7

"Islam is the Religion of the Federation"

Over half of all Muslim-majority countries have constitutional clauses that proclaim Islam the religion of state. For Malaysia, it is Article 3. Clause 1 of Article 3 declares, "Islam is the religion of the Federation . . . "[1] For decades, the clause received little attention. The federal judiciary understood the clause to carry ceremonial and symbolic meaning only. However, recent years have seen increasing litigation around the meaning and intent of the clause. Recent federal court decisions introduce a far more robust meaning, which practically elevates Islamic law as the new *grundnorm* in the Malaysian legal system. Jurisprudence on the matter is still unfolding, but what is clear – and what has been clear for quite some time – is that two legal camps hold radically divergent visions of the appropriate place for Islamic law and liberal rights in the legal and political order. This chapter builds on the legal and political context of the preceding chapters to make sense of the increasing contestation over Article 3, as well as the federal judiciary's shifting jurisprudence on the matter. I argue that the Article 121 (1A) cases provided a unique opportunity for Islamist lawyers to push for sweeping new interpretations of Article 3, which have gained surprising traction in the civil courts.

LITIGATING ARTICLE 3 IN CHE OMAR BIN CHE SOH

Che Omar bin Che Soh v. Public Prosecutor was the first case in which the Supreme Court (as it was called at the time) considered the meaning of Article 3.[2] The occasion for the landmark 1988 decision was a constitutional challenge to the mandatory death penalty for the trafficking of drugs. The appellant claimed that the provision did not conform to Islamic jurisprudence and was therefore unconstitutional by virtue of Article 3 (1) of the Federal Constitution.[3] The Supreme Court

[1] The full clause reads, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation."

[2] *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55.

[3] The specific arguments turned around whether the Fire Arms (Increased Penalties) Act conformed to Islamic jurisprudence on matters *qisas* and *huddud* punishments. Ironically, the attorneys for the

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decision in *Che Omar bin Che Soh v. Public Prosecutor* denied the appeal, affirmed the "secular" nature of the Malaysian state, and restricted the meaning of Article 3 (1) to matters of ritual and ceremony. However, the decision simultaneously validated a narrative that is increasingly championed by Islamist attorneys and judges. Given the importance of *Che Omar bin Che Soh v. Public Prosecutor*, it is worth examining the text and the reasoning of the decision in some detail.

In considering the meaning of Article 3 (1), the Lord President of the Supreme Court, Salleh Abas, articulated the significance of the constitutional challenge as follows:

> If the religion of Islam . . . means only such acts as relate to rituals and ceremonies, the argument has no basis whatsoever. On the other hand, if the religion of Islam or Islam itself is an all-embracing concept, as is normally understood, which consists not only the ritualistic aspect but also a comprehensive system of life, including its jurisprudence and moral standard, then the submission has a great implication in that every law has to be tested according to this yard-stick.[4]

With this framing of the case, the stakes were monumental. Either Article 3 would be considered purely symbolic, with no legal effect, or it would carry the implication that *every* law on the books should be similarly "tested" against Islam and Islamic law. Before indicating which of these two positions had legal merit, Salleh Abas avowed the all-embracing reach of Islam and the importance of Islamic law, regardless of what state law might say on the matter. Here, the Lord President references the writings of the Islamist thinker *par excellence*, Syed Abul A'la Maududi:

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered. (See S. Abdul A'la Maududi, *The Islamic Law and Constitution*, 7th Ed., March 1980.)[5]

With Islam defined as "a complete way of life, covering all fields of human activities," the Lord President Salleh Abas turned to the question of what the framers of the Federal Constitution meant by Article 3:

> Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.

appellant were not Muslim, but they were very much interested in Islamic law insofar as it might save their client's skin.

4 *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ at 55–56

5 *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ at 56.

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> Before the British came to Malaya, which was then known as Tanah Melayu, the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law . . . .When the British came, however, through a series of treaties with the sultans beginning with the Treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, *viz.* the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, *i.e.* to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. . . . Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only . . .[6]

Whether the Lord President was aware or not, this stylized narrative legitimized the Islamist claim that the pre-colonial Malay Peninsula was "Islamic in the true sense of the word." The Court decision not only advanced the Islamist talking point that sovereignty belonged "to God alone" in the pre-colonial era, but also the implication that this historical schism can be corrected. The decision does not elaborate on how God's sovereignty was actualized in the pre-colonial era, nor does the decision provide clues as to how God's sovereignty might be restored so that Malaysia can once again be "Islamic in the true sense of the word." After affirming this narrative, the Lord President only explains that, as a strictly legal matter, Article 3 must be read narrowly:

> In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void . . . .

