

## The Judicialization of Religion

This chapter turns to the judicialization of religion in Malaysia.<sup>1</sup> The central argument presented here is that the drivers of judicialization have little to do with religion itself (as a practice of faith) and everything to do with the regulation of religion (as a state project). The burning questions, controversies, and conundrums that are adjudicated by Malaysian courts are nearly always a byproduct of state regulation. I suggest that the judicialization of religion is most acute in contexts that are comparable to Malaysia, where: (a) religion is tightly regulated, (b) different legal regimes are applied to different (legally constituted) communities, (c) constitutional commitments are made to both religion and liberal rights, and (d) courts are relatively empowered with broad public access.<sup>2</sup>

As the reader will recall, the Malaysian state regulates Islam more than almost any other country. The Federal Constitution provides for separate family and personal status laws for Muslims and non-Muslims. This bifurcated legal system hardwires complex institutional dilemmas. This is not only because the shariah courts entrench an illiberal vision of Islam that is in tension with state commitments to liberal rights, but also because courts are put in a position where they must “see like a state” (Scott 1998) and categorize individuals in order to apply different personal status and family law regimes. These legal institutions are meant to operate independent of one another, but in the context of Malaysia’s complex, multi-religious society, situations arise where legal entanglements are unavoidable. These quandaries destabilize the legal system and fuel the construction of a “rights-versus-rites” binary. They also open opportunities for activists – both self-ascribed Islamists and secularists – to engage in strategic litigation to challenge the status quo and assert broad claims about Islam, liberal rights, and the role of the state.

<sup>1</sup> The judicialization of religion was defined in the Introduction as a circumstance wherein courts increasingly adjudicate questions and controversies over religion.

<sup>2</sup> This chapter is not meant to provide an exhaustive inventory of necessary or sufficient conditions that drive the judicialization of religion. Instead, it is meant to offer a contextualized case study of these mechanisms at work in Malaysia. This is first and foremost a theory-building endeavor, not a theory-testing exercise.

The most significant flashpoint concerning shariah versus civil court jurisdiction is Article 121 (1A) of the Federal Constitution. The Article states that the High Courts of the Federation “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.” As noted in Chapter 3, the government introduced the clause in a 1988 constitutional amendment, despite the fact that the civil courts had rarely intervened in shariah court matters. The amendment was meant to clarify the distinct competence of the shariah courts. In practice the clause produced legal difficulties from virtually the moment it came into force. What follows is an analysis of the entire universe of Article 121 (1A) cases, grouped by the three different types of conundrums that emerged.<sup>3</sup>

#### BURYING THE DEAD

The first type of legal conundrum to emerge from Article 121 (1A) concerned the burial rites/rights when the official religious status of the deceased is contested. The first such reported case decided by the High Court was *Ng Wan Chan v. Federal Territories Islamic Religious Council*.<sup>4</sup> In this case, a widow found herself in the position of having to fight for the right to bury her husband following his death in 1991. Ng Wan Chan knew her husband as a practicing Buddhist. However, upon his death, the Federal Territories Islamic Religious Council claimed that he had officially converted to Islam in 1973 and he therefore required a proper Muslim burial. This case was one of many in which Islamic religious councils claimed the right to bury the dead when there was an official record of conversion to Islam. These situations stir particularly intense emotions when there are questions about whether the deceased had registered as a Muslim under duress, for material benefit, or in anticipation of marriage to a Muslim at some earlier stage in life. When these “body snatching” situations emerge, the family will often attempt to negotiate with the religious authorities and seek permission to pay their respects and to mourn briefly before the body is taken away for a Muslim burial. In some cases, non-Muslim prayers may be permitted. In other cases, they are not, and family members can only look on and mourn privately. In still other situations, families will contest the authenticity of the conversion and litigate for the right to bury their family member in keeping with their religious rites. Ng Wan Chan opted to litigate. A prominent lawyer-activist cum politician, Karpal Singh, served as her attorney.

Karpal Singh attempted to block the Federal Territories Islamic Religious Council in the High Court, but the Islamic Religious Council challenged the

<sup>3</sup> Case selection in Chapters 4 and 5 is not anecdotal, but exhaustive of all Article 121 (1A) cases that were reported in the *Current Law Journal* and the *Malayan Law Journal*.

<sup>4</sup> *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 487. It should be noted that only a select number of High Court decisions were published in the *Malayan Law Journal* and the *Current Law Journal*, the leading outlets at the time. There may have been other Article 121 (1A) decisions prior to *Ng Wan Chan*, but this is the first such published decision.

jurisdiction of the civil courts to intervene. The Islamic Religious Council contended that Article 121 (1A) gave the shariah courts exclusive jurisdiction to determine the religious status of the deceased. The High Court rejected the Council's challenge and reasoned that the shariah courts only had jurisdiction to consider issues that were expressly conferred by state law in accordance with the Federal Constitution.<sup>5</sup> The High Court proceeded to consider the factual merits of the case and delivered its judgment, declaring that "the deceased was a Buddhist at the time of his death." and "his widow, the plaintiff, is entitled to the remains of the deceased."<sup>6</sup>

The High Court soon faced a similar question in *Dalip Kaur*, a case that shaped all subsequent jurisprudence on the matter.<sup>7</sup> In this case, a young Sikh man, Gurdev Singh, had converted to Islam. Evidence suggested that he had a Muslim girlfriend at the time, and the High Court inferred that Gurdev had converted to marry her (as marriage is not permissible between non-Muslims and Muslims) but he died before the wedding. His mother, Dalip Kaur, wished to bury her son in accordance with Sikh rites. With representation by Karpal Singh, she claimed that her son had converted back to his original Sikh faith before his death. She provided documentation of rebaptism from a Sikh temple along with his signature on a deed poll.<sup>8</sup> She also presented supporting evidence that her son was not a practicing Muslim: he had attended Sikh religious services, he had continued to eat pork, and he had remained uncircumcised. However, the High Court received expert testimony that rejected the baptism and determined that the signature on the deed poll was forged. Considering this testimony, the High Court ruled that Gurdev Singh must not be buried in accordance with Sikh rites and that his remains must be withheld from his mother. The High Court decision was penned by Abdul Hamid Mohamad, who was a judicial commissioner on the High Court at the time. He would eventually rise to become the Chief Justice of the Federal Court.

Dalip Kaur appealed to the Supreme Court concerning the more general question of what constitutes conversion out of Islam, considering the fact that there was no explicit provision in the Kedah Administration of Islamic Law Enactment.<sup>9</sup> The Supreme Court remitted the case back to the High Court with instructions to refer a series of queries to the Fatwa Committee of Kedah.<sup>10</sup> The Court sought to

<sup>5</sup> The High Court declared, "If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication." *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ at 489.

<sup>6</sup> *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 174 at 178.

<sup>7</sup> *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1.

<sup>8</sup> A deed poll is a legal statement to express an active intention.

<sup>9</sup> Malaysia's highest appellate court was named the Supreme Court between 1985 and 1994. Before and after those dates, it is referred to as the Federal Court of Malaysia.

<sup>10</sup> This was done via the High Court, as provided in Section 37 (4) of the Administration of Muslim Law Enactment of Kedah. It provides that "If in any Civil Court any question of Muslim law falls for decision, and such Court requests the opinion of the Majlis on such question, the question shall be

clarify the actions that constitute a renunciation of faith in Islamic law. The questions submitted to the Fatwa Committee and the answers that were received are as follows:<sup>11</sup>

- Q: If a Muslim declares through a deed poll that he rejects Islam, has he in fact left Islam?
- A: [Yes] if a Muslim declares through a deed poll that he rejects Islam, he has left Islam (He is an apostate).
- Q: If a Muslim prays at a Sikh temple following Sikh worship rituals, has he left Islam?
- A: [Yes] A Muslim who prays at a Sikh temple following Sikh worship rituals has also left Islam (He is an apostate).
- Q: If a Muslim carries out a ceremony to embrace Sikhism, has he left Islam?
- A: [Yes] A Muslim who carries out a ceremony to embrace Sikhism has left Islam (he is an apostate). However, to determine whether or not someone has left Islam (committed apostasy), it is necessary to be convicted by a shariah court and be sentenced for apostasy first. If there is no shariah court conviction and sentence, that person is still a Muslim.
- Q: If a Muslim eats pork, has he left Islam?
- A: [No] A Muslim who eats pork has not left Islam.
- Q: If a non-Muslim converts to Islam but is uncircumcised and remains as such until death, does he die as a non-Muslim, simply because he is uncircumcised?
- A: A person who converts to Islam who is not circumcised is a legitimate Muslim.

[Therefore] In the opinion of the Kedah Islamic Council Fatwa Committee, which convened on 27 October 1991, Gurdev Singh *a/l* Guruvak Singh, Identity Card: A 1028701 is a Muslim because he professed his faith in Islam by saying the two clauses of the affirmations of faith in front of the Kadi of Kulim District, Kedah on the 1<sup>st</sup> of June 1991 as stated in the pledge form for new converts to Islam, number 5/91, and he remains Muslim because there is no judgment from any Shariah Court in Kedah that convicted him of having left Islam.<sup>12</sup>

The Fatwa Committee distinguished between acts that constitute apostasy in their understanding of *religious doctrine* on the one hand, and the procedure for determining an individual's official religious status in a *legal and regulatory* sense on the other.<sup>13</sup> The Fatwa Committee determined that Gurdev Singh had taken actions

referred to the Fetua [sic] committee which shall . . . give its opinion thereon and certify such opinion to the requesting court."

<sup>11</sup> The judges and litigants collectively agreed on the questions to be posed to the fatwa committee.

<sup>12</sup> *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 at 6.

<sup>13</sup> There are differing views on apostasy within the Islamic legal tradition. For further contextualization in the Islamic legal tradition and in contemporary Malaysia, see Saeed and Saeed (2004).

that constituted apostasy in a religious sense, but affirmed that his official status remained unchanged without a decision from a shariah court, the appropriate body for handling such matters. Thus, while Singh may have left Islam in practice, his official status is Muslim. In other words, the decision articulates a specific *fiqh* position regarding apostasy and yet immediately sidelines whatever religious doctrine might have to say in deference to administrative practices of the state.<sup>14</sup>

Before proceeding further, it is important to recall that members of the Fatwa Committee, an officially constituted state body, are *not* required to have formal training in Islamic law, nor are they required to have any training in the common law. The sole requirement for membership on the Fatwa Committee is that members be “fit and proper Muslims.”<sup>15</sup> It is perhaps no wonder that the Fatwa Committee introduced such a glaring lacuna into the law, which required compliance with an administrative procedure that does not exist. Nonetheless, the decision of the Fatwa Committee was considered an authoritative pronouncement of the Islamic position regarding apostasy. Having reviewed the “fatwa,” the Supreme Court affirmed the High Court decision.

A dissenting opinion noted the problematic aspects of the decision. Among the three-judge panel, Justice Hashim Yeop Sani observed, “the new [clause] 1A of Article 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts.”<sup>16</sup> However, the amendment “does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law.” With this delicate entry, the Justice waded deeper into the legal morass, noting that the Kedah Administration of Muslim Law Enactment did not provide Muslims with an avenue through which to change their official religious status.<sup>17</sup> He highlighted the failure of the state to provide a solution. Justice Hashim also noted that a provision in the Administration of Muslim Law Enactment had afforded Muslims an avenue to convert out of Islam in the neighboring state of Perak, but that the provision was repealed in 1975. He recommended that “clear

<sup>14</sup> The fatwa was peculiar in more ways than one. The Committee regarded the conversion as a criminal offense, yet there was no legal avenue for the shariah court to prosecute an apostasy offense under the Kedah Administration of Muslim Law Enactment. The Kedah Enactment detailed several criminal offenses in Articles 142–169, but there were no provisions concerning apostasy. An attorney familiar with the case reflected on the changing legal context as one possible reason for the apparent contradiction: “I think the Fatwa Committee used the terms ‘convict’ and ‘sentence’ loosely. The usage of the Malay words, such as ‘sabit’ and ‘hukum,’ was not firmly fixed in 1991, since the language of the courts were largely still in English. It may well be that the Fatwa Committee merely meant a decision of a court, rather than a punitive measure” (Interview with the author November 26, 2016). If accurate, this transmutation underlines the general argument that the increasing regulation of religion and the increased fixity of these terms introduced new lacunas into the law.

<sup>15</sup> Administration of Muslim Law Enactment Kedah (1962), section 36.

<sup>16</sup> Justice Hashim Yeop Sani was, at the time, the Chief Judge of the High Court in Peninsular Malaysia, and the 3rd highest office bearer in the Judiciary.

<sup>17</sup> Gurdev Singh converted to Islam in Kedah, making the Administration of Muslim Law Enactment of Kedah the relevant legal framework.

provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts.” For his part, Justice Mohamed Yusoff adopted a narrower perspective. Rather than acknowledge the lacunas in the law, Justice Yusoff simply stated:

Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence. On this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the syariah court.

Justice Hashim Yeop Sani’s dissenting opinion had identified a significant problem in the law, but the Court declared that the parties were bound by their agreement to accept the Fatwa Committee’s determination that, “... the deceased was a Muslim as he had been duly converted to Islam and there was no decision of a syariah court which decided that he had renounced or left the Islamic faith.” Dalip Kaur lost the appeal and, with it, her right to bury her son in accordance with Sikh rites.<sup>18</sup> The court decision had a lasting impact on civil court jurisprudence for decades to come. While Justice Hashim Yeop Sani had identified a critical lacuna in the law, it was Justice Mohamed Yusoff’s statement that became the standard refrain of civil court judges in future decisions.

#### FREEDOM OF RELIGION

The next landmark case also went all the way to the apex court, which was by then renamed the Federal Court. *Soon Singh v. Malaysian Islamic Welfare Organization of Kedah* involved a Sikh man who had converted to Islam as a minor but later reverted to his original Sikh faith in a religious ceremony.<sup>19</sup> Unlike the previous cases that concerned the religious status of the dead, *Soon Singh* was flesh and blood Malaysian, pleading for official recognition of his religious conversion out of Islam.

At the time of his reversion back to his original Sikh faith, Malaysians like *Soon Singh* were able to secure official recognition of conversion out of Islam by affirming a statutory declaration before a commissioner of oaths and registering a new name in

<sup>18</sup> In another case, the Court of Appeal further restricted the purview of the syariah courts to cases in which they had *exclusive* jurisdiction. When an offense could be tried under both the Syariah Criminal Offenses Act and the Malaysian Penal Code, the case could go to the Civil Courts. See *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor.* [1999] 1 MLJ 226. The substance of this case is also worthy of comment. Sukma Darmawan was alleged to have had sexual relations with Anwar Ibrahim. The case was part of a series of prosecutions against Ibrahim after he was removed from his position as Deputy Prime Minister. The prosecutions were widely discredited but, at that moment, also intersected with the emerging case law around Article 121 (1A).

<sup>19</sup> *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 1MLJ 690; [1999] 1 MLJ 489.

the civil court registry through a deed poll.<sup>20</sup> With this documentation, an individual could then apply for a new identity card reflecting the name change, which signified one's new religious status.<sup>21</sup> However, Singh encountered difficulties when he sought a declaration of his new religious status from the High Court in Kuala Lumpur. The Kedah Islamic Affairs Department challenged the High Court's jurisdiction in light of the newly adopted constitutional amendment, Article 121 (1A). The High Court agreed that the new amendment prevented it from certifying Soon Singh's new faith. The Court drew upon the "fatwa" from *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* and ceded jurisdiction on that basis. The court decision stated:

It is clear from the fatwa that a Muslim who renounced the Islamic faith by a deed poll or who went through a baptism ceremony to reconvert to Sikhism continues to remain in Islam until a declaration has been made in a syariah court that he is a "murtad" [apostate]. Therefore, in accordance with the fatwa, the plaintiff is still a Muslim. He should go to a syariah court for the declaration. Whether or not his conversion is invalid is also a matter for the syariah court to determine in accordance with hukum syarak and the civil courts have no jurisdiction.

Singh appealed, pointing out that there were no express provisions in the Kedah Administration of Muslim Law Enactment that conferred jurisdiction on the syariah courts. However, the Islamic Affairs Department invoked Article 121 (1A) again. The Supreme Court affirmed the decision and adopted a new doctrine of implied jurisdiction. The new doctrine effectively ceded jurisdiction to the syariah courts on all cases concerning conversion out of Islam. The Court held that "jurisdiction of the syariah courts to deal with conversions out of Islam, although not expressly provided for in some State Enactments, can be read into those enactments by implication derived from the provisions concerning conversion into Islam."<sup>22</sup> Similar cases that followed conformed to the same logic. The civil courts would no longer certify conversion out of Islam, ceding their jurisdiction to the syariah courts.<sup>23</sup>

<sup>20</sup> A statutory declaration is a sworn statement made outside of pending legal proceedings. A deed poll is a legal statement to express an active intention.

<sup>21</sup> Ahmed, *Islam in Malaysia*, 10–11.

<sup>22</sup> The decision was quite convoluted in that it did not point directly to the state powers detailed in Schedule 9, List Two, of the Federal Constitution. Rather, it referred to other Article 121 (1A) decisions that had examined state enactments for evidence of jurisdiction. The court then reasoned that since state enactments regulated conversion into Islam, they must, by implication, also provide state syariah courts with jurisdiction over cases dealing with conversion out of Islam.

<sup>23</sup> Soon Singh can be contrasted with a slightly earlier decision, that of *Teoh Eng Huat v. The Kadhi, Pasir Mas, Kelantan & Anor* [1990] 2 MLJ 300. In that case, a 17-year-old Chinese Buddhist, Susie Teoh Bee Kue, eloped with her Muslim boyfriend and converted to Islam. Susie's father raised a case contesting her conversion on the basis of the Guardianship Act of 1961. The High Court recognized Susie's conversion to Islam, but the Supreme Court considered the argument that Susie could not lawfully change her religious designation without the permission of her father. The Supreme Court eventually overturned the High Court ruling that had recognized her conversion to Islam. However, Susie had reached the age of majority by the time of the Supreme Court ruling, rendering the decision

The decision papered over the fact that most state enactments provide no viable avenue for official conversion out of Islam, with some states treating requests for official change of religion as criminal offenses. Six of Malaysia's thirteen states (Perlis, Kedah, Penang, Selangor, Johor, and Sarawak) and the Federal Territories do not criminalize conversion out of Islam, but nor do they specify a legal mechanism for the official recognition of religious conversion. Five more states (Perak, Pahang, Terengganu, Malacca, and Sabah) criminalize conversion out of Islam with punishments that include fines and imprisonment (and whipping in the case of Pahang).<sup>24</sup> In three more states (Sabah, Kelantan, and Malacca), a judge may order mandatory counseling at a "faith rehabilitation center" for periods ranging from six to thirty-six months. Negeri Sembilan is the *only* state that provides a formal avenue for official conversion out of Islam, but the process is lengthy, and it requires mandatory counseling.<sup>25</sup> As a result, the shariah courts received only 686 petitions for change of official religious status out of Islam between 2000 and 2010. Of these, the courts approved only 135 petitions – or less than fourteen approvals per year, nationwide.<sup>26</sup> Most, if not all, of these 135 individuals had converted to Islam for marriage but then reverted to their previous faith. This small number of conversions over the course of the decade suggests that official conversion out of Islam is – for all practical purposes – virtually impossible.

Nonetheless, the civil courts remained aloof. Such indifference was painfully clear in cases like *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan*. A former Buddhist who had converted to Islam, Md Hakim Lee sought to revert his official religious status to Buddhism.<sup>27</sup> Lee pleaded that Article 11 of the Federal Constitution guaranteed his right to change his religious status. The case provided the civil courts with the first opportunity to consider Article 121 (1A) in light of a constitutional provision guaranteeing religious freedom. The Federal Territories Islamic Religious Council challenged the jurisdiction of the civil courts to hear the case. Justice Abdul Kadir Sulaiman agreed with the Council, declaring that "the language of art 121 (1A) . . . is clear and without any ambiguity." He explained that shariah court jurisdiction was not limited to matters explicitly provided for in the Administration of Islamic Law Act. Henceforth, shariah court jurisdiction included *any matter* listed in Schedule Nine of the Federal Constitution concerning states' rights. When Md Hakim Lee's attorneys argued that such a strict interpretation of

"academic" in the words of the Court. What is notable about the Susie Teoh case is that the civil court system exercised jurisdiction on the matter.

<sup>24</sup> For example, the Terengganu Administration of Islamic Law Enactment of 1996 provides that "any Muslim who attempts to renounce the religion of Islam or declares himself to be non-Muslim, shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding one year or both."

<sup>25</sup> I rely on Mohamed Adil (2007a; 2007b).

<sup>26</sup> These figures were announced by the Islamic Affairs Minister in the Prime Minister's Department and reported in *Malaysiakini*, June 14, 2011. Figures for different periods are provided in Adil (2007, 2008).

<sup>27</sup> *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan*, Kuala Lumpur [1998] 1 MLJ 681.

Article 121 (1A) harmed his right to freedom of religion, Justice Abdul Kadir Sulaiman explained that “the issue is not one of whether a litigant can get his remedies, but one of jurisdiction of the Courts to adjudicate . . . The fact that the plaintiff may not have his remedy in the syariah court would not make the jurisdiction exercisable by the civil court.”<sup>28</sup> This refrain was heard time and again in cases that followed.

*Lina Joy v. Federal Territories Islamic Religious Council*

One of the most controversial cases that attracted national and international attention was that of Lina Joy, an ethnic Malay woman who sought official recognition of her conversion to Christianity so that she could marry her non-Muslim partner. In 1997, she applied to change the name on her National Registration Identity Card from Azlina bte Jailani (a Muslim name) to Lina Lelani (a non-Muslim name). While there is no official route to marriage between Muslims and non-Muslims in Malaysia, changing one’s name was a way for star-crossed lovers to circumvent the letter of the law and register a marriage with the state. However, the administrative unit charged with processing the name change, the National Registration Department (NRD), rejected Azlina’s paperwork. They did not explain why. Azlina then filed a second request, this time to change her legal name to “Lina Joy.”<sup>29</sup> The National Registration Department approved this second application, but Joy’s replacement identity card now stated her official religious affiliation: “Islam.” The statement of her official religious status was the result of a new administrative procedure that was designed to close the loophole that had enabled Muslims to effectively sidestep the state’s regulation of religion by way of a name change. Joy filed a third application, this time to remove the word “Islam” from her identity card, but the NRD refused to accept her application without certification from a syariah court that she was no longer a Muslim. However, there was no formal legal avenue for official recognition of conversion through the syariah court administration in the Federal Territories. Lina Joy’s attorney, Benjamin Dawson, explained that Joy was sent from law office to law office, but lawyers shied away from the case due to sensitivities around conversion out of Islam for ethnic Malays in particular.<sup>30</sup> Dawson took the case and helped Joy initiate a lawsuit against the National Registration Department and the Federal Territories Islamic Religious Council.<sup>31</sup> They pointed to Article 11 (1) of the Malaysian Constitution, which states, “Every person has the right to profess and practice his religion . . . .” They argued that Joy had no obligation to seek certification from a third party and that Article 11 gave Joy

<sup>28</sup> *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan*, Kuala Lumpur [1998] 1 MLJ at 684, 687.

<sup>29</sup> She explained in both applications that she had converted to Christianity and that she intended to marry a Christian man. It is likely that this statement raised alarms among those in the NRD.

<sup>30</sup> Personal interview, November 23, 2012.

<sup>31</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119.

alone the freedom to declare her religion.<sup>32</sup> Counsel for the government argued that the High Court should dismiss the petition because apostasy was a legal matter within the exclusive jurisdiction of the shariah courts.

The High Court agreed but, unlike earlier cases such as *Md Hakim Lee v. Majlis Agama Islam*, where the courts had sidestepped constitutional protections on freedom of religion, Justice Faiza Tamby Chik addressed Article 11 directly. He explained that Joy's fundamental freedoms were not violated because the actual intent of Article 11 is to protect the freedom of *religious communities* to practice their faith free of interference, rather than for *individuals* to profess and practice the religion of their choice. To support this interpretation, Justice Faiza pointed to other clauses in Article 11 of the Federal Constitution, including Clause 3, which states: "Every religious group has the right . . . to manage its own religious affairs . . .", as well as to Article 3(1) of the Federal Constitution, which proclaims that "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony." The actual meaning of freedom of religion, Justice Faiza argued, is that religious groups should be left to regulate their internal matters without outside interference:

When a Muslim wishes to renounce/leave the religion of Islam, his other rights and obligations as a Muslim will also be jeopardized and this is an affair of Muslim [sic] falling under the first defendant's jurisdiction . . . . Even though the first part [of Article 11] provides that every person has the right to profess and practice his religion, this does not mean that the plaintiff can hide behind this provision without first settling the issue of renunciation of her religion (Islam) with the religious authority which has the right to manage its own religious affairs under art 11 (3) (a) of the FC.<sup>33</sup>

Justice Faiza reasoned that Article 11(3) protects *religious communities* to practice their faith free of interference, including the ability to regulate matters of entry *and* exit from the faith. Those guarantees must supersede the ability of *individuals* to drift among different religious affiliations to suit whimsical desires under the guise of Article 11 (1). Departing from such an interpretation would threaten "public order."<sup>34</sup>

It is worth noting that Justice Faiza made extensive use of Islamist scholarship to support his reasoning. Extended quotations were offered from Professor Ahmad Ibrahim, the most prominent early advocate of an expanded role for Islamic law

<sup>32</sup> Joy's attorneys challenged the constitutionality of Article 2 of the Administration of Islamic Law (Federal Territories) Act of 1993 and related state enactments. They also claimed that the Shariah Criminal Offences Act of 1997 and related State Enactments were not applicable to the plaintiff, who was now a Christian.

<sup>33</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ at 126.

<sup>34</sup> "I am of the opinion that this threaten [sic] public order and this cannot have been the intention of the legislature when drafting the FC and the 1993 Act." *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ at 126.

in the Malaysian legal system, as well as more recent writings from Muhammad Imam and others. The High Court decision makes broad claims about the meaning of Article 3, with implications for all facets of social and political life. According to the decision, “... the position of Islam in art 3(1) is that Islam is the main and dominant religion in the Federation. Being the main and dominant religion, the Federation has a duty to protect, defend and promote the religion of Islam.” Islamist lawyers had found a ready ally in Justice Faiza. Although he did not rise to the upper reaches of the Malaysian judiciary, Justice Faiza’s legal reasoning played an important role in shaping two of the most important cases concerning shariah court jurisdiction: *Lina Joy v. Majlis Agama Islam*, which shaped all religious freedom cases thereafter, and *Shamala v. Jeyaganesh*, a crucial child custody/conversion case (discussed later in this chapter).

Having lost the battle in the High Court, Lina Joy’s legal team shifted strategy and focused on the administrative question of whether the Director General of the National Registration Department had overstepped his authority by requiring certification of Joy’s religious conversion by a shariah court.<sup>35</sup> In a split decision, Justice Abdul Aziz Mohamad and Justice Arifin Zakaria took the position that whether a person had renounced Islam is “a question of Islamic law that was not within the jurisdiction of the NRD and that the NRD was not equipped or qualified to decide.”<sup>36</sup> The dissenting judgment from Justice Gopal Sri Ram took the position that “an order or certificate from the Syariah Court was not a relevant document for the processing of the appellant’s application. It was not a document prescribed by the 1990 Regulations.” Justice Sri Ram concluded that “[w]here a public decision-maker takes extraneous matters into account, his or her decision is null and void and of no effect.”<sup>37</sup>

Having lost in the Court of Appeal, Joy and her attorneys had one final opportunity in the highest appellate court, the Federal Court of Malaysia. Joy’s legal team focused again on two central questions: 1) whether the NRD was empowered by law to impose the requirement that the applicant provide certification of apostasy from a shariah court, and, 2) whether the implied jurisdiction theory developed in *Soon Singh* and *Md Hakim Lee* should prevail over the express jurisdiction theory expounded in *Ng Wan Chan* and *Lim Chan Seng*. Watching briefs were held by NGOs on both sides of the case. The Bar Council, HAKAM, and the Malaysian Consultative Council of Buddhism, Christianity, Hinduism, and Sikhism held watching briefs on behalf of Lina Joy, while conservative Muslim organizations holding watching briefs included ABIM, the Muslim Lawyers Association, and the Shariah Lawyers Association of Malaysia.

<sup>35</sup> It is not clear why the legal team abandoned the more robust legal challenge that was taken up in the High Court.

<sup>36</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193.

<sup>37</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193 at 194.

In a 2–1 split decision, the 53-page decision reproduced the same fault lines that were present in the Court of Appeal.<sup>38</sup> Chief Justice Ahmad Fairuz and Justice Alauddin found the NRD’s actions reasonable and further that the *Soon Singh* decision was sound. In a decision with far-reaching effect, they concluded that “art 11(1) should not be argued as a provision that provides unrestricted right of freedom [and] the right to profess and practise a religion should always be subject to the principles and practices prescribed by the said religion.”<sup>39</sup>

The dissenting judgment from Justice Richard Malanjum pointed once again to the glaring lacuna in the law: “The insistence by NRD for a certificate of apostasy from the Federal Territory Syariah Court or any Islamic Authority was not only illegal but unreasonable. This was because under the applicable law, the Syariah Court in the Federal Territory has no statutory power to adjudicate on the issue of apostasy.”<sup>40</sup> Justice Malanjum explained that, in such a situation, the Federal Court has a constitutional duty to protect fundamental rights, regardless of Article 121 (1A):

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

By making individual liberties subject to specific regulations on apostasy, the majority decision in *Lina Joy v. Federal Territories Islamic Religious Council* exacerbated the difficulties at the heart of all prior conversion cases.

The *Lina Joy* case was also unique in one regard: Joy was an ethnic Malay, whereas prior conversion cases concerned non-ethnic Malays who had converted to Islam (typically for marriage) and who subsequently sought to revert to their prior religious status. *Lina Joy*’s case thus exposed a “racial” dimension to religious freedom cases. In its decision, the High Court pointed to Article 160 of the Federal Constitution, which defines Malay as “a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom . . .” Citing Article 160, the High Court explained that *Lina Joy*’s racial (and therefore religious) status carried legal consequences that could not be abandoned:

In her affidavit affirmed on 8 May 2000, the plaintiff stated that her father is a Malay. His name is Jailani bin Shariff. All his life, the father has been professing and practising [sic] the Islamic religion. So is the mother. Her name is Kalthum bte

<sup>38</sup> *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585.

<sup>39</sup> *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ: 618–619.

<sup>40</sup> *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ: 597–598.

Omar, a Malay. Both of the parents are still professing and practising [sic] the Islamic religion. And being Malays they habitually speaks [sic] the Malay language and conform to Malay custom. The plaintiff also stated that she is raised, and grew up in a household of Islamic belief although her belief in Islam is shallow. In exh C, she stated that her original name is Azlina bte Jailani as is stated in her I/C No 7220456. I therefore conclude that the plaintiff is a Malay. By art 160 of the FC, the plaintiff is a Malay and therefore as long as she is a Malay by that definition she cannot renounce her Islamic religion at all. *As a Malay, the plaintiff remains in the Islamic faith until her dying days* [emphasis added].<sup>41</sup>

The decision provides a clear illustration of how law and the social imaginary conflate Malay racial and religious identity in contemporary Malaysia. In fact, it is worth noting that the majority opinion in *Lina Joy* was written in Bahasa Malaysia and not in English, as is conventional practice. This departure from standard convention was surely meant to deliver the message that matters concerning Islam and Malay identity are first and foremost Malay issues, as opposed to Malaysian issues.

*Lina Joy v. Federal Territories Islamic Religious Council* illustrates how the extensive regulation of religion and race gives rise to festering legal conundrums. But rather than working to untangle these legal conundrums by deregulating the religious sphere, the government moved in the opposite direction. Additional regulations were introduced to shore up religious and racial compartmentalization. Before 2001, Malaysian identity cards did not state an individual's religious status. Religious affiliation was imputed from one's name. Malaysians could change their official name and for most purposes, including marriage, they were assumed to be non-Muslim. This possibility ended when the government began to list religion on national identity cards. An amendment to the regulations guiding the National Registration Department (NRD) in 2001 also required that applicants submit documentation from a shariah court or a state department of religious affairs to change their official religion.<sup>42</sup> Although it is impossible to know with certainty, it is likely that these regulations changed as a direct result of *Lina Joy's* attempt to marry a non-Muslim man by changing her name.<sup>43</sup>

### *The (Near) Impossibility of Shariah Court Conversion*

The majority decision in *Lina Joy v. Federal Territories Islamic Religious Council* presumes that the shariah courts provide a viable avenue for securing recognition of conversion out of Islam. As noted earlier, however, official recognition of conversion is practically impossible to obtain. The few shariah court judges who were willing to

<sup>41</sup> *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ at 144.

<sup>42</sup> P.U. (A) 70/2000 came into force retroactively on October 1, 1999; National Registration Regulations, 1990 (amended 2001).

<sup>43</sup> The timing of the rule change and their retroactive effect suggests that this is the case.

“certify” an individual’s non-Muslim status grew more hesitant to accommodate after the extraordinary public spectacle that emerged in *Lina Joy v. Federal Territories Islamic Religious Council*.<sup>44</sup> The case of Rashidah bt Mohamad Myodin illustrates the roadblocks that Malaysian Muslims face when they attempt to change their official religious status from Muslim to non-Muslim.<sup>45</sup> The case further shows how rigid legal categories are unable to cope with the complex social realities of Malaysia’s multiethnic and multi-religious society.

Rashidah bt Mohamad Myodin was registered as a Muslim at birth, but a Hindu foster parent adopted her at the age of three. Rashidah was therefore raised Hindu even though she was officially Muslim. She eventually filed an application with the Shariah Court of Kuala Lumpur for a formal declaration that she was not a Muslim.<sup>46</sup> In its proceedings, the Shariah Court acknowledged that Rashidah had never practiced Islam. However, the judge rejected her application because the Administration of Islamic Law Act for the Federal Territories does not provide a legal mechanism for officially certifying that an individual is not a Muslim. This lacuna was precisely the conundrum that Justice Richard Malanjum identified in his dissenting opinion in *Lina Joy v. Federal Territories Islamic Religious Council*, as had other judges before him. Although the civil courts ceded jurisdiction to the shariah courts in personal status matters for individuals registered as Muslim, the shariah courts were an administrative dead-end for those seeking to change their official religious status. Individuals like Rashidah bt Mohamad Myodin and Lina Joy faced a lacuna in the law, with no remedy in either the federal civil courts or in the shariah courts.<sup>47</sup>

#### *Zaina Abidin bin Hamid v. Kerajaan Malaysia and Ors*

The case of *Zaina Abidin bin Hamid* highlights the fact that this legal lacuna can impact entire families across generations.<sup>48</sup> This story begins in the 1950s when an ethnic Indian Hindu man by the name of Maniam converted to Islam to marry an ethnic Indian Muslim woman. This was a “paper conversion.” In other words, while Maniam was now officially Muslim and he took the official Muslim name Hamid, he continued to practice Hinduism. Maniam and his wife raised their son, Zaina Abidin bin Hamid, in accordance with the Hindu faith. In 1973, their son changed his legal name by deed poll to Balachandran so that he might be recognized as

<sup>44</sup> This was explained by lawyers Latheefa Koya and Ravi Nekoo, both of whom worked on legal aid cases through the Kuala Lumpur Legal Aid Centre. Interview with the author, June 29, 2009.

<sup>45</sup> Application 14200–002-2003 with the Shariah Court of Kuala Lumpur. I rely on Mohamed Adil (2007a) for the details of this case.

<sup>46</sup> It is instructive that the Kuala Lumpur Shariah Court is the same court that Lina Joy would have approached for a certificate of apostasy if she had attempted to pursue that avenue.

<sup>47</sup> For another example, see *Balbir bin Abdullah lwn. Mahadzir bin Mohd Nor, Jumal Hukum*, v. 27 (1) at 53.

<sup>48</sup> *Zaina Abidin bin Hamid @ S. Maniam and Ors v. Kerajaan Malaysia and Ors* [2009] 6 MLJ 863.

Hindu.<sup>49</sup> Balachandran later married a Hindu woman under the Law Reform (Marriage and Divorce) Act and they had three children. The 1989 Selangor Administration of Islamic Law Enactment (revised in 2003) defines a Muslim as someone who is *born to a Muslim*. Because Balachandran was the son of a Muslim, the State of Selangor therefore considered Balachandran a Muslim. Moreover, his three children were also officially Muslim. This adds up to three generations of practicing Hindus, all of whom are officially registered as Muslim, thus making them beholden to the rules and regulations that apply to Muslims in Malaysia. This status was especially crippling to Balachandran's children, who would only be able to marry Muslims. The legal quandary of the Balachandran family put the absurdity of Malaysia's tightly regulated religious system into high relief. These practicing Hindus could only marry – *wait for it* – Muslims! To add to the irony, this result is precisely the opposite of what the state regulation of religion had aimed to accomplish in Malaysia.

Balachandran and his three children were represented by K Shanmuga and Fahri Azzat, two of the top attorneys litigating freedom of religion cases. As part of their strategy, the attorneys focused the attention of the court on what it means to “profess” a faith in Article 11 (1) of the Federal Constitution. They argued that any state regulation that ties an individual's religious status to anything other than their professed faith is inconsistent with the Federal Constitution. The High Court struck out the entire case as an abuse of process on the grounds that settled law provided the civil courts with no jurisdiction to hear such matters, leaving it to the shariah court system to decide. The legal team appealed.<sup>50</sup> The Court of Appeal agreed that there had been an error. It set aside the High Court decision and remitted the case back to the High Court to be heard on its merits. To date, the plight of the Balachandran family remains unresolved.

Given case law on the matter, the chances that the Balachandran family will prevail are slim at best. The reader will recall that between 2000 and 2010, shariah courts nationwide had approved only 135 petitions for the official recognition of conversion out of Islam.<sup>51</sup> I managed to interview one of the only attorneys who had successfully shepherded a case through the Kuala Lumpur Shariah court administration. As one of the very few cases where a “letter of release” was obtained from a shariah court, it is worth reviewing. In this case, an ethnic Indian Hindu woman and an ethnic Indian Muslim man had married in accordance with Hindu religious rites in the mid-1970s, but the wedding had not been registered.<sup>52</sup> The couple had

<sup>49</sup> The reader will recall that this avenue was possible in the 1970s.

<sup>50</sup> At this point, Edmund Bon Tai joined the case representing the MCCBCHST. Meanwhile, the Government of Malaysia was represented by the Attorney General's Chambers, while the Selangor State Legal Adviser represented the Government of Selangor.

<sup>51</sup> These figures were announced by the Islamic Affairs Minister in the Prime Minister's Department and reported in *Malaysiakini*, June 14, 2011.

<sup>52</sup> These are the facts of the case as presented in the statutory declaration presented to the Kuala Lumpur Shariah Court. The names and specific details are not provided to preserve anonymity.

several children, each of whom was given a Muslim name. However, the children were practicing Hindus and they never practiced Islam. Each child filed statutory declarations to this effect and they appeared in the shariah court where they managed to convince the presiding shariah court judge that they were not and had never been practicing Muslims. This was an extremely rare decision and one that was only possible before the spectacle that emerged around the Article 121 (1A) cases in 2004.

*Siti Fatimah Tan Abdullah: The Exception that Proves the Rule*

*Penang Religious Council v. Siti Fatimah Tan Abdullah* represents another of the very few cases where a registered Muslim successfully changed her official religious status. The case is instructive because it is the exception that proves the rule. Siti Fatimah Tan Abdullah was a Buddhist who converted to Islam to marry an Iranian man. After Siti Fatimah Tan Abdullah's husband had left her, she petitioned the shariah court for a formal declaration that she was no longer Muslim.<sup>53</sup> The shariah court obliged, but the Penang Islamic Religious Council appealed the judgment to the Shariah Court of Appeal. Capitalizing on the lacuna in the Administration of Islam Enactment, the Islamic Religious Council argued that the shariah court did not have the power to declare Siti Fatimah a non-Muslim. The Shariah Court of Appeal examined the technical minutia of the Administration of the Religion of Islam Enactment for the State of Penang, including the intent of the specific language deployed in Articles 61 (3) (b) (x) and 107. The Shariah Court of Appeal agreed with the Religious Council's objection that the Enactment did not allow Muslims to renounce Islam: "[F]or those who had thus become Muslims, they could not be declared as non-Muslims under this section . . . clothing the Syariah Court with jurisdiction to grant leave to anyone to abandon the religion of Islam is abhorrent and repugnant to the principles of Hukum Syarak."<sup>54</sup> However, the Shariah Court of Appeal affirmed that Siti Fatimah was not a Muslim on the basis that she had, in fact, *never* been a Muslim. "The evidence showed that the respondent had professed Islam only for the purpose of her marriage, had never performed the practices of Islam and had engaged in idol-worshipping even after her conversion to Islam."<sup>55</sup> The Shariah Court of Appeal concluded that "the respondent's declaration of faith herein did not constitute a valid conversion into Islam as per the requirements [and] since the respondent's conversion process was flawed, she could no longer be taken as a Muslim. She must remain a Buddhist and could not, therefore, be accused of apostasy."<sup>56</sup> The case confirmed that there was no avenue for Muslims to legally convert out of Islam in the state of Penang. Only if the original conversion to Islam was found to be faulty could one be declared non-Muslim under

<sup>53</sup> *Majlis Agama Islam Pulau Pinang lwn. Siti Fatimah Tan Abdullah* [2009] 1 CLJ (Sya) 162.

<sup>54</sup> [2009] 1 CLJ (Sya) at 166. <sup>55</sup> [2009] 1 CLJ (Sya) at 166. <sup>56</sup> [2009] 1 CLJ (Sya) at 166–7.

the Administration of Islam Enactment. In other words, the case was the exception that proved the rule.

The cases examined up to this point concern individuals who were officially registered as Muslim but who sought legal recognition of conversion. Nearly all of them remained in a quandary as the result of Malaysia's hyper-regulated religious sphere and the unwillingness of the civil courts to consider their plight. These individuals faced long ordeals in court. But others had it much worse, as in the case of a woman who went by the name Priyathaseny.

*Priyathaseny v. Department of Islamic Religious Affairs Perak*

*Priyathaseny v. Perak Department of Islamic Religious Affairs* concerns an ethnic Malay Muslim woman who converted to Hinduism in 1998 to marry an ethnic Indian of Hindu faith.<sup>57</sup> Because changing one's official religious status is impossible for ethnic Malays and there is no legal path for a Muslim to marry a non-Muslim, Zuraidah bte Hassan changed her name to Priyathaseny, a Hindu name. The couple performed a Hindu marriage ceremony, but they did not register the marriage with the state authorities. After giving birth to her first child and while pregnant with her second, Priyathaseny was arrested and charged with deriding the religion of Islam and cohabitation outside of lawful Muslim wedlock under the Administration of Islamic Law Enactment and the Shariah Criminal Enactment of Perak (1992). The Enactment provides that "Any Muslim who declares himself to be a non-Muslim so as to avoid any action being taken against him under this Enactment or any other law in force is guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both." Despite Priyathaseny's conversion ceremony, her change of name, and her Hindu wedding ceremony, the state nonetheless considered her Muslim. While in custody, Priyathaseny pleaded guilty on the advice of a shariah court lawyer. She was fined RM 5,000 (approximately \$1,300) and detained for three days. During this period, her husband converted to Islam under the threat that Priyathaseny would be jailed if he did not.

Upon their release, the couple initiated litigation in the civil courts. Priyathaseny sought a declaration that the charges against her were null and void because she did not profess Islam. They also sought the reregistration of her husband as a Hindu on the grounds that his conversion was made under duress. Finally, Priyathaseny challenged the constitutionality of certain aspects of the Administration of Islamic Law and Shariah Criminal Enactments based on Article 11 of the Federal Constitution, guaranteeing freedom of religion. The Department of Religious Affairs challenged the civil court's jurisdiction based on Article 121 (1A).

<sup>57</sup> *Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 CLJ 221.

In response to this preliminary objection, her attorney Shanmuga Kanesalingam reasoned that a shariah court was not the appropriate forum because the case concerned constitutional questions, not under the purview of the shariah courts. Leaving the matter to the shariah courts would not provide relief, and it would put the family in jeopardy by making them subject to further criminal charges. Shanmuga explained that:

To send this case to Syariah Court would be to give the Syariah Court powers over persons who do not profess Islam in Malaysia [which is] a country comprising people professing and practicing so many different religions. This cannot be right, particularly as the Federal Constitution expressly provides that the Syariah Courts shall have jurisdiction “only” over persons “professing the religion of Islam.”<sup>58</sup>

The presiding High Court Justice sided with the preliminary objection fielded by the Department of Islamic Religious Affairs and refused to review the Administration of Islamic Law and Shariah Criminal Enactments. The judge referred to previous Article 121 (1A) jurisprudence and declared: “I am now guided by and bound by the pronouncement of our apex court in *Soon Singh* that the jurisdiction of this court is now ousted from determining the merits of this application. The central issue is clearly out of the bound of jurisdiction of the civil court as it is clearly a matter that can only be determined by the Syariah authorities.”<sup>59</sup>

Why were the civil courts ceding broad authority to the shariah courts? Liberal lawyers maintained that the original intent of Article 121 (1A) was to prevent the civil courts from overturning shariah court decisions that lay within the shariah court’s express jurisdiction. Liberal lawyers contend that, when properly read, Article 121 (1A) should not preclude the civil courts from retaining jurisdiction over cases where fundamental rights are at stake.<sup>60</sup> Doing so abandons a primary role of the federal judiciary. A basic problem, liberal rights lawyers explained, is that judges had been made increasingly vulnerable to political pressures after the government weakened judicial independence in 1988. This vulnerability is especially acute when the courts adjudicate “sensitive issues” such as the position of the shariah courts vis-à-vis the civil courts and anything touching on religion. In this view, the willingness of the civil courts to cede authority to the shariah courts is the product of political pressures rather than the specific constitutional text embodied in Article 121 (1A). This interpretation fits the political context of a much more recent case concerning the religious status of Azmi Mohamad Azam.

<sup>58</sup> *Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 CLJ at 226.

<sup>59</sup> *Priyathaseny & Ors v. Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 CLJ at 227. The Court of Appeal later overturned the decision in 2009 and remitted the case back to the High Court for consideration on its merits. However, lawyers did not secure a resolution to the original plea. As a result, the case remains in a state of legal limbo.

<sup>60</sup> Interviews with Shanmuga Kanesalingam (July 9, 2009) and Malik Intiaz Sarwar (November 5, 2009).

*Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak*

Azmi Mohamad Azam, also known as Roneey Rebit, litigated to change his official religious status from Muslim to Christian in 2015.<sup>61</sup> Roneey's parents had converted to Islam in 1983 when Roneey was just ten years old, and they changed his official religious status along with their own. Roneey's official name became Azmi bin Mohamad Azam @ Roneey.<sup>62</sup> As an adult, Roneey embraced Christianity and had himself baptized in 1999. In 2014, he attempted to secure formal state recognition of his conversion from the state. With his baptism certificate in hand, Roneey requested a new identity card recording a new, non-Muslim name from the National Registration Department (NRD). The NRD informed Roneey that to make such a change, they required a "letter of release from Islam" and a shariah court order.<sup>63</sup> Roneey attempted to comply. He approached the Islamic Affairs Department, but they told Roneey that they could not help without a shariah court order.<sup>64</sup> Facing this run-around with no clear path to official recognition of his conversion, Roneey raised a case in the High Court of Sarawak. After reviewing the facts of the case and the relevant case law, the High Court determined that Roneey's official religious status should be Christian. The Court ordered the NRD to record his new name and to change his official religious status on his identity card and in the National Registry. Roneey managed to win official recognition of his conversion, a feat that so many others before him had failed to secure.

There are two notable aspects of the High Court decision. The first is that Roneey's ethnic background appears to have been a determinative factor. In several passages, the court highlights the fact that Roneey is "a Bidayuh by race" and that he had been brought up in a Christian Bidayuh community.<sup>65</sup> Interestingly, the Court juxtaposes this context with that of the Lina Joy case, presumably to draw a distinction between the two cases to provide a rationale for the official recognition of Roneey's conversion. The High Court explains that "In Lina Joy case [sic] the appellant was a Malay woman brought up as a Muslim."<sup>66</sup> By contrast, "the applicant in the present case is a Bidayuh by race and brought up in a Christian Bidayuh community since birth. The choice of Islam religion [sic] was decided for him by his parents . . ."<sup>67</sup> Part of the difficulty in *Lina*

<sup>61</sup> *Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 C JL 562.

<sup>62</sup> Much of the press coverage reported his name as "Rooney," but the court decision records his name correctly, as "Roneey."

<sup>63</sup> *Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 C JL at 565.

<sup>64</sup> The reader will recall that this is precisely the situation that Lina Joy faced, only she had refused to request the letter from a shariah court, knowing full well that others before her reached the same impasse.

<sup>65</sup> The Bidayuh are an indigenous group in Southern Sarawak.

<sup>66</sup> *Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 C JL at 571. Of course, Lina Joy had no choice about the official faith that she was brought up in, but this parallel was not addressed by the court.

<sup>67</sup> *Ibid*, 571.

*Joy v. Majlis Agama Islam*, it will be recalled, is the fact that Islam and the Malay “race” are bound together as a single legal category in Article 160 of the Federal Constitution – one of many legacies of the colonial-era legal regime. Moreover, Malay ethnic identity is conflated with Islam in popular legal consciousness. It appears that the High Court was attempting to identify a rationale for breaking with the precedent set in *Lina Joy v. Majlis Agama Islam* and citing Roneey’s “race” was one way to do this. Another distinction articulated by the Court is that Roneey “... has never practiced the Islamic faith.”<sup>68</sup> The logic of the ruling is thus reminiscent of the Shariah Court of Appeal decision in *Penang Islamic Religious Council v. Siti Fatimah Tan Abdullah*.<sup>69</sup> In that judgment, the Shariah Court of Appeal had established that Siti Fatimah Tan Abdullah was not Muslim because she had, in fact, *never* been Muslim.

Nonetheless, *Azmi v. Director of Jabatan Agama Islam* is a potential game-changer for future case law. The High Court emphasized the importance of *belief* for determining an individual’s religious status, as opposed to some external criteria that is regulated by the state and imposed on individuals. The High Court decision declared that:

the freedom of religion gives individuals the liberty to worship their Creator in the way they think and are more agreeable with. In order to give life and meaning to “constitutional freedom of religion”, the exercise of that freedom should not be impeded by subjecting the applicant to the decision of a Syariah Court. He does not need a Syariah Court Order to release him from Islam religion because the right to choose his religion lies with the applicant himself and not the religious body. The rights to religious freedom are the natural rights of mankind and thus, only the applicant alone can exercise that right. In other words, the exercise of constitutional religious freedom is out of bound/jurisdiction of a Syariah Court and the applicant can approach the civil court for a declaration that he is a Christian.

The Court based its decision in Article 11 (1) which provides that “Every person has the right to profess and practice his religion . . . .” Equally important, the Court pointed to the Ninth Schedule of the Federal Constitution, which determines state power over the administration of religion. Here, the Court reproduced the text of the Ninth Schedule, highlighting in bold that the shariah courts, “... **shall have jurisdiction only over persons professing the religion of Islam.**”<sup>70</sup> The decision goes on to explain, “Given that the Syariah Court shall have jurisdiction only over persons **professing** the religion of Islam, it is therefore helpful at this juncture to ascertain the meaning of ‘professing’ or ‘profess.’” Next,

<sup>68</sup> Whether the claim is true or not will never be known, as the only legal rationale that has worked in terms of securing official conversion out of Islam has been the claim the individual had never practiced Islam.

<sup>69</sup> *Majlis Agama Islam Pulau Pinang lwn. Siti Fatimah Tan Abdullah* [2009] 1 CLJ (Sya) 162.

<sup>70</sup> *Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 CJL at 574 (emphasis in the original).

the decision turns to the meaning of “profess” and its implications for the case at hand:

*Longman Dictionary of Contemporary English* defined “profess” as “a statement of your belief, opinion, or feeling.” From the definition aforesaid, it conveys the meaning that to profess a religion is making a public statement about the religion you believe in. Thus, a person professing the religion of Islam is a person who has made a public declaration, affirmed his faith in or his allegiance to Islam.

It is a fact that the Islam religion [sic] was chosen and decided for the applicant (a minor) by his mother when she converted to be a Muslim; his conversion was not by reason that he professed the religion of Islam. To put it in another way, the conversion of the applicant to Muslim faith was not on his own volition by affirming, declaring his faith in or allegiance to Islam religion but by virtue of his mother’s conversion when he was a minor aged ten years old and his mother has determined his religion. In my view, since the applicant, who is a Bidayuh by birth, had not in the first place professed his faith in Islam but his conversion followed that of his mother as he was a minor at the material time, logic dictates that he cannot be considered as a person professing that particular faith. That the applicant has not lived like a person professing Islam is seen in his averment that he was raised and brought up in the Bidayuh Christian community.

In my view, by reason that the applicant’s conversion in the first place was not based on his professing Islam but by virtue of his mother’s conversion and by his mother’s choice for him, now that the applicant is a major, he is at liberty not only to exercise his constitutional religious right to choose his religion, he can come to this court to enforce his choice to be reflected in his identity card, i.e., his name and religion.

In the light of the above the third respondent has not acted fairly towards the applicant by insisting on a letter of release from Islam and a court order to effect [sic] the amendments applied for by the applicant.

For the reasons aforesaid, I allow the judicial review and make the following declarations:

- (a) that the applicant is a Christian;
- (b) that the third respondent do change the applicant’s name from Azmi b Mohamad Azam Shah @ Roneey to Roneey anak Rebit;
- (c) that the third respondent do drop the applicant’s religion Islam in his identity card and/or the records and/or particulars of the applicant’s religion held at the National Registry to that of Christian.<sup>71</sup>

The court did not address the question of whether an adult who professes Islam can subsequently profess a different faith and change her or his official religious status. Nor does it address the situation of a Malay Muslim professing a different faith. However, the attention to the meaning of the word “profess” carries potentially significant implications for future case law.

<sup>71</sup> *Azmi Mohamad Azam v. Director of Jabatan Agama Islam Sarawak & Ors* [2016] 6 CJL at 575.

Subsequent developments underline the political backdrop for these legal conundrums. After the High Court ruling, the National Registration Department initiated an appeal, but quickly backtracked and withdrew the case. Newspapers reported that the Chief Minister of Sarawak, Adenan Satem, secured an agreement from Prime Minister Najib that the NRD would not pursue the appeal. A deal had apparently been cut to guard the position of the *Barisan Nasional* component party in the May 7, 2016, Sarawak State elections. Given that Christians make up the largest religious community in Sarawak, the political calculus of Najib's intervention in the NRD appeal was hard to miss. Whether future litigation around freedom of religion will continue to focus on the word "profess" is yet to be seen. Given the trajectory of civil court jurisprudence over the past decade, it is doubtful that the focus on belief will stick. What the Roneey case suggests is that political context is a defining feature in shaping the outcome.

#### CHILD CUSTODY AND CONVERSION

Another thorny question concerned child custody and the religious status of children when one parent converts to Islam, but not the other. An early example of this was *Tan Sung Mooi v. Too Miew Kim*, in which a couple had married in accordance with Chinese customary rites in 1964 and filed for divorce in 1991.<sup>72</sup> When Tan Sung Mooi submitted an application for maintenance and division of matrimonial assets, her husband's legal team protested that the High Court was not the proper legal forum to hear the case considering Too Miew Kim's conversion to Islam. The matter went to the Supreme Court, which decided that the civil courts must exercise jurisdiction because the Law Reform (Marriage and Divorce) Act 1976 (which was applicable only to non-Muslims) had applied to the parties as non-Muslims at the time of the divorce. After examining the legal technicalities, the Court ruled that "It would be a grave injustice to non-Muslim spouses and children whose only remedy would be in the Civil Courts if the High Court no longer has jurisdiction since the Syariah Courts do not have jurisdiction over non-Muslims." The Supreme Court confirmed, "[T]he respondent's legal obligations under a non-Muslim marriage cannot be extinguished or avoided by his conversion to Islam."<sup>73</sup> *Tan Sung Mooi v. Too Miew Kim* was resolved with little fanfare because such cases were not yet in the public spotlight. Future cases would be far more contentious, particularly when the official religious status of the children was in dispute.

*Chang Ah Mee v. Islamic Religious Affairs Department* was an early case involving child custody.<sup>74</sup> In this case, a non-Muslim couple had been married for three years when the husband, Khoo Tak Jin, converted to Islam and changed his daughter's official religious status without his wife's consent. Chang Ah Mee turned to the civil

<sup>72</sup> *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ 708.

<sup>73</sup> *Tan Sung Mooi v. Too Miew Kim* [1994] 3 CLJ at 709.

<sup>74</sup> *Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam & Ors.* [2003] 1 CLJ 458.

courts to have her daughter's conversion nullified on account of the Sabah Administration of Islamic Law Enactment, which requires the consent of the "parents" of an infant for purposes of conversion [emphasis added]. The Department of Islamic Religious Affairs countered that Article 12 (4) of the Federal Constitution states, "... the religion of a person under the age of eighteen years shall be decided by his parent or guardian." The Department of Islamic Religious Affairs argued that because the text of the Constitution specified "parent" (in the singular form), *either* the father or the mother should have the right to initiate a religious conversion without the consent of the other spouse. The High Court ruled "there is no merit in the argument" because the Constitution "does not discriminate against the sexes." Therefore, the term "parent" in Article 12 (4) "must necessarily mean both the father and the mother. To allow just the father or just the mother to choose the religion would invariably mean depriving the other of the constitutional rights under art. 12 (4)."<sup>75</sup> The High Court ruled the conversion null and void. What is notable about this case is that the Department of Islamic Religious Affairs did not invoke Article 121 (1A) to challenge the jurisdiction of the civil courts to hear the case.<sup>76</sup> It is unclear why lawyers did not invoke the Article, but it appears to have helped the court to exercise jurisdiction. This is the only instance – until the Indira Gandhi decision – in which a court had declared the conversion of a child in such circumstances to be null and void. Had the Department of Islamic Religious Affairs challenged the jurisdiction of the civil courts, Chang Ah Mee likely would have been unable to recover her rights. The critical importance of Article 121 (1A) was evident in the custody/conversion cases that soon followed.

*Nedunchelian v. Nurshafiqah* presented a similar child conversion/custody situation. In this instance, it was a mother who had changed the official religious status of her four children without her husband's consent.<sup>77</sup> Drawing on the reasoning in *Chang Ah Mee v. Department of Islamic Religious Affairs*, the father contested the conversions of the children on the grounds that Article 12 (4) must be understood to require the consent of both parents. However, the defendant's lawyer invoked Article 121 (1A). The High Court agreed and affirmed that "it is settled law that the Civil Courts have no jurisdiction ... as established by a plethora of cases."<sup>78</sup> The High Court reviewed the previous case law on the matter, including the principle established in *Md Hakim Lee* that "the issue is not one of whether a litigant can get his remedies but one of jurisdiction ... The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the civil court." The Court also differed with the understanding of Article 12 (4)

<sup>75</sup> *Chang Ah Mee v. Jabatan Hal Ehwal Agama Islam & Ors* [2003] 1 CLJ at 459.

<sup>76</sup> That is, the report of the decision gave no mention of Article 121 (1A). Nonetheless, the Court held in its decision that "The issue as to the legality of the conversion has nothing to do with religion but with the interpretation of the provisions of the Enactment ..." [2003] 1 CLJ at 458.

<sup>77</sup> *Nedunchelian V Uthiradam v. Nurshafiqah Mah Singai Annals & Ors* [2005] 2 CLJ 306.

<sup>78</sup> *Nedunchelian V Uthiradam v. Nurshafiqah Mah Singai Annals & Ors* [2005] 2 CLJ at 310.

established in *Chang Ah Mee v. Department of Islamic Religious Affairs*. Whereas the *Chang Ah Mee* decision found that the intent of Article 12 (4) required the consent of both parents, *Nedunchelian v. Nurshafiqah* arrived at the opposite conclusion. The Court noted that Article 160b of the Constitution specifies that the Bahasa Malaysia version of the Federal Constitution is the authoritative text. That version of the Federal Constitution carries the term “ibu bapa,” which the court interpreted as constituting the right of a single parent, as opposed to extending that right to both parents “kedua ibu bapa.”<sup>79</sup> The husband lost his appeal and the custody of his children.

Of all the child custody/conversion cases, the one that commanded the most nationwide attention was *Shamala v. Jeyaganesh*.<sup>80</sup> Shamala Sathiyaseelan and Jeyaganesh Mogarajah, both Hindus, were married in 1998 under the Marriage and Divorce Act, which governs family law for non-Muslims. Four years later, Jeyaganesh left his wife, converted to Islam, and subsequently changed the official religious status of their two children (ages two and four) to Islam without his wife’s knowledge or consent. Shamala took the children to her parents’ home and filed a petition to secure their custody. She obtained an interim custody order from the civil courts, the appropriate legal body for adjudicating family law issues among non-Muslims. However, her husband secured a temporary custody order of his own, from a shariah court, on the grounds that he and his children were now Muslim and therefore under the jurisdiction of the shariah courts in matters of family law. The two custody orders came to opposite conclusions over who had the right to child custody.

In the High Court proceedings that ensued, Shamala sought a court order declaring the conversions of the children null and void. Shamala’s attorney drew on the decision in *Chang Ah Mee v. Department of Islamic Religious Affairs* and called attention to the language of the Guardianship of Infants Act, which provides that “the rights and authority of mother and father shall be equal.” However, Justice Faiza Tamby Chik, the same judge who had issued the High Court decision in *Lina Joy v. Majlis Agama Islam*, backed the interpretation of Article 12 (4) of the Constitution provided in *Nedunchelian v. Nurshafiqah*. He denied Shamala’s petition to nullify the conversions and held that:

by virtue of art. 121 (1A) of the Federal Constitution, the Shariah Court is the qualified forum to determine the status of the two minors. Only the Shariah Court has the legal expertise in hukum syarak to determine whether the conversion of the two minors is valid or not. Only the Shariah Court has the competency and expertise to determine the said issue.<sup>81</sup>

<sup>79</sup> This is despite the fact that the Federal Constitution was drafted in English. An amendment making the Bahasa Malaysia translation the authoritative version once it is decreed as such by the Agong – Malaysia’s constitutional monarch – has not yet taken effect, since no such decree has been made to date.

<sup>80</sup> *Shamala a/p Sathiyaseelan v. Dr. Jeyaganesh all C Mogarajah* [2004] 2 MLJ 648

<sup>81</sup> *Shamala a/p Sathiyaseelan v. Dr. Jeyaganesh all C Mogarajah* [2004] 2 MLJ at 649.

The ruling put Shamala in a no-win situation. She had no remedy in the civil courts, nor did she have legal standing in the shariah courts because she was not Muslim. Even if she had wished to approach the shariah courts for relief, it was not an avenue that was available to her. Fearing that her husband would deny her joint custody, Shamala fled to Australia with the children and lodged an appeal with the Federal Court. The Federal Court dismissed her appeal, without considering the constitutional questions at stake, on the grounds that Shamala was in contempt of the court for denying Jeyaganesh visitation rights.<sup>82</sup> As Chapter 5 documents, *Shamala v. Jeyaganesh* was the first case that became a focal point for NGO mobilization.

In another case that mirrored many of these circumstances, *Subashini v. Saravanan* concerned a Hindu couple who had been married for four years when, in 2006, the husband (Saravanan) left his wife and converted to Islam. As in previous cases, Saravanan changed the religious status of their child, who was three years old at the time. Saravanan's wife (Subashini) was subsequently served with papers from the Registrar of the Syariah High Court, Kuala Lumpur, notifying her that Saravanan had initiated proceedings to claim custody of their child. Subashini applied for an injunction to restrain her ex-husband from continuing with any proceedings in the shariah court and she filed a petition for divorce in the civil courts.<sup>83</sup> Subashini's lawyers, Haris Ibrahim and Shanmuga Kanesalingam, insisted that the proper legal forum to hear issues related to the breakdown of a civil marriage must be the High Court. Further, they contended that the shariah court should have no jurisdiction over the matter because Subashini was not a person professing the religion of Islam. Conversely, Saravanan's attorney, Mohamed Haniff Khatri, claimed that the civil court had no authority to issue an injunction that is binding on the shariah courts. Khatri contended that from the moment of his conversion, Saravanan enjoyed standing in the shariah courts in personal status matters and that it was, in fact, the only legal avenue available to him. The High Court agreed with Khatri's reasoning and denied Subashini's request for a civil court injunction.<sup>84</sup> According to the Court, Saravanan was "subject to the jurisdiction of the Syariah Court which has exclusive jurisdiction over persons professing the religion of Islam." *Subashini v. Saravanan* pointed to yet another failure of the civil courts to remedy disputes over jurisdiction.

Husband and wife both filed appeals. Subashini's legal team (now an all-star cast with the addition of prominent human rights lawyer Malik Imtiaz) eventually won the right to approach the Federal Court, which gave a decision in late 2007.<sup>85</sup>

<sup>82</sup> *Shamala Sathiyaseelan v. Jeyaganesh Mogarajah & Anor* [2011] 2 MLJ 281

<sup>83</sup> *Subashini a/p Rajasingam v. Saravanan all Thangathoray* [2007] 2 MLJ 798.

<sup>84</sup> However, the High Court provided Subashini with an interim injunction pending appeal.

<sup>85</sup> This may appear to be in contradiction with the High Court's observation that Saravanan did not enjoy standing in the civil courts, but his appeal concerned constitutional questions, not personal status issues.

In a lengthy and complex decision spanning eighty-six pages, the Federal Court ruled in a 2–1 split decision. The decision reasoned that “by contracting the civil marriage, the husband and wife were bound by the Marriage Reform Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continued to have jurisdiction over him, notwithstanding his conversion to Islam.”<sup>86</sup> The Federal Court also exercised jurisdiction on the grounds that, although Subashini did not enjoy legal standing in the shariah court under Article 46 (2) (b) of the Administration of Islamic Law Act, Saravanan had legal standing in the civil courts (albeit only as a respondent). In this regard, *Subashini v. Saravanan* set an important precedent and addressed one of the key failings of *Shamala v. Jeyaganesh*. However, the Court affirmed the finding in *Nedunchelian v. Nurshafiqah* and *Shamala v. Jeyaganesh* that one parent could initiate the conversion of a child without the consent of the spouse. The Federal Court explained that it could not overrule a validly obtained order of a shariah court because such an action would constitute “interference by the High Court of the husband’s exercise of his right as a Muslim to pursue his remedies in the Syariah High Court.” The upshot of the decision was that the civil courts retained jurisdiction in custody cases between Muslim converts and their non-Muslim spouses, yet other questions concerning civil and shariah court jurisdiction remained unresolved.

These unresolved questions came to the fore yet again in *Indira Gandhi v. Muhammad Ridzuan Abdullah*. The circumstances of the case mirrored *Shamala v. Jeyaganesh* and *Subashini v. Saravanan* almost one to one. Patmanathan a/l Krishnan converted to Islam, assuming the name of Muhammad Ridzuan Abdullah in March of 2009. The next month, Ridzuan changed the official religious status of his three children without the knowledge or consent of his wife. Ridzuan then secured a permanent custody order for the three children from the shariah court. Indira’s attorneys launched two lawsuits in the Ipoh High Court, the first to challenge the conversions and the second to secure custody of the children. Muhammad Ridzuan’s attorneys urged the High Court to follow the precedent set in *Subashini v. Saravanan* that a child’s official religious status could be changed by only one parent alone and that the civil courts have no jurisdiction to review the matter once the children are registered as Muslim. Indira’s attorneys countered that the shariah courts must not have exclusive jurisdiction because, as a non-Muslim, Indira does not have legal standing in the Syariah High Court. They pointed to the decision in *Tan Sung Mooi v. Too Miew Kim*, where the Supreme Court ruled that conversion to another religion did not extinguish one’s legal obligations under one’s former religious status. They also highlighted the apparent double-standard that converts out of Islam are always subject to the duties of one’s prior personal status law, as was the case in *Kamariah binti Ali v. Kelantan State Government*.

<sup>86</sup> *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147.

Justice Dato' Wan Afrah Binti Dato' Paduka Wan Ibrahim exercised civil court jurisdiction in the application regarding custody, reproducing the reasoning in *Tan Sung Mooi*. The decision maintained that "it would be a grave injustice to non-Muslim spouses and children whose only remedy would be in the Civil Courts if the High Court no longer has jurisdiction since the Syariah Courts do not have jurisdiction over non-Muslims." The High Court conferred custody of the children to Indira. However, the children were still registered as Muslims, and Ridzuan had physical possession of the youngest child, whom he refused to return. The application to challenge the conversion was eventually heard in 2013, and another High Court Justice, Lee Swee Seng, annulled the conversions and ruled unilateral conversion of a child to be unconstitutional. The next year, the Ipoh High Court cited Ridzuan for contempt of the 2010 custody decision and ordered that he be arrested if the youngest child was not returned within the week. When Ridzuan failed to meet this deadline, the High Court ordered the police to find the child. What followed was a game of cat and mouse, with a barrage of legal actions from the High Court, the Court of Appeal, and the Federal Court concerning whether the police were legally obliged to execute the civil court warrant for arrest in light of the still contested legal positions over conflicting custody orders. In April 2016, the Federal Court held that both the syariah *and* civil court orders regarding custody were binding on the police, and the Court refused a recovery order under the Child Act 2001. However, the Federal Court held that the police were duty bound to assist the civil courts in the contempt proceedings against Ridzuan and issued an order of mandamus against the Inspector General of Police. By the end of 2015, there was also a 2–1 decision by the Court of Appeal upholding unilateral child conversions. The decision found that any matter of religion lay solely within the purview of the syariah courts. In May 2016, Indira Gandhi was granted leave to challenge the Court of Appeal ruling in Federal Court. The appeal was heard over three days in November 2016. The result of litigation was still pending at the time of writing.

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These three types of cases – concerning the official religious status of the dead, religious freedom for the living, and battles over child custody/conversion – marked a fault line down the middle of the Malaysian judiciary. Rather than clarify matters of jurisdiction, Article 121 (1A) exacerbated legal ambiguities and produced new legal tensions. Ironically, the clause put the civil courts in a position of hearing *more* claims concerning religion, not fewer. Before the introduction of Article 121 (1A) in 1988, fewer than two High Court decisions touched on Islam per year on average (see Figure 3.1). After the amendment, the number of reported decisions mentioning Islam surpassed an average of eight per year, reaching an all-time high of eighteen reported decisions in 2014. In other words, Article 121 (1A) seems to have produced exactly the sorts of jurisdictional tensions and ambiguities that it was supposed to resolve. To be clear, this data is not presented as evidence of increasing civil court

interference with shariah court jurisdiction, as many conservatives claim. Rather, these legal dilemmas were a product of the formalization of the shariah judicial system, the tightening state regulations on religion, and the introduction of Article 121 (1A). As the legal system was made increasingly rigid, boundary maintenance between the federal civil courts and the state shariah courts was judicialized. The fact that one jurisdiction is meant to implement “Islamic law” and the other “secular law” made this jurisdictional fault line ripe for ideological polarization.

To be sure, there were a variety of motives among those who raised Article 121 (1A) objections to civil court jurisdiction. For some litigants, Article 121 (1A) provided a means to achieve strategic advantage in a domestic squabble.<sup>87</sup> This was often the situation in custody/conversion cases, where conversion to Islam (or the threat thereof) provides leverage in divorce settlements.<sup>88</sup> In other circumstances, such as the freedom of religion and “body-snatching” cases, it is the religious bureaucracy and state lawyers that invoked Article 121 (1A) to affirm their role as gatekeepers for the religious community. For others, Article 121 (1A) provides an instrument to expand the ambit of the shariah courts and the position of Islam in the constitutional order. It is this last set of actors – those with an ideological agenda – to which we will return in Chapter 7. In the meantime, Chapter 5 turns to examine of how political activists mobilized on either side of an emergent “rights-versus-rites” binary to construct a political spectacle in the court of public opinion. As we shall see, the Article 121 (1A) cases became the center of a heated national debate around the place of Islam in Malaysia’s legal and political order.

<sup>87</sup> In all the reported cases, the husbands contended that their conversions were sincere.

<sup>88</sup> An attorney familiar with many of these cases explained that anecdotal evidence suggest that wives are threatened by their husbands that if they do not agree to a divorce, or to certain disadvantageous terms of a divorce, they will lose control of their children by way of unilateral conversion.