

# How are Constitutional Theocracies Born?

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[Editor's note: This is one of our biweekly I-CONnect columns. For more information about our four columnists for 2020, please click [here](#). For a fuller discussion of the ideas in this post, see Yvonne Tew, *Stealth Theocracy*, 58 Va. J. Int'l L. 31 (2018). Available at SSRN: <https://ssrn.com/abstract=3287923>.]



Religion appears to be a rising political force across the globe. Constitutional democracies the world over are grappling with politics based on religious and racial identities as well as increasing ethno-nationalism. In September 2019, after its unprecedented defeat in Malaysia's national elections the year before, the United Malays National Organisation signed a political cooperation pact with the Malaysian Islamic Party, formalizing the alliance between the country's two largest Malay-Muslim parties at an event in Kuala Lumpur that attracted thousands of supporters.[1] Indonesia's 2019 presidential elections featured a divisive battle between incumbent President Joko Widodo, who picked the leader of Indonesian Ulema Council as his running mate, while his opponent Prabowo Subianto ran a campaign aimed at mobilizing conservative Indonesian Muslims.[2] In India, the Bharatiya Janata Party swept to a landslide victory in May 2019; a few months later, Prime Minister Narendra Modi's party passed a contentious citizenship law for migrants that excluded Muslims, sparking massive protests.[3] Sri Lanka, Bangladesh, and Pakistan have witnessed a surge in nationalist political forces that have agitated against religious minorities.[4] And in January 2020, accounts of the Myanmar military's violence against the Rohingya Muslim minority played out on the public stage of the international court of justice.[5] Religion's role has been increasingly expanded in the public sphere of many constitutional orders, including those not normally thought of in terms of constitutional theocracy.[6] What is striking is how this global phenomenon is taking place.

The birth of a constitutional theocracy tends to be associated with revolution or the explicit creation of religious principles of governance. Think, for example, of the 1979 Iranian revolution. Or the twenty-first century constitution-writing efforts for Afghanistan and Iraq, and those following the Arab Spring revolutions in Egypt, Libya, and Tunisia, which explicitly constitutionalized Islam as a source of law within those states.

Sometimes, though, a constitution's religious character may emerge through more subtle means of constitutional change, which are less transparent than creating or amending a constitutional text. Fundamental transformations of constitutional identity toward a more religious order can occur by stealth through political and judicial actors. What's striking is the key role that courts play in elevating the place of religion in the public order. We tend to think of courts as "bastions" of secularism that act as "effective shields against the spread of religiosity" and principles of theocracy. [7] Yet, in many contexts, courts act to expand, not limit, the place of religion in the constitutional order.

Take Malaysia, for example. For years, federal civil courts tended to decline jurisdiction over certain matters even when constitutionally guaranteed rights were implicated, leaving determination of these issues solely to the religious courts. By deferring jurisdiction to the Sharia courts, secular courts avoided adjudicating several contentious matters, like apostasy. In 2018, affirming its decision in the well-known case of *Lina Joy*, [8] the Malaysian Federal Court dismissed an appeal by four Muslim applicants who wished to leave Islam, ruling that matters of apostasy are within the jurisdiction of the Sharia Courts. [9] Civil courts have also elevated Islam's position through expansive judicial interpretations of the Malaysian Constitution's Article 3(1) declaration: "Islam is the religion of the Federation, but other religions may be practiced in peace and harmony." Courts have read this constitutional provision as granting Islam supremacy over other religions, prioritizing Islamic principles over other constitutional norms like religious freedom and freedom of speech. [10] Recent decisions indicate that Malaysia's highest court is beginning to show itself willing to reassert judicial power, including over the Sharia courts. [11] But for decades the civil courts' trend toward jurisdictional deference and judicial Islamization have fueled the shift away from the Malaysian constitution's originally secular basis.

This experience of a constitution's alteration toward a more religious order through informal mechanisms of constitutional change is not confined to Malaysia. Indonesia's controversial blasphemy law, which has been used against members of non-mainstream Muslim religious groups, has been upheld as constitutional by the Constitutional Court; [12] recently, Indonesia's Supreme Court upheld a jail sentence imposed on a non-Muslim woman who was convicted of blasphemy for complaining that her neighborhood mosque was too loud. [13] And the Sri Lankan Supreme Court has tended to invoke the Article 9 constitutional Buddhism provision to regulate religious practice in line with an understanding of Buddhism's place as the dominant religion. [14]

These comparative contexts illustrate a phenomenon of global relevance. Stealth changes toward theocratic constitutionalism tend to manifest in societies divided over the state's religious or secular character, where constitutional arrangements on religion are often a product of a compromise at the time of constitution-making. For example, the preamble to Indonesia's Constitution refers to "a belief in the one and only God" and its Article 29 holds

that “the state is based upon belief in one supreme God,” [15] rather than establishing a particular religion. The framers of the Malaysian Constitution viewed the Article 3 constitutional provision on Islam’s position as “innocuous,”[16] with symbolic rather than legal effect.[17] Over time in some places, a reversal occurs in the priority of norms through the politicization and judicialization of religion, resulting in religious principles being asserted over secular norms.

The rising receptiveness toward religion in constitutional governance coincides with another global phenomenon: the ascendancy of illiberal politics worldwide.[18] Under local conditions of growing polarization, illiberalism often manifests itself in politics rooted in religious and ethnic identity. These pervasive shifts underscore that the question of how the slide toward stealth theocracy might occur in any constitutional order is one of the pressing issues of our day. In divided societies like Malaysia, Indonesia, India, and Sri Lanka, but also in apparently secular constitutional systems like Turkey’s and many established democracies in the West, the place of religion is being elevated through subtle, yet profound, revisions to the constitution’s character. These changes are less transparent than explicit, formal mechanisms of amending or creating a constitution, but they are no less transformative to a nation’s constitutional identity. Theocratic constitutions are sometimes created with a bang, but occasionally they are born with barely a whimper.

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[1] See *Malaysian opposition parties UMNO and PAS formalise pact*, Channel News Asia (Sept. 14, 2019), <https://www.channelnewsasia.com/news/asia/malaysian-umno-and-pas-formalise-pact-11906484>; Shannon Teoh, *Malaysian parties Umno and PAS sign unity pact*, Straits Times (Sept. 14, 2019), <https://www.straitstimes.com/asia/se-asia/thousands-attend-as-malaysian-parties-umno-and-pas-sign-unity-pact>.

[2] See *Indonesia election: Joko Widodo re-elected as president*, BBC (May 21, 2019), <https://www.bbc.com/news/world-asia-48331879>.

[3] See Becky Dale & Christine Jeavans, *India general election 2019: What happened?*, BBC (May 24, 2019), <https://www.bbc.com/news/world-asia-india-48366944>; Jeffrey Gettleman & Maria Abi-Habib, *As Protests Rage on Citizenship Bill, Is India Becoming a Hindu Nation?*, N.Y. Times (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/world/asia/india-citizenship-protests.html>.

[4] See Hannah Beech et al., *Religious Minorities Across Asia Suffer Amid Surge in Sectarian Politics*, N.Y. Times (Apr. 21, 2019), <https://www.nytimes.com/2019/04/21/world/asia/sri-lanka-religion-christians.html>.

[5] See Owen Bowcott & Rebecca Ratcliffe, *UN's top court orders Myanmar to protect Rohingya from genocide*, Guardian (Jan. 23, 2020), <https://www.theguardian.com/world/2020/jan/23/international-court-to-rule-on-rohingya-genocide-safeguards>.

[6] Ran Hirschl describes a constitutional theocracy 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. Ran Hirschl, *Constitutional Theocracy* 2-3 (2010).

[7] *Id.* at 13.

[8] *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* [2007] 4 Malayan L.J. 585 (F.C.); see also Thomas Fuller, *Malaysian court refuses to recognize Muslim's conversion to Christianity*, N.Y. Times (May 30, 2007), <https://www.nytimes.com/2007/05/30/world/asia/30iht-malaysia.1.5926215.html>.

[9] See Sulok Tawie, *Federal Court defers to Shariah courts in Sarawak apostasy cases*, Malay Mail (Feb. 27, 2018), <https://www.malaymail.com/s/1586381/federal-court-defers-to-shariah-courts-in-sarawak-apostasy-cases#TooU16GPfvofDdUQ.99>.

[10] See *Malaysia Allah dispute: Top court rejects challenge*, BBC (June 23, 2014), <https://www.bbc.com/news/world-asia-27970565>; Siva Sithraputhran, *Malaysia court rules use of 'Allah' exclusive to Muslims*, Reuters (Oct. 14, 2013), <https://www.reuters.com/article/us-malaysia-court-allah/malaysian-court-rules-use-of-allah-exclusive-to-muslims-idUSBRE99D01J20131014>.

[11] See Yvonne Tew, *Symposium: Indira Gandhi v Pengarah Jabatan Agama Islam Perak (2018): Landmark Case in Malaysia*, IACL-IADC Blog (Dec. 12, 2019), <https://blog-iacl-aidc.org/2019-posts/2019/12/12/indira-gandhi-v-pengarah-jabatan-agama-islam-perak-2018-landmark-case-in-malaysia-1-3rmcd>; see also *Semenyih Jaya v. Pentadbir Tanah Daerah Hulu Langat*[2017] 3 Malayan L.J. 561.

[12] 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.* 1 (2016); Simon Butt, *Between Control and Appeasement, in Religion, Law and Intolerance in Indonesia* 62-63 (Tim Lindsey & Helen Pausacker, eds., 2016).

[13] See *Indonesia loses blasphemy appeal over mosque loudspeaker complaint*, Reuters (Apr. 8, 2019), <https://www.reuters.com/article/us-indonesia-blasphemy/indonesian-loses-blasphemy-appeal-over-mosque-loudspeaker-complaint-idUSKCN1RKoZA>.

[14] See Rehan Abeyratne, *Rethinking Judicial Independence in India and Sri Lanka*, 10 Asian J. Comp. L. 99 (2015); Benjamin Schonthal, *Buddhism, Politics, and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* (2016).

[15] Const. of the Rep. of Indon., art. 29,  
[https://www.constituteproject.org/constitution/Indonesia\\_2002?lang=en](https://www.constituteproject.org/constitution/Indonesia_2002?lang=en).

[16] Report of the Federation of Malaya Constitutional Commission ¶ 11 (1957). (Justice Abdul Hamid).

[17] Fed. Const. (Malay.), art. 3(1),  
[https://www.constituteproject.org/constitution/Malaysia\\_2007?lang=en](https://www.constituteproject.org/constitution/Malaysia_2007?lang=en).

[18] See Tom Ginsburg & Aziz Huq, *How to Save a Constitutional Democracy* (2018).