

The Invisible Constitution in Comparative Perspective

Edited by

ROSALIND DIXON

University of New South Wales

ADRIENNE STONE

University of Melbourne



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Malaysia's Invisible Constitution

Yvonne Tew

13.1. INTRODUCTION

Religion has become the great fault line of the Malaysian constitutional order. Contemporary Malaysian politics and adjudication are divided by competing views over the constitutional identity of the modern Malaysian state as secular or Islamic. At the heart of this debate is Article 3(1) of the Federal Constitution of Malaysia, which declares 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony'. Over the last two decades, the clause constitutionalising Islam as the state religion has increasingly been pitted as being in tension with the right of religious freedom guaranteed under Article 11(1).¹ This chapter considers the invisible constitution in connection with the Malaysian Constitution's religion clauses. It explores the conceptual aspect of the unwritten, extra-textual influences surrounding the interpretation of the religion clauses, and also examines the deeper foundations of the constitutional framework underlying the visible text of Article 3(1).

Malaysia's religion clauses provide a focal point for examining the invisible constitution in two main ways. The first aspect of invisibility is connected to the expansion of Islam's position in the constitutional order by political and judicial actors through means outside textual constitutional change. Although the text of Article 3(1) has remained unchanged since the nation's founding, Islam's role in the Malaysian Constitution has been expanded through unwritten, extra-textual means in contemporary constitutional discourse. The invisible elevation of Islam's supremacy in recent decades has taken place through expansive judicial interpretations of Article 3(1) by prioritising Islam's place over other constitutional norms. This approach, in effect, amounts to a claim that Article 3(1) gives rise to an implication of Islam's primacy in Malaysia's constitutional order. The invisible Islamisation of judicial discourse

¹ Fed. Const. (Malay.), Article 11(1) ('[e]very person has the right to profess and practice his religion ...').

has also taken place through judges referring to sources beyond the Constitution, like Islamic texts and principles, in judicial reasoning when deciding cases in the civil courts.

A second, contrasting approach to Malaysia's invisible Constitution is to have recourse to the Constitution's original framework. Invisibility in this sense refers to the architecture of the Constitution – the overarching constitutional structure and commitments underlying the surface of its visible text. Malaysia's Constitution came into force at the birth of a newly independent state, setting in place a framework for constitutional governance at the nation's founding. Those who defend the Constitution's secular nature argue that constitutional history and the original understanding of the constitutional bargain at the time it was framed are crucial sources establishing the secular basis underlying the text of Article 3(1). Understood properly, these unwritten constitutional fundamentals supply the framework for interpreting the written document. On this account of Malaysia's invisible Constitution, the secular basis on which the Constitution was founded as well as its structural principles and fundamental rights guarantees are integral to Malaysia's constitutional core.

Section 13.2 of this chapter begins by setting the background for discussing the Malaysian Constitution's religion clauses. It describes the constitution-making process behind the constitutional provisions on religion and the growing Islamisation phenomenon in the contemporary Malaysian state. Section 13.3 examines the role of the courts and the constitutional adjudication relating to religion in Malaysia. Section 13.4 discusses the religion clauses and their connection to the invisible constitution in Malaysia. It explores the expansion of Islam's place in the constitutional order through extra-textual means, as well as the use of constitutional history to uncover the Constitution's unwritten secular basis. Section 13.5 offers some concluding reflections on the observations gained from the Malaysian example for broader comparative understandings.

13.2. CONSTITUTIONALISING RELIGION

13.2.1. *Constitution-making and the Islamic Establishment Clause*

The Constitution of Malaya was conceived in the post-colonial climate of a nation on the cusp of independence.² The Independence Constitution

² See generally Rais Yatim, 'The Road to Merdeka,' in Andrew Harding and J. P. Lee (eds.) *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007* (Kuala Lumpur: LexisNexis, 2007), 1.

came into force when the Federation of Malaya ceased to be a British colony and became an independent state on 31 August 1957, following negotiations between the newly elected local political leaders and the departing British colonial powers. It would later become the basis for the Federal Constitution of Malaysia, when Singapore and the North Borneo states of Sabah and Sarawak joined Malaya in 1963 to become a new Federation: Malaysia.³

Five legal experts from the United Kingdom and the Commonwealth were appointed to form a constitutional commission chaired by Britain's Lord Reid, a Lord of Appeal in Ordinary, to draft the constitution for the newly independent state.⁴ This was the result of a deliberate decision by the local Alliance political party led by Tunku Abdul Rahman;⁵ the Malayan leaders gave the Reid Constitutional Commission specific terms of reference that the local representatives had already negotiated and agreed on.⁶ The Commission's task was essentially to translate into legal terms that which had already been politically settled.⁷

The Constitution that was drafted established a federal system of government with a legislative, executive and judicial branch,⁸ and a constitutional monarch – the *Yang di-Pertuan Agong* – as the head of the Federation.⁹ Malaysia's constitutional structure is based on a parliamentary system modelled after Westminster, and contains an explicit bill of rights.¹⁰ The power of judicial review over the constitutionality of legislation and executive action is implicitly assumed as a natural corollary of the Constitution's supremacy clause.¹¹

³ Singapore would leave the Federation two years later to form its own separate, independent state. Sabah and Sarawak remain within the Malaysian Federation, which currently consists of thirteen states and the three federal territories of Kuala Lumpur, Labuan and Putrajaya.

⁴ See Joseph M. Fernando, *The Making of the Malayan Constitution* (Kuala Lumpur: MBRAS, 2002), 95.

⁵ See Joseph M. Fernando, *Federal Constitutions: A Comparative Study of Malaysia and the United States* (Kuala Lumpur: University of Malaya Press, 2007), 12–13 (explaining that 'the choice of an independent body made up of legal experts from the Commonwealth was a conscious choice of the ruling Alliance party and was intended to avoid local prejudices in the framing of the Constitution').

⁶ Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (1957) [3], [hereinafter 'Reid Report'].

⁷ Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford: Hart Publishing, 2012), 32.