As the reader will recall from Chapter 3, important context is missing from this historical account, particularly concerning the intent of the framers of the Constitution. Missing is the irony that the most determined resistance to Article 3 came from those who were meant to be the guardians of Islam – the Sultans. Also missing is the story of how Justice Abdul Hamid came to play a pivotal role on the Reid Commission at the eleventh hour (Stilt 2015). Perhaps most crucial is the fact that the Alliance had agreed to the text of Article 3 only on the condition that, "the

[6] *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ at 56.

observance of this principle . . . shall not imply that the State is not a secular State" (Fernando 2006: 253).[7] Nonetheless, the Supreme Court decision constructed an account in which Malaysia was subject to a legal straightjacket imposed by the British and that Malaysian judges, even if they wished to correct this historical injustice, were duty-bound to apply secular law. In the closing text of the decision, Salleh Abas explains that:

> We have to set aside our personal feelings because 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. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.[8]

The seminars and other activities that Salleh Abas suggested in *Che Omar bin Che Soh* were, in fact, organized through the 1980s and 1990s. A series of workshops and conferences focused primarily on the administration of Muslim law and the formalization of the shariah judiciary. Within these forums and elsewhere, a few Islamist thinkers explored the possibilities for expanding the meaning and ambit of Article 3 beyond the constraints articulated by Lord President Salleh Abas in his 1988 landmark decision. One of the most influential thought-pieces, already cited in this book, is a law review article by Mohammad Imam (1994) that provides extensive argumentation for why Article 3 (1) must be understood to carry the broad meaning denied in *Che Omar bin Che Soh*.

ARTICLE 121 (1A) AS A SPRINGBOARD TO ARTICLE 3 LITIGATION

A few lawyers began to make these arguments in court. There, they found a receptive audience among a few civil court judges. One of the earliest such decisions was the 2001 High Court ruling in *Lina Joy v. Majlis Agama Islam* (Chapter 4). In that case, Haji Sulaiman Abdullah represented the Islamic Religious Council of the Federal Territories. In oral arguments, he submitted to the court that "There is nothing which is outside the scope of Islamic law and adat because Islam . . . is a complete way of life and . . . controls all aspects of our life" (Dawson and Thinu 2007: 154). Justice Faiza Tamby Chik concurred, connecting these broad claims to Article 3 and the implications that this meaning holds for all facets of social and political life. Specifically citing the scholarship of Mohammad Imam and others, Justice Faiza advanced a "purposive interpretation" to Article 3 (1).[9] He averred that " . . . 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

[7] As explained in Chapter 3, this was the text of the Alliance joint memorandum to the Reid Commission requesting that "The religion of Malaysia shall be Islam."

[8] *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 56-57.

[9] *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ at 128.

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protect, defend and promote the religion of Islam."[10] Justice Faiza took another page out of Mohammad Imam's playbook with his focus on Article 11 (3) of the Federal Constitution, which states that "Every religious group has the right . . . to manage its own religious affairs . . . ."[11] Justice Faiza argued that Article 11 (3) supports the view that Article 121 (1A) provides for the absolute supremacy of the shariah courts in any matter related to Islam, even in cases when individual rights are curtailed as a result. For Justice Faiza, the right of religious communities (as provided in Article 11 (3)), must supercede an individual's rights (as provided in Article 11 (1)) anytime it comes to Islam. Indeed, what emerges in Justice Faiza's decision is a series of interlocking interpretations of select articles that collectively elevate the supremacy of Islam in the Federal Constitution.

Justice Faiza's 2001 decision in *Lina Joy* was an outlier at the time, but similar interpretations of Article 3 would find their way to the apex Federal Court as the decade progressed. The Federal Court's Article 3 jurisprudence is largely the fruit of the concerted efforts of a small number of Islamist lawyers enabled by Article 121 (1A) and the spectacle that surrounded those cases. Article 121 (1A) provided a unique opportunity for Islamists to advance an expansive interpretation of Article 3 and a new vision for the role of Islam in the legal and political order. Once Article 121 (1A) litigation reached the court of public opinion, the polarized political environment that followed (Chapter 5) made it increasingly uncomfortable for judges who did not share the revisionist view of Article 3 (1). Given the centrality of Article 121 (1A) to Article 3 jurisprudence, a refresher on Article 121 (1A) may be useful.

As the reader will recall from Chapter 3, the Mahathir administration introduced Article 121 (1A) as a constitutional amendment in 1988. On its face, the amendment sought to clarify matters of jurisdiction between the civil courts and the shariah courts. The clause states that the High Courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts." However, rather than clarify matters of jurisdiction, Article 121 (1A) exacerbated legal ambiguities and produced new legal tensions. Cases concerning the 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. As I argued in Chapter 4, these legal dilemmas were a product of tightening state regulations on religion, the formalization of the shariah judicial system, 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 was 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 domestic squabbles, as in custody/

[10] Ibid, 130. [11] Ibid, 126.

conversion cases where conversion to Islam (or the threat thereof) provided leverage in divorce settlements.[12] In other circumstances, such as the freedom of religion and "body-snatching" cases, it is the religious bureaucracy and state lawyers that invoke 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 now turn.

For a handful of activist lawyers, Article 121 (1A) is part of a long-term strategy motivated by specific ideological commitments to build an "Islamic" legal order. These lawyers seized upon ambiguities in the law to advance a program of "Islamization" through the courts.[13] They invoked Article 121 (1A) at every opportunity to challenge civil court jurisdiction and to expand the ambit of the shariah courts.[14] A lead attorney in many of the Article 121 (1A) cases, Haniff Khatri Abdulla, was frank about this strategy as a means to expand the purview of the shariah courts and the place of Islam in the legal system more generally.[15] The "body snatching" cases, the religious conversion cases, and the child custody/conversion provided the most openings for strategic litigation.[16] Equally important, once the cases were politically salient, they provided opportunities for activists outside of the court to shape popular legal consciousness. As previously noted, 2004 was the watershed year

[12] In all the reported cases, the husbands contended that their conversions were sincere. However, anecdotal evidence suggests that wives are sometimes threatened by their husbands that if they do not agree to a divorce, or certain terms of divorce, they will lose control of their children by way of their unilateral conversion.

[13] Liberals contend that Islamist lawyers and some civil court judges *produced* ambiguities around the plain meaning of Article 121 (1A).

[14] Islamist lawyers explain that were it not for Schedule 9 of the Federal Constitution (which provides the states with authority to administer Anglo-Muslim law) Article 121 (1A) would be *the* main vehicle for "Islamizing" civil law. This is because, in their vision, Islamic law provides the basis for every aspect of state law, with the only exception being family law for non-Muslims.

[15] For a detailed presentation of this legal agenda, see Khatri et al. (2009). Haniff Khatri has been frank in private and public settings. He presented similar views publicly at the "Strategic Litigation Conference," October 3, 2015, organized by the MCCHR and the Malaysian Bar Council. I also had the opportunity to discuss these with Haniff Khatri and Abdul Rahim Sinwan in 2009, 2010, and 2014.

[16] There were a few other types of Article 121 (1A) cases. For instance, *Latifah bte Mat Zin* brought Article 121 (1A) into play in the context of dividing an estate following the death of an individual. A year later, the Federal Court decided *Abdul Kahar bin Ahmad v. Kerajaan Negeri Selangor.* In that case, Abdul Kahar was charged in the Syariah High Court of Selangor with expounding a doctrine contrary to Islamic law under the Shariah Criminal Offenses Enactment of Selangor. He was also charged for claiming himself to be a prophet, defiling the religion of Islam, defying the lawful orders of the Mufti, and disseminating opinions contrary to Islamic law. Abdul Kahar skipped out on the shariah court hearing and instead challenged the constitutionality of the state enactments in the civil courts. An Article 121 (1A) objection was raised to challenge civil court jurisdiction, and Islamist lawyers argued further that the shariah court should have some role in determining whether shariah court provisions are in harmony with the Federal Constitution. The Federal Court refused this logic but did not strike down the legislation in question. Abdul Kahar was sentenced to ten years in jail, RM 16,500 in fines, and six strokes of the rotan. He was released after seven years in prison after repenting.

when the Article 121 (1A) cases became politically salient. Beginning with the first *Malaysiakini* story on *Shamala v. Jeyaganesh*, Article 121 (1A) cases were covered more intensively than any other issue. This coverage broadened the audience for the 121 (1A) cases. This audience expansion is directly attributable to the efforts of liberal rights groups to bring the cases to the public's attention, and to the media's persistent scrutiny. Thirteen liberal rights groups formed a working coalition in the wake of the *Shamala v. Jeyaganesh* decision. This was subsequently surpassed by a coalition of over fifty conservative organizations mobilizing in the opposite direction. Together, this spectacle turned up the political heat for civil court judges.

