removed the principle of secularism from the Constitution's preamble. The amendment replaced the secularism principle with a commitment to "the high ideals of absolute faith and trust in the almighty Allah"[280] and also incorporated a reference to *Bismillah-ar-Rahman-ar-Rahim* (in the name of Allah, the Beneficent, the Merciful).[281] In 1988, in what has been seen as a bid to shore up popular support in the face of strong political opposition, then-President Lieutenant General Hussain Muhammad Ershad declared Islam the state religion of Bangladesh.[282] Shortly after, Parliament passed the Eighth Amendment to the Constitution making Islam the state religion under Article 2(A).[283]

In 2010, the Bangladesh Supreme Court's Appellate Division ruled the Fifth Amendment illegal, reaffirming secularism as a basic feature of Bangladesh's Constitution.[284] Endorsing an earlier decision by the High Court Division of the Supreme Court in 2015, the Supreme Court rejected as unconstitutional the notion that the amendment that had "changed the secular character of the Republic of Bangladesh into a theocratic State."[285] A year later, the Awami League ruling party passed the Fifteenth Amendment, which restored the principle of secularism to the Constitution.[286] While Islam was maintained as the state religion under Article 2A, the constitutional provision was modified to affirm the "equal

279. BANGL. CONST. (1972), Second Paragraph of the Preamble ("Pledging that the high ideals of nationalism, socialism, democracy, and secularism…shall be the fundamental principles of the constitution.").

280. BANGL. CONST. (1979), Second Paragraph of the Preamble (after Fifth Amendment) ("Pledging that the high ideals of absolute trust and faith in the almighty Allah, nationalism, democracy, and socialism…shall be the fundamental principles of the Constitution").

281. Habibul Haque Khondker, *State and Secularism in Bangladesh*, *in* STATE AND SECULARISM: PERSPECTIVES FROM ASIA, 224 (Michael Heng Siam-Heng & Ten Chin Liew eds., 2010).

282. Jahid Hossain Bhuiyan, *Secularism in the Constitution of* Bangladesh, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 204, 211 (2017).

283. BANGL. CONST., art. 2(A) (after 1988 Eighth Amendment) ("The state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the republic.").

284. Khondker Delwar v. Bangladesh Italian Marble Works, Ltd., 62 DLR (AD) 298, 366-71 (2010).

285. *Id.* at 366 (quoting Bangladesh Italian Marble Works, Ltd. v. Bangladesh, 14 BLT (Special Issue) (HCD) 1, (2006)), 391 (holding further that "the Fifth Amendment is also illegal and void and the High Court Division rightly declared the same as repugnant, illegal and ultra vires the Constitution").

286. BANGL. CONST., art. 12. ("The principle of secularism shall be realised by the elimination of: a. communalism in all its forms; b. the granting by the State of political status in favour of any religion; c. the abuse of religion for political purposes; d. any discrimination against, or persecution of, persons practicing a particular religion.").

status and equal right" of the practice of other religions.[287] In addition, the amendment removed the phrase "absolute faith and trust in Allah" from the Preamble.[288]

In 2016, the High Court Division of the Supreme Court considered a petition seeking to remove the Article 2A provision declaring Islam as the state religion.[289] Prior to the ruling being handed down, Islamist political parties called for a nationwide strike protesting the legal challenge and held protest rallies demanding that the hearing be rejected.[290] The court eventually dismissed the petition on grounds that the petitioners lacked standing.[291] The decision came at a time of religiously-laden tensions in Bangladesh's political landscape. In recent times, Bangladesh has faced a surge of violence against religious minorities and secular writers[292] amidst indications of growing popular support for Islamic principles in governance.[293]

What is notable about the Bangladesh experience is that the struggle between secularists and religionists has largely played out through explicit, formal alterations to the constitutional text. Unlike the more surreptitious modifications to the constitutional order in Malaysia, Indonesia, Sri Lanka, and Turkey, the contention over Bangladesh's secular or religious character

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287. BANGL. CONST., art. 2(A) (after the Fifteenth Amendment in 2011) ("The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions.").

288. In addition to the modifications above, the Fifteenth Amendment also added Article 23A, which states: "The state shall take steps to protect and develop the unique local culture and tradition of the tribes, minor races, ethnic sects, and communities."

289. *Sirajul Islam Chowdhury and others v Bangladesh*, Writ Petition No. 1834 of 1988 *in* Developments in Bangladeshi Constitutional Law: The Year 2016 in Review (Ridwanul Hoque & Sharowat Shamin eds., 2016).

290. *See* Maher Sattar & Ellen Barry, *In 2 Minutes, Bangladesh Rejects 28-Year-Old Challenge to Islam's Role*, N.Y. TIMES (Mar. 28, 2016), https://www.nytimes.com/2016/03/29/world/asia/bangladesh-court-islam-state-religion.html; Kamran Reza Chowdhury, *High Court Backs Islam as State Religion of Bangladesh*, BENARNEWS (Mar. 28, 2016), https://www.benarnews.org/english/news/bengali/state-religion-03282016141344.html.

291. *See* Syed Zain Al-Mahmood, *Bangladesh Court Rejects Challenge to Islam as State Religion*, WALL ST. J. (Mar. 28, 2016), https://www.wsj.com/articles/bangladesh-court-rejects-challenge-to-islam-as-state-religion-1459166329; David Bergman, *Bangladesh court upholds Islam as religion of the state*, AL JAZEERA (Mar. 28, 2016), http://www.aljazeera.com/news/2016/03/bangladesh-court-upholds-islam-religion-state-160328112919301.html.

