CAN ISLAM AND "ISLAMIZATION" BE A FORCE FOR REFUGEE RIGHTS IN MALAYSIA?

Matthew Seet*

Malaysia has ratified neither the 1951 Refugee Convention nor the 1967 Protocol Relating to the Status of Refugees. Accordingly, refugees in Malaysia are not accorded legal status and, like other irregular migrants, face arrest, detention, and basic human rights violations on a daily basis. This Article argues that invoking the importance of asylum in Islam (Malaysia's "official religion" according to the Federal Constitution) will provoke moral sensibilities and inspire legal reform of Malaysia's refugee rights protection framework, given the aggrandized role of Islam in Malaysian politics and public law, which now extends beyond the syariah (Islamic law) jurisdiction. This Article then considers whether the court is the most appropriate forum for such advocacy: it proposes a constitutional litigation strategy, analyzes Malaysia's constitutional jurisprudence, and examines the larger implications of this litigation strategy in Malaysian society, especially regarding the religious freedom of Muslims who seek to renounce their Islamic faith. More broadly, this Malaysian case study supports a religious, rather than a secular model of human rights, and demonstrates why and when religion can be a force for, rather than an obstacle to, human rights. It also challenges the Vienna Declaration's claims that human rights are inalienable, universal, indivisible and inter-related.

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* The author is reading for a Master in International Law at the Graduate Institute of International and Development Studies in Geneva on a Swiss Government Scholarship, and is concurrently serving as a legal intern at the Headquarters of the Office of the United Nations High Commissioner for Refugees (UNHCR). This Article is a revised version of the author's directed research thesis written during his final year of law school, which won the university-level National University of Singapore Outstanding Undergraduate Research Prize in 2012. The author conducted research on this Article during his summer internship at the Outreach and Protection Intervention Unit of the UNHCR field office in Kuala Lumpur, whose mandate is the prevention of arrest and detention of refugees and asylum-seekers in Malaysia. The author would like to thank his supervisor, Professor Thio Li-Ann, for her extensive feedback on earlier drafts of this Article and her insights provided in her public international law and human rights seminars. The author would also like to thank the staff members of the UNHCR Kuala Lumpur field office for inspiring the author to write his directed research thesis on this particular subject (especially Mohammad Khairul bin Za'im Zawawi, Darmain V. Segaran, and a fellow intern, Mehrnoosh Fazamfar) and his ex-classmate, Ian Ong, for his helpful suggestions at the start of this project, and the NUS International Relations Office for funding the author's internship at the UNHCR Kuala Lumpur field office. All errors in this Article remain the author's own, and the views expressed in this Article are those of the author and do not necessarily reflect those of the UNHCR.

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I. INTRODUCTION: THE LIMITS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL REFUGEE LAW

> "Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth."[1]

This twentieth-century refugee phenomenon, graphically described by Hannah Arendt in *The Origins of Totalitarianism*, demonstrates how citizenship is the "right to have rights."[2] Once citizenship is lost, one no longer has a government willing to protect one's rights, becoming "rightless."[3]

The refugee phenomenon exposes the limited reach of international human rights law, which focuses on the needs of citizens and neglects those of non-citizens (like refugees), including needs which arise from not having citizenship.[4] Such neglect is illustrated by how each of the two key human rights conventions—the International Covenant on Civil and Political Rights ("ICCPR")[5] and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")[6]—permits its states parties to discriminate against non-citizens with respect to important rights,[7] including rights of political participation,[8] freedom of movement,[9]

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1. Hannah Arendt, The Origins Of Totalitarianism 266 (1951).
2. *Id.* at 294.
3. *Id.* at 288. Arendt notes that the human rights of persons who were no longer citizens of any sovereign state were unenforceable even in countries whose constitutions were based on them. *Id.* at 290.
4. James Hathaway, The Rights Of Refugees Under International Law 147 (2005).
5. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
6. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].
7. Another human rights convention which allows states parties to discriminate between citizens and non-citizens is the International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195. Article 1(1) defines "racial discrimination" and stipulates, "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to this Convention between citizens and non-citizens." *Id.*, art. 1(1). However, states parties must "not discriminate against any particular nationality." *Id.*, art. 1(2).
8. The ICCPR explicitly guarantees political rights to citizens only. Article 25 of the ICCPR establishes that "every citizen" shall have the right to participate in public affairs, to vote and hold office, and to have access to public service. ICCPR, *supra* note 5, art. 25.
9. The ICCPR does not extend freedom of movement to undocumented migrants. Article 12 (1) of the ICCPR grants "the right to liberty of movement and freedom to choose [one's] residence" only to persons who are "lawfully within the territory of a state." ICCPR, *supra* note 5, art. 12(1). Similarly, Article 13 accords the right to certain procedural guarantees in expulsion proceedings only to non-citizens "lawfully within the territory" of a state party. ICCPR, *supra* note 5, art. 13.

judicial remedies,[10] and economic rights.[11] Moreover, neither Covenant adequately provides for the critical concerns of refugees, including access to courts, immunity from penalization for illegal entry, identity documents, and, in particular, protection from *refoulement*.[12] States parties may withdraw all but a few civil rights from non-citizens in public emergencies,[13] and only need to "take steps" to progressively realize the economic, social and cultural rights of refugees.[14]

Outside of the twin Covenants, customary international law only provides refugees with the "bare minimum of rights," such as freedom from genocide, systemic racial discrimination and slavery,[15] and arguably non-*refoulement*.[16] While "everyone" (presumably including non-citizens) is entitled to the list of rights enumerated in the Universal Declaration of Human Rights (UDHR),[17] including the "right to seek and enjoy . . . asylum from persecution,"[18] the UDHR, unlike the twin Covenants, is not a legally binding instrument,[19] and cannot confer legal rights on non

10. The ICCPR guarantees procedural fairness in judicial proceedings without accounting for non-citizens' lack of access to courts. ICCPR, *supra* note 5, arts. 14-16.

11. The ICESCR permits developing states to withhold the economic rights of non-citizens, depending on their economic situation. Article 2(3) of the ICESCR allows developing countries to "determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals . . . with due regard to human rights and their national economy." ICESCR, *supra* note 6, art. 2(3). This effectively allows the vast majority of the world's refugees present in developing States (which are states parties of the ICESCR) to be denied employment or subsistence rights. Hathaway, *supra* note 4, at 122.

12. Hathaway, *supra* note 4, at 121-123. *Refoulement* is defined in the 1951 Convention on the Status Relating to Refugees ("Refugee Convention") as the expulsion or return ("*refouler*") of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention on the Status Relating to Refugees, Dec. 14, 2950, 189 U.N.T.S. 150 [hereinafter Refugee Convention], art. 33(1).

13. The civil rights which are non-derogable are the rights to life, freedom from torture, cruel, inhuman, or degrading treatment or punishment, freedom from slavery, freedom from imprisonment for contractual breach, freedom from *ex post facto* criminal law, recognition as a person, and freedom of thought, conscience, and religion. ICCPR, *supra* note 5, art. 4(2).

14. ICESCR, *supra* note 6, art. 2(1).

15. Hathaway, *supra* note 4, at 36.

16. *See* Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, *in* Refugee Protection in International Law 87-177 (Erika Feller, Volker Türk and Frances Nicholson eds., 2003). *C.f.* Kay Hailbronner, *Nonrefoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?,* 26 Va. J. Int'l L. 857 (1986).

17. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

18. *Id.*, art. 14. *See* Alice Edwards, *Human Rights, Refugees and the Right 'to Enjoy' Asylum*, 17 Int'l. J. Refugee L. 293 (2005).

19. Regarding what constitutes "binding" international law, the sources of international law are provided in Article 38 of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law

-citizens, including refugees.[20] The same is true of the General Assembly's Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.[21]

Where international human rights law discriminates against non-citizens and fails to adequately address the needs of refugees, international refugee law steps in to provide refugees with international protection, as a surrogate to ruptured national state protection.[22] This informally provides refugees with the legal status they previously lost.[23] Refugee law attempts to regulate how states exercise their sovereign prerogative over the admission and exclusion of non-citizens at state borders. Such sovereign prerogative is traditionally characterized as a state's right to defend its territorial boundaries.[24] Refugee law also seeks to impose minimum standards of treatment of refugees while they are under the state's jurisdiction. The cornerstone of refugee law is the 1951 Convention on the Status Relating to Refugees (Refugee Convention),[25] as amended by

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such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. 993 (1945).

20. Diana Elles, *Aliens and Activities of the United Nations in the Field of Human Rights*, 7 Revue des Droit L'Hommes [R.D.L.H.] 291, 314–315 (1974) (Fr.). There remains controversy over whether the UDHR has in fact become part of customary international law binding on all states regardless of treaty obligations. As the International Court of Justice has stated, "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the principles enunciated in the Universal Declaration of Human Rights." United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3, ¶ 91 (May 20). However, the Court did not characterize the breach of the "principles" of both the Charter and the Universal Declaration as a breach of law. Hathaway, *supra* note 4, at 46 n.110.

21. Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 40/144, U.N. Doc. A/RES/40/144 (Dec. 13, 1985).

22. Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133, 134-135 (2002).

23. Arendt, *supra* note 1, at 290, 292.

24. *See*, *e.g.*, James A.R. Nafziger, *The General Admission of Aliens under International Law*, 77 Am. J. Int'l L. 804 (1983).

25. Convention on the Status Relating to Refugees, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The Refugee Convention restricted protection to events occurring before January 1, 1951 and allowed states to further restrict protection to acts occurring in Europe before January 1, 1951. *Id.*, art. 1B.

the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).[26] It defines a refugee as any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country."[27]

The Refugee Convention provides that persons satisfying the above definition are entitled to a full range of rights. As the Preamble[28] and Article 5[29] recognize, the Refugee Convention is a special human rights instrument which does not displace the *lex generalis* of human rights law.[30] While the Refugee Convention does not provide as broad a range of civil rights as those codified in the ICCPR,[31] it addresses critical concerns of refugees neglected by the ICCPR[32] and imposes absolute obligations on states parties with regards to economic rights, unlike the ICESCR.[33] The Refugee Convention takes into account a state's obligations to its own citizens by allowing for a "sliding scale" of standards of treatment with regards to refugees. These standards range from treatment as favorable as that which a state would apply to its own citizens[34] to treatment as favorable as that applied to non-citizens generally.[35]

However, two problems in the Refugee Convention and 1967 Protocol have led states like Malaysia to reject the application of

26. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The 1967 Protocol expanded the temporal and geographical coverage of the Refugee Convention.

27. Refugee Convention, *supra* note 25, art. 1A(2).

28. The Preamble refers to the 1945 UN Charter, the Universal Declaration of Human Rights and "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." Refugee Convention, *supra* note 25, preamble. This confirms that international refugee law was not intended to be seen in isolation from international human rights law. Edwards, *supra* note 18, at 297.

29. Article 5 of the Refugee Convention states, "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention." Refugee Convention, *supra* note 25, art. 5.

30. Jane McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, *in* Forced Migration, Human Rights and Security 263, 268 (Jane McAdam ed., 2008).

31. These ICCPR rights include the rights to life (Article 6) and family (Article 23), freedoms of opinion and expression (Article 19), and protection from torture, inhuman or degrading treatment (Article 7), and slavery (Article 8). ICCPR, *supra* note 5, arts. 6, 7, 8, 19 and 23.

32. These include the rights to identity papers and travel documents (Articles 27 and 28), prohibition on refoulement (Article 33), naturalization (Article 34), immunity from penalization for illegal entry (Article 31), and access to courts (Article 16). Refugee Convention, *supra* note 25, arts. 16, 27, 28, 31, 33 and 34.

33. Compared to the ICESCR, economic rights granted in the Refugee Convention are duties of result which may not be avoided because of competition within the host state for scarce resources. Hathaway, *supra* note 4, at 122-23. *See* Chapters III (Gainful Employment) and IV (Welfare) of the Refugee Convention, *supra* note 25.

34. Refugee Convention, *supra* note 25, arts. 4, 20, 22, 23 and 24.

35. Refugee Convention, *supra* note 25, arts. 13, 15, 17, 18, 19, 21 and 26.

international refugee law within their borders.[36] First, during the drafting of the Refugee Convention by states at the end of World War Two, the concerns of non-European states regarding the Convention's applicability in non-European contexts were ignored.[37] As a result, the Refugee Convention explicitly limited the Office of the United Nations High Commissioner of Refugees' (UNHCR) mandate to Europe and refugees fleeing events before January 1, 1951.[38] The 1967 Protocol did little to effectively "universalize" the Refugee Convention.[39] Southeast Asian states like Malaysia refused to ratify these refugee instruments, claiming that they did not apply to the specific refugee situations they faced.[40] This further excluded refugees in Southeast Asia from the international refugee law regime.[41]

Second, despite the global scope and impact of cross-border refugee flows, the refugee law instruments adopt a territorial paradigm of obligations which imposes on states parties primary (if not sole) responsibility for managing refugee flows within their respective territories and protecting the rights of refugees,[42] without specifying who has secondary responsibility.[43] The chief international organization charged with responding to refugee flows, the UNHCR, merely exercises supervisory

36. There are 145 states parties to the Refugee Convention and 146 states parties to the 1967 Protocol. (The United States has ratified the 1967 Protocol but not the Refugee Convention.) *See* United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en *and* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en

37. *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 151-157 (1990). The delegate from China reminded the Convention drafters that "other groups of people outside Europe might also stand in need of legal protection, either immediately or in the future." Statement of Mr. Cha of China, 11 U.N. ESCOR (161sr meg.) at 7, U.N. Doc. El AC. 7/SR.161 (1950). The Pakistani delegation "was of the opinion that the problem of refugees was not a European problem only and thought, therefore, that the definition of the term 'refugee' should cover all chose who might properly fall within the scope of that term." Statement of Mr. Brohi of Pakistan, 11 U.N. ESCOR (399th mtg.) at 215 (1950).