Polarization also provided an opportunity for Islamist activists to introduce and amplify what I call the "harmonization trope." Although the term harmonization connotes an amicable reckoning, the clear objective in operational terms has been the "Islamization" of the Malaysian legal system beyond the ambit of the shariah court judiciary. Beginning in 2003, the Ahmad Ibrahim School of Law at the International Islamic University of Malaysia (IIUM) began to organize biennial conferences on the "Harmonization of Civil Law and Shariah." By 2005, the conference gained further endorsement when Justice Abdul Hamid Mohamad (soon to be Chief Justice of the Federal Court) officiated the function. The 2007 conference was organized jointly by the IIUM and the Attorney General's Chambers, with the further participation of the Department of Syariah Judiciary, Malaysia (JKSM). So close was the "harmonization" project to the corridors of power, the Headquarters of the Attorney General's Chambers provided the physical venue for the 2007 event. The 2007 conference ended with several resolutions, all of which articulated the need to amend "laws that are not Shari'ah compliant."[17] The fact that the Attorney General's Chambers posted the document on its official website spoke volumes as to the inroads that Islamist lawyers had made into the central functions of the federal government. Indeed, one need only examine the reports of the Advisory Division of the Attorney General's Chambers to see that the Shariah Section of the Attorney General's Chambers has an active agenda in sponsoring research on harmonization, which includes ongoing consultative meetings with prominent Islamist civil society organizations.[18] Such access to state authority is over and above the concerted efforts of the Attorney General's Chambers to litigate Article 121 (1A) cases in the same manner as freelance Islamist lawyers. This documentary evidence matched my observations in meetings with Nasir Bin Disa, then the head of the Shariah Section of the Advisory Division of the Attorney Generals Chambers, as well as other highly placed judges such as former Chief Justice Abdul Hamid Mohamad. Given these ideological strains within the Malaysian legal community and the

[17] The resolutions are detailed in the document "*Projek Harmonisasi Antara Undang-Undang Syariah Dan Undang-Undang Sivil*" (On file with the author).

[18] See the 2005–2006 report of the Advisory Division of the Attorney General's Chambers (on file with author).

polarized discourse more broadly, it is not surprising that revisionist readings of Article 3 appear to be gaining traction.

More recently, the civil courts have ceded jurisdiction in areas outside the domain of personal status law. A good example of this concerns the authority of the Shariah Advisory Council of the Central Bank of Malaysia vis-à-vis the civil courts. The Shariah Advisory Council was established in 2009 to issue binding rulings concerning "Islamic" finance. Commercial law had always been under the jurisdiction of the civil court administration, as per Schedule Nine of the Federal Constitution. However, with the rapid growth of Islamic finance, Islamist activists targeted this lucrative field of economic activity as "their own." *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* affirmed that decisions of the new Shariah Advisory Council are binding on the civil courts.[19] Islamist lawyers have also pushed an expansionist reading of Article 3 (1) to shift the *Grundnorm* of civil court jurisprudence. An important case in this regard concerns the seizure of books from an international book retailer.

The Borders Bookstore Case

On May 23, 2012, religious authorities raided and seized books from a Borders bookstore in Kuala Lumpur. ZI Publications had translated the book *Allah, Liberty and Love* by Canadian author Irshad Manji. Enforcement officers from the Federal Territories Islamic Religious Affairs Department (JAWI) raided the store with reporters in tow, seized copies of the book, and eventually charged the bookstore manager, a Muslim, under Article 13 of the Shariah Criminal Offenses Act. One week later, the Enforcement Division of the Selangor Department of Islamic Affairs raided the office of ZI Publications and seized additional copies of the book. Later, the owner of the publishing company, Ezra Zaid (son of Zaid Ibrahim), was charged under Article 16 of the Shariah Criminal Offences Enactment (Selangor), which states:

> Any person who —
>
> (a) prints, publishes, produces, records or disseminates in any manner any book or document or any other form of record containing anything which is contrary to Islamic law; or
>
> (b) has in his possession any such book, document or other form of record for sale or for the purpose of otherwise disseminating it, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (2) The Court may order any book, document or other form of record referred to in subsection (1) to be forfeited and destroyed notwithstanding that no person may have been convicted of an offence in connection with such book, document or other form of record.

[19] *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor [2011] 4 CLJ 654.*

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The first set of charges against Borders bookstore and the bookstore manager were contested in the Kuala Lumpur High Court. The High Court decided to exercise jurisdiction despite the Article 121 (1A) objections raised by JAWI.[20] In considering the case, the Court found that Borders could not be punished because it is a corporate entity (and hence "non-Muslim") and that it would be unjust to punish the Muslim bookstore manager because she worked under the direction of a non-Muslim supervisor. JAWI appealed the decision, but the Court of Appeal affirmed the High Court's reasoning in stronger wording yet.[21]

Meanwhile, Ezra Zaid sought a declaration that Article 16 of the Shariah Criminal Offences Enactment was invalid in *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor*.[22] Ezra's attorneys argued that the Selangor State Legislative Assembly did not have the power to legislate restrictions on freedom of expression. The Federal Court dismissed the request and explained that:

> . . . a Muslim in Malaysia is not only subjected [sic] to the general laws enacted by Parliament but also to the state laws of religious nature enacted by [the] Legislature of a state to legislate and enact offenses against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state. For the above reasons, we hold that the impugned section as enacted by the SSLA is valid and not ultra vires the Federal Constitution.[23]

The Federal Court decision underlined the reality that, despite the many financial advantages of being an ethnic Malay, Muslims enjoy fewer rights and freedoms compared with their non-Muslim counterparts. The decision also underscored an important class dimension to the enforcement of most shariah criminal offenses. Most of the punitive measures meted out by the shariah courts disproportionately affect those of more modest economic means. Moreover, they do so with far greater frequency.[24] The ZI Publications case was exceptional in that it drew the attention of the Malaysian elite to the chilling effect of shariah criminal offenses on freedom of expression.

The court's reasoning carried significant implications for the future of case law. Most important, the judges drew upon Article 3 to support the curtailment of fundamental rights. The Federal Court decision states, " . . . we are of the view that art 10 of the Federal Constitution must be read in particular with Arts 3 (1), 11, 74 (2) and 121. Article 3(1) declares Islam as the religion of the Federation

[20] *Berjaya Books Sdn Bhd & Ors v. Jabatan Agama Islam Wilayah Persekutuan & Ors* [2013] MLJU 758.
[21] *Jabatan Agama Islam Wilayah Persekutuan & Ors v. Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65.
[22] *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ 153.
[23] *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ at 164.
[24] One of many examples that can be offered here are the periodic and highly publicized raids on lower-end hotels to combat *khalwat* ("close proximity") infractions.

. . . ."[25] The Federal Court goes on to explain that it is not only the shariah courts that are charged with administering Islamic law in Malaysia. The civil courts also have a role to play because the Federal Constitution must be read "harmoniously." With this reasoning, Article 3 takes a different legal meaning, one that is no longer tied to "rituals and ceremonies," which had been established by the Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor*. Rather, Article 3 assumes an expansive meaning that provides a rationale for curtailing fundamental rights. In this upside-down world, fundamental rights provisions must bend to accommodate a new, expansive meaning for Article 3. Moreover, Islam is assumed to be in fundamental tension with liberal rights, although the Court provides no clear explanation as to why this must be the case.

The Catholic Herald *("Allah") Case*

The ZI Publications case is not the only decision where the meaning of Article 3 shifted. This change is also apparent in litigation over use of the word "Allah" in the Malaysian Catholic newspaper, the *Herald*. In this case, the publisher of the *Herald*, the Titular Roman Catholic Archbishop of Kuala Lumpur, received a letter from the Minister of Home Affairs forbidding them from using the word "Allah" in the Bahasa Malaysia version of its publication. The Minister of Home Affairs claimed that the use of the word violated the prohibition on proselytization to Muslims and, therefore, it posed a threat to public order. The Titular Roman Catholic Archbishop decided to fight in the High Court, drawing attention to the passage in Article 3 (1) that states " . . . religions other than Islam may be practiced in peace and harmony in any part of the Federation." Attorneys for the Church insisted that Catholics had long used the word "Allah." Moreover, attorneys argued that word is from Arabic and it is used by Christians and Muslims alike to refer to God. Finally, attorneys submitted that use of the word had nothing to do with proselytization. The High Court agreed with the Archbishop and issued a decision in favor of the *Herald*.[26] However, the Ministry of Home Affairs appealed the decision and managed to secure a more expansive interpretation for Article 3 from the Court of Appeal.[27]

The Court of Appeal decision hammered on what it claimed was the inescapable implication of the *first part* of Article 3 (1), which states that "Islam is the religion of the Federation." The main line of reasoning in the Court of Appeal decision is that Article 3 (1) is meant to secure the position of Islam in the country. This interpretation of Article 3 (1), coupled with the prohibition on proselytization in Article 11 (4),

[25] *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ at 160.

[26] *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor* [2010] 2 CLJ 208. The Court also reasoned that the Church had the right to use the word "Allah" in accordance with Articles 10, 11, and 12 of the Federal Constitution.

[27] *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468. For a more extensive treatment of the Court of Appeal judgment, with emphasis on the ethnocratic inflection of the legal reasoning, see Neo (2014).

provided the rationale for the Court to declare that the Ministry of Home Affairs had acted within its appropriate powers to ban the use of the word "Allah." The decision explains that:

> . . . the fundamental liberties of the respondent in this case, has to be read with Art 3 (1) of the Federal Constitution . . . The article places the religion of Islam at par with the other basic structures of the Constitution, as it is the third in the order of precedence of the articles that were within the confines of Part I of the Constitution. It is pertinent to note that the fundamental liberties articles were grouped together subsequently under Part II of the Constitution.[28]

The reasoning that the sequencing of constitutional provisions reflects their relative importance in the Malaysian constitutional order was dubious, to say the least. More significantly, this reading contradicted the clear text of Article 3 (4) of the Federal Constitution, which specifies that "nothing in this Article derogates from any other provision in the Constitution." The Court of Appeal decision contained even stronger and more direct language about the character of Article 3 and its meaning for the Malaysian legal order. In a passage penned by Justice Abdul Aziz Ab Rahim, the decision explains:

> [t]he position of Islam as the religion of the Federation, to my mind imposes certain obligation on the power[s] that be to promote and defend Islam as well to protect its sanctity. In one article written by Muhammad Imam, entitled *Freedom of Religion under Federal Constitution of Malaysia — A Reappraisal* . . . it was said that: "Article 3 is not a mere declaration. But it imposes positive obligation on the Federation to protect, defend, promote Islam and to give effect by appropriate state action, to the injunction of Islam and able to facilitate and encourage people to hold their life according to the Islamic injunction spiritual and daily life."[29]

Justice Abdul Aziz Ab Rahim acknowledges the learned counsel for citing and supplying Muhammad Imam's scholarship. The learned counsel in the case was none other than Haniff Khatri, the lawyer behind many of the strategic litigation efforts to expand the meaning of Article 3. Khatri had already relied on Muhammad Imam's article in his manifesto titled "Moving Forward to Strengthen the Position of Islam UNDER the Federal Constitution" (Khatri et al. 2009). Moreover, Muhammad Imam's scholarship had already made an earlier appearance in none other than *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan*. In that decision, Justice Faiza Tamby Chik relied on Imam's scholarship to support broad and sweeping claims about the meaning of Article 3 in the Malaysian legal order. Justice Faiza's High Court decision had shaped one of the most important Federal Court decisions on religious conversion. Another decision of Justice Faiza started

[28] *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 489-490.

[29] *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ at 511.

FIGURE 7.1: Demonstrators chant slogans outside Malaysia's Court of Appeal in Putrajaya, March 5, 2014.
REUTERS/Alamy/Samsul Said.

FIGURE 7.2: Activists gather with a sign reading "Save the word Allah" while they wait outside of the Court of Appeal for a decision in the *Catholic Herald* case.
Choo Choy May/Malay Mail Online.

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the Islamist ball rolling in the High Court judgment of *Shamala v. Jeyaganesh*.[30] The confluence of Islamist legal scholarship, Islamist strategic litigation, and the welcome reception by like-minded judges, such as Justice Faiza, demonstrates that "public interest litigation" and "cause lawyering" are not inevitably liberal in orientation (Sarat and Scheingold 2006; Teles 2012; Bennett 2017). My interviews with Islamist-oriented lawyers, highly placed attorneys in the Attorney General's Chambers, and even former Federal Court judges affirmed what is apparent in the court records themselves: strategic litigation occurs on both sides of the rights-versus-rites binary.

A striking dynamic in the *Catholic Herald* case is that it drew in the religious bureaucracy from across Malaysia. Religious councils from Terengganu, Melaka, Kedah, Selangor, Johor, and the Federal Territories intervened as formal parties to the dispute. Moreover, well-known Islamist lawyers, including Zainul Rijal, Mohamed Haniff Khatri Abdullah, and Abdul Rahim Sinwan, represented these religious councils. On the other side were prominent liberal rights attorneys Cyrus Das, Philip Koh, Benjamin Dawson, and Leonard Teoh among others. In total, 14 NGOs gained official (watching brief) status.

The Transgender Rights Case

Another high-profile case concerned transgender (*Mak Nyah*) rights in Negeri Sembilan. Section 66 of the Shariah Criminal Enactment of Negeri Sembilan forbids Muslim men from wearing women's attire or posing as a woman in public. The offense is subject to a fine of up to RM 1,000 and a prison term of up to six months. By 2010, activists in the *Mak Nyah* community had become vocal about periodic abuse at the hands of the religious authorities in the state of Negeri Sembilan. In 2012, four individuals from the *Mak Nyah* community initiated a case challenging Section 66 of the Shariah Criminal Enactment.[31] Each had repeatedly been detained, arrested, and prosecuted by the authorities. They sought protection from the civil courts from further punishment and harassment.[32] They filed a case in the High Court of Seremban, requesting a declaration that Section 66 of the Shariah Criminal Enactment is inconsistent with the Federal Constitution's provisions for the right to live with dignity (guaranteed by Article 5), the right to equal protection under the law (guaranteed by Article 8), the right to freedom of movement (guaranteed by Article 9), and the right to freedom of expression (guaranteed by Article 10). The lead attorney in the case was Aston Paiva, who was later

[30] *Shamala Sathiyaseelan v. Jeyaganesh Mogarajah & Anor* [2004] 2 MLJ 648.

[31] For more on the background to the case, activism around the case, and related issues of concern to the *Mak Nyah* community of Malaysia, see the website Justice for Sisters, at: https://justiceforsisters.wordpress.com [website last visited May 4, 2017].

[32] *Muhamad Juzaili Mohd Khamis & Ors v. State Government of Negeri Sembilan & Ors* [2015] 1 CLJ 954.

accompanied by Fahri Azzat. Both attorneys were cause lawyers embedded in liberal rights activist circles. Aston Paiva worked in the offices of Shanmuga Kanesalingam, and Fahri Azzat was one of the founding members of the Malaysian Centre for Constitutionalism and Human Rights. They won their bid for constitutional review in the High Court, but lost this first constitutional challenge. They subsequently secured leave to approach the Court of Appeal. At this point, the case was attracting national attention. Watching briefs were held by the Women's Aid Organization, Sisters in Islam, the All Women's Action Society, the Malaysian Centre for Constitutionalism and Human Rights, and others. *Amicus curiae* briefs came from Human Rights Watch and the Malaysian Bar Council. In a landmark ruling, the Court of Appeal, led by Justice Hishamudin Mohd Yunus, agreed to all the constitutional challenges put before them.

Victory for *Mak Nyah* rights in the Court of Appeal only set the stage for a more dramatic face off in the Federal Court.[33] The State Government of Negeri Sembilan, including the Islamic Affairs Department, the Chief Religious Enforcement Officer, the Chief Shariah Prosecutor, and the Religious Council of Negeri Sembilan, focused their energies on overturning the Court of Appeal decision. Intervenors from other state governments soon joined, including representatives from the Islamic Religious Councils of Perak, Penang, Johor, and the Federal Territories. A slew of *amicus curiae* briefs came from the United Malay National Organization (UMNO), the Women's Aid Organization, Sisters in Islam, the All Women's Action Society, the Attorney General's Chambers, the Shariah Lawyer's Association of Malaysia, the International Commission of Jurists, and a relatively new Islamist lawyer's group calling themselves Concerned Lawyers for Justice (*Persatuan Penguam Muslim Malaysia*), and others. Leading Islamist lawyers either litigated or submitted *amicus curiae* briefs, including Haniff Khatri, Zainul Rijal bin Abu Bakar, Abdul Rahim Sinwan, and others. In an anti-climactic decision, the Federal Court voided the Court of Appeal decision on a technicality. The Federal Court claimed that the specific procedures for approaching the High Court and the Court of Appeal were not followed, which therefore invalidated the Court of Appeal decision. The Federal Court did not address the constitutional issues at stake whatsoever.[34]

[33] *State Government of Negeri Sembilan & Ors v. Muhammad Juzaili Bin Mohd Khamis & Ors* [2015] MLJU 597.

[34] More recently, there was a successful challenge to the National Registration Department (NRD) refusal to change the official sex designation from woman to man. In a High Court of Kuala Lumpur decision on July 18, 2016, a man successfully won the right to reclassify his official sexual designation after having completed gender reassignment surgery in Thailand. Justice Nantha Balan decided that "The Plaintiff has a precious constitutional right to life under Article 5 (1) of the Federal Constitution and the concept of 'life' under Article 5 must necessarily encompass the Plaintiff's right to live with dignity as a male and be legally accorded judicial recognition as a male." Case 24NCVC-1306-08/2015. There are several interesting parallels here to litigation over the right to convert one's official religious status. Just as official conversion has important implications for an individual's rights and obligations, so too does a change in one's official sex designation, at least as far as Muslims are concerned. This is because Muslims have different rights and obligations depending on whether they are officially classified as men or women.

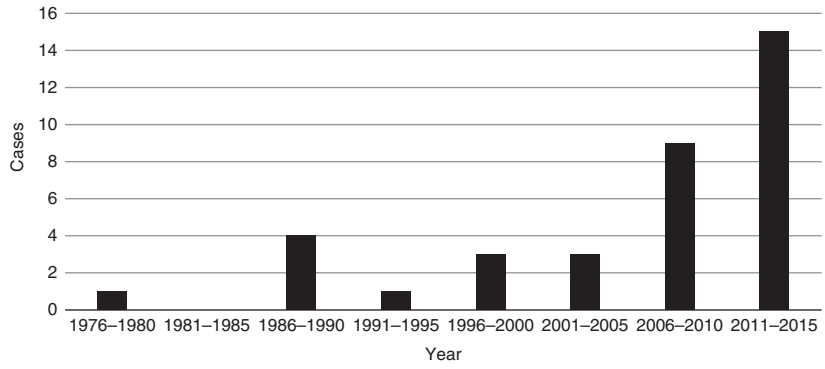

FIGURE 7.3: Reported Civil Court Decisions Concerning Article 3 (1), by Year
Source: Data compiled from the *Malayan Law Journal* and the *Current Law Journal*.

LIBERAL RIGHTS LITIGATION AS AN ENABLER OF ISLAMIST LEGAL MOBILIZATION?

The three cases reviewed above – the Borders bookstore case, the *Catholic Herald* case, and the *Mak Nyah* transgender rights case – all represented efforts to challenge the overreach of the religious authorities and defend liberal rights. Ironically, however, liberal litigation may have had the unintended effect of facilitating the efforts of Islamist legal activists to field a more expansive interpretation of Article 3. Figure 7.3 illustrates the fact that there was little attention given to Article 3 in civil court decisions through the mid-2000s. This relative neglect of Article 3 changed significantly through 2015.

The uptick in Article 3-related cases reflects increased contestation over the place of religion in the legal and political order, as well as the legal conundrums that were a product of the increasing regulation of religion and the formalization of shariah courts functions. Nonetheless, all three cases illustrate the way that liberal litigation provided Islamist lawyers with opportunities to field new, expansive interpretations of Article 3. They also provided opportunities for like-minded judges to build new case law. These new precedents shaped the trajectory of the law and narrowed the range of legal claims that could be fielded by liberal activists. Figure 7.4 illustrates the increasing number of reported civil court decisions that engage the key phrase "religion of the Federation" in Article 3 of the Federal Constitution.

The observation that liberal litigation may paradoxically facilitate the construction of Islamist-oriented case law is not to blame liberal activists for their own plight. Rather, it is to acknowledge the predicament that they face. Litigation can produce legal precedents that are exactly the opposite of the liberal protections that liberal rights advocates aim to secure. To describe their quandary in the new religious

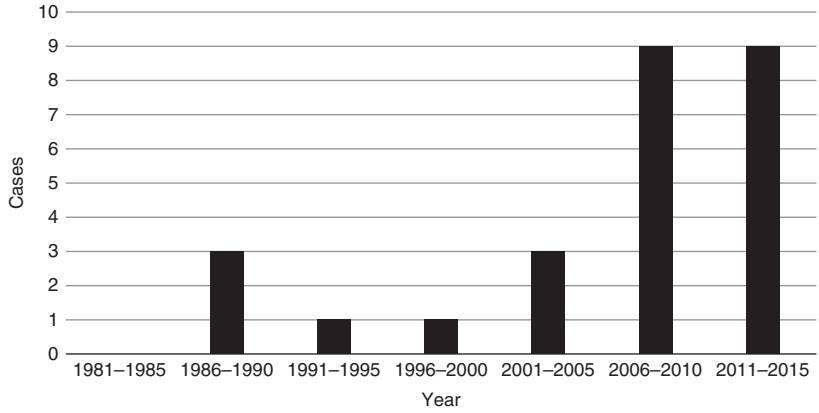

FIGURE 7.4: Reported Civil Court Decisions with the Term "Religion of the Federation"
Source: Data compiled from the *Malayan Law Journal* and the *Current Law Journal*.

FIGURE 7.5: Thousands gather in Padang Merbok, Kuala Lumpur, on February 18, 2017, to show support for amendments that would strengthen the Syariah Courts Act 335
Shafiq Hashim/NEWZULU/Alamy Live News.

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idiom of Article 3 jurisprudence, "they're damned if they do and they're damned if they don't."

Litigation shifted case law over time. But perhaps more important than the new legal precedents is the way that judicialization fueled profound shifts in the broader political climate. Each successive case became a new focal point in debates over the place of Islam in the legal and political order. They inspired the formation of entirely new NGOs as well as coalitions of civil society groups on opposite sides of a polarizing rights-versus-rites binary.