292. *See* U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM: ANNUAL REPORT 2017, http://www.uscirf.gov/sites/default/files/Bangladesh.2017.pdf; *See* UCIRF ANNUAL REPORT 2017, *Bangladesh*, http://www.uscirf.gov/sites/default/files/Bangladesh.2017.pdf; HUMAN RIGHTS WATCH: WORLD REPORT 2017, *Bangladesh Events of 2016*, https://www.hrw.org/world-report/2017/country-chapters/bangladesh.

293. *See, e.g.*, *A long shadow: Bangladesh's government is pandering to Islamist zealots*, THE ECONOMIST (Jun. 1, 2017), https://www-economist-com.proxy.library.georgetown.edu/news/asia/21722858-public-statuary-paying-price-bangladeshs-government-pandering-islamist-zealots (observing that "[p]olling commissioned by the government shows broad support for caning people caught drinking alcohol, even greater enthusiasm for Islamic banking and inheritance law and near-universal support for women covering their heads in public").

has taken place through the use of formal amendments to remove or alter the constitutional commitments to secularism or Islam.

v. Conclusion: Global Resonance of Stealth Theocracy

The experiences of Indonesia, Sri Lanka, and Turkey add to the Malaysian example, illustrating, in various forms, a phenomenon that is of clear global significance. Variations of stealth theocracy have tended to manifest in societies divided along religious and ethnic lines over the nature of the state's religious or secular character. In these religiously polarized polities, constitutional arrangements on religion tend to be a product of a compromise at constitution-making, which has typically taken the form of some accommodation for the place of religion within a generally secular constitutional framework. Over time, however, a reversal in the prioritization of norms occurs, resulting in the increasing assertion of religious principles over secular norms.

There is another important dimension to the stealth theocracy phenomenon worth mentioning. The rise of stealth theocracy across these polities has tended to coincide with another global phenomenon: the ascendency of illiberal politics. From Asia and the Middle East to Europe and the United States, there has been a rise in illiberal and populist movements in global politics. The stealth theocracy case studies discussed in this Article are no exceptions: the rise of religiosity has typically accompanied the ascendency of illiberal political elements within Turkey, Indonesia, Sri Lanka, and Malaysia.[294]

Under local conditions of growing religious and ethnic polarization, illiberalism appears to manifest itself in religious terms. Political parties with conservative and nationalist leanings tend to use a religiously-oriented lexicon not only to push for a more expansive role for religion but also to advance their wider policy agendas. Considered from this perspective, constitutional arrangements on religion framed in open-ended terms are particularly susceptible to politicization. In these circumstances, such constitutional provisions have the capacity to be co-opted by illiberal movements in the political order and are catalysts for a drift toward theocratic constitutionalism.

294. *See, e.g.*, *Terrorism in Malaysia: Lurch to Illiberalism*, THE ECONOMIST, Apr. 11, 2015, https://www.economist.com/news/asia/21648027-anti-terror-law-curtails-liberties-lurch-illiberalism; Uri Friedman, *Turkey's Referendum: How Democracies Decline*, THE ATLANTIC, Apr. 17, 2017, https://www.theatlantic.com/international/archive/2017/04/turkey-referendum-democracy/523257/; Sidney Jones, *Indonesia's Illiberal Turn*, FOREIGN AFFAIRS, May 26, 2017, https://www.foreignaffairs.com/articles/indonesia/2017-05-26/indonesias-illiberal-turn.

V. IMPLICATIONS

The implications of the stealth theocracy phenomenon become apparent when considered in the context of its global significance and relevance for wider constitutional understandings. In this Part, I discuss the broader insights the stealth theocracy account offers for constitutional change, constitutional design, and constitutional identity.

A. Constitutional Change

When considered through the lens of constitutional change, the transformation of the state's religious or secular character in the polities this Article discusses is striking in terms of how the change has occurred and what the change has involved. The phenomenon takes place primarily through informal means of constitutional change, rather than through formal mechanisms like constitutional amendment; at the same time, the nature and scale of the change are transformative to the state's religious character. Both these elements underscore the stealth aspect of the changes to the existing constitutional order.

In terms of "how" the change has come about, the alteration of the religious order is driven primarily by informal constitutional change by political and judicial actors. Unlike the existing scholarship on authoritarianism, which focuses on the use of formal constitutional or legal mechanisms to undermine the state's character,[295] my focus is on less overt means of transforming a constitution's fundamental identity.

Recall Malaysia's Article 3 Islamic constitutional clause. Although Islam's position in the constitutional order has changed dramatically in contemporary Malaysia, the text of Article 3 has remained unaltered since its constitutional drafting sixty years ago. That such substantial transformation to the Malaysian Constitution's religious identity over the last two decades has occurred primarily outside the constitutional amendment process is significant, especially given that the formal amendment procedure in Malaysia is relatively easy.[296]

Notably, the Article 3 provision in the Malaysian Constitution is not afforded any special protection from amendment. By comparison, many states protect the religious character of the constitution from being amended. The Constitution of Tunisia, for example, entrenches Islam's status as the religion of the state by explicitly prohibiting any amendment to

295. *See, e.g.*, David Landau, *Abusive Constitutionalism*, *supra* note 14; Ozan Varol, *Stealth Authoritarianism*, *supra* note 14.