⁸ Fed. Const. (Malay.), pt. IV, arts. 39–65; pt. IX, arts. 121–31.

⁹ *Ibid.*, pt. IV, arts. 32–7.

¹⁰ *Ibid.*, pt. II, arts. 5–13.

¹¹ *Ibid.*, pt. I, Article 4(1) ('[t]his Constitution is the supreme law of the Federation and any law ... which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void').

The Independence – or *Merdeka* – Constitution was fashioned at the birth of a new nation attempting to accommodate the competing demands of a pluralistic society made up of a Malay ethnic majority group and non-Malay – primarily Chinese and Indian – ethnic minorities.¹² It was a document founded on the basis of the constitutional bargain established at independence. As the result of inter-ethnic negotiations and compromise, a clause declaring that ‘Islam is the religion of the Federation; but other religions may be practised in peace and harmony’ was eventually included as Article 3(1) of the Constitution.¹³ Understanding the text of Article 3(1) requires locating it in its historical and political context.

The Reid Constitutional Commission, the drafters of the Independence Constitution, initially rejected the suggestion that a provision declaring Islam as the religion of the Federation be included in the draft Constitution.¹⁴ The Malay rulers of the various Malayan states, concerned that a clause establishing an official religion would encroach on their traditional positions as the head of Islam in their respective states, supported the Reid Commission’s decision not to include an Islamic establishment clause.¹⁵

The main push for a declaration of Islam as the religion of the Federation came from the Alliance, a coalition of three political parties – the United Malays National Organization (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC) – which would later become the *Barisan Nasional* ruling coalition after the country’s independence.¹⁶ UMNO, the Malay constituent of the Alliance, sought the inclusion of the Islamic establishment clause as part of a larger package of demands in which religion was connected to Malay special privileges and quotas, language and citizenship, not because it had a particular vision of imposing Islamic law on the Federation.¹⁷ The Reid Commission rejected the Alliance’s initial proposal; its Report also emphasised that there was ‘universal agreement’ that ‘if

¹² *Merdeka* is the Malay word for independence.

¹³ Fed. Const. (Malay.), pt. I, Article 3(1). See generally Joseph M. Fernando, ‘The Position of Islam in the Constitution of Malaysia’ (2006) 37 *Journal of Southeast Asian Studies* 249.

¹⁴ See Reid Report, note 6. For a comprehensive examination of the historical sources surrounding the drafting of the position of Islam in the Constitution of Malaysia, see Fernando, note 7. See Harding, note 7; Kristen Stilt, ‘Contextualizing Constitutional Islam: The Malayan Experience’ (2015) 13 *International Journal of Constitutional Law* 407.

¹⁵ Harding, *Supra* note 7, 39.

¹⁶ The Alliance Party was the precursor to the National Front (*Barisan Nasional*), the ruling political coalition in Malaysia. *Barisan Nasional* is made up of three parties, each representing one of the three major ethnic communities.

¹⁷ Stilt, *Supra* note 14, 410, 430.

any such a provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims'.¹⁸

Significantly, there was no suggestion that the new nation would not be a secular state, even from the proponents of a clause declaring Islam as the religion of the Federation. The Alliance Party's own memorandum stated: 'The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practicing their own religions, and shall not imply that the State is not a secular State'.¹⁹

Only one member of the Constitutional Commission supported the inclusion of a declaration establishing Islam as the state religion: Justice Abdul Hamid from Pakistan. Yet he, too, thought that such a provision would be 'innocuous', writing in the Reid Report that such a clause would not 'impose any disability on non-Muslim citizens' nor 'prevent the State from being a secular State'.²⁰

Negotiations between the Alliance Party and the Working Party in charge of reviewing the draft Constitution proceeded on the understanding that a provision declaring Islam as the official religion would not undermine the secular basis of the new nation. The Alliance coalition maintained that such a provision would serve a symbolic purpose, rather than have any practical effect.²¹ Tunku Abdul Rahman, the leader of the Alliance Party and later Malaysia's first Prime Minister, declared unequivocally that 'the whole Constitution was framed on the basis that the Federation would be a secular state'.²²

On the basis of these explicit assurances that the insertion of the declaration would be symbolic and would not comprise their rights as non-Muslims, the non-Malay political parties accepted the insertion of the declaration on Islam.²³ Numerous historical sources document this common understanding among all the parties involved in the nation's founding. The Colonial Office in London finally accepted the insertion of the Islamic constitutional clause, noting in its memorandum that the Alliance delegation had 'stressed that they had no intention of creating a Muslim theocracy and that Malaya would be a secular State'.²⁴

¹⁸ Reid Report, *Supra* note 14, [169].

¹⁹ Alliance Memorandum to the Reid Constitutional Commission, 27 September 1956, 19.

²⁰ Reid Report, *Supra* note 14, [11].

²¹ Joseph M. Fernando, *Supra* note 13, 258.

²² *Ibid.*, 258 (citing Minutes of the 19th Meeting of the Working Party, 17 April 1957, CO 941/87).

²³ *Ibid.*, 258.

²⁴ *Ibid.*, 260 (citing Memorandum by Jackson, Colonial Office, 23 May 1957, CO 1030/494 [20]).

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

There has been included in the proposed Federation Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular state, and every person will have the right to profess and practice his own religion and the right to propagate his religion.²⁵

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

Article 3(1) of the new Federal Constitution states: 'Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation'. The intentions of those involved in the constitution-making process affirm that the provision was not meant to affect the secular basis of the state.