38. Refugee Convention, *supra* note 25, arts. 1A(2) and 1B.

39. The 1967 Protocol contains the same definition of a refugee as the Refugee Convention, but without the limits of "events occurring before 1 January 1951" or "events in Europe before 1 January 1951," and abandoned the temporal and geographical limitations on the definition of a refugee. 1967 Protocol, *supra* note 26, art. I(2)-(3). Yet as Hathaway notes, the 1967 Protocol did not expand the refugee definition beyond political persecution to include the social phenomena prompting forced migration outside Europe. In particular, the refugee definition did not include natural disaster, war, and broadly based political and economic turmoil. Hathaway, *supra* note 4, at 162-165.

40. Sara E. Davies, Legitimising Rejection: International Refugee Law in Southeast Asia 24, 150-151 (2008).

41. Hathaway, *supra* note 4, at 165.

42. Jeanne Rose C. Field, *Bridging the Gap Between Refugee Rights and Reality: A Proposal for Developing International Duties in the Refugee Context*, 22 Int'l. J. Refugee L. 512, 515 (2010); Anker, *supra* note 22, at 135.

43. Field, *supra* note 42.

responsibility over the application of the Refugee Convention by states parties.[44] The UNHCR does not respond to inter-state disputes or individual communications with binding decisions.[45] Therefore, the UNHCR only has, at best, an indirect influence over the actual implementation of refugee protection.[46]

As such, states situated near refugee-producing crises shoulder a disproportionate burden of the refugee flows.[47] These states may become increasingly protective of their exercise of sovereignty over their national borders because they may perceive protracted refugee situations as endangering their domestic welfare and security in the face of inaction by the international community.[48] For example, during the Indochinese crisis in the late 1970s and 1980s, which saw a mass influx of Vietnamese refugees entering Southeast Asian states like Malaysia, Malaysia noted the "socio-economic and political threats that [refugees] posed to regional and national security," and reminded the UNHCR Executive Committee that it is "incumbent upon all countries. . . to work towards a solution."[49] Malaysia has refused to sign the Refugee Convention and the 1967 Protocol in order to retain sovereign independence over the admission of aliens into Malaysian territory.[50] And when refugee flows continue despite states' reluctance to protect refugees within their jurisdiction, violations

44. Refugee Convention, *supra* note 25, preamble and art. 35(1). *See* The UNHCR and the Supervision of International Refugee Law (James C. Simeon ed., 2013); Corrine Lewis, UNHCR and International Refugee Law: From Treaties To Innovation (2012); Volker Türk, *UNHCR's Supervisory Responsibility*, 14 Revue Québécoise de Droit International [R.Q.D.I.] 135 (2001) (Can.); Katie O' Byrne, *Is There A Need for Better Supervision of the Refugee Convention*, 26 J. Refugee Stud. 330 (2013); Alysia Blackham, *A Proposal for Enhanced Supervision of the Refugee Convention*, 26 J. Refugee Stud. 392 (2013).

45. However, the Refugee Convention provides that disputes "between parties to [the] Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute." Refugee Convention, *supra* note 25, art. 38.

46. Erik Roxström & Mark Gibney, *The Legal and Ethical Obligations of UNHCR*, *in* Problems of Protection: The UNHCR, Refugees, and Human Rights 37, 43 (Niklaus Steiner, Mark Gibney & Gil Loescher eds., 2003).

47. Field, *supra* note 42, at 519.

48. Field, *supra* note 42, at 522-23. In identifying a "protracted refugee situation," the UNHCR uses a "crude measure of refugee populations of 25,000 persons or more who have been in exile for five or more years in developing countries." Executive Committee of the High Commissioner's Programme, Protracted Refugee Situations, Standing Committee, 30th mtg. at 2, U.N. Doc. EC/54/SC/CRP.14 (June 10, 2004).

49. U.N. GAOR, 33rd Sess.,346th mtg. at 7,, U.N. Doc. A/AC.96/SR.346 (Oct. 18, 1982), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A%2FAC.96%2FSR.346&Submit=Search&Lang=E (last visited Feb. 28, 2014). Malaysia called for speedier resettlement, particularly by the United States, claiming that it would attack the problem "at its roots." UNHCR, *Note for File: Meeting with Mr. Ahmad Kamil bin Jaafar (Confidential)*, 78/KL/845, Folio 6, 671.1.MLS, at 1, (Jun. 28, 1978), *cited in* Davies, *supra* note 40, at 148.

50. Davies, *supra* note 40, at 149.

of the basic human rights of refugees ensue.[51] This shall be demonstrated in this Article's study of Malaysia, a state which has received much criticism for its treatment of refugees.[52]

Because Malaysia has not ratified the refugee instruments, it is not bound by international refugee law and is not legally obliged to enact domestic legislation for the protection of refugees under its jurisdiction.[53] Unwilling to create a comprehensive legal and administrative framework which addresses the special vulnerabilities of refugees, the Malaysian government has left the registration, status determination, and protection of refugees in Malaysia entirely to the UNHCR's liaison office in Kuala Lumpur.[54] The UNHCR registers asylum-seekers as "persons of concern,"[55] and grants refugee status in international law to persons satisfying the definition of a "refugee" under the Refugee Convention.[56]

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51. Field, *supra* note 42, at 523.

52. This was especially so in 2011 when the Government of Australia signed a "refugee-swap" agreement with Malaysia for the transfer and resettlement of refugees, and the agreement was declared by the High Court of Australia as invalid on the basis that Malaysia did not offer adequate legal protection for refugees. *See Plaintiff M70/2011 v Minister for Immigration and Citizenship*, 280 ALR 18 (2011). Under the Australian-Malaysian arrangement, 800 migrants arriving illegally in Australia would be sent to Malaysia where their claims would be processed by UNHCR; in return, 4000 UNHCR-recognized refugees in Malaysia would be resettled in Australia over the next four years. *See, e.g.,* Liz Gooch, *Australia and Malaysia Sign a Refugee Swap Deal*, N.Y. Times (July 25, 2011) *available at* http://www.nytimes.com/2011/07/26/world/asia/26malaysia.html?_r=0 (last visited Feb. 28, 2014). For discussions of the Australian-Malaysian refugee swap deal and international law, *see* Michelle Foster, *The Implications of the Failed 'Malaysian Solution': The Australian High Court and Refugee Responsibility Sharing at International Law*, 13 Melbourne J. Int'l L. 1 (2012); Tamara Wood & Jane McAdam, *Australian Asylum Policy All at Sea: An Analysis of* Plaintiff M70/2011 v Minister for Immigration and Citizenship *and the Malaysia–Australia Arrangement*, 61 Int'l & Comp. L. Q. 274 (2012); Anthony Pastore, Comment, *Why Judges Should Not Make Refugee Law: Australia's Malaysia Solution and the Refugee Convention*, 13 Chi. J. Int'l L. 615 (2013).

53. The Shah Alam High Court in Tun Naing Oo v. Pub. Prosecutor noted that because Malaysia is not a party to the Refugee Convention, it has no obligations towards enacting legislation for the protection of refugees. Tun Naing Oo v. Pub. Prosecutor, 6 Current L.J. 490, ¶ 28 (2009) (Malay.).

54. *See* UNHCR, *UNHCR Global Appeal 2013 Update: Malaysia*, at 222 (Dec. 1, 2012), *available at* http://www.unhcr.org/50a9f82da.html (last visited Feb. 28, 2014). Another important role of the UNHCR in Malaysia is to promote durable solutions for refugee populations, which include local integration, voluntary repatriation, and third-country resettlement. *Id*. The UNHCR's involvement in Malaysia is a "modest but important battle to create exceptions to existing state regimes concerning illegal immigrants." Alice M. Nah, *Struggling with (Il)legality: The Indeterminate Functioning of Malaysia's Borders for Asylum Seekers, Refugees, and Stateless Persons*, *in* Borderscapes: Hidden Geographies and Politics at Territory's Edge 33, 36 (Prem Kumar Rajaram & Carl Grundy-Warr eds., 2007).

55. For details on how UNHCR registers asylum-seekers as "persons of concern," *see* U.N. High Commissioner for Refugees (UNHCR), *UNHCR Handbook for Registration*, September 2003, *available at* http://www.refworld.org/docid/3f967dc14.html (last visited Feb. 28, 2014).

56. A refugee is a person who, "owing to a well-founded fear of being persecuted

Yet refugees do not have legal status under Malaysian domestic law. The Immigration Act 1959/1963 (Act 155) (Immigration Act),[57] which defines immigration offences in Malaysia, does not distinguish a UNHCR-recognized refugee or registered asylum-seeker from an irregular migrant whose presence in Malaysia is illegal under the Immigration Act. As such, refugees are subject to the Immigration Act[58] and face the same penalties as irregular migrants.[59] The lack of legal status accorded to refugees under domestic law allows for violations of their basic human rights.[60] The Malaysian government's piece-meal "humanitarian approach" to such instances of human rights violations has proven to be of limited efficacy.

In the absence of binding obligations under international refugee law, domestic legislation may play an alternative role in refugee protection.[61] Such domestic legislation should not only incorporate a human rights framework providing refugees with institutionalized remedies, but should also address the special vulnerabilities of refugees, and grant them rights above and beyond what general human rights law provides.

This Article argues that such an alternative domestic mechanism for refugee protection may be brought about in Malaysia by appealing to Islam, the "religion of the Federation" according to Article 3(1) of the Federal Constitution,[62] in order to provoke moral sensibilities and lead to the necessary legal reforms for refugee protection. Exploring how asylum is anchored in Islamic notions of human dignity, and how *syariah* law (Islamic law) imposes obligations on Muslim communities to provide pro-

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for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country." Refugee Convention, *supra* note 25, art. 1(A)(2).

57. Immigration Act 1959/1963 (Act 155/2006), *available at* http://www.agc.gov.my/Akta/Vol.%204/Act%20155.pdf (last visited Feb. 28, 2014).

58. Tun Naing Oo, *supra* note 53, ¶ 29. The court reaffirmed the holding in Subramaniyam Subakaran v. Pub. Prosecutor, 1 CURRENT L.J. 470 (2007). Interestingly, the court in *Tun Naing Oo* substantiated its position by referring to Article 2 of the Refugee Convention which states that every refugees has duties to the country to which he finds himself, which requires him in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order. Tun Naing Oo, *supra* note 53, ¶ 29. This is despite having affirmed in the previous paragraph that Malaysia was not bound by any of the obligations laid in the Refugee Convention. Tun Naing Oo, *supra* note 53, ¶ 28

59. Penalties include imprisonment of up to five years, a fine not exceeding ten thousand *ringgit*, and six strokes of the cane. Immigration Act, *supra* note 57, § 6(1)(c)(3).

60. *UNHCR Global Appeal 2013 Update: Malaysia*, at 220 (Dec. 1, 2012), *available at* http://www.unhcr.org/50a9f82da.html (last visited Feb. 28, 2014).

61. Field, *supra* note 42, at 513 n.5, 519 n.39. *See* GUY S. GOODWIN-GILL AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 296-330 (3rd ed. 2007), for a discussion on how complementary mechanisms—regional, domestic, or other international agreements—may improve the status and treatment of refugees.

62. FED. CONST., art. 3(1) (Malay.), *available at* http://www.agc.gov.my/images/Personalisation/Buss/ pdf/Federal%20Consti%20(BI%20text).pdf (last visited Feb. 28, 2014).

tection to all Muslims and non-Muslims fleeing persecution, legitimizes and enhances the human rights of refugees in Malaysia. Such an appeal to Islamic ideology for the purpose of protecting refugees in Malaysia is not without precedent, and is likely to succeed in Malaysia's current legal-political setting where Islam is increasingly politicized in the public sphere and exerts an increasingly strong influence in Malaysian public law outside of the *syariah* jurisdiction. However, the legitimacy of an interpretation of Islam calling for greater protection of refugees may face challenges in Malaysia, given that Islam is not a monolithic religion, and that the Malaysian government has in the past deemed certain teachings and schools of Islam illegitimate, even deviationist.

This Article then considers whether the court is the appropriate forum for the invocation of Islamic values with the aim of inspiring legal reform in Malaysia's refugee policy, given the rise of social reform litigation, where litigation is strategically utilized to raise rights consciousness and to influence social policy. In particular, this Article proposes a litigation strategy challenging the constitutionality of the Immigration Act, which does not differentiate refugees and asylum-seekers from irregular migrants, exposing them to basic human rights violations. Considering that Malaysian courts have interpreted the "right to life" under Article 5(1) of the Federal Constitution to include a right to livelihood, refugees might successfully claim that their "right to life" is infringed by the Immigration Act, which deprives them of legal status, prohibits their employment, and subjects them to indefinite detention. Their claim is unlikely to be hindered by the claw-back clause, "save in accordance with law" which expressly qualifies the "right to life," because recent Malaysian judicial decisions have avoided interpreting the word "law" to strictly refer to legislation enacted by Parliament and have held that "law" incorporates fundamental principles of natural justice.

However, the next stage of the proposed litigation strategy is likely to attract controversy. A difficult argument to make is that, by virtue of Article 3(1) of the Federal Constitution, which states that "Islam is the religion of the Federation," Islamic tenets of asylum and refugee protection should form part of the meaning of "law" in Article 5(1); therefore, by depriving refugees of legal status, the Immigration Act contravenes their "right to life" under Article 5(1). The 2007 decision by the Federal Court (the highest court in Malaysia from which there is no appeal), *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan and Ors*,[63] illustrates the difficulties of this argument. The majority judgment invoked "Islam" in Article 3(1) to define and limit one's right to freedom of religion under Article 11(1) of the Federal Constitution,[64] a fundamental liberty under

63. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan and 2 Ors, 4 THE MALAYAN L.J. 585 (2007).

64. Article 11(1) of the Federal Constitution states, "Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it." FED. CONST., *supra* note 62, art. 11(1) (Malay.).

Part II of the Federal Constitution, like the right to life under Article 5(1). While this Article's proposed litigation strategy is supported by the majority judgment, the majority's application of Islamic values outside the *syariah* jurisdiction was vigorously challenged by the dissenting judge and also resulted in polarized responses within Malaysian civil society.

Even if the proposed litigation strategy were to succeed and a Malaysian court were to hold that the Immigration Act contravenes Article 5(1) when read together with Article 3(1) of the Federal Constitution, such an interpretation would have serious implications for Malaysian society. Extending Article 3(1)'s declaration of "Islam" as "the religion of the Federation" beyond ceremonial symbolism flouts constitutional history and forsakes the social compact of Malaysia as a secular—not Islamic—state, as originally intended by the framers of the Federal Constitution. This interpretation of Article 3 also adversely affects the religious freedom of Malaysian Muslims who seek to renounce their Islamic faith, by supporting and entrenching the *Lina Joy* majority's restrictive interpretation of the right to freedom of religion under Article 11(1) of the Federal Constitution. These broader implications in Malaysian society cast doubt on whether the end of enhancing the protection of refugees—who are but one category of vulnerable persons in Malaysia—truly justifies the means.

Part II of this Article examines the current treatment of refugees in Malaysia in light of international and comparative human rights standards and assesses the "humanitarian approach" adopted by the Malaysian government in its attempt to address refugees' needs. Part III argues that Islam may be a force for refugee rights in the Malaysian public sphere in light of past governmental practices and the current wave of "Islamization." Part IV explores whether a normative appeal to Islamic values in order to inspire legal reform can and should be carried out in a court of law in the Malaysian context. Part V takes a step back and demonstrates how this Malaysian case study challenges the claims made in the 1993 Vienna Declaration and Programme of Action[65] that human rights are "inalienable,"[66] "universal,"[67] and "indivisible and interdependent."[68]

II. BACKGROUND: MALAYSIA'S REFUGEE POLICY AND PRACTICE

A. *The Government's "Humanitarian Approach": An Inadequate Response*

Because the Office of the United Nations High Commissioner of Refugees (UNHCR)-recognized refugees and UNHCR-registered asylum-seekers are not accorded legal status under Malaysian law, they are

65. Vienna Declaration and Plan of Action, U.N. Doc. A/CONF/157/23 (Jul. 12, 1993) [hereinafter Vienna Declaration].

66. *Id.*, ¶ 18.

67. *Id.*, ¶ 5.

68. *Id.*, ¶ 5.

often subject to raids and arrests by both the police and the *Ikatan Relawan Rakyat Malaysia* ("RELA"),[69] an untrained volunteer citizens' police force[70] authorized to assist the police and the Immigration Department in apprehending irregular migrants without proper documentation.[71] These arrests are often accompanied by allegations of extortion[72] and excessive violence.[73] After arrest and prosecution for immigration offences under the Immigration Act, refugees and asylum-seekers may be indefinitely detained in Immigration Detention Centers (IDCs) pending deportation.[74] Such indefinite detention is not subject to periodic reviews as it is in countries like Canada, which has regular administrative reviews of detention.[75] Nor is there a maximum period of detention pending deportation, as there is in other common law jurisdictions.[76]

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69. The RELA is a people's volunteer corps formed on January 11, 1972 under the Essential (Ikatan Relawan Rakyat) Regulations 1966 (P.U. 33/1966), pursuant to the Emergency (Essential Powers) Act,, 1964 (30/64) and continues to be in force by virtue of Section 6 of the Emergency (Essential Powers) Act 1979 (Act 216).

70. During a mission conducted by the United Nations Working Group on Arbitrary Detention from 7 to 17 June 2010 at the invitation of the Malaysian Government, a meeting with the General Director of RELA revealed that most RELA personnel had not received training, and that those who were "trained" had only followed a one-day orientation course. *Report of the Working Group on Arbitrary Detention: Mission to Malaysia*, ¶ 47, U.N. Doc. A/HRC/16/47/Add.2 (Feb. 8, 2010) [hereinafter WGAD Report]. Similarly in 2006, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on the Human Rights of Migrants noted the RELA's lack of command and accountability in relation to the Immigration Department. *Communications to and from Governments*, at 201-203, U.N. Doc. A/HRC/4/20/Add.1 (Mar. 12, 2007) [hereinafter Special Rapporteurs' joint report].

71. These powers were granted to the RELA through amendments to the Essential (Amendment) Regulations 2005 on 1 February 2005.

72. As noted in the WGAD Report, *supra* note 70, ¶ 47, many civil society representatives have claimed that the RELA extorts money from irregular immigrants and physically abuses them.

73. Excessive violence by the RELA could have led to death in one incident. The day after a major RELA raid in Selayang, five dead bodies were recovered from a lake. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on the Human Rights of Migrants sent a communication to the Government, but received no response. Special Rapporteurs' joint report, *supra* note 70.

74. WGAD Report, *supra* note 70, ¶¶ 43, 74. Section 34(1) of the Immigration Act provides, "Where any person is ordered to be removed from Malaysia under this Act, such person may be detained in custody for such period as may be necessary for the purpose of making arrangements for his removal." Immigration Act, *supra* note 57, § 34(1).

75. In Canada, administrative reviews are to be conducted initially at 48 hours, then after 7 days, then every 30 days. Immigration and Refugee Protection Act, C.R.C. 2001, c. 27 (Can.).

76. In common law countries, it is a generally accepted principle of law that even where a statute does not impose an express maximum limit on the length of detention, it is nonetheless subject to limitations, and that the period in detention must be reasonable. *See* Sahin v. Canada Minister of Citizenship and Immigration, [1995] 1 F.C. 214 (Can.); R v. Governor of Durham Prison, ex p. Singh, [1984] 1 All E.R. 983 (Q.B.). The U.S. Supreme Court has ruled that the government may detain aliens

Moreover, the conditions of detention under which irregular migrants, including refugees, live in the IDCs fall far short of minimum international standards.[77] Detainees live in overcrowded conditions with insufficient food and water and inadequate medical care, conditions which facilitate the transmission of communicable diseases and which have resulted in death in several instances.[78] At the same time, the conditions in the prisons which house local offenders are, for the most part, in accordance with minimum international standards.[79] The difference in living conditions between prisons and IDCs may be explained by the Prisons Regulations 2000,[80] which safeguards the fundamental liberties of predominantly local offenders housed in prisons.[81] However, no similar domestic legal framework regulates the treatment of irregular migrants (including refugees) detained in IDCs.

Moreover, child refugees, including unaccompanied minors, are arrested and indefinitely detained in IDCs together with adults.[82] Even if Malaysia does not adopt the United Kingdom's policy of ending the detention of unaccompanied migrant children,[83] it should, at the very least, end the

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subject to final removal orders, but must release them after six months if "there is no significant likelihood of removal in the reasonably foreseeable future." Zadvydas v. Davis, 533 U.S. 1, 21 (2001).

77. United Nations Standard Minimum Rules for the Treatment of Prisoners (Aug. 30, 1955), adopted by the Economic and Social Council in Resolution 663 C (XXIV) (Jul. 31, 1957) and Resolution 2076 (LXII) (May 13, 1977). Article 20(1) requires that every prisoner be provided "at the usual hours. . . with food of appropriate nutritional value," and Article 20(2) provides that "[d]rinking water shall be available to every prisoner whenever he needs it". *Id.*, art. 20.

78. WGAD Report, *supra* note 70, ¶ 81 (also noting that 14 detainees died in 2009 and 3 detainees died in the first five months of 2010).

79. WGAD Report, *supra* note 70, ¶ 61 (noting that "the conditions in prison . . . were considerably better than those at the immigration detention centres") and ¶ 92 (noting that "[m]ost prisons visited were found to meet international standards and regulations on conditions. This finding does not, however, apply to immigration detention centres.").

80. P.U. (A) 325/2000 [hereinafter Prison Regulations].

81. These include the rights to food (Regulations 60-66), medical treatment (Regulations 230-244), education and recreation (Regulations 151-156), visits and communication (Regulations 86-112). *Id.*

82. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Malaysia,* 44th Sess., ¶ 81, U.N. Doc. CRC/C/MYS/CO/1 (Feb. 2, 2007) [hereinafter CRC Committee Report]. Further, the Working Group on Arbitrary Detention discovered a 14 year old boy in Lenggeng IDC who had been detained since June 2008. WGAD Report, *supra* note 70, ¶ 82. For a report on the arrest and detention of child refugees and asylum-seekers in the latest crackdown on irregular migrants, *see Malaysia Accused of Arresting Asylum-Seekers and Children*, The Guardian (U.K.) (Sep. 4, 2013), *available at* http://www.theguardian.com/world/2013/sep/04/malaysia-accused-arresting-asylum-seekers (last visited Feb. 28, 2014).

83. *See* Melanie Gower, *Ending Child Immigration Detention*, Commons Library Standard Note (U.K.) (Jan. 2, 2013), *available at* http://www.parliament.uk/briefing-papers/SN05591 (last visited Feb. 28, 2014). Local children's rights non-governmental organizations in Malaysia are similarly urging the Malaysian government

detention of unaccompanied child refugees together with adults. In fact, Malaysia's detention and treatment of child refugees in IDCs violates its binding international obligations under the Convention on the Rights of the Child,[84] which obliges states parties to provide child refugees or asylum-seekers, accompanied or unaccompanied, with "appropriate protection and humanitarian assistance."[85] This may be contrasted with how juvenile offenders in Malaysian prisons receive special protection.[86]

The Malaysian government has responded to criticisms of the above violations of refugees' human rights by adopting a piece-meal "humanitarian approach." In 2005, the Attorney General's Chambers (AGC), the principal organ tasked with providing legal advice to the Malaysian government, issued an informal directive stating that it will not prosecute holders of UNHCR documentation, including asylum-seeker's certificates issued to applicants registered as persons of concern to UNHCR and UNHCR refugee cards issued to UNHCR-recognized refugees.[87] Courts have extended this "humanitarian approach" to newly arrived unregistered asylum-seekers by setting aside their whipping penalties under the Immigration Act on "humanitarian grounds."[88] The Malaysian government has also increased its cooperation with UNHCR[89] by releasing more of UNHCR's persons of concern from detention,[90] including particularly vulnerable groups such as children and pregnant women.[91]

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to end the detention of all children, especially child refugees and asylum-seekers. *Government Urged to End Detention of Child Refugees*, The Star (Malaysia) (Oct. 9, 2013), http://www.thestar.com.my/News/Nation/2013/10/06/Stop-child-detention.aspx (last visited Feb. 28, 2014).

84. Convention on the Rights of the Child, 1577 U.N.T.S. 3 [hereinafter CRC]. The Government of Malaysia acceded to the CRC on 17 February 1995. For the most updated status of ratifications of and accessions to the CRC, *see* United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en (last visited Feb. 28, 2014).

85. CRC, *supra* note 84, art. 22(1).

86. The Prison Regulations provide that a "young prisoner, whether male or female, shall be kept apart from adults." Prison Regulations, *supra* note 80, § 6(1). Further, the Prison Regulations also treat a person with a mental age below 21 as a young prisoner. Prison Regulations, *supra* note 80, § 6(1).

87. CRC Committee Report, *supra* note 82, ¶ 80.

88. The court in *Tun Naing Oo* decided against whipping the asylum-seeker charged under the Immigration Act because, "going by humanitarian grounds," it was "not humane" to "add to his suffering." Tun Naing Oo, *supra* note 53, ¶ 33. Similarly, in Kya Hliang and 10 others v. Pub. Prosecutor, Semakan Jenayah No. (MT-1) 43-1-2009 (High Court, Johor Bahru), the court set aside the whipping penalty because the offenders "escaped from their own country [and] came not by choice." However, in both cases, the imprisonment sentences were not set aside.

89. *UNHCR Global Appeal 2013 Update: Malaysia*, *supra* note 54, at 220, 222.

90. For example, interventions by UNHCR led to the release of 4,600 persons of concern in 2009, up from 500 persons of concern released in 2008. *UNHCR Global Report 2009: Malaysia*, at 243 (Jun. 1, 2010), *available at* http://www.unhcr.org/refworld/docid/4c57cc5b0.html (last visited Feb. 28, 2014).

91. UNHCR, *UNHCR Staff Celebrate Release of Babies from Detention in Malaysia* (Mar. 23, 2007), http://www.unhcr.org/460400114.html (last visited Feb. 28, 2014).

However, the reality remains that even UNHCR-recognized refugees are still arrested and detained in IDCs.[92] The effectiveness of the Malaysian government's "humanitarian approach" is largely contingent on the willingness of the police and RELA to abide by the AGC's policy that holders of UNHCR documentation should not be arrested. This is particularly true because the UNHCR's ability to intervene to prevent the arrest of its persons of concern and to secure their release depends on maintaining good relations with the police and the Immigration Department, and is limited.

Further, refugees are not allowed to work, given that the Immigration Act formally criminalizes the employment of non-citizens who do not hold a valid Pass, and imposes severe penalties in the event of a violation.[93] While the UNHCR has acknowledged that less developed countries may withhold employment rights from refugees insofar as to accord priority to citizens,[94] a developing country like South Africa, a state less developed than Malaysia, has allowed refugees to work.[95] Malaysia's Home Affairs Ministry has unequivocally stated that refugees "cannot work here but they can do odd jobs."[96] However, employment on an *ad hoc* basis leaves refugees vulnerable to exploitation from unscrupulous employers who may force them to work in conditions described as the 3 'D's (Dirty, Demeaning, Dangerous),[97] or withhold their wages arbitrarily, while refugees have no legal recourse under domestic law.[98]

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92. WGAD Report, *supra* note 70, ¶¶ 43, 69.

93. Section 55B of the Immigration Act states that the employment of one or more non-citizens not holding a valid Pass may lead to a fine of ten to fifty thousand *ringgit* and a maximum sentence of twelve months. Employment of five such illegal employees may subject the employer to imprisonment for a term of six months to five years and even a whipping of up to six strokes. Immigration Act, *supra* note 57, § 55B. According to the Immigration Act, a Pass "means any Pass issued under any regulations made under this Act entitling the holder thereof to enter and remain temporarily in Malaysia." Immigration Act, *supra* note 57, at § 2(1).

94. UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 11, U.N. Doc. EC/SCP/54 (Jul. 7, 1989).

95. In South Africa, any person recognized as a refugee is "entitled to seek employment." *Refugees Act (No. 130, 1998)* [South Africa] § 27(f), available at: http://www.refworld.org/docid/3ae6b6090.html (last visited Feb. 28, 2014). *Refugee Regulations (Forms and Procedures) 2000* [South Africa], R 366, Apr 6, 2000, § 15(1)(f), available at: http://www.refworld.org/docid/3affee564.html (last visited Feb. 28, 2014). Further, the South African Supreme Court of Appeal held that even persons awaiting refugee status verification are entitled to work. Minister of Home Affairs v. Watchenuka (2004) 1 All SA 21 (S.Afr.). *See, also,* IRIN, *Pakistan: Non-Afghan Refugees Given Right To Work* (May 14, 2003), available at: http://www.irinnews.org/report/19926/pakistan-non-afghan-refugees-given-right-to-work (last visited Feb. 28, 2014).

96. *Sec-Gen: UN-Recognised Refugees to Get ID Cards*, The Star (Malaysia) (Feb. 2, 2010), http://thestar.com.my/news/story.asp?file=/2010/2/2/nation/5594803&sec=nation (last visited Feb. 28, 2014).

97. *See, e.g., Locals Put Off By 'Dirty, Demeaning and Dangerous' Low-End Jobs*, The Star (Malaysia) (Feb. 19, 2011) http://www.thestar.com.my/story.aspx?file=%2f2011%2f2%2f19%2fbusiness%2f8070096& sec=business (last visited Feb. 28, 2014).

98. *See, e.g., Getting Refugees to Fill Labor Needs*, The Star (Malaysia) (Sep.

B. *The Human Rights Framework And The Issue Of Human Dignity*

As Arendt observes, once refugees are deprived of their membership in a political community and no longer have a government willing to protect their rights, they lose their human dignity, their essential quality as humans.[99] As demonstrated in the previous section, the kind of protection afforded by the Malaysian government's informal "humanitarian approach" has done little to restore the human dignity of refugees living in Malaysia.[100] While Arendt implies that the only way in which a refugee can restore his or her human dignity is through acquiring new citizenship and membership in a new political community,[101] this Article adopts a more pragmatic stance. Although Malaysia has no binding obligations under international refugee law, domestic mechanisms imposing duties on the state may play an alternative role in refugee protection.[102] Such domestic legislation should address the specific harms refugees face and the special protection refugees require, and must provide refugees with enforceable rights above and beyond the basic human rights accorded to them under general human rights law.

This domestic mechanism incorporates a human rights framework which holds state actors accountable for human rights abuses instead of providing them with immunity from prosecution.[103] Such a mechanism also provides refugees with institutionalized remedies upon which to call if they are treated improperly.[104] Compared to the "humanitarian approach," the human rights framework restores the human dignity of refugees by empowering their agency as individuals[105] and by allowing them to play

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15, 2013), http://www.thestar.com.my/News/Nation/2013/09/15/Getting-refugees-to-fill-labour-needs.aspx (last visited Feb. 28, 2014).

99. Arendt, *supra* note 1, at 295.

100. *See* Jera Beah H. Lego, *Protecting and Assisting Refugees and Asylum-Seekers in Malaysia: The Role of the UNHCR, Informal Mechanisms, and the 'Humanitarian Exception'*, 17 J. Pol. Sci. & Socio. 75 (2010) (arguing that the protection and assistance to refugees and asylum seekers is temporary, partial, and altogether insufficient for the preservation of the dignity of refugees and asylum seekers, and that it is via the application of the "humanitarian exception" for refugees and asylum seekers that Malaysia is asserting its sovereignty).

101. Refugee Law and Policy: A Comparative and International Approach 18 (Karen Musalo, Jennifer Moore & Richard A. Boswell eds., 2nd ed. 2001).

102. Field, *supra* note 42, at 513 n.5, 519 n.39. *See* Guy S. Goodwin-Gill and Jane McAdam, *supra* note 61, for a discussion on how complementary mechanisms—regional, domestic, or other international agreements—may improve the status and treatment of refugees.

103. RELA officers are immune from prosecution, in relation to their official conduct. Public Authorities Protection Act 1948 (Act 198) § 2.

104. George Kent, *Food as a Human Right*, *in* Human Rights in the World Community: Issues and Action 191, 192 (Richard Pierre Claude & Burns H. Western eds., 3rd ed. 2006).

105. Michael Ignatieff, *Human Rights as Idolatry*, *in* Human Rights as Politics and Idolatry 53, 57 (Amy Gutmann ed., 2001) [hereinafter Ignatieff, *Human Rights as Idolatry*].

active roles in shaping the conditions under which they live.[106] For example, providing a refugee with a right to work allows him to participate as a productive member of society and, in turn, enhances his human dignity.[107]

However, the normative content of "human dignity" is neither self-evident nor easily-defined; it depends on intuitive understanding, where we know a violation of human dignity when we see it, even if we cannot say what it is.[108] As such, human dignity is largely culturally specific[109] and open to ideological and religious dispute.[110] When invoked in concrete situations, an affirmation or violation of human dignity might be easily claimed despite its lack of definition.[111] This Article's next section considers how the human dignity of refugees may be derived from Islamic sources in order to provide a foundation for the protection of the human rights of refugees in Malaysia.

III. WHY APPEALING TO ISLAMIC VALUES WILL INSPIRE GREATER PROTECTION OF REFUGEE RIGHTS IN MALAYSIA

A. *Why and How the Human Rights of Refugees Should Be Grounded in Islam*

Having discussed the inadequacy of the Malaysian government's piece-meal "humanitarian approach" and the need for incorporation of a human rights framework in domestic legislation which addresses the special needs of refugees, this Article now argues that such a framework in Malaysia may be brought about by appealing to Islamic values, given that "Islam is the religion of the Federation" according to Article 3(1) of Malaysia's Federal Constitution.[112] This argument supports a religious model of human rights which grounds human rights discourse in religious notions of human dignity, as opposed to a secular model which "base[s] human rights on the pragmatic consideration that the practice of according certain

106. Kent, *supra* note 104, at 192-193.

107. Edwards, *supra* note 18, at 320. Also, the South Africa Supreme Court of Appeal ruled that issuing a blanket prohibition on employment to all asylum-seekers, without offering social benefits, amounts to a breach of the constitutional right to "dignity", and that "human dignity has no nationality." *Watchenuka*, *supra* note 95, ¶ 25.

108. Oscar Schachter, *Human Dignity As A Normative Concept*, 77 Am. J. Int'l L. 848, 849 (1983).

109. Michael Ignatieff, *Dignity and Agency*, *in* Human Rights as Politics and Idolatry 161, 164 (Amy Gutmann ed., 2001) [hereinafter Ignatieff, *Dignity and Agency*].

110. Nicholas Walterstorff, *Response: The Irony of It All*, 9 Hedgehog Rev. 63, 65 (2007) (arguing that any line of thought, religious or non-religious, yields the conclusion that human beings have dignity).

111. Schachter, *supra* note 108. Further, Ignatieff provides examples of expressions of human dignity which strike him as "profoundly inhumane", such as female genital mutilation, which, as a ritual of sexual initiation, is "linked to the idea of womanly dignity and worth" in some cultures. Ignatieff, *Dignity and Agency*, *supra* note 109.

112. Fed. Const., *supra* note 62, art. 11(1) (Malay.).

rights to all human beings yields desirable social consequences."[113] This secular model contends that because no set of religious beliefs commands universal assent, human rights should not be grounded in religion,[114] but a "common denominator . . . across a range of divergent cultural and political viewpoints."[115] Adopting a religious, rather than a secular, model dispels doubts about the universality of human rights[116] and legitimizes human rights[117] "within diverse religious traditions and not just alongside them."[118] A religious model ensures that human rights are effectively implemented across different religious traditions and "owned" by the local populace[119] instead of being perceived as another facet of Western hegemony.[120]

Such legitimation of human rights within religious traditions (including the Islamic tradition) requires internal dialogue and what professor of Islamic law and human rights, Abdullahi An-Na'im, terms, "enlightened interpretations" of existing religious norms and values, according to his "cultural legitimacy" thesis.[121] Of course, this presumes that religious traditions which appear in conflict with human rights may be influenced to adapt to human rights standards.[122] In general, cultural norms and institutions have varying degrees of ambivalence and flexibility to meet their followers' different needs and circumstances, and varying interpretations of cultural norms can usually be presented within a range

113. Walterstorff, *supra* note 110, at 65.

114. Louis Henkin, *Religion, Religions, and Human Rights*, 26 J. Religious Ethics 229, 238 (1998) (also arguing that human rights "are not, and cannot be, grounded in religious conviction" because the success of human rights depends on its secularity and rationality).

115. Ignatieff, *Human Rights as Idolatry*, *supra* note 105, at 64.

116. Abdulaziz Sachedina, *The Clash of Universalisms: Religious and Secular in Human Rights*, 9 Hedgehog Rev. 49, 59 (2007).

117. Arguing that religious foundations endow human rights with legitimacy, Marks and Clapham define legitimacy as "the quality that makes law seem justified, appropriate and morally compelling." Susan Marks & Andrew Clapham, International Human Rights Lexicon 312 (2005).

118. Diane Orentlicher, *Relativism and Religion*, *in* Michael Ignatieff, Human Rights as Politics and Idolatry 141, 155 (Amy Gutmann ed., 2001).

119. Abdullahi An-Na'im, *Conclusion*, *in* Human Rights in Cross-Cultural Perspectives: A Quest for Consensus 427, 431 (Abdullahi Ahmed An-Na'im ed., 1995).

120. Sachedina provides the example of the drafting of the UDHR. She argues that the detachment of universal morality from any foundational consideration in order to accommodate diverse cultures and national communities in drafting of Article 1 has unfortunately allowed political authorities in different Muslim countries to use cultural relativity to justify their lack of commitment to promote certain freedoms for their Muslim, as well as non-Muslim, citizens. Sachedina, *supra* note 116, at 53.

121. Abdullahi An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, *in* Human Rights in Cross-Cultural Perspectives: A Quest for Consensus 19, 21 (Abdullahi An-Na'im ed., 1995).

122. Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 Hum. Rts. Q. 838, 842 (2000).

of possibilities.[123] Similarly, Islamic texts like the *Qur'an* and the *Sunnah* are open to competing interpretations such that one may find textual authority for both liberalism and conservatism.[124]

The importance of asylum and refugee protection is evident in the Islamic tradition.[125] The concept of asylum is anchored in human dignity which, according to the *Qur'an*, has been gratuitously conferred by God "on the children of Adam."[126] The Prophet Muhammad was himself a refugee, and his escape from persecution in Mecca (the *hijrah*) marks the beginning of the Islamic calendar and is central to the Islamic faith.[127] Further, *syariah* law[128] explicitly provides all persons fleeing persecution, even non -Muslims, with the right to enter an Islamic community and ask for *aman* (protection).[129] Once *aman* is granted, refugees, especially particularly vulnerable persons like women and children,[130] should benefit from all of the rights guaranteed to nationals, including the right to work, education, free movement, and family reunification.[131] An enlightened interpretation of *syariah* law which highlights the importance of asylum in Islam may provide a valuable "faith-based guarantor"[132] of the human rights of refugees in predominantly Islamic societies, by reflecting back to these societies core values and understandings, which, in turn, have the potential to influence current legal and governance practices affecting the lives of refugees.[133]

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123. Abdullahi An-Na'im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child, in* The Best Interests of the Child: Reconciling Culture and Human Rights 62, 67 (Philip Alston ed., 1994) [hereinafter An-Na'im, *Cultural Transformation*].

124. Abdullahi An-Na'im, *What Do We Mean by Universal?*, Index on Censorship, Sept & Oct. 1994, at 120, 125.

125. *See, e.g.*, Ahmed Abou-El-Wafa, The Right to Asylum Between Islamic Shari'ah and International Refugee Law: A Comparative Study (2009).

126. Qur'an 17:70.

127. Nida Kirmani and Ajaz Ahmed Khan, *Does Faith Matter: An Examination Of Islamic Relief's Work With Refugees And Internally Displaced Persons*, 27 Refugee Surv. Q. 41, 42 (2008).

128. Ghassan M. Arnaout, Asylum in the Arab-Islamic Tradition 32 (1987) (also noting that, by reason of the sacred nature of asylum, a refusal to grant asylum entails not only dishonor and contempt, but also violation of an oath and sacrilege).

129. Qur'an 9:6 ("If any [one, even] of the idolaters seeks thy protection, grant him protection [forthwith] . . . and then convey him to a place where he can feel safe . . .").

130. The *Qur'an* provides additional protections to vulnerable groups such as women and children, providing refugee women and children, even non-Muslims [5:8], with the same rights as women and children in the host country [8:75] Saeid Rahaei, *Islam, Human Rights and Displacement: The Rights of Refugee Women and Children in Islam*, Forced Migration Rev., June 2012, at 4, 4, *available at* http://www.fmreview.org/en/FMRpdfs/Human-Rights/human-rights.pdf (last visited Feb. 28, 2014).

131. Khadija Elmadmad, *Asylum in Islam And In Modern Refugee Law*, 27(2) Refugee Surv. Q. 51, 54 (2008). This was why, in declaring brotherhood among the Muhajirun and Ansar, the Prophet stated, "The rights of migrants are the same as those of their hosts." Rahaei, *supra* note 130.

132. Rahaei, *supra* note 130, at 5.

133. Volker Türk, *Asylum and Islam*, 27(2) Refugee Surv. Q. 3, 7-8 (2008).

B. *Why Malaysia's Legal-Political Setting Supports Such An Appeal to Islamic Values*

This suggested appeal to Islamic values for the protection of refugees is not without precedent in Malaysia. For instance, when the Malaysian government extended humanitarian assistance to Bosnian Muslim refugees during the Yugoslav crisis in the early 1990s,[134] it explicitly invoked the Islamic ideology to lobby domestic support for Bosnian Muslims, by reminding Malaysians that the Bosnian Muslims were "of the same religion."[135]

A new appeal to Islam to inspire legal reform would be especially timely given Malaysia's current legal-political setting where the influence of Islam in the public sphere is growing by the day, as part of the broader movement of "Islamization."[136] Islam is increasingly politicized in Malaysia due to the rising prominence of the opposition party, Partai Islam Semalaysia (PAS),[137] which promotes Islamic values in the Malaysian government[138] and appeals to Muslim voters' Islamic duties by promising

134. This included unilaterally "adopting" Bosnian refugee camps in countries neighboring Bosnia-Herzegovina with the assistance of the UNHCR and providing direct refuge to approximately 300 Bosnian refugees on Malaysian soil. Shanti Nair, Islam in Malaysian Foreign Policy 254 (1997). Further, Malaysia's representative in 1992 Security Council debates noted, "The plight of the Bosnian Muslims has touched the hearts of the people of Malaysia . . . To date, more than $2 million [has] been collected through voluntary contributions . . . We have begun . . . taking in refugees from the war-torn country [including] orphan[ed] children who have been victims of the war there to live in Malaysia until stability and security returns to that country." U.N. SCOR, U.N. Doc. S/PV.3134, Nov. 13, 1992, reproduced in The Yugoslav Crisis in International Law 144 (Daniel Bethlehem & Marc Weller eds., 1997).

135. Then-Prime Minister Dr. Mahathir explained to domestic audiences the importance of Malaysia as a relatively prosperous nation to aid those "who are of the same religion and status as ours." Similarly, then-Deputy Prime Minister, Anwar Ibrahim, addressed the Government's commitment to the cause of Muslims everywhere in order to rally the Bosnian cause. Nair, *supra* note 134, at 255.

136. 'Islamization' may be traced to global Islamic revivalism dating back to the 1970s, where Muslim revulsion against the West has primarily been attributed to the Arab-Israel wars of 1967 and 1973 and the Islamic revolution in Iran in 1979. Hussin Mutalib, Islam in Malaysia: From Revivalism to Islamic State 6-7 (1993). At the national level, "Islamization" started with the proliferation of *dakwah* (Islamic missionary) movements in the local public universities in the 1970s. *See*, *e.g.*, Zainah Anwar, Islamic Revivalism in Malaysia: Dakwah among the Students (1987).

137. PAS was previously Pan-Malayan Islamic Party, which advocated for an entirely Islamic form of government since independence but was defeated at the 1954 *Muktamar*. *See*, *e.g.*, John N. Funston, Malay Politics in Malaysia: A Study of the United Malays National Organisation and Party Islam (1981).

138. Liew Chin Tong, *PAS Politics: Defining a Islamic State*, *in* Politics in Malaysia: The Malay Dimension, 107, 110-111 (Edmund Terence Gomez ed., 2007) (citing the PAS 2002 Constitution which stipulates that the "basis" of the party is Islam (Clause 3), and its objective is to "struggle for the existence in this country of a society and government that implements Islamic values and laws in accordance with God's will." (Clause 5:1)

rewards in the afterlife.[139] PAS's 1999 electoral victory[140] ignited a competition between PAS and the ruling party, United Malay National Organization (UMNO), to "out-Islamize" each other and retain the support of the Malay-majority electorate.[141] This led then-Prime Minister Dr. Mahathir bin Mohamad to declare in 2001 that Malaysia is a "fundamentalist, not a moderate Islamic state" and a "model Islamic state."[142] Following Dr. Mahathir's declaration, the Ministry of Information published a booklet entitled "Malaysia is an Islamic State."[143] Similarly, in 2007, the Malaysian prime minister, Dato' Sri Haji Mohammad Najib bin Tun Haji Abdul Razak, declared that Malaysia has "never been secular" but has "always been driven by [an] adherence to the fundamentals of Islam," citing Article 3(1) of the Federal Constitution for support.[144] Further, the *Islam Hadhari* (Civilizational Islam) Institute was set up at the National University of Malaysia for the purpose of furthering the "Islamization" process.[145]

The "Islamization" movement in Malaysian politics has influenced Malaysian public law. Presently, the AGC has tasked its Syariah Division to ensure that all federal Malaysian domestic laws are consistent with *syariah* law.[146] Also, the Attorney General has explicitly acknowledged

139. *See*, *e.g.*, *Malaysian Voters Promised Heaven*, AlJazeera (Qatar), Mar. 7, 2004, http://english.aljazeera.net/archive/2004/03/200841010197704263.html (last visited Feb. 28, 2014).

140. In 1999, PAS formed two state governments and for the first time since 1969 replaced the Chinese-based Democratic Action Party (DAP) as the main opposition party in the Parliament.

141. Islamic invocations have become common at political rallies where there is often a need to couch messages in 'religious imagery' to elicit popular creditability and votes. A. J. Langlois, The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory 15 (2001).

142. *See Mahathir: Malaysia is a Fundamentalist State,* CNN, June 18, 2002, http://edition.cnn.com/2002/WORLD/asiapcf/southeast/06/18/malaysia.mahathir/ (last visited Feb. 28, 2014); *see also PM Defends 'Islamic State' Declaration*, Malaysiakini (Malaysia), Sept. 17, 2002, http://www.malaysiakini.com/news/12988 (last visited Feb. 28, 2014) (reporting on how Dr. Mahathir defended his declaration against criticism by PAS and DAP).

143. The booklet by Wan Zahidi Wan Teh, entitled Malaysia Adalah Sebuah Negara Islam (2001), states that the government has launched the policy of *Penerapan Nilai-nilai Islam* (*Assimilation of Islamic Values*) so that "everything that conflicts with Islam will be brought in line with the requirements of Islam in stages," and that this policy is a large and open one covering all Islamic values, including Islamic laws, which the government must implement, and that this policy will continue until the aim of upholding an Islamic nation in the national system is fully implemented. Patricia Martinez, *The Islamic State or the State of Islam in Malaysia*, 23 Contemp. S. E. Asia 474, 493-94 (2001).

144. *See Malaysia Not Secular State*, *Says Najib*, Bernama (Malaysia), Jul. 17, 2007, http://www.bernama.com/bernama/v3/news_lite.php?id=273699 (last visited Feb. 28, 2014).

145. The Institut Islam Hadhari was set up on 10 May 2007. See the Institut Islam Hadhari website *at* http://www.ukm.my/hadhari/ (last visited Feb. 28, 2014).

146. As stated on the AGC's website, "Syariah Section also carries out research on legal provisions of the Federal laws to ensure its consistency with Syariah

that the "harmonisation" of civil laws and *syariah* "forms part of the Islamization process as initiated by the government," given that "Islamic law is the law of the land."[147] The status of Syariah Courts administering *syariah* law in the different Malaysian states[148] was enhanced after the insertion of Article 121(1A) into the Federal Constitution. Article 121(1A) removes "any matter within the jurisdiction of the Syariah Courts" from the jurisdiction of the civil courts.[149] After this constitutional amendment, civil courts have increasingly expanded Syariah Courts' jurisdiction and truncated their own jurisdiction, particularly in cases of religious apostasy where a Muslim seeks to exercise his or her right to freedom of religion under Article 11(1) of the Federal Constitution in order to renounce his or her Islamic faith.[150] This ultimately gives Syariah Courts wider powers to prevent Muslims from converting out of Islam.[151] Additionally, apart

law. Should there be any inconsistencies between the provisions of the Federal and Syariah laws, proposals will be submitted to amend the provision so that it is consistent with Syariah law." Att'y-Gen. Chambers Portal, http://www.agc.gov.my/index.php?option=com_content&view=category&id=73%3Aagc-faqs&layout=blog&Itemid=44&lang=en (last visited Feb. 28, 2014).

147. YBHG Tan Sri Abdul Ghani Patail (Attorney General of Malaysia), *3rd International Conference on Harmonization of Civil Laws and Shariah: Keynote Address: Harmonization of Civil Laws and Shariah: Effective Strategies for Implementation*, ¶¶ 6, 28 (Dec. 4, 2007), *available at* http://www.agc.gov.my/agc/pdf/speech/KEYNOTE%20ADDRESS.pdf (last visited Feb. 28, 2014).

148. The role of Islamic law is preserved in a formalized Syariah Court structure that operates under the jurisdiction of the respective states as provided for in Schedule 9 of the Federal Constitution; state governments can independently legislate on matters pertaining to Islamic law. However, the field in which Islamic law can operate is limited by the subject-matters prescribed in List II of Schedule 9, which mostly relate to personal and family law, and Islamic law only applies over persons professing the religion of Islam. Fed. Const., *supra* note 62, Item 1, List II (State List), Schedule 9 (Malay.).

149. Fed. Const., *supra* note 62, art. 121(1A) (Malay.).

150. Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor, 2 Current L. J. 5 (1999) (Malay.) [hereinafter Soon Singh]. The Federal Court held that in view of the insertion of Article 121(1A), the jurisdiction of Syariah Courts over conversion out of Islam, even if not addressed in state enactments as in the present case, could be implied from statutory provisions pertaining to conversion into Islam. The court reasoned that determining Muslim apostasy "involves inquiring into the validity of his purported renunciation of Islam under Islamic law." As such, the court refused to hear Article 11 freedom of religion arguments. *Id.* at 22. *Soon Singh* was subsequently affirmed in a line of cases which assumed that any matter relating to Muslim apostasy fell within Syariah Court jurisdiction. For instance, the High Court in Tongiah Jumali v. Kerajaan Johor, 5 Malayan L. J. 41 (2004), recognized that *Soon Singh* "most conclusively settled... [the] thorny question" of whether civil courts have jurisdiction over cases of religious apostasy. *Id.* at 46-47.

151. According to Thio, this runs counter to the logic of constitutionalism and doctrine of harmonious construction where civil courts are charged with safeguarding fundamental liberties, including the right to change one's religious affliation under Article 11 of the Federal Constitution. Thio Li-ann, *Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution*, *in* Constitutional Landmarks in Malaysia 197, 207 (Andrew Harding & H.P. Lee eds., 2007).

from expanding the jurisdiction of Syariah Courts, Islam's influence in Malaysian public law outside of the *syariah* jurisdiction has also occurred through the civil courts' subtle co-option of *syariah* law into common law cases like the landmark *Lina Joy* case[152] (though this has generated controversy, as the next section of this Article will demonstrate). Therefore, the "Islamization" of Malaysian public law provides fertile ground for the enactment of a domestic legal framework protecting the human rights of refugees, given that such legal reform would support Islamic tenets of asylum and *syariah* law.

C. *Why the Legitimacy of Such an Invocation of Islamic Values May Be Challenged*

However, the legitimacy of the "enlightened interpretation" of Islam calling for the protection of refugees may not go unchallenged, particularly in the growing climate of parochialism, where Islamic teachers are increasingly resisting all modern Western thought and rejecting alternative interpretations of Islam aligned with human rights norms.[153] Islam is not a monolithic religion; there is a sectarian divide between the Sunni and Shi'a traditions. While the Federal Constitution does not endorse a particular version of Islam,[154] Malaysian Muslims largely follow the Sunni tradition.[155] The Sunni tradition comprises four varying interpretations of Islamic law,[156] and this has led to differences in Islamic practice in Malaysia.[157]

While cultures are open to different interpretations of their norms and values, proponents of dominant interpretations will often present them as the "only" authentic and legitimate position.[158] There is a danger that an

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152. Joshua Neoh, *Islamic State and the Common Law in Malaysia: A Case Study of* Lina Joy, 8(2) Global Jurist, no. 4, 2008, at 10.

153. Jaclyn Ling-Chien Neo, *"Anti-God, Anti-Islam and Anti-Quran": Expanding the Range of Participants and Parameters in Discourse over Women's Rights and Islam in Malaysia*, 21 UCLA Pac. Basin L.J. 29, 42 (2003).

154. This is compared to the 2004 Constitution of Afghanistan where Article 130 "Judicial Discretion" states, "When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the *Hanafi* jurisprudence and in a way to serve justice in the best possible manner." Const. of the Islamic Republic of Afghanistan, art. 130.

155. It was as early as the 14th century that Tamil Indian traders, who were Sunni Muslims, brought Islam to the port of Malacca on the Malay Peninsula. Erica Miller, *The Role of Islam in Malaysian Political Practice*, Al-Nakhlah, 2004, art. 4 at 1.

156. The four schools are Hanifi, Maliki, Shafi and Hanbali. Donna Arzt, *The Application of International Human Rights Law in Islamic States*, 12 Hum. Rts. Q. 202, 204 (1990).

157. This was acknowledged in Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd 5 Malayan L.J. 210 (2005), where the Shah Alam High Court commented that "what is, and what is not approved by the religion of Islam in relation to the banking business [has] occasioned the raising of many thorny questions" and "the existence of those branches and sects cannot be denied. Each equally believes in the righteousness of its principles and belief, perhaps much to the annoyance of the opposing splintered group." *Id*., ¶ 19.

158. An-Na'im, *Cultural Transformation*, *supra* note 123, at 67.

"enlightened interpretation" of Islam which calls for greater protection of refugees may be viewed as "unorthodox" by the Malaysian government,[159] which has on several occasions deemed itself the keeper of orthodoxy and declared modernist re-interpretations of the traditional *syariah*[160] to be "deviationist."[161] The Malaysian government has gone so far as to detain proponents of such teachings without trial[162] under the Internal Security Act.[163]

Moreover, an "enlightened interpretation" of Islam which urges Islamic societies to grant asylum to both Muslim and non-Muslim refugees without discrimination may not be accepted by the Malaysian government. Its extensive humanitarian aid to Bosnian Muslims was largely driven by "co-religionist" motivations, where humanitarian assistance was provided mainly because those refugees were fellow Muslims[164] (although the government claimed otherwise[165]). Historically, the Malaysian government has also displayed an "ethnic slant towards Muslim refugees"[166] in its refugee policy by allowing predominantly-Muslim persons to seek refuge[167] (although Malaysia is now accepting more non-Muslim refugees[168]). Therefore, invoking Islamic values in order to strengthen protection of refugee rights in Malaysia may prove to be a difficult task.

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159. Jamila Hussain, *Freedom of Religion in Malaysia: The Muslim Perspective*, *in* Public Law in Contemporary Malaysia 107, 127 (Wu Min Aun ed., 1999).

160. For example, an Islamic social reformist, Kassim Ahmad, wrote a book calling for reliance on the *Qur'an* as opposed to the *Hadith* as the principal source of Islamic knowledge. This book was banned in Malaysia. *Id.*

161. Datuk Abdul Hamid Othman, the minister in the Prime Minister's Department in charge of Islamic affairs referred to those who are "pro-Quran and anti-Hadith" as deviationist in the Far Eastern Economic Review on 6 July 1995. *Id.*

162. For example, six Shi'a followers were detained in October 2000. Memorandum from Sisters in Islam on ISA Arrest of Shi'ah Followers to Minister of Home Affairs (Feb. 20, 2001), http://www.sistersinislam.org.my/news.php?item.31.98 (last visited Feb. 28, 2014). Further, the Al-Arqum movement was banned from holding public meetings and disseminating its literature by the National Fatwa Committee in August 1994. Its leader was detained in September 1994 and subsequently made to appear on television, where he recanted his views and pledged to bring his followers "back to the true path." Hussain, *supra* note 159, at 126.

163. Internal Security Act 1960 (Act 82).

164. Nair, *supra* note 134, at 255, 257.

165. In tabling the motion on the genocide in Bosnia, Foreign Minister Abdullah Badawi reminded the Malaysian Parliament that the country would have sent peacekeeping missions even if the issue involved non-Muslims. Nair, *supra* note 134, at 257-58.

166. Vitit Muntarbhorn, The Status Of Refugees In Asia 116 (1992).

167. Davies, *supra* note 40, at 145. Examples include giving refuge to 40,000 to 90,000 Muslim Filipinos between 1972 and 1985, more than 10,000 Cambodian Muslims between 1975 and 1992, to the Burmese Rohingyas and the Acehnese Muslims in the early 1980s. However, there are limits to a shared Muslim identity, which has also not guaranteed Filipino Muslims inalienable rights or security greater than that of the non-Muslim Vietnamese refugees. Davies, *supra* note 40, at 149-50.

168. According to the latest figures on the UNHCR Malaysia website, of the 108,336 refugees and asylum-seekers registered with UNHCR in Malaysia, the non-Muslim refugees and asylum-seekers from Myanmar include 33,281 Chins, 7,941 Rakhine, 3,554 Burmese & Bamars, 3,453 Mon, and 2,983 Kachins. The Muslim refugees

IV. WHETHER SUCH AN APPEAL TO ISLAMIC VALUES CAN AND SHOULD TAKE PLACE IN THE JUDICIAL FORUM

Having argued that the invocation of Islamic values for the purpose of provoking moral sensibilities will strengthen the protection of refugee rights in Malaysia, this Article now considers whether the court is the most appropriate forum for such advocacy, given the growth of social reform litigation utilized by social movements primarily as a means to raise awareness of their causes. This section first argues that litigation may contribute to the broader aim of strengthening refugee protection regardless of the judicial outcome. It then proposes a litigation strategy, tests the strategy's likelihood of success according to Malaysian public law jurisprudence, and discusses the broader implications of the proposed litigation strategy's success.

A. *How Litigation Contributes to the Broader Aim of Strengthening the Protection of Refugee Rights Regardless of the Judicial Outcome*

Regardless of the judicial outcome, litigation may be successful in itself as part of a broader strategy to strengthen protection of refugee rights, because the process of highlighting the importance of asylum in Islam may compel the Malaysian government to enact legal reforms outside of the judicial forum as part of the "Islamization" movement. According to social reform litigation theory, the value of litigation should not only be judged in terms of how the case fares in court but also in terms of its systemic impact on social policy.[169] Governments and legislatures across the world have developed new laws and policies in response to judicial decisions, including judicial decisions which were not "successful" in the narrow sense.[170]

The proposed litigation strategy may also raise consciousness of the importance of asylum in Islam among the general public. It may influence

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and asylum-seekers from Myanmar include 30,463 Rohingyas and 10,881 Myanmar Muslims. There are some 8,632 refugees and asylum-seekers from other countries, including some 3,586 Sri Lankans, 1,167 Somalis, 793 Iraqis, 369 Afghans. *Figures at a Glance*, UNHCR.org, http://www.unhcr.org.my/About_Us-@-Figures_At_A_Glance.aspx (last visited Feb. 28, 2014).

169. Siri Gloppen, *Public Interest Litigation, Social Rights and Social Policy*, *in* Inclusive States: Social Policy And Structural Inequalities 343, 344 (Anis A. Dani & Arjan de Haan eds., 2008). *See also* Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941 (2011); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

170. *See* Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism through Women's Use of CEDAW*, 9 Sing. Year Book of Int'l Law. 103, 120-22 (2005) for various examples in Bangladesh, South Korea, Japan, and Nepal, where, although the sexual discrimination claims of female litigants failed, the legislature subsequently amended laws and set standards meeting the demands of the female litigants. The laws were amended to comply with anti-discriminatory principles, and this ultimately furthered the broader goals of the women's movement for social change and reinforced a culture of justiciable rights.

the conduct of state officials, including ground-level immigration law enforcement officers like the police and RELA, who are largely responsible for violating the human rights of refugees. As social reform litigation theorists argue, the ancillary costs, pressures, and publicity forming part of the litigation process[171] may increase the "bargaining power" of the social movement vis-à-vis that of state actors and private elites.[172] This is illustrated by the Malaysian Supreme Court[173] decision of *Woon Tan Kan and 7 Others v. Asian Rare Earth Sdn Bhd*.[174] In *Woon Tan Kan*, a Mitsubishi-owned local corporation had been dumping radioactive waste on the claimants' land. The local corporation successfully appealed the claimants' injunctions, but eventually terminated its operations due to political pressure generated by the publicity of the court case.[175]

B. *Whether the Proposed Litigation Strategy is Likely to Succeed According to Existing Malaysian Jurisprudence*

The proposed litigation strategy is as follows. Article 5(1) of the Federal Constitution states, "No person shall be deprived of his life or personal liberty save in accordance with law."[176] Refugees should claim that their "right to life" under Article 5(1) of the Federal Constitution (which is provided to "every person" and not restricted to citizens) is infringed by the Immigration Act, because it deprives them of legal status, prohibits their employment, and subjects them to arbitrary arrest, detention, and abuse, thus affecting their right to livelihood, which forms part of their "right to life."[177] Although any deprivation of this "right to life" is allowed if such deprivation is "in accordance with law" as provided for in Article 5(1), refugees may claim that the Immigration Act's deprivation of their "right to life" is in fact not "in accordance with law."[178] This is because the meaning of "law" in Article 5(1) does not only include

171. Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization 144 (1994).

172. *Id.* at 145.

173. The Supreme Court was the name of the highest court in Malaysia until it was renamed the Federal Court in 1994. *See History of the Malaysian Judiciary*, Office of the Chief Registrar, Federal Court of Malaysia: Official Website, http://www.kehakiman.gov.my/?q=en/node/410 (last visited Feb. 28, 2014).

174. Woon Tan Kan and 7 Others v. Asian Rare Earth Sdn Bhd, 4 Current L. J. 2299 (1992) (Malay.). For a discussion of this case, see Mika Ichihara & Andrew Harding, *Human Rights, the Environment and Radioactive Waste: A Study of the Asian Rare Earth Case in Malaysia*, 4 Rev. Eur. Comp. & Int'l Envtl. L. 1 (1995).

175. The costs of the litigation included the "virulence of local opposition" generated by the publicity of the litigation, the considerable financial losses sustained by the lengthy trial, and the political pressure by the Japanese government which, following a lower court decision, announced that Japanese factories overseas must not harm the environment and issued a warning to Mitsubishi. Andrew Harding, *Practical Human Rights, NGOs and the Environment in Malaysia, in* Public Law in Contemporary Malaysia 222, 239-41 (Wu Min Aun ed., 1999).

176. Fed. Const., *supra* note 62, art. 5(1) (Malay.).

177. *Id*.

178. *Id*.

written legislation like the Immigration Act but also fundamental Islamic tenets of asylum and refugee protection, given the special status of Islam in Malaysia's constitutional order by dint of Article 3(1) which establishes that "Islam is the religion of the Federation." The judicial outcome ultimately sought is a court declaration that the Immigration Act is unconstitutional because it violates Article 5(1) when read together with Article 3(1). This court declaration should result in Parliament amending the Immigration Act so as to accord refugees legal status.

1. Why An Interpretation Of The "Right to Life" Under Article 5(1) Of The Federal Constitution As Encompassing The Right To Livelihood Is Likely To Be Accepted

According to Malaysian public law jurisprudence, refugees are likely to successfully claim that their "right to life" under Article 5(1) includes the right to livelihood, and that the Immigration Act, which adversely affects their livelihood, violates their right to life. This argument has previously found support in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan.*[179] The Court of Appeal in *Tan Tek Seng* held that "life" in Article 5(1) should be given a "broad and liberal meaning" so that it "incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life."[180] This liberal interpretation was subsequently affirmed by the Court of Appeal in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan*,[181] and by the Federal Court in *R. Rama Chandran v. The Industrial Court of Malaysia and Anor*.[182] However, the Federal Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*[183] subsequently adopted a more restrictive reading of "life"

179. Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan, 1 MALAYAN L.J. 261 (1996).

180. *Id.* at 288 (noting that such matters include the "right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer its members," the "right to live in a reasonably healthy and pollution-free environment," and in this particular case, "the right to continue in public service subject to removal for good cause by resort to a fair procedure"). For a critique of this case, see Vanitha Sundra Karean, *Constitutional Protection of the Right to Livelihood in Malaysia: Reality or Mere Fallacy?*, 11 ASIA PAC. L. REV. 23 (2003).

181. Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan, 1 MALAYAN L.J. 481 (1996). Gopal Sri Ram JCA followed his ruling in *Tan Tek Seng* and interpreted "life" in Article 5(1) to be "wide enough to encompass the right to livelihood" now elevated to "one of those fundamental liberties guaranteed under Pt. II of the Federal Constitution." *Id.* at 510.

182. R. Rama Chandran v. The Industrial Court of Malaysia and *Anor*, 1 MALAYAN L.J. 145 (1997). Edgar Joseph Jr. FCJ endorsed Gopal JCA's statement in *Tan Tek Seng* that "life" in Article 5(1) is "wide enough to encompass the right to be engaged in lawful and gainful employment." *Id.* at 190. Edgar Joseph Jr. FCJ further endorsed Gopal JCA's statement in *Hong Leong Equipment* that "[q]uite apart from being a proprietary right, the right to livelihood is one of the fundamental liberties guaranteed under Part II of the Federal Constitution." *Id.* at 195.

183. Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan, 3 MALAYAN L.J. 72 (2002) [hereinafter Sugumar Balakrishnan].

in Article 5(1).[184] The Federal Court implicitly rejected the argument that there exists such a "right to livelihood" under Part II of the Federal Constitution, and held that an entry permit into Sabah (a state in East Malaysia) does not confer any right to livelihood.[185] This restrictive approach was followed in *Peter James Tennet v. Kaka Singh Dhaliwal (Secretary of the Malayan Racing Association)*.[186]

Yet recent judgments after *Sugumar Balakrishnan* strongly indicate a return to *Tan Tek Seng*'s liberal interpretation of the "right to life" under Article 5(1) as including a "right to livelihood." Such judgments include *Abdullah bin Borhan v. Ketua Polis Melaka*,[187] the Federal Court decision of *Lee Kwan Woh v. Public Prosecutor*,[188] and most recently in September 2011, the Federal Court decision of *Bato Bagi and 6 Ors v. Kerajaan Negeri Sarawak & Another Appeal*.[189] In *Bato Bagi*, Sarawak natives claimed that their "right to life" under Article 5(1) had been violated by a local law which permitted the Sarawak Government to acquire their native lands for the Bakun Dam and Pulpwood Mill projects.[190] While the court unanimously dismissed the claims based on their specific facts[191] and declined to address the constitutional question of whether

184. The Federal Court overruled the Court of Appeal, which had held that the wide meaning given to "life" in *Tan Tek Seng*, *Hong Leong Equipment* and *Rama Chandran* should similarly apply to "personal liberty" under Article 5(1) because both "life" and "personal liberty" are "both equally dynamic concepts and should be treated in like fashion." Sugumar Balakrishnan v. Pebngarah Imigresen Negeri Sabah and Anor, 3 Malayan L.J. 289 at 305 (1998).

185. Sugumar Balakrishnan, *supra* note 183, at 102.

186. Peter James Tennet v. Kaka Singh Dhaliwal (Secretary of the Malayan Racing Association), 3 Malayan L.J. 67 (2007). The Kuala Lumpur High Court held that the disqualification of a horse trainer did not fall within Article 5 because "life and personal liberty. . . do not encompass the other facets of life. Hence, the plaintiff's disqualification which resulted in him being deprived of his livelihood is not at all an issue under art[sic] 5 of the Federal Constitution". *Id.* at 73.

187. Abdullah bin Borhan v. Ketua Polis Melaka, 8 Malayan L.J. 161, ¶ 35 (2008).

188. Lee Kwan Woh v. Pub. Prosecutor, 5 Current L.J. 631 (2009) (Malay.) [hereinafter Lee Kwan Woh]. The court held that the concept of "life" under Article 5(1) was held to contain other rights, and thus "means more than mere animal existence and includes such rights as livelihood and the quality of life." *Id.* at 643.

189. Bato Bagi and Ors v. Kerajaan Negeri Sarawak & Another Appeal, 1 Malay. L. Rev. App. Cts. 1 (2012) [hereinafter Bato Bagi].

190. The impugned legislations were the Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun) (No.26) 1997 and the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No. 3) 1997.

191. Malanjum CJSS stated that in the first of the two jointly heard appeals (Bato's case), "the compensation money was agreed and accepted by them. They did not go for arbitration. They did not even accept the compensation under protest. Further, the land in question is now underwater upon the completion of the Bakun Dam. There is no question of returning it to them." Bato Bagi, *supra* note 189, ¶ 107. And in the second of the two jointly-heard appeals (Jalang's case), he stated, "it is also a fact that substantial number of the former residents of the land in question had accepted the compensation which was later increased by the arbitrator. In my view they are in the same position as in Bato's case. The land has been vacant for some years now." Bato

such land acquisition contravened Article 5(1) of the Federal Constitution,[192] Richard Malanjum, Chief Judge of the High Court in Sabah and Sarawak, endorsed *Tan Tek Seng*'s liberal interpretation of Article 5(1) and held that the natives' land was "part and parcel of their livelihood which is within the meaning and spirit of Article 5(1)."[193] Therefore, interpreting the "right to life" under Article 5(1) as encompassing a right to livelihood is in accordance with Malaysian public law jurisprudence as it stands today.

2. Why The Phrase "Save in Accordance with Law," Which Qualifies The "Right To Life," Does Not Present Much Difficulty

Having established that the Immigration Act violates a refugee's "right to life" under Article 5(1) because it affects his livelihood, will the litigation then be hindered by the phrase "save in accordance with law," which expressly qualifies the "right to life," given that the Immigration Act is "law" passed by Parliament? The word "law" in Article 5(1) may refer to either statutory law or to a broader concept of law extending beyond legislative rules to principles of justice, such that properly enacted legislation is not "law" if it falls below a standard of fairness.[194] Until recently, Malaysian courts had not questioned the fairness of laws passed by Parliament.[195] Rather, courts preferred a literal, pedantic interpretation of the phrase "save in accordance with law" in Article 5(1) to refer only to duly enacted law and not to general concepts of law.[196] Specifically, the Federal Court in *Sugumar Balakrishnan* emphasized that the Immigration Act was duly enacted by Parliament, and that "the constitutional rights guaranteed under Art. 5(1) . . . can be taken away in accordance with law."[197]

However, recent Federal Court decisions indicate that fundamental principles of natural justice must be satisfied for duly enacted legislation to comply with Article 5(1). The court in *Lee Kwan Woh* endorsed the Privy Council decision of *Ong Ah Chuan v. Public Prosecutor*,[198] which

Bagi, *supra* note 189, ¶ 108.

192. Malanjum CJSS reasoned, "Hence, with the limited submissions made before this Court. . . I do not think there is a need for me to answer the Question posed. To do so would be unfair not only to this Court but to the parties as well. I think that such an important issue is best left to another occasion when it is fully ventilated instead of being made just a side issue." Bato Bagi, *supra* note 189, ¶ 106.

193. Bato Bagi, *supra* note 189, ¶ 74.

194. Kevin Tan & Thio Li-Ann, Constitutional Law in Malaysia and Singapore 746-747 (3rd ed. 2010).

195. Attorney General v. Chiow Thaim Guan, 1 Malayan L.J. 50 (1983); Pub. Prosecutor v. Yee Kim Seng, 1 Malayan L.J. 252 (1983).

196. Comptroller General of Inland Revenue v. NP, 1 Malayan L. J. 165 (1973).

197. Sugumar Balakrishnan, *supra* note 183, at 103. This was in relation to Section 59 of the Immigration Act which removed the *audi alterem partem* rule. Immigration Act, *supra* note 57, § 59.

198. Ong Ah Chuan v. Pub. Prosecutor, 1 Malayan L.J. 64 (1981).

interpreted the phrase "save in accordance of law" in Article 9(1) of the Singapore Constitution, which is identical to Article 5(1) of the Federal Constitution, as referring to "a system of law which incorporates those fundamental rules of natural justice,"[199] and held that rules of natural justice are an "integral part" of Article 5(1).[200] Most recently in *Bato Bagi*, Justice Malanjum criticized the lower court for holding that the impugned legislative sections were valid pieces of legislation allowable under Article 5.[201] Noting that the laws restricted the claimant's right to life,[202] Justice Malanjum emphasized that "a piece of legislation passed by Parliament . . . may be the will of the majority but it is the court that must be the conscience of the society so as to ensure that the rights and interests of the minority are safeguarded."[203] Therefore, according to Malaysian public law jurisprudence, the phrase "save in accordance with law" in Article 5(1) is unlikely to hinder the proposed litigation strategy.

3. Why Invoking "Islam" In Article 3(1) Of The Federal Constitution To Support An Expansive Reading Of Article 5(1) Is Extremely Controversial

Where this Article's proposed litigation strategy is most likely to face difficulties is in the argument that Article 5(1) must be read together with Article 3(1), such that Islamic tenets of asylum and refugee protection should form part of "law" in the phrase "save in accordance with law" in Article 5(1). The likely controversy that will result from such an expansive interpretation of "Islam" in Article 3(1)[204] is demonstrated by

199. When addressing Article 9(1) of the Constitution of Singapore, Lord Diplock stated, "In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or right . . . It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules." *Id.* at 71.

200. Lee Kwan Woh, *supra* note 188, at 644-45 (incorporating procedural fairness into Article 5(1) of the Federal Constitution).

201. The Court of Appeal judgment for *Bato Bagi* is reported at 3 Current L. J. 469 (2011) (Malay.).

202. Malanjum CJSS considered such an interpretation of "save in accordance with law" to be "strict constructionist, literal, dogmatic and overly relian[t] on the English philosophy of legal positivism." Bato Bagi, *supra* note 189, ¶ 70.

203. Bato Bagi, *supra* note 189, ¶ 69.

204. For discussions of Article 3(1)'s significance and, more generally, the position of Islam in Malaysia's constitutional order, see Nurjaanah Abdullah, *Legislating Faith In Malaysia*, Sing. J. Legal Stud. 264 (2007); Salbiah Ahmad, *Islam in Malaysia: Constitutional and Human Rights Perspectives*, 2(1) Muslim World J. Hum. Rts., no. 7, 2005; Andrew Harding, *The* Keris*, the Crescent and the Blind Goddess: The State, Islam and the Constitution in Malaysia,* 6 Sing. J. Int. Comp. L. 154 (2002); Jaclyn Ling-Chien Neo, Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia, 13 Int'l J. Min. & Grp. Rts. 95 (2006); Amanda J. Whiting, *Secularism, the Islamic State and the Malaysian Legal Profession*, 5(1) Asian J. Comp. L., no. 10 (2010).

the 2007 Federal Court decision of *Lina Joy* (decided by a majority of 2-1, with Richard Malanjum, then-Federal Court Judge, dissenting) and the aftermath of the decision. In that case, the court addressed—and answered in the affirmative—the question of whether the National Registration Department (NRD) had acted correctly by requiring the claimant to produce an order by the Syariah Court that she had apostatized before deleting the entry "Islam" on her identity card.[205]

In rejecting the appellant's argument that the NRD's requirement infringed her right to freedom of religion under Article 11(1) of the Federal Constitution, the *Lina Joy* majority endorsed the reasoning of *Kamariah bte Ali lwn dan lain-lain v. Kerajaan Negeri Kelantan*,[206] which stated that "Article 11(1) cannot be construed . . . with such wide meaning to the extent it annuls all laws that require a Muslim to perform an Islamic obligation."[207] The *Lina Joy* majority took this reasoning further, holding that the way a person renounces a religion "must essentially be carried out pursuant to the rules or laws or practices . . . set by the religion itself" such that "if a Muslim wishes to leave the religion of Islam, he [or she] actually uses his [or her] right under the context of *syariah* law which has its own jurisprudence on the issue of apostasy."[208] To buttress its restrictive interpretation of Article 11, the *Lina Joy* majority again endorsed the view in *Kamariah* that "the position of Islam in the Federal Constitution differs from the position of other religions . . . only Islam as a religion is mentioned [by] its name in the Federal Constitution i.e. 'as the religion of the Federation.'"[209] Contrary to the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor*,[210] which had confined "Islam" in

205. The background facts of the *Lina Joy* litigation are as follows: Azalina binti Jailani (as she was then known) applied to the NRD on February 21, 1997 to change her name to Lina Lelani on the grounds that she had renounced Islam for Christianity. The application was rejected without any reason being given on August 11, 1997. She made a second application on March 15, 1999, but this time with the name changed to "Lina Joy." This application was approved on October 22, 1999 but the new identity card issued to her stated that she was a Muslim. Lina made a third application to the NRD on March 1, 2000 to have the word "Islam" dropped from her identity card, and tendered a statutory declaration to support her application. However, the NRD refused to accept her application on the grounds that it was incomplete without an order of the Syariah Court stating that that she had renounced Islam. The claimant then brought her case to the country's civil courts, but the Kuala Lumpur High Court and, subsequently, the Court of Appeal rejected her demand to have Islam removed as the religion stated on her identity card. The Court of Appeal denied her request on the basis that an approval from the Syariah Court was required as a prerequisite for conversion out of Islam. She then appealed to the Federal Court, the highest civil court in Malaysia.

206. Kamariah bte Ali lwn dan lain-lain v. Kerajaan Negeri Kelantan, 3 MALAYAN L.J. 657, 665 (2002).

207. TAN & THIO, *supra* note 194, at 1289. The *Lina Joy* majority judgment (except for the headnotes) was reported in Malay. This Article refers to the English translation of the majority judgment in TAN & THIO.

208. *Id*. at 1287-88.

209. *Id*. at 1289.

210. Che Omar bin Che Soh v. Pub. Prosecutor, 2 MALAYAN L. J. 55 (1988)

Article 3(1) to ceremonial symbolism on the basis that this was the intent of the framers of the Federal Constitution,[211] the *Lina Joy* majority stated that Islam is "not only a gathering of dogmas and rituals" but "a complete way of life."[212] As such, the appellant's pre-conversion Islamic obligations "mean[t] practicing not only the theological aspect of the religion but also the laws of the religion,"[213] and she was required to comply with the *syariah* law which prescribed the way of converting out of Islam.[214] The *Lina Joy* majority hence "constructed a particular lens to read Article 11(1) conforming to [its] view of what Islamic tenets required,"[215] where Islamic values were taken outside the confines of the *syariah* jurisdiction and into the civil jurisdiction to shape the scope of a constitutional right, ultimately playing a more robust role in common law adjudication.[216]

Indeed, the *Lina Joy* majority's interpretation of Articles 3(1) and 11(1) of the Federal Constitution supports this Article's proposed litigation strategy, which attempts to invoke "Islam" in Article 3(1) so as to buttress an expansive reading of the "right to life" under Article 5(1), another fundamental liberty under Part II of the Federal Constitution. However, reference to Islamic tenets for the purpose of defining the scope of a constitutional right would probably attract fierce criticism if raised in court, as evidenced by Justice Malanjum's vigorous dissenting judgment in *Lina Joy*. At the outset of his dissenting judgment, Justice Malanjum stated that morality not accepted by the general secular law of Malaysia does not enjoy the status of law,[217] implying that Islamic precepts cannot be legitimately co-opted into the Malaysian common law.[218] Justice Malanjum then clarified the position of "Islam" in Article 3(1), acknowledging that while Article 3(1) indeed "placed Islam [in] a special

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[hereinafter Che Omar].

211. The Supreme Court examined the drafting process of the Federal Constitution and held that the framers of the Constitution understood the meaning of "Islam" in Article 3 to be confined only to the law of marriage, divorce, and inheritance, andit was applicable only to Muslims as their personal law, or else the framers of the Federal Constitution would have included another provision stipulating that any law contrary to the injunction of Islam will be void. *Id.* at 56G-H.

212. According to the *Lina Joy* majority, Islam covers "all human activities, private or public, legislation, political, economic; social, customs, moral or judicial." Tan & Thio, *supra* note 194, at 1288.

213. *Id*. at 1288.

214. *Id*. at 1288.

215. Neoh, *supra* note 152, at 12, *citing* Thio Li-ann, *Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation*, 2 Malayan L.J. 1, 9 (2006), which discusses the Court of Appeal decision of *Lina Joy*, Lina Joy v. Majlis Agama Islam Wilayah Persekutan, 6 Malayan L.J. 193 (2005) [hereinafter Lina Joy (C.A.)].

216. Neoh, *supra* note 152, at 12.

217. In referring to the "wise words" of Salleh Abas LP in *Che Omar*, Malanjum FCJ stated that "the 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." Lina Joy, *supra* note 63, at 619.

218. Neoh, *supra* note 152, at 16.

position in this country,"[219] it "was never intended to override any right, privilege or power explicitly conferred by the Constitution"[220] because Article 3(4) "clearly provides" that "[n]othing in this Article derogates from any other provision of the Constitution."[221] According to Justice Malanjum's restrictive reading of Article 3(1), any fundamental right under Part II of the Federal Constitution, be it the right to freedom of religion under Article 11(1) or the "right to life" under Article 5(1), cannot be read through the lens of "Islam" in Article 3(1).

Moreover, the polarized responses of Malaysian civil society stakeholders to the *Lina Joy* decision demonstrate the opposition the proposed interpretation of Article 3 is likely to face.[222] Proponents of "Islamization" hailed the *Lina Joy* decision as correctly vindicating the supremacy of Islam in Malaysia,[223] and non-Muslim organizations and human rights groups were concerned over the Federal Court's importation of religious influences into the common law adjudicatory process, fearing that it would ultimately compromise the supremacy of the Federal Constitution[224] and fundamental rights.[225] The *Lina Joy* decision provoked disquiet to the point where then-Prime Minister Abdullah Badawi felt pressured into claiming that the decision was not politically motivated and that Malaysia "upholds the Constitution and supremacy of the law, otherwise, [it] would . . . become a failed state."[226]

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219. Lina Joy, *supra* note 63, at 623.

220. *Id*. at 623-24.

221. Fed. Const., *supra* note 62, art. 3(4) (Malay.).

222. Neoh, *supra* note 152, at 20.

223. Following the Federal Court decision, ABIM and Organizations in Defence of Islam (*Pertubuhan-Pertubuhan Pembela Islam*—PEMBELA) issued a joint statement asking "those desiring an opposite outcome to reconsider their position and to consider modifying their expectations to suit what is good and more sustainable considering [Malaysia's] realities." Press Statement, ABIM and PEMBELA, Kenyataan Media Rasmi Susulan Keputusan Kes Azlina Jailani (Official Press Statement Following the Judgment of the Case of Azlina Jailani, ¶¶ 5, 7 (May 30, 2007), *cited in* Neoh, *supra* note 152, at 20.

224. The Malaysian Bar Council issued the following statement: "The Federal Constitution is, and must remain in law, supreme. In the event of any inconsistency or conflict between the provisions of State Enactments and of the Federal Constitution, the latter must prevail. The majority decision in the Lina Joy case pronounced yesterday runs counter to this position." Press Statement, Bar Council of Malaysia, Lina Joy Decision, ¶ 2 (May 31, 2007), *cited in* Neoh, *supra* note 152, at 21-22.

225. The National Evangelical Christian Fellowship issued a statement that "public morality is [now] based on the principles of a particular religion," and that *Lina Joy* "sets a landmark example of making legal judgment based on religious sentiment and thus inadvertently disregarding the fundamental right of an individual." Press Statement, National Evangelical Christian Fellowship Malaysia, Response to the *Lina Joy* Judgment, ¶¶ 9, 11 (June 1, 2007), *cited in* Neoh, *supra* note 152, at 20.

226. *Islam Not Above Constitution, Says PM*, The Sun (Malaysia), May 31, 2007.

C. *Why the Suggested Interpretation of Article 3(1) of the Federal Constitution Has Serious Implications Affecting Malaysian Society*

Even if the proposed litigation strategy were to succeed, an expansive interpretation of "Islam" in Article 3(1) as extending beyond ceremonial symbolism has two serious implications for the Malaysian society. These consequences would probably not be fully justified by the ultimate aim of enhancing the rights of refugees, who are but one category of particularly vulnerable persons in Malaysia. First, the proposed interpretation of Article 3(1) forsakes the social compact of secularity, as embodied in the drafting of the Federal Constitution. Although the Federal Constitution does not explicitly mention that Malaysia is a "secular" state, as does the constitution of Turkey (another state with a Muslim majority),[227] a study of constitutional history reveals that Article 3(1) was included within a constitutional order designed to be secular,[228] as part of the constitutional compromise struck between the Federation's multi-racial Alliance Party[229] and the British colonial authorities in order for independence to be granted.[230] Article 3(1) was a concession made by the Malayan Chinese Association and the Malayan Indian Congress to the United Malay National Organization (UMNO) in exchange for UMNO's concessions on citizenship and language.[231] The Alliance Party informed the British colonial authorities that such a provision would not impose any disability on non-Muslims and did not imply that the state would not be a secular state.[232] According to the Alliance Party, it "had no intention of creating a Muslim theocracy"; on the contrary, it intended that "Malaysia would be a secular state."[233]

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227. Article 2 of the Turkish Constitution expressly states that Turkey is a "democratic, secular and social state." CONST. OF REP. OF TURK., art. 2.

228. Fernando considers that the clearest indication of the Federal Constitution's framers' intent is to be found in the Working Party deliberations, where it was recorded that Chief Minister Tunku Abdul Rahman said that the whole Constitution was framed on the basis that the Federation would be a secular state. Joseph M. Fernando, *The Position of Islam in the Constitution of Malaysia*, 37 J. SOUTHEAST ASIAN STUD. 249, 260 n.45 (2006), *citing* Minutes of the 19th Meeting of the Working Party, Apr. 17, 1957, CO 941/87.

229. The Alliance Party, the leading nationalist movement from 1952, comprised three communal parties representing the three main races in the Federation: the United Malays National Organization (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC).

230. H.P. Lee, *Constitutional Amendments in Malaysia*, 18 MALAYAN L. REV. 59, 59 (1976).

231. Minutes of Alliance Ad-Hoc Political Sub-Committee meeting, Apr. 2, 1957, *cited in* Fernando, *supra* note 228, at 253 n.18.

232. In its memorandum to the Reid Constitutional Commission, the Alliance 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." Alliance Memorandum to the Reid Constitutional Commission, Sept. 27, 1956, 19, *cited in* Fernando, *supra* note 228, at 253, n.17.

233. Memorandum by Jackson on the Constitutional talks held in London in

Second, and more dangerously, by giving "Islam" in Article 3(1) a "quasi-constitutional *grundnorm*" status,[234] where Islamic values are to define the scope of a constitutional right, the proposed interpretation of Article 3(1) supports and entrenches the *Lina Joy* majority's restrictive interpretation of the right to freedom of religion under Article 11(1), which the *Lina Joy* majority justified by according special status to "Islam" in Article 3(1). By requiring the appellant to exercise her Article 11(1) right only "under the context of *syariah* law which has its own jurisprudence on the issue of apostasy,"[235] the *Lina Joy* majority effectively excluded from Article 11 the right to convert out of a religion,[236] and reduced it to a "license conditioned upon permission granted by officials of the religion one wishes to convert out of."[237] In practice, it is extremely difficult (if not impossible) for Muslims in Malaysia to obtain permission to convert out of Islam. Given that Article 121(1A) of the Federal Constitution removes from civil jurisdiction matters pertaining to conversion out of Islam,[238] permission to convert out of Islam can only be granted by Syariah Courts under the law of each Malaysian state.[239] Conversion out of Islam is "generally regarded by the Muslim community as a very

May 1957 with the Alliance delegation and the Rulers' representatives, May 23, 1957, CO 1030/494 (20), *cited in* Fernando, *supra* note 228, at 260. Barely a year after independence the Prime Minister again clarified in a Legislative Council debate that Malaysia "is not an Islamic state as it is generally understood" but "we merely provide that Islam shall be the official religion of the State." Federal Legislative Council Debates, May 1 1958, 4671-2.

234. Thio and Neo adopt this phrase to describe the central role accorded to "Islam" in Article 3(1) of the Federal Constitution by the High Court in Meor Atiqulrahman bin Ishak v Fatimah bte Sihi, 5 Malayan L.J. 375 (2000), where, like the *Lina Joy* majority, Justice Noor invoked Article 3 to buttress a reading of Article 11 which expansively interpreted the scope of protection given to Islamic religious practices, such that Islam is central in constitutional interpretation and legislation must conform with it. Thio Li-Ann and Jaclyn Ling-Chien Neo, *Religious Dress in Schools: The Serban Controversy in Malaysia*, 55 Int'l & Comp L. Q. 680 (2006). A *grundnorm* is a concept created by legal philosopher, Hans Kelsen, denoting a basic norm, order or rule forming the underlying basis for an entire legal system. *See generally* Hans Kelsen, Pure Theory of Law (1967).

235. Tan & Thio, *supra* note 194, at 1288.

236. The *Lina Joy* majority judgment affirms the position in Daud bin Mamat & Ors v. Majlis Agama Islam & Anor, 2 Malayan L. J. 390 (2001), where the High Court of Kota Bahru held that Article 11 does not extend to freedom to convert out of Islam because leaving a religion "is certainly not a religion" and cannot be equated with the right to profess and that for the right to renounce a religion to exist, Article 11 must expressly state "everyone has the right to renounce or profess and practise his religion, and subject to cl[ause] (4), to propagate it." *Id.*

237. Neoh, *supra* note 152, at 14.

238. Article 121(1A) provides that civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the *Sya'riah* courts." Fed. Const., *supra* note 62, art. 121(1A) (Malay.).

239. For example, under the state law of Kelantan, "[n]o person who professes the Islamic religion can declare that he is no longer a Muslim unless the Syariah Court gives such approval." Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 (Enactment No. 4 of 1994), s.102(1).

grave matter"[240] and mere application for such conversion exposes Muslims in some states to criminal penalties under *syariah* law that include[241] whipping,[242] fines, imprisonment,[243] and detention at a "faith rehabilitation center" where the offender is to undergo religious counseling.[244] The proposed interpretation of Article 3(1) would affirm the *Lina Joy* majority judgment and ultimately truncate the right to freedom of religion, particularly of Muslims seeking to renounce their Islamic faith. These broader implications cast serious doubt on the viability of the proposed litigation strategy.

V. CONCLUSION: REVISITING THE UNIVERSALITY, INALIENABILITY, INDIVISIBILITY, AND INTERDEPENDENCE OF HUMAN RIGHTS

This Malaysian case study has called into question the validity of three claims of human rights made in the Vienna Declaration. Are human rights truly "inalienable?"[245] The refugee phenomenon demonstrates how "the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left

240. As per Abdul Aziz Mohamad, Judge of the Court of Appeal, in the Court of Appeal decision of the *Lina Joy* litigation, Lina Joy (C.A.), *supra* note 215, at 208 ("The Muslim community regards it as a grave matter not only for the person concerned, in terms of the afterlife, but also for Muslims generally, as they regard it to be their responsibility to save another Muslim from the damnation of apostasy. The incidence of apostasy is therefore a highly sensitive matter among Muslims.").

241. This was noted in Malanjum FCJ's dissenting judgment in *Lina Joy*, where he stated, "In some states in Malaysia apostasy is a criminal offence. Hence, 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 is in my view unreasonable for its means the appellant is made to self-incriminate." Lina Joy, *supra* note 63, at 632. *See* Mohamed Azam Mohamed Adil, *Law of Apostasy and Freedom of Religion in Malaysia*, 2(1) Asian J. Comp. L., no. 6, 2007 (arguing that Muslims who intend to leave the Islamic faith are only required to undergo *tawba*, a process of repentance, and any punishment prescribed for apostasy is contrary to the right to freedom of religion).

242. For example, under the state law of Pahang, "any Muslim who states that he has ceased to be a Muslim, whether orally, in writing or in any other manner whatsoever, with any intent 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." Administration of the Religion of Islam and the Malay Custom Enactment 1982 (amended 1989), § 185.

243. For example, under the state law of Perak, the offence of Muslim apostasy is punishable with either a RM 2000 fine or up to two years imprisonment. Administration of Islamic Law Enactment, § 13.

244. For example, under the state law of Kelantan, a person who leaves or intends to leave Islam may be detained at a faith rehabilitation center for a period not exceeding 36 months. Council of the Religion of Islam and Malay Custom, Kelantan Enactment 1994 (Enactment No. 4 of 1994), § 102(3).

245. Vienna Declaration, *supra* note 65, ¶ 18. The UDHR in its preamble similarly claims that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." UDHR, *supra* note 17, preamble.

to protect them and no institution was willing to guarantee them."[246] Both international human rights law and international refugee law similarly assume a territorial framework which requires the state for the protection of the rights of persons within its borders. This Article's thesis—invoking Islamic values so as to provoke religious sensibilities and inspire legal reform for refugees in Malaysia—largely focuses on influencing the Malaysian government. This underscores the government's critical role in enhancing the human rights of refugees in Malaysia. Human rights are not truly independent of governments and are not truly "inalienable."

Are human rights truly "universal?"[247] International human rights law primarily addresses the needs of citizens and fails to adequately deal with the specific vulnerabilities of refugees, which a specialist refugee law regime is required to address. This Article aims to achieve such a refugee-specific domestic legal mechanism in Malaysia, notwithstanding the Malaysian government's rejection of international refugee instruments. Further, the proposed litigation strategy, which attempts to remove refugees from the broader category of irregular migrants subject to punishment under the Immigration Act, demonstrates how different categories of persons within a state—refugees as differentiated from irregular migrants—may be subject to unequal rights regimes necessitated by the particular harms they face and the specific protection responses they require. Although all "members of the human family" should have "equal" rights according to the Universal Declaration of Human Rights (UDHR),[248] they do not necessarily enjoy them equally.

Are human rights truly "indivisible and interdependent?"[249] The proposed litigation strategy seeks to extend "Islam" in Article 3(1) beyond the *syariah* jurisdiction into the realm of Malaysian public law so as to define the scope of a fundamental liberty, with the aim of buttressing a refugee's enjoyment of his right to life under Article 5(1) of the Federal Constitution. But this interpretation of Article 3(1) is likely to adversely affect the religious freedom of a Muslim seeking to convert out of Islam. This illustrates how the enhancement of a human right does not necessarily support the enjoyment of, and might even violate, another human right.[250] Human rights are not "indivisible and interdependent."

246. Arendt, *supra* note 1, at 288.

247. Vienna Declaration, *supra* note 65, ¶ 5.

248. UDHR, *supra* note 17, preamble.

249. Vienna Declaration, *supra* note 65, ¶ 5

250. *See, e.g.,* James Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights*, 30 Hum. Rts. Q. 984 (2008) (arguing that the purported indivisibility and interdependence of human rights may not be relevant to or even possible in developing countries, which are not in a position to fully implement all human rights simultaneously). *See, also,* Eric Posner, *Human Welfare, Not Human Rights*, 108 Colum. L. Rev. 1771-1772 (2008) (arguing that human rights treaties barely recognize that governance unavoidably involves trade-offs in the first

Ultimately, this Article argues for a religious, as opposed to a secular, model of human rights, by demonstrating how grounding the human rights of refugees in Islam may compel the Malaysian government to strengthen its protection of refugee rights. Yet, as this Malaysian case study demonstrates, the extent to which religion can be "[an] obstacle to or [a] force for the enjoyment of human rights"[251] in a state depends on the state's understanding of religion and its tolerance of alternative religious interpretations, the role religion plays in the state's legal and political discourse, and the particular forum in which religion is invoked.

place, for instance, where a very poor country's government must justifiably refuse to finance education (hence violating the right to education) because health needs are so pressing (hence attempting to protect the right to health)).

251. Marks & Clapham, *supra* note 117, at 309.