296. *See infra* note 320.

its Article 1 provision.[297] Likewise, the 2004 Afghanistan Constitution states: "The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended."[298] Similar constitutional clauses safeguarding the position of religion from amendment exist in other countries, including Algeria,[299] Bahrain,[300] Bangladesh,[301]Iran,[302] Morocco,[303] and Somalia.[304] Some constitutions, like the Iraqi Constitution, protect the Islamic state religion clause by specifying stringent requirements for amending the clause compared to other parts of the Constitution.[305] Other constitutional systems place the principle of secularism beyond the realm of formal constitutional change. This can be done explicitly by enshrining secularism as an unamendable provision—like

297. *See* CONST. OF TUNIS., art. 1: "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This article might not be amended."

298. CONST. OF AFG. of 2004, art. 149.

299. CONST. OF ALG. 1989 (reinstated 1996, revised 2008), art. 178: "None of the following shall be the object of a constitutional amendment: … 3. the role of Islam as the religion of the State…."

300. CONST. OF BAHR. 2002, art. 2 ("The religion of the State is Islam. The Islamic Shari'a is a principal source for legislation. The official language is Arabic."); art. 120(c) ("It is not permissible to propose an amendment to Article 2 of this Constitution.").

301. CONST. OF BANGL. of 1972, pt. I, sec. 2A ("The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions."); pt. I, sec. 7B ("…all articles of Part I, all articles of Part II, subject to the provisions of Part IXA all articles of Part III, and the provisions of articles relating to the basic structures of the Constitution including article 150 of Part XI shall not be amendable by way of insertion, modification, substitution, repeal or by any other means.").

302. CONST. OF THE ISLAMIC REP. OF IRAN 1979, art. 177: "The contents of the Articles of the Constitution related to the Islamic character of the political system; the basis of all the rules and regulations according to Islamic criteria; the religious footing; the objectives of the Islamic Republic of Iran; the democratic character of the government; the wilayat al-'amr; the Imamate of Ummah; and the administration of the affairs of the country based on national referenda, official religion of Iran [Islam] and the school [Twelver Ja'fari] are unalterable."

303. CONST. OF MOROCCO 2011, tit. XIII, art. 175 ("No revision may infringe the provisions relative to the Muslim religion, on the monarchic form of the State, on the democratic choice of the Nation or on [those] acquired in matters of [the] freedoms and of fundamental rights inscribed in this Constitution.").

304. CONST. OF SOM. of 2012, ch. 15, tit. 1, art. 132 ("Notwithstanding Clause (2), whether before or after the expiry of the first term of the Federal Parliament, neither House of Parliament may consider an amendment to the Founding Principles mentioned in Chapter 1 of this Constitution."); ch. 1, art. 2 ("1. Islam is the religion of the State. 2. No religion other than Islam can be propagated in the country. 3. No law which is not compliant with the general principles of Shari'ah can be enacted."); ch. 1, art. 3 ("The Constitution of the Federal Republic of Somalia is based on the foundations of the Holy Quran and the Sunna of our prophet Mohamed (PBUH) and protects the higher objectives of Shari'ah and social justice.").

305. *See*, *e.g.*, CONST. OF IRAQ 15 Oct. 2005, § 1 art. 2, ("Islam is the official religion of the State and is a foundation source of legislation"). This principle, among others, is subject to more stringent requirements for amendment as set out in § 6 ch. 1. art. 126 (2), requiring the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum, and the ratification by the President of the Republic within seven days.

in Turkey[306] and Portugal[307]—or through implicit judicial entrenchment, as the Indian Supreme Court has done.[308]

In contrast, the Malaysian Constitution does not protect the place of religion in any explicit manner. The Article 3(1) clause declaring Islam the religion of the state is not subject to any special protection from formal constitutional amendment: it is not enshrined in an unamendable constitutional clause, nor is it subject to any particularly stringent restrictions from amendment. Like most other constitutional provisions in the Malaysian Constitution, Article 3 can be amended simply with a two-thirds legislative majority.[309] This lack of any special protection of Islam's position is indicative that the Malaysian framers did not view Article 3 as a special provision establishing a theocratic state.

Yet although the text of Article 3 has remained unchanged since its 1957 drafting during the nation's independence, Islam's position in the constitutional order has expanded substantially. This constitutional change has had far-reaching effects on the nation's state-religion relations and the protection of fundamental rights.

To be sure, much scholarly work has been written on how constitutional change takes place irrespective of any formal amendment of the text. Particularly in the context of the United States, there is a vast literature on informal amendment exploring the process of "alteration of constitutional meaning in the absence of textual change."[310] Bruce Ackerman's theory of

306. *See* CONST. OF THE REP. OF TURK. Nov. 7, 1982, art. 2: "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble." Art. 4 holds, "The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed."

307. CONST. OF PORT. Apr. 2, 1976, art. 288(c): "Constitutional revision laws shall respect…The separation of the churches from the State." Such constitutional eternity clauses also appear in the constitutions of Angola, Burundi, Central African Republic, Chad, The Republic of Congo, Cote d'Ivoire, Guinea, Mali, Sao Tome and Principe, Tajikistan, and Togo. *See* Yaniv Roznai, *Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions,* 2017 MICH. ST. L. REV. 253 (2017).

308. *See* Kesavananda Bharati v. State of Kerala (1973) 4 S.C.C. 225, at 292 (per Sikri J) and at 582 (per Shelat and Grover JJ). Israel provides another example of implicit entrenchment. The principle from the Israeli Declaration of Independence that Israel is a "Jewish and democratic" State has been enshrined in a number of Basic Laws, notably in Basic Law: Freedom of Occupation (1992) which also contains an entrenchment provision in its § 7, requiring that amendment be only achieved by the passage of a Basic Law, with a majority of members of the Knesset.

309. *See* supra notes 79-85.

310. *See, e.g.*, Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929 (2006) (providing an overview of accounts of "the informal amendment process" in United States scholarship exploring "the alteration of constitutional meaning in the absence of textual change"); William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215–76 (2001); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS (1996); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2002); Jack M. Balkin & Sanford Levinson, *Understanding the*

"constitutional moments" is one such account,[311] and other scholars have variously highlighted the role of judicial interpretation,[312] legislation, [313] and the people[314] in bringing about extra-constitutional change. These accounts explore the extensive changes to the constitutional understandings of the United States Constitution that have not been brought about by formal amendment or regular interpretive development. There also has been some scholarly work on these practices of constitutional change in other comparative contexts. Such work has been primarily focused on Europe and Canada, with some coverage of India, South Africa, and Japan, [315] but the experiences of countries in the global south have remained largely unexamined.[316] The Malaysian experience offers an underexplored example of a constitutional system modified by extra-constitutional amendment.

A key distinction between the American experience and many other countries, however, is the extreme difficulty of formally amending the United States Constitution. Because much of the literature on informal amendment is focused on the American constitutional experience, such scholarship tends to be based on the premise that effecting constitutional change through formal amendment is virtually impracticable. The United States Constitution is widely considered one of the most difficult in the world to amend.[317] So much so that the formal amendment procedure under Article V, which requires a two-thirds vote in both houses of Congress followed by ratification by three-quarters of the state legislatures, has been deemed by some as effectively irrelevant for bringing about constitutional change.[318] Viewed in this light, the prevalence of informal amendments to the United States Constitution is a corollary of its difficult formal amendment process. As Heather Gerken observes, "an informal

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Constitutional Revolution, 87 VA. L. REV. 1045–1109 (2001); MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003).

311. *See generally* BRUCE ACKERMAN, WE THE PEOPLE VOLUME 1: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS (1998).

312. STRAUSS, *supra* note 310.

313. Eskridge and Ferejohn, *supra* note 310.

314. Balkin and Levinson, *supra* note 310; Post and Siegel, *supra* note 310.

315. *See, e.g.*, ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophon Contiades, ed.) (2013); HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY (Dawn Oliver & Carlo Fusaro, eds.) (2011) (covering Canada, Europe, the United States, India, and South Africa); Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the Reinterpretation of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427, 429 (2016).

316. *See* RAN HIRSCHL, COMPARATIVE MATTERS 211 (2014) (critiquing the lack of comparative studies on the global south and observing that "[t]he constitutional experiences of entire regions—from sub-Saharan Africa to Central America and Eurasia—remain largely *terra incognita*, understudied, and generally overlooked").

317. *See* DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (presenting an index of cross-national data showing that the United States Constitution has the second most difficult amendment process in a list of countries across the world).

318. *See, e.g.*, David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001). *But see* Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247 (2002).

amendment process exists because formal amendment is so difficult."[319] These perspectives highlight the view that amendment of the United States Constitution through informal means is thought of as necessary because of the difficulty of formal amendment.

Constitutional change in contexts outside the United States—like Malaysia[320] and Indonesia[321]—provide a striking comparison because of the ease of their amendment procedures. Formal amendment predominates as a method of constitutional change in states like these. In a country like Malaysia, which was governed by a single political coalition for more than sixty years,[322] obtaining the two-thirds legislative majority required for a constitutional amendment was not an obstacle in practice for much of Malaysia's history since its independence. Indeed, during the many decades of its political dominance, the *Barisan Nasional* coalition aggressively employed the amendment process to effect numerous constitutional alterations.[323] The reasons that such fundamental constitutional change to the place of religion has taken place informally have little to do with the difficulty of the amendment process. Rather, political actors have found it efficacious to push contentious religious issues from the realm of public opinion to the sphere of the courts. Courts have become sites of religious contestation and principal agents in elevating the position of religion in the state.

The relative ease of formal amendment complicates the story of constitutional change in the Malaysian context. Bringing about changes of such magnitude to the state's religious character in a manner that circumvents the formal amendment process raises questions about the legitimacy of such changes. Similar concerns have been raised elsewhere. For example, Richard Albert argues that constitutional amendment by stealth occurs in Canada when political actors attempt to create a new constitutional convention in order to "deliberately evade the public, transparent, and predictable formal amendment procedures."[324] An

319. Gerken, *supra* note 310 at 933. *But see* Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 75 (2005); Jonathan Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55 (2018).

320. *See supra* notes 80-82 (describing Malaysia's constitutional amendment rules).

321. The Indonesian Constitution's amendment procedure requires that two-thirds of the members of the People's Consultative Assembly (the legislative branch) be present and that any proposed amendment requires a simple majority of the entire People's Consultative Assembly membership. The form of the unitary state of the Republic of Indonesia may not be amended. UNDANG-UNDANG DASAR REPUBLIK INDONESIA 1945 [UDD '45] [CONSTITUTION] art. 37.

322. *See* note 83 and accompanying text (on Malaysia's historic change of government following its 2018 election).

323. There have been more than fifty amending acts and 700 individual textual amendments made to the Malaysian Constitution since its enactment in 1957. Cindy Tham, *Major Changes to the Constitution*, THE SUN (July 17, 2007), http://www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html.

324. Richard Albert, *Constitutional Amendment by Stealth*, 60 MCGILL L.J. 673, 712 (2015).

amendment brought about in this way "violates the democratic rule of law values" because it does not satisfy law's expectations of "transparency, accountability, and predictability."[325]

There are similar issues at stake in polities where substantial alteration to the role of religion within the state has primarily taken place outside the formal amendment process. Constitutional change of this magnitude that has circumvented the amendment process seems deeply undesirable from a democratic perspective, particularly when amendment procedures do not pose a high obstacle. Political actors in Malaysia appear to have consciously avoided the amendment route because of the political costs involved in explicitly entrenching a more Islamic identity. As a result, the courts have become the arena in which core issues regarding the constitutional place of religion are staked. These constitutional modifications to the state's religious character have primarily taken place through informal amendment by stealth.

So far, our discussion has centered on the form by which the change has occurred. Something must now be said about the substance of the constitutional change. The transformations of the state's secular or religious character in the countries we have discussed are not minor changes; they represent substantial modifications to the nation's identity.

Despite being regarded by its framers as an "innocuous" provision,[326] the Islamic constitutional clause has become the focal point of polarizing battles over the state's identity as secular or Islamic in Malaysia today. Those in favor of an Islamic state support an expansionist reading of Article 3(1) which would make the provision akin to an Islamic source of law clause. This reinterpretation is starkly at odds with its original understanding of the Islamic constitutional clause, which was affirmed by the Supreme Court's 1988 declaration that "the law in this country is . . . secular law."[327] Over the past two decades, there has been a systematic, and significant, shift in Malaysian judicial and political discourse in favor of reading Article 3(1) as establishing Islam as "the main and dominant religion" of the state.[328]

The scale of these modifications to the Malaysian Constitution's religion clauses goes beyond ordinary constitutional change: it constitutes a deeply transformative change to the nation's fundamental constitutional identity. Efforts to establish Islam's supremacy are reflective of "a larger movement within Malaysia to reverse the priority of secular (non-Islamic) over Islamic norms."[329] The developments in Malaysia have shifted it from a "secular-

325. *Id.* at 712.

326. REID REPORT, *supra* note 59, at para. 12.

327. Che Omar bin Che Soh v. Public Prosecutor (1988) 2 MALAYAN L.J. 55, 57.

328. Lina Joy v. Majlis Agama Islam Wilayah & Anor, (2004) 2 MALAYAN L.J. 119 (H.C.) at 144[60].

329. *See* Neo, *Competing Imperatives*, *supra* note 111, at 18.

constitutional democracy with Islamic symbols to one where Islam, as the religion of the federation, is becoming a public doctrine."[330]

The substantial changes to Malaysia's state-religion relations and constitutional rights guarantees amount to what would be regarded as at least an amendment-level change—and arguably go beyond mere amendment. They are changes that "dismantle the basic structure of the constitution" by altering "a core feature of the identity of the constitution."[331] Such modifications are better characterized as "self-conscious efforts to repudiate the essential characteristics of the constitution" that are "incompatible with the existing framework," which are more properly understood as a constitutional dismemberment.[332]

For such material alterations to be brought about outside the democratic process of formal amendment raises serious concerns about legitimacy.[333] Unlike some accounts of informal constitutional change in the United States—for example, Bruce Ackerman and Akhil Amar view certain American constitutional developments, like the New Deal, as ratified by expressions of popular sovereignty—there has been no indication that the changes to the Malaysian religious order have been legitimated by popular will. Malaysia's pluralistic society remains deeply polarized over the place of Islam within the state.[334]

B. Constitutional Design

From the perspective of designing constitutional arrangements on religion, the experiences of contexts involving a shift away from an original secular constitutional framework have significant implications. It is notable that originalist arguments in these constitutional systems are typically employed by secularists who argue against the expansion of religion in the public order by championing recourse to the constitution's original purpose. Secularists in Malaysia, for example, view the elevation of Islam's position as incompatible with the original constitutional arrangements on religion and as a deliberate repudiation of the constitution's secular founding. Unlike the emergence of the originalist movement in the United States, which tends to be associated with a conservative political movement and the promotion

330. Neo, *Competing Imperatives*, *supra* note 111, at 1.

331. Albert, *supra* note 23 at 3-4.

332. *Id.* at 2.

333. Some scholars regard certain changes so fundamental that they could not be considered legitimate even if effected through formal amendment. *See, e.g.*, Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 119 (1893) (arguing that alterations inconsistent with the existing constitution are "illegitimate as amendments").

334. Craig Martin argues, in exploring the reinterpretation of Japan's war powers clause, that the legitimacy of informal amendment should be considered with reference to public ratification, deliberate agency, and the passage of time. Martin, *supra* note 315. According to these criteria, I argue that it seems that the changes to the Malaysian constitutional order fall closer to the illegitimate side of the spectrum.

of judicial restraint,[335] the opposite phenomenon is apparent in contexts like Malaysia.[336] Historical arguments are frequently employed by secularists in service of a rights-expansive constitutional adjudication approach, which is not associated with judicial constraint. Secularists routinely reach back to the founding premises of the Malaysian Constitution to support the protection—and, in many cases, the expansion—of religious freedom and other constitutional rights. Originalist arguments in newer democracies like Malaysia lean toward secularism.

These accounts of constitutional history have relevance for the work of constitutional designers considering the formal constitutionalization of religion. The experiences of multi-ethnic states—like Malaysia, Indonesia, and Sri Lanka—illustrate how various forms of accommodating religion in the constitutional text can produce unintended effects for a state's secular character in a manner unforeseen by the framers. The constitution-making of Malaysia's Article 3 constitutional clause offers an instructive example.[337] Justice Abdul Hamid, the only member of the drafting commission who supported adopting the clause establishing Islam as the religion of the state, described the provision as "innocuous;"[338] and, until recently, this original understanding of Article 3 was widely accepted in judicial, political, and academic discourse.[339] Yet today, that clause has become anything but "innocuous." To the contrary, Article 3(1), with its generally framed religion clause,[340] has become a catalyst for the elevation of Islam through the politicization and judicialization of religion.

The case studies explored in this Article provide an important counterpoint to Hirschl's claim that the formal establishment of religion in a constitution "helps limit the potentially radical impact of religion by bringing it under state control."[341] In these religiously and ethnically pluralistic societies, the constitutionalization of religion has been seized upon by political and judicial actors over time as a platform for expanding the place of religion in the public order. The examples of Malaysia, Sri

335. *See* Thomas B. Colby, *The Sacrifice of the New Originalism* (2011) 99 GEO. L.J. 713, 714 (observing that "originalism was born of a desire to constrain judges"). This emphasis on judicial restraint is closely associated with the birth of the originalist movement as a reaction to the perceived rights-expansive judicial activism of the Warren and Burger Courts. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) (noting that "originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts").

336. I have explored this argument in greater length in other work. *See* Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2014).

337. *See* JOSEPH FERNANDO, THE MAKING OF THE MALAYAN CONSTITUTION, at 162-63.

338. Reid Report, *supra* note 59, at para. 11. Justice Abdul Hamid argued that similar establishment clauses in other countries had "not been found to have caused hardships to anybody." *Id.* at para. 12.

339. *See* Neo, *Competing Imperatives*, *supra* note 111, at 4.

340. FED. CONST. (MALAY.), art. 3(1) ("Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.").

341. HIRSCHL, *supra* note 1, at 13–14.

Lanka, and Indonesia offer lessons on the far-reaching—and uncontemplated—consequences of the constitution-writing process on the religious arrangements under conditions of religious and ethnic polarization.

Constitutional arrangements on religion drafted in general, framework terms appear particularly susceptible to constitutional expansion and distortion. This perspective suggests a note of caution for designers seeking to balance competing interests by using ambivalent or ambiguous language, as in Malaysia and Indonesia, or by incorporating conflicting commitments in the constitutional provision, like in Sri Lanka. Bâli and Lerner argue that such incremental strategies, which often reflect the deliberate efforts of drafters to avoid clear-cut resolutions on contentious religious matters,[342] may well be the best institutional solution for some religiously divided societies.[343]

But although incremental solutions may appear appealing to framers eager to reach constitutional compromise in a society with multi-ethnic and religious groups, they also invite further contestation. Open-ended or abstractly framed constitutional provisions on religion may set the stage for generating religious contestation that simply serves to magnify existing religious divisions. We see this in the battle between secularists and religionists over Article 3(1) constitutional clause in Malaysia and the *Pancasila* principle of "belief in God" in the Indonesian Constitution.[344] And Sri Lanka's constitutional protections for Buddhism, as Schonthal describes, have "amplified and multiplied—rather than allayed—public concerns over the well-being and status of Buddhism."[345]

There is another, perhaps more troubling, risk. Many of the manifestations of the stealth theocracy phenomenon in recent times have taken place amidst a rise in illiberal political discourse across the world. The ascendant illiberalism has closely tracked the rise of religious nationalism, whether in Turkey, Indonesia, Malaysia, or Sri Lanka. In religiously and

342. Bâli & Lerner, *Lessons from Religiously Divided Societies*, *supra* note 5, at 293.

343. *Id.* at 303.

344. Malaysia's generally framed constitutional religious clause can be compared with Singapore's constitutional arrangements on religion. Initially part of Malaysia, Singapore separated from the federation to become a sovereign state in 1965. Unlike Malaysia, Singapore's Constitution does not profess any particular religion. Although it does contain specific provisions for the government to "recognise the special position of the Malays" and for the legislature to enact laws to regulate "Muslim religious affairs" and for "constituting a Council to advise the President in matters relating to the Muslim religion," there is no recognition of a state religion nor is ethnic identity connected to religious identity. CONST. OF THE REP. OF SING., Dec. 22, 1965, art. 152(2), art. 153.

In terms of Singapore's legal approach, there is "a discernibly clear priority of secular over religious laws and authorities." Jaclyn Neo, *Secular Constitutionalism in Singapore: Between Equality and Hierarchy*, 5 OXFORD J.L. & RELIGION 431, 434 (2016). In contrast to the elevation of the place of religion in Malaysia's political and legal discourse, fueled in large part by expansive readings of the Malaysian Constitution's abstractly-framed Article 3 provision ("Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation"), Singapore's constitutional practice has generally adopted a model of secular constitutionalism.

345. SCHONTHAL, *supra* note 4, at 154.

ethnically divided polities with ambivalently framed constitutional arrangements on religion, illiberalism has the capacity to manifest powerfully in religious terms. Stealth theocracy appears to be the particular form illiberalism tends to manifest itself in contexts with such local conditions. This returns us to a central concern: open-ended constitutional arrangements on religion leave the place of religion susceptible to co-optation as a platform for accommodating the illiberal tendencies advanced by nationalist and populist political movements. Seen in this light, the constitutional design of state-religion arrangements takes on added significance: the implications extend beyond the legal sphere in fundamental ways into the wider political and public sphere.

C. Constitutional Identity

A final observation concerns the profound connection between religion and constitutional identity. Argumentation over a constitution's religion clauses is a means by which a society articulates and cements constitutional narratives about itself.[346] Contestations over the constitutional position of religion are not simply about religious faith; they reflect a broader struggle over the nation's constitutional identity that is powerfully connected to issues of ethnicity and nationalism.

Secularists and Islamists in Malaysia, for example, battle so deeply over the understanding of the constitutional provisions on religion because it is, in essence, a struggle over the nation's identity. Race and ethnicity are intimately connected with religion in Malaysia. This perception is most marked in relation to the Islamic religion and Malay identity, reinforced by the constitutional definition of "Malay" as "a person who professes the Muslim religion."[347]

Those involved in the constitutional drafting of the Malayan state did not intend "to achieve substantive legal outcomes of religious law through the establishment clause."[348] Rather, as Kristen Stilt puts it, Article 3 "was part of the package that connected religion to privilege, language, and citizenship."[349] As part of the "social contract" struck at the nation's founding, non-Malay residents were granted citizenship while the special

346. *See* Carolyn Evans, *Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia*, 23 EMORY INT'L L. REV. 437, 438 (2009) ("Constitutional narrative in this context is a culturally and legally created story about the role, purpose, history, and relevance of the constitution in a particular society.").

347. FED. CONST. (MALAY.), art. 160(2) ("'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs . . .").

348. Stilt, *supra* note 15, at 416. The Alliance ruling political coalition played an important role in the Malaya's transition from British colony to independent state and was heavily involved in the constitution-making process.

349. *Id.* at 430.

position of the Malay majority group was protected by the new constitution.[350]

Seen in this light, the constitutional provisions on Islam's position and its definition of Malays as Muslim were a form of insurance for the Malays' special benefits.[351] At the inception of the Malayan Federation in 1957, the special position of the Malays "took the form of a 'thin' conceptualization of *Ketuanan Melayu*."[352] Under this notion of Malay dominance, "the special rights and privileges accorded to the Malays were understood to be time-bound…and were to be pursued with careful appreciation of non-Malay interests and sensitivities toward their place in the nascent nation-state."[353] The resulting constitutional document drafted at the country's independence reflects this sensibility: it established a generally secular system of constitutional governance and included a bill of fundamental rights modeled after liberal constitutions.[354]

In recent times, this understanding of the nation's constitutional identity has changed substantially. The past few decades have seen the ascendency of a notion of Malay supremacy closely connected to a notion of religious nationalism, which has fueled Islam's elevation in the public discourse. Malay ethnic-religious nationalism became a narrative increasingly employed to powerful effect in political discourse by UMNO, PAS, and Malay nationalist groups. "Because of the intimate, constitutionally-enshrined relationship between Malay ethnic identity and the Islamic religion," Joseph Liow observes, the rhetoric of "Malay 'rights and privileges' segues into a discourse of the primacy of Islam . . . over other religions."[355]

A caveat is in order: it would be misguided, of course, to think that all those who identify as Malay-Muslim in Malaysia uniformly subscribe to a supremacist narrative of ethno-religious nationalism.[356] Indeed, progressive Malay-Muslim groups have challenged the notion of Malay dominance by offering alternative views of being Malay and Muslim built on a

350. FED. CONST. (MALAY.), art. 153(1) ("It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.").

351. Some of these privileges include "reserving to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities…" FED. CONST. (MALAY.), art. 153(3) *See* Stilt, *supra* note 15, at 430.

352. LIOW, *supra* note 205, at 145. *Ketuanan Melayu* translates to Malay dominance or privilege.

353. *Id.*

354. Article 3(4) clarifies Article 3(1): "Nothing in this Article derogates from any other provision of this Constitution." *See* Neo, *Competing Imperatives, supra* note 111, at 3; Clive Kessler, WHERE MALAYSIA STANDS TODAY, http://www.themalaymailonline.com/what-you-think/article/where-malaysia-stands-today-clive-kessler (last visited Jun 27, 2017).

355. LIOW, *supra* note 205, at 168.

356. *Id.* at 170.

multiculturalist and pluralist vision of the Malaysian state.[357] Nevertheless, the exclusivist narrative of Malay supremacy connected to religious nationalism perpetuated by conservative Malay factions in recent times, unchecked by the *Barisan Nasional* government,[358] has undoubtedly helped to fuel the ascendency of religiosity in contemporary Malaysia.

More broadly, the experiences of the constitutional contexts discussed illustrate how constitutional identity is mutable and not necessarily tethered to the constitutional text.[359] The support or opposition for the expansion of religion in a polity reflects a broader struggle over competing visions of the nation's collective identity by various political and public actors. Understanding the dynamics underlying the connection of religion to ethnicity and nationalism also help to make sense of the cases that have featured most prominently in the landscape. For example, cases involving apostasy (like *Lina Joy*) or the religious conversion of children (like *Indira Gandhi*) draw such heated public debate in Malaysia because the matters at stake go beyond religious identity; they implicate questions regarding the Malay majority's special position and the dominance of the majority vis-à-vis the religious minority groups.[360] Under such conditions of ethnic pluralism, the close connection between religious and ethnic identity suggests that the expansion of religion might be seen as the epiphenomenon rather than the primary phenomenon, which is more closely connected to ethnic identity and the hegemony of the majority.

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357. Some examples of such progressive groups within the Malay-Muslim community include segments of the PAS leadership, *see id.* at 171, as well as Muslim civil society organizations like Sisters in Islam. *See* Zainah Anwar, *Sisters in Islam and the Struggle for Women's Rights*, *in* THE POLITICS OF MULTICULTURALISM: PLURALISM AND CITIZENSHIP IN MALAYSIA, SINGAPORE, AND INDONESIA 227 (Robert W. Hefner ed., 2001).

358. Whether the new political regime under the *Pakatan Harapan* government, which assumed power in 2018, will be able to change the narrative the political discourse on issues relating to Islam and Malay supremacy remains to be seen. The current Prime Minister, Mahathir Mohamad, maintains that the new government will not undermine the position of Islam but will also uphold the laws and the Constitution. *Mahathir says his govt will safeguard Islam as he pushes back against critics*, STRAITS TIMES, June 5, 2018, https://www.straitstimes.com/asia/se-asia/mahathir-says-his-govt-will-safeguard-islam-as-he-pushes-back-against-critics. *Pakatan Harapan* has also sought to distance itself from the largely race and religion-based politics of the *Barisan Nasional* coalition. Sumisha Naidu, In multi-ethnic Malaysia, PM Mahathir tells young to forget race and be 'pure Malaysian', CHANNEL NEWS ASIA, July 1, 2018, https://www.channelnewsasia.com/news/asia/mahathir-young-malaysians-forget-about-race-10482338. *See also* Estern Ng & Razak Ahmad, *Anwar: The law is for everyone*, THE STAR ONLINE, June 10, 2018, https://www.thestar.com.my/news/nation/2018/06/10/anwar-the-law-is-for-everyone-nonmuslims-have-every-right-to-debate-on-any-new-bill-says-pkr-leader/.

359. On constitutional identity, *see generally* GARY JACOBSOHN, CONSTITUTIONAL IDENTITY (2010).

360. *See* Stilt, *supra* note 15, at 432. *See also* Joseph Chinyong Liow, *Political Islam in Malaysia: Problematising Discourse and Practice in the UMNO-PAS "Islamisation race,"* 42 COMMONWEALTH & COMP. POL. 159, 184–205 (2004).

Courts often serve as the vehicles through which questions of "foundational collective identity" are addressed.[361] The examples of Malaysia, Indonesia, Sri Lanka, and Turkey underscore how courts play a constitutive role in shifting a generally secular constitutional order toward a more theocratic identity. While the rise of religion in these contexts has no doubt been influenced by its politicization in the popular and political sphere, the judicialization of religion has played a key part. Courts are not merely the main forums of contestation over religion; they are also principal catalysts for the profound shift of the religious identity of the contemporary state. Seen in this light, the courts' expansive reading of the Article 3(1) constitutional clause in Malaysia is not primarily about interpretive method; rather, judicial interpretation of this kind is best understood as an argument about constitutional ethos.

Religion contestations in these countries, however, are not confined to the courts; they have a distinctly popular dimension. Constitutional arguments over the nation's identity as secular or Islamic have public resonance. Debate over the role of secularism and religion in Malaysia, Indonesia, Turkey, and Sri Lanka extends beyond judicial discourse and has rhetorical potency in political and popular discourse. The battle over the place of religion in the public order continues in these contexts as a struggle between competing visions of the nation's constitutional soul.

VI. CONCLUSION

Theocratic constitutions are sometimes created with a bang, but occasionally they are born with a whimper. Scholarly accounts have tended to concentrate on the establishment of religious constitutional governance through constitutional writing or amendment. But not all constitutional theocracies emerge in this way. This Article has argued for reorienting the focus from formal mechanisms of constitutionalizing religion to a subtler process of reconfiguring the constitutional religious order. Constitutions can change—and change fundamentally—through less transparent means of constitutional modification to their secular or religious character.

The Article has provided a sustained treatment of a phenomenon of global significance: stealth theocracy. This account of stealth theocracy has deep relevance in a time where the importance of religion in constitutional politics is inescapable. It provides us with an overarching frame by which to identify and understand a phenomenon that is manifesting in various forms worldwide. It also challenges the conventional view of courts as secularizing bulwarks against the rise of religiosity by showing how courts act as principal catalysts in profoundly transforming a constitution's religious character. A

361. *See* Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1819 (2003).

deeper comprehension of the slide toward stealth theocracy has important implications for testing existing assumptions on constitutional change, for constitutional design, and for broader understandings on the relationship of religion to constitutional identity.

The rising receptiveness toward religion in constitutional governance is reshaping polities worldwide. From Malaysia and Indonesia to Sri Lanka and Turkey, the place of religion has been elevated through subtle, yet profound, revisions aimed at reconfiguring the constitutional order. These changes are less transparent than more explicit, formal mechanisms of constitutional change, but they are no less transformative to a nation's constitutional identity. Understanding the evolution of stealth theocracy equips us to grasp more fully the profound global relevance of religion to modern constitutionalism in our contemporary world.