The text of Article 3 reflects this basic understanding. The Article 3(1) clause establishing Islam as the religion of the Federation provides in the same provision that 'other religions may be practised in peace and harmony'. Additionally, Article 3(4) specifies that: 'Nothing in this Article derogates from any other provision of this Constitution'. And, under the Constitution's bill of rights, Article 11(1) guarantees that 'every person has the right to profess and practice' his or her religion.²⁶

13.2.2. *The Politicisation of Islam*

Growing Islamist political and social discourse in Malaysia over the past three decades, however, has challenged the established understanding of the Article 3 clause declaring Islam as the state religion. The politicisation of Islam has increasingly been at the forefront of the battleground between the UMNO, which is part of the *Barisan Nasional* coalition, and the opposition Islamic party, the Pan-Malaysian Islamic Party (PAS). PAS's political platform has been to project itself as the authentic Islamic party as compared to the ruling party. In response to PAS, UMNO expanded its own campaign of Islamisation. This set the stage for an Islamisation race between PAS and

²⁵ *White Paper on the Federation of Malaya Constitutional Proposals 1957* (Kuala Lumpur: Government Printer, 1957), 18; *Legislative Council Paper No. 42 of 1957*.

²⁶ Article 11(1).

UMNO beginning in the 1980s and intensifying in the 1990s to secure the support of the Malay–Muslim electorate.

Against this backdrop of political competition between UMNO and PAS, on 29 September 2001, then Prime Minister Mahathir Mohamad made the unprecedented declaration that ‘Malaysia is an Islamic state’.²⁷ In 2007, Deputy Prime Minister Najib Tun Razak – now the current Prime Minister – endorsed Mahathir’s pronouncement with his assertion that: ‘Islam is our official religion and we are an Islamic state’.²⁸

The Islamisation phenomenon has pushed the position of Islam in the Malaysian constitutional system into the spotlight of public discourse. At the centre of this debate is the Article 3(1) declaration that ‘Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation’. Those who support Islam’s supremacy argue that the establishment of Islam in Article 3(1) provides the justification for an expanded role for Islam in the public sphere.²⁹ Secularists, on the other hand, argue that the clause was intended by the framers to establish Islam as the official religion for ceremonial purposes and that the foundations of the Malaysian constitutional order are generally secular in nature.³⁰

²⁷ See ‘Malaysia Recognised as Islamic Nation’ *New Straits Times* (11 August 2001) 4. See also *ibid.*, clxxv.

²⁸ ‘Malaysia Not Secular State, says Najib,’ *Bernama* (17 July 2007) www.bernama.com/bernama/v3/news_lite.php?id=273699. See also Clarence Thomas, ‘Islamic State Label Sparks Controversy in Malaysia,’ *Reuters* (25 July 2007). For recent affirmations of the *Barisan Nasional* government’s position, see ‘BN Government Committed to Make Malaysia an Islamic State,’ *Malay Mail Online* (14 October 2017), www.themalaymailonline.com/malaysia/article/bn-government-committed-in-making-malaysia-an-islamic-state.

²⁹ See e.g., Abdul Aziz Bari, ‘Islam in the Federal Constitution: A Commentary on the Decision of Meor Atiqulhman’ (2000) 2 *Malayan Law Journal* cxxix, cxxv (arguing that ‘history and the essential character of the country’ are the ‘most important’ reasons supporting Islam’s supremacy); Mohamad Ismail Shariff, ‘The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law’ (2005) 3 *Malayan Law Journal* cv, cx ([t]here is nothing in Article 3 that restricts the natural meaning of the term “Islamic”. And there is no reason to circumscribe its meaning to rituals and ceremonies only ... It is suggested that what the framers of the Constitution have in fact done is to resurrect the lost or hidden power relating to Islamic law, that which was taken away by the British, and entrenched it in Article 3’).

³⁰ See e.g., Ahmad F. Yousif, *Religious Freedom, Minorities and Islam* (Selangor: IIUM Press, 1998), 171 ([f]irst and foremost, it should be stated that Malaysia is not an Islamic state’); Ismail Mohamad Abu Hassan, *Introduction to Malaysian Legal History* (Selangor: Ikhiah Publishers, 2004), 147 (supporting the view that Islam is meant to be recognised formally in rituals and government ceremonies of the Federation, and not as the basis for the law of Malaysia); Benjamin Dawson and Steven Thiru, ‘The Lina Joy Case and the Future of Religious Freedom in Malaysia’ (2007) *Lawasia Journal* 151; Tommy Thomas, ‘The Social Contract: Malaysia’s Constitutional Covenant’ (2008) 1 *Malayan Law Journal* cxxvii. See also Andrew Harding, ‘The Keris, the Crescent and the Blind Coddess: The State, Islam and the Constitution in Malaysia’

This push for an Islamic state, involving a prioritised role for Islam in the constitutional order, is further complicated by the broader social and political context in Malaysia. Religious and racial identity are perceived as inextricably intertwined in Malaysian society. The Federal Constitution's definition of 'a person who professes the religion of Islam' as one of the elements of being Malay adds a religious dimension to ethnic nationalism.³¹ Viewed in this context, claims for Islamic supremacy are perceived as connected to a religious nationalism that seeks to protect the special position of the Malays. The connection of the Islamic establishment clause to Malay special privileges engenders increased polarisation in a country divided along ethnic lines. The politicisation of Islam's supremacy fuels tensions between the Malay community and the non-Malay ethnic minorities, who increasingly perceive themselves as being treated as second-class citizens.³²

13.3. ADJUDICATING RELIGION IN MALAYSIA

Initially, the Supreme Court affirmed the secular nature of the Malaysian Constitution in two apex court decisions.³³ In the 1988 decision of *Che Omar bin Che Soh v. Public Prosecutor*, the Supreme Court declared that the Malaysian Constitution was founded on a secular basis.³⁴ Lord President Mohamad Salleh Abas, writing for the Supreme Court, concluded that the history of British colonialism and the drafting history of the Constitution showed that Islam's role was confined only to 'rituals and ceremonies'.³⁵ The appellants in this case faced the mandatory death penalty for drug trafficking and firearm offenses. They argued that the death penalty was unconstitutional because crimes involving drugs and firearms were not offences requiring the death penalty under Islamic law. Since Islam is constitutionally declared as the religion of the Federation, the appellants' counsel argued, Islamic precepts

(2002) 6 *Singapore Journal of International and Comparative Law* 154; Li-ann Thio, 'Apostasy and Religious Freedom: Constitutional Issues Arising from the Lina Joy Litigation' (2006) 2 *Malayan Law Journal* 1; Jaelyn Ling-Chen Neo, 'Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia' (2006) 13 *International Journal on Minority and Group Rights* 95, 104.

³¹ Fed. Const. (Malay.), Article 160.

³² Take, for example, Member of Parliament Badruddin bin Amiruldin's declaration in a House of Representatives debate in 2005: 'Malaysia is an Islamic state! You don't like it you get out of Malaysia!' (translated from Malay), Hansard (11 July 2005) 34, video clip available at www.youtube.com/watch?v=pkqyhBDU5HM.

³³ The Supreme Court (now the Federal Court) is Malaysia's highest appellate court.

³⁴ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 *Malayan Law Journal* 55.

³⁵ *Ibid.*, 56-7.

should be regarded as the source of all legal principles; on this basis, the death penalty could not be imposed for offences that were not in line with Islamic law.

The Malaysian Supreme Court unanimously rejected the idea that laws passed by Parliament contrary to Islamic principles could be struck down, dismissing the notion that laws 'must be imbued with Islamic and religious principles' as 'contrary to the constitutional and legal history of the Federation'.³⁶ Indeed, the Court noted that the opposite is true: the Constitution 'purposely preserves the continuity of secular law prior to the Constitution ...'.³⁷ The Lord President of the Supreme Court emphasised that 'the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law'.³⁸

Two years later, the Supreme Court reaffirmed the secular basis of the Constitution in its *Susie Teoh* decision.³⁹ In this case, the Court relied on the Constitution's secular founding principles and the framers' intent to uphold a statute allowing a parent or guardian to decide the upbringing, education, and religion of a minor.⁴⁰ Historical documents written by the constitutional framers at the time they drafted the Constitution stated that the recognition of Islam as the state religion 'would not in any way affect the civil rights of non-Muslims'.⁴¹ Since 'under normal circumstances' a non-Muslim parent had the right to decide various issues affecting a minor's life, the Supreme Court upheld the civil family law statute that gave a parent the right to determine a minor's religious upbringing.⁴² The new Lord President, Abdul Hamid, emphasised that the Malaysian Constitution 'was not the product of an overnight thought', but represented a negotiated constitutional settlement among local representatives.⁴³

In these two early decisions, the Supreme Court affirmed the secular basis of the Malaysian Constitution, viewing Islam's position under Article 3(1) as serving a chiefly ceremonial role in the constitutional order.

This dynamic would soon change. Recent judicial decision-making in religion cases has moved away from the Supreme Court's affirmation of the Constitution's secular basis toward prioritising Islam's supremacy in Malaysia's constitutional order. I begin by exploring several examples that demonstrate

³⁶ *Ibid.*, 57.

³⁷ *Ibid.*, 56.

³⁸ *Ibid.*, 57.

³⁹ *Teoh Eng Huat v. Kadhi Pasir Mas (Susie Teoh)* [1990] 2 *Malayan Law Journal* 300.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, 301-2 (citing the Reid Report, *Supra* note 6, [169]).

⁴² *Ibid.*, 302.

⁴³ *Ibid.*, 279.

the major areas in which the civil courts have expanded Islam's constitutional scope and the authority of the religious courts.

Apostasy is one major area of controversy. Cases involving Muslims who wish to convert out of Islam bring into sharp tension the Article 3(1) declaration of Islam as the religion of the state and the Article 11(1) right of religious freedom. Civil courts have refused to exercise jurisdiction over such cases, even when they clearly engage the constitutional right to religious freedom, deferring these matters to the religious Sharia courts instead. One prominent example is the case of *Lina Joy v. Majlis Agama Islam*.⁴⁴ Lina Joy, a Malay woman born and raised by a Malay-Muslim family, converted to Catholicism in her adulthood. She wanted to marry her Christian fiancé but could not do so under civil law unless she too was officially recognised as not being Muslim.⁴⁵ She applied to the National Registration Department to have her name and religion changed on her national identity card. Her application to remove 'Islam' as the religion on her identity card was rejected. The Department refused to change her religious status without a certificate of apostasy from the Sharia court declaring that she had converted out of Islam.

Obtaining a declaration of apostasy from the Sharia courts for a Malay-Muslim is a practical impossibility. Apostasy is regarded as an offence in several Malaysian states, punishable in some states by fines, imprisonment, or whipping.⁴⁶ In other states, Sharia courts can order apostates to be detained at Islamic faith centres for mandatory rehabilitation.⁴⁷

⁴⁴ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* (2007) 3 All Malay. Rep. 585 (F.C.).

⁴⁵ The Law Reform (Marriage and Divorce) Act 1976 governs marriages between non-Muslim couples only. Muslims must contract their marriage under the Islamic Family Law (Federal Territories) Act 1984, which prohibits marriage with non-Muslims. *Laws of Malaysia* vol. 14 163–4 (2006). See also Brief of Amicus Curiae on Behalf of the All Women's Action Society, Sisters in Islam, Women's Aid Organisation, Women's Centre for Change and Women's Development Collective for *Lina Joy* [3.2]; Julia E. Barry, 'Apostasy, Marriage, and Jurisdiction in *Lina Joy*: Where was CEDAW,' Note (2008) 41 *New York University Journal of International Law and Politics*: 407.

⁴⁶ See e.g., Administration of the Religion of Islam and the Malay Custom of Pahang Enactment of 1982 (amended 1989), § 185 ('[a]ny Muslim who states that he has ceased to be a Muslim, whether orally, in writing or in any other manner whatsoever, commits an offence, and on conviction shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and to whipping of not more than six strokes'.) See Jaclyn Ling-Chen Neo, 'Competing Imperatives: Conflicts and Convergences in State and Islam in Pluralist Malaysia' (2015) *Oxford Journal of Law and Religion* 1, 16–17; Mohammad Azam Mohamed Adil, 'Law of Apostasy and Freedom of Religion in Malaysia' (2007) 2 *Asian Journal of Comparative Law* 29.

⁴⁷ One case illustrating this is that of Revathi, an Indian Malaysian woman who converted to Hinduism. When she applied to the Malacca Sharia Court regarding her renunciation of Islam, the Sharia Court ordered that she be detained for 100 days at an Islamic rehabilitation centre. See Claudia Theophilus, 'Malaysian Family Split by Faith,' *Aljazeera* (7 May 2007) www.aljazeera.com/news/asia-pacific/2007/05/200852513390760277.html.

Lina Joy brought a challenge before the civil courts arguing that her constitutionally guaranteed right to religious liberty under Article 11(1) had been infringed. The High Court held that the constitutional right to profess and practice one's religion did not extend to Muslims who wished to leave Islam without the approval of the Sharia courts.⁴⁸ According to the high court judge, the Article 3(1) declaration of Islam as the religion of the Federation 'has a far wider and meaningful purpose than a mere fixation of the official religion'.⁴⁹ As the High Court judge declared, the upshot of this approach is that: 'A Malay ... remains in Islamic faith until his or her dying days'.⁵⁰

In 2007, the Federal Court, in a two-to-one decision, dismissed Lina Joy's appeal.⁵¹ The majority held that 'freedom of religion under Article 11 of the Federal Constitution requires [the individual] to comply with the practices or law of the Islamic religion in particular with regard to converting out of the religion'.⁵² In effect, the majority's decision prevents a Muslim from exiting the Islamic religion without obtaining the approval of the Sharia court. In a robust dissent, Justice Richard Malanjum emphasised that the civil courts had a duty to uphold the individual's right to religious freedom and the supremacy of the constitution.

A second area in which the civil courts have abdicated their jurisdictional responsibility involves family law disputes between a non-Muslim parent and a parent who converts to Islam.⁵³ These cases involve a parent (typically the father) who converts himself and the children to Islam, and then applies to the Sharia courts for divorce and custody of the children. This leaves the non-Muslim parent unable to contest the custody or conversion of the children because she has no recourse to the Sharia court.

⁴⁸ *Lina Joy v. Majlis Agama Islam Wilayah & Anor* [2004] 2 Malayan Law Journal 119 (H.C.), 144.

⁴⁹ *Ibid.*, 129 [19]. The High Court's decision was affirmed by a majority in the Court of Appeal: *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* (2005) 5 All Malay. Rep. 663, 690 [27]-91 [29], 690 (C.A.).

⁵⁰ *Ibid.*, 143 [58]. See Fed. Const. (Malay.), Article 160(2) ("Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs ...).

⁵¹ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* (2007) 4 Malayan Law Journal 585 (F.C.).

⁵² *Ibid.*, [14].

⁵³ See e.g., *Viran all Nagapan v. Deepa alp Subramaniam*, Civil Appeal No 02(f)-4-01-2015 (2016) (F.C.); *Shamala Sathiyaseelan v. Jeyaganesh Mogarajah* [2004] Current L. J. 516 (H.C.) [hereinafter 'Shamala']; *Subashini Rajasingam v. Saravanan Thangothoray* [2008] 2 Malayan Law Journal 147 (F.C.) [hereinafter 'Subashini']; *Indira Gandhi alp Mutho v. Pengarah Jabatan Agama Islam Perak* [2013] 5 Malayan Law Journal 552 (H.C.).

Consider, for example, the case of *Indira Gandhi*.⁵⁴ At stake in this case was whether a parent could unilaterally convert a child to Islam without the knowledge or consent of the other parent. Indira Gandhi's ex-husband had converted from being Hindu to Muslim. Without her knowledge, he then converted all their three children to Islam and obtained custody over the children from the Sharia court – a religious court which Indira Gandhi could not access as a non-Muslim. Indira Gandhi brought her case to the civil courts, arguing against the children's conversion to Islam without her knowledge and requesting custody. The Court of Appeal majority ruled against Indira Gandhi, holding that the Sharia courts had exclusive jurisdiction to determine the validity of any conversion to Islam.⁵⁵ In 2018, the Federal Court set aside the Court of Appeal's decision. In a landmark judgment the apex court affirmed that the civil courts had jurisdiction over matters relating to Islamic law when constitutional issues are involved.⁵⁶

These apostasy and child conversion cases highlight how the prioritisation of Islam over religious liberty claims is often framed as a jurisdictional matter between the secular courts and the religious courts. The Federal Court's decision in *Indira Gandhi* is welcome for its robust affirmation of the civil courts' jurisdiction over child conversion disputes; however, the Court has not been as willing to exercise judicial review over matters of apostasy, continuing to defer such cases to the Sharia courts.⁵⁷

Another example illustrating the growing prioritisation of Islam's constitutional position is the litigation over the ban on non-Muslim publications using the word 'Allah'. In 2014, Malaysia's Court of Appeal upheld a government order prohibiting a Catholic publication from using the term 'Allah' to refer to God.⁵⁸ The Court of Appeal overturned the High Court's decision that the government's ban of the use of the word 'Allah' by non-Muslims violated the Catholic Church's right to religious freedom.⁵⁹ In a unanimous decision,

⁵⁴ *Pathmanathan all Krishnan v. Indira Gandhi a/p Mutho* [2016] Current Law Journal 911 (C.A.).

⁵⁵ *Ibid.*, [33]. The Federal Court has allowed Indira Gandhi leave to appeal on this matter. Qishin Tariq, 'Federal Court: Indira Gandhi Can Question Validity of Children's Unilateral Conversion,' *The Star Online* (19 May 2016) www.thestar.com.my/news/nation/2016/05/19/federal-court-allows-indira-gandhi-to-question-validity-of-childrens-unilateral-conversion/.

⁵⁶ *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam: Perak & Ors.* [2018] 1 *Malayan Law Journal* 545 (F.C.).

⁵⁷ See Sulok Tawie, 'Federal Court Defers to Shariah Courts in Sarawak Apostasy Cases,' *Malay Mail Online* (27 February 2018) www.themalaymailonline.com/malaysia/article/federal-court-defers-to-shariah-courts-in-sarawak-apostasy-cases#iKsoGVrDMifR1qdE.97.

⁵⁸ See Jaclyn L. Neo, 'What's in a Name? Malaysia's "Allah" Controversy and the Judicial Intertwining of Islam with Ethnic Identity' (2014) 12 *International Journal of Constitutional Law* 751.

⁵⁹ *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Anor* [2010] 2 *Malayan Law Journal* 78 (H.C.).

the intermediate appellate court held that there was no infringement of any constitutional rights because the use of the word 'Allah' is not an integral part of the faith and practice of Christianity.⁶⁰

In a striking endorsement of the view that Article 3(1) established Islam's supremacy,⁶¹ the Court of Appeal ruled that the reference to 'other religions may be practised in peace and harmony' in Article 3(1) meant that the freedom of religion guaranteed by Article 11(1) of the Federal Constitution must be read in line with 'the doctrine that the welfare of an individual or group must yield to that of the community'.⁶² The Federal Court dismissed the Catholic Church's application for leave to appeal, holding that the Court of Appeal had applied the correct test.⁶³

13.4. RELIGION AND THE INVISIBLE CONSTITUTION

Malaysia's religion clauses provide a case study for exploring the unwritten constitution in two main ways. The first is through the unwritten expansion of the place of Islam in the Malaysian Constitution. Although the text of Article 3(1) has remained the same, Islam's position in the constitutional order has been vastly expanded through the use of informal, extra-textual means in judicial discourse. In contrast, others defend the nature of the Constitution through the use of constitutional history and originalist arguments to protect the Constitution's unwritten secular basis.

13.4.1. (Invisible) Elevation of Islam's Constitutional Position

Judicial discourse over Malaysia's religion clauses has gradually expanded Islam's supremacy in the constitutional order. The Islamic prioritisation by the courts has far-reaching effects on the nature of Malaysia's Constitution and on the protection of constitutional rights like religious liberty and equality.

⁶⁰ *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] Malayan Law Journal 468 (Court of Appeal) [hereinafter '*Allah Case*' (C.A.)].

⁶¹ Fed. Const. (Malay.), Article 3(1) ('Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation').

⁶² *Allah Case* (C.A.), note 60, 495 [48].

⁶³ *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* 4 (2014) Malayan Law Journal 765. See "Top Malaysian Court Dismisses 'Allah' Case", *Aljazeera* (23 June 2014) www.aljazeera.com/news/asia-pacific/2014/06/top-malaysian-court-dismisses-allah-case-201406232448487953.html; Ida Lim and Shaun Tan, 'Last Nail in Catholic Church's "Allah" Case as Federal Court again Says No', *Malay Mail Online* (21 January 2015) www.themalaymailonline.com/malaysia/article/last-nail-in-catholic-churchs-allah-case-as-federal-court-again-says-no.

Yet this constitutional change has not taken place though formal amendment but through informal constitutional change.

This invisible elevation of Islam's position in the constitutional system, I argue, has largely taken place through less visible means in the judicial discourse. The primary means has been through expansive interpretation of the Article 3(1) Islamic declaration clause which has led to judicial prioritisation of Islam's position vis-à-vis other constitutional norms. Proponents of this view are, in essence, claiming that Article 3(1) gives rise to a constitutional implication of Islam's primacy in the Malaysian constitutional order. Another means has been through the civil courts' use of non-constitutional sources – such as Islamic texts and principles – in judicial reasoning.

Perhaps the most marked approach toward Islam's expansion in the Malaysian courts' jurisprudence has been to endorse Islam's position under Article 3(1) as a lens through which the rest of the Constitution must be interpreted. This prioritisation of Islam's status is often used in turn to justify a restrictive interpretation of constitutional rights like religious freedom. In *Lina Joy v. Majlis Agama Islam*,⁶⁴ for example, the High Court declared that, '[f]reedom of religion under art 11(1) must be read with art 3(1) which places Islam in a special position as the main and dominant religion' of the Federation.⁶⁵ The trial judge rejected the precedent in *Che Omar* that Islam had a merely ceremonial role, asserting that Article 3(1) had 'a far wider and meaningful purpose than a mere fixation of the official religion'.⁶⁶ *Lina Joy* had interpreted the religious freedom right under Article 11 in a 'limited and isolated manner' without due regard to other constitutional provisions relating to Islam.⁶⁷ According to the judge, there was a 'clear nexus' between Article 3(1) and 11(1), which necessarily restricts the scope of religious freedom. In sum, on the court's account, Article 3(1) provides an interpretive lens through which to read the right to religious liberty.⁶⁸

The Federal Court's majority reasoning in *Lina Joy* that 'one cannot renounce or embrace a religion at one's own whims and fancies' likewise reveals a conception of apostasy from an Islamic perspective, rather than generally accepted common law principles.⁶⁹ The Chief Justice, writing for the majority, reasoned: 'If a person professes and practices Islam, it would definitely mean that he must comply with the Islamic law which has prescribed

⁶⁴ *Lina Joy v. Majlis Agama Islam Wilayah & Anor* [2004] 2 Malayan Law Journal 119 (H.C.).

⁶⁵ *Ibid.*, 144 [60].

⁶⁶ *Ibid.*, 127 [19].

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, 128 [21].

⁶⁹ *Lina Joy* [2007] 3 All. Malay. Rep. 693, 715 [14].

the way to embrace Islam and convert out of Islam'.⁷⁰ The overall tenor of the Federal Court's majority judgment prioritises Islam's supremacy in the Constitution at the expense of the constitutionally guaranteed right of religious liberty.

Judicial endorsement of Islam's primacy in the constitutional order is also evident in the High Court's decision in *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi*.⁷¹ Schools in Malaysia prohibit Muslim students from wearing religious headgear – like the *serban* – according to the education policy on school uniforms. The High Court judge found the school ban on wearing the *serban* unconstitutional and explicitly asserted that Article 3(1) established Islam's supremacy in the constitutional system:

[The Article 3 declaration that] 'Islam is the religion of the Federation, but other religions can be practiced in peace and harmony' means that Islam is the dominant religion among the other religions which are professed in this country like Christianity, Buddhism, Hinduism and others. Islam is not of the same status as other religions; it does not sit shoulder to shoulder or stand at the same height. Islam sits at the top, it walks first ... If this were not the case, Islam would not be the religion of the Federation but just one of the several religions practiced in the country and every person would be equally free to practice any religion he or she professes, no one better than the other.⁷²

Civil courts have used this expansive reading of the Article 3(1) Islamic constitutional clause to justify adopting a restrictive interpretation of the Article 11(1) religious freedom guarantee.⁷³ In *Daud Mamat v. Majlis Agama Islam*,⁷⁴ for example, the High Court held that to find that Article 11(1) protected the right to profess and practice the religion of one's *choice* 'would stretch the scope of Article 11(1) to ridiculous heights, and rebel against the canon of construction'.⁷⁵

Another means by which growing Islamisation has crept into judicial reasoning has been through the use of extra-constitutional sources, such as

⁷⁰ *Lina Joy* [2007] 3 All Malay. Rep. 693 720 [17.2].

⁷¹ *Meor Atiqulrahman bin Ishak v. Fatimah bte Sihi* [2000] 5 Malayan Law Journal 375.

⁷² *Ibid.*, 375, 377 (translated from Malay).

⁷³ Fed. Const. (Malay.), Article 3(1) ('Islam is the religion of the Federation ...'); Fed. Const. (Malay.), Article 11(1) ('Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it').

⁷⁴ *Daud Mamat v. Majlis Agama Islam* [2001] Current Law Journal 161.

⁷⁵ *Ibid.*, 172.

Islamic texts and principles.⁷⁶ Judges in the secular *civil* courts – not the religious Sharia courts – have explicitly referred to Qur'anic verses and Islamic principles in several decisions. Consider, for example, the High Court's judgment in *Shamala*, where the judge cited a verse from the Qur'an regarding polygamy while interpreting a civil statutory provision providing the spouse of a convert to Islam with a ground to elect for divorce.⁷⁷

[T]he defendant husband, now a Muslim though [he] cannot file a petition for divorce against his plaintiff Hindu wife, can take another wife – a Muslim wife because the defendant husband being a Muslim is now practising a polygamous marriage ... The word used in the Section is 'may', i.e., to maintain the status of the civil marriage (Hindu marriage) if the unconverted wife wishes to remain the wife of her converted husband although the converted husband can take another wife if he can do justice as the Holy Quran *Al-Nisa* (IV) Ayat 3 states and which reads, 'if ye fear that ye shall not Be able to deal justly With the orphans, Marry women of your choice, Two, Three, or Four; But if ye fear that ye shall not Be able to deal justly (with them), Then only one or two (a captive)'.⁷⁸

Likewise, in *Subashini*, the Court of Appeal judge, Justice Suriyadi, upheld the Sharia Court's jurisdiction reasoning that the Islamic judge's position would 'squarely fall' under 'Quranic revelations' to follow the sacred law.⁷⁹

What is striking is the explicit use of religious texts as extra-constitutional sources by *civil* court judges who are meant to apply the general, secular law of the land. The use of Islamic sources and religious rhetoric in civil court opinions is deeply concerning. While Islamic sources may properly be regarded as within the domain of the Sharia courts, civil courts deal with general legislation and common law, which are not meant to have any religious basis.

Religion cases are fraught because of their connection in the socio-political context with racial-religious nationalism, where Islam's position is seen as

⁷⁶ See Amanda Whiting, 'Desecularising Malaysian Law?' in Sarah Biddulph and Penelope Nicholson (eds.), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff, 2008), 229, 249–52.

⁷⁷ *Shamala* [2004] Malayan Law Journal 241.

⁷⁸ *Ibid.*, [13].

⁷⁹ *Subashini* [2008] 2 Malayan Law Journal 147, [61] ('[h]is position would squarely fall under these Quranic revelations: And We have set you on a road of Our Commandment (a Syariah, or a Sacred Law of Our Commandment, Syaria'tin min al-amr); so follow it, and follow not the whims of those who know not (45:18)').

intertwined with the protection of the Malay community's special position. Cases involving religious conversion out of Islam, in particular, bring these tensions to the fore; they are further complicated by the perceived inextricability between religious and racial identity. Such perceptions are exacerbated by the reasoning used by the civil court judges in highly contentious religion cases. In *Lina Joy*, for example, the Court of Appeal's majority, consisting of two Malay-Muslim judges, declared: 'Renunciation of Islam is generally regarded by the Muslim community as a very grave matter'.⁸⁰

13.4.2. *Constitutional History and the Original Secular Framework*

Secularists have sought to defend the Malaysian Constitution's secular basis against the expansion of Islam's constitutional position through the use of constitutional history. Interpreting the written Constitution's religion clauses, they argue, requires recourse to the original constitutional framework behind the text. The Article 3(1) declaration of Islam as the religion of the Federation must be viewed with an understanding of the historical context of the Constitution's founding and the original meaning of the text. On this view, the Constitution's original founding and fundamental core, understood properly, provides the proper framework for interpreting the written text.

Originalist arguments have typically focused on the intent of the framers to affirm the Constitution's secular foundations. The Supreme Court in *Che Omar bin Che Soh v. Public Prosecutor* declared the secular nature of the Constitution by relying on the framers' original intent.⁸¹ The Lord President of the Supreme Court made clear the Court's focus of inquiry: 'The question here is this: Was this the meaning intended by the framers of the Constitution?'⁸² Using a historical lens, the Lord President concluded that the history of British colonialism and the drafting history of the Constitution showed that Islam's role was confined only to 'rituals and ceremonies'.⁸³

Likewise, in *Susie Teoh*, the Supreme Court again employed an interpretive approach based on the framers' intent to affirm the secular foundations of the Constitution.⁸⁴

Although normally ... we base our interpretative function on the printed letters of the legislation alone, in the instant case, we took the liberty ... to

⁸⁰ *Lina Joy* [2005] 5 All Malay. Rep. 663, 690 [29].

⁸¹ *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 Malayan Law Journal 55.

⁸² *Ibid.*, 56.

⁸³ *Ibid.*, 56–7.

⁸⁴ *Teoh Fing Huat v. Kadhi Pasir Mas (Susie Teoh)* [1990] 2 Malayan Law Journal 300.

ascertain for ourselves what purpose the founding fathers of our Constitution had in mind when our constitutional laws were drafted.⁸⁵

To fuel the movement toward greater Islamisation, however, some of its proponents have mobilised historicist rhetoric to promote judicial elevation of Islam's constitutional position. In *Meor Atiqulrahman*,⁸⁶ for example, to support its vastly expansive interpretation of Islam's position under Article 3(1), the High Court judge focused heavily on constructing a historical account of the constitutional bargain to argue that the constitutional framers had intended to secure Islam's dominant position as the result of a social contract between the Muslims and non-Muslims.⁸⁷ And in *Lina Joy*, the same High Court judge insisted that an interpretation of religious freedom that would allow Muslims to freely convert out of Islam 'would result in absurdities not intended by the framers' of the Constitution.⁸⁸ '[T]o give effect to the intention of the framers of our [C]onstitution', the judge claimed, religious freedom must be qualified by other constitutional provisions relating to Islam.⁸⁹ 'The historicist accounts of the High Court in these decisions have been heavily criticised by scholars as 'revisionist' and 'erroneous'.⁹⁰ But what is striking is the courts' insistence on using history and original intent in support of their expansive interpretation of the Islamic clause despite established Supreme Court precedent in *Che Omar* confining Islam's scope in Article 3 to a ceremonial role.

Judges who viewed this expansion of Islam's position with alarm fought back on originalist turf. In a robust dissent against the Federal Court's majority opinion in *Lina Joy*, Justice Richard Malanjum asserted that the civil courts had a duty to uphold an individual's right to religious freedom guaranteed in the Constitution.⁹¹ Significantly, Justice Malanjum viewed his interpretation as faithful to the original intent of the constitutional framers: 'Sworn to uphold the Federal Constitution, it is my task to ensure that it is upheld at all times by giving effects to what I think the founding fathers of this great nation had in mind when they framed this sacred document'.⁹² He emphasised that Islam's

⁸⁵ Ibid., 301.

⁸⁶ *Meor Atiqulrahman bin Ishak v. Fatimah bte Sibi* [2000] 5 *Malayan Law Journal* 375 (High Court, Seremban). The High Court occupies the lowest tier in Malaysia's appellate court structure, which comprises of the High Court, the Court of Appeal and the Federal Court.

⁸⁷ Ibid., 385; see also *ibid.*, 384.

⁸⁸ Ibid., 129 [18].

⁸⁹ Ibid., 129 [19].

⁹⁰ See Li-ann Thio and Jaclyn Ling-Chien Neo, 'Religious Dress in Schools: The Serban Controversy in Malaysia' (2006) 55 *International and Comparative Law Quarterly* 671, 681-3.

⁹¹ *Lina Joy*, 4 *Malayan Law Journal* (2007) 585, at 631 [85].

⁹² Ibid., 619 [23].

special position in Article 3(1) 'was never intended to override any right, privilege or power explicitly conferred by the Constitution'.⁹³

Recourse to constitutional history as an extra-textual constitutional source in Malaysia has reached beyond issues of religion and the state. Judges advocating a purposive and rights-expansive approach to interpreting the Malaysian Constitution's bill of rights have also used the language of originalism to support their constitutional adjudication approach. Liberals promoting a robust rights-oriented approach to constitutional interpretation systematically refer to the original commitments of the framers.⁹⁴ 'Those who support this living constitutionalist approach do so on originalist grounds, exhorting the courts 'to adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution'.⁹⁵ On this account, the framers themselves contemplated the necessity of constitutional construction by future generations. As Justice Gopal Sri Ram declared, 'the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights'.⁹⁶

Proponents of this form of framework originalism support empowering judges to protect individual rights from legislative infringement by *expanding* the scope of enforceable constitutional rights.⁹⁷ Judges who endorse this approach have been willing to find implied fundamental rights and to expand a number of constitutional rights – such as the right to life,⁹⁸ equality,⁹⁹ and the

⁹³ *Ibid.*, 623 [53]–24 [53].

⁹⁴ *Sivaraasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 *Malayan Law Journal* 333, 339 (observing that 'the provisions of the Constitution, in particular the fundamental liberties guaranteed ... must be generously interpreted').

⁹⁵ *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 *Malayan Law Journal* 261, 288. See also *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia* [1999] 1 *Malayan Law Journal* 266, 271 ('[T]he Federal Constitution, unlike any ordinary statute, does not merely declare law ... It also confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers.') (emphasis added).

⁹⁶ *Lee Kwan Woh v. Pub. Prosecutor* [2009] 5 *Malayan Law Journal* 301, 312 (quoting *Boyce v. The Queen*, [2004] UKPC 32).

⁹⁷ See Jack M. Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011), 23 (arguing that framework originalism holds that 'interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie them').

⁹⁸ Courts have found that the right to life in the Constitution of Malaysia protects the right to access to court (*Sivaraasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 *Malayan Law Journal* 333); employment (*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan*, [1996] 1 *Malayan Law Journal* 261); livelihood under native customary land rights (*Nor Anak Nyawai* [2005] 3 *Current Law Journal* 555); and the right to fair trial (*Lee Kwan Woh v. Public Prosecutor* [2009] 5 *Malayan Law Journal* 316).

⁹⁹ *Sivaraasa Rasiah*, 2 *Malayan Law Journal* 333.

freedom of expression and association¹⁰⁰ – by applying a purposive interpretive approach in line with the founding principles of the Constitution.

Originalist arguments have not been confined to the courts. Scholars and commentators regularly invoke originalist appeals in debates over Malaysia's secular or Islamic identity.¹⁰¹ Secularists vigorously defend the original commitments of the Malaysian Constitution as secular, arguing that historical evidence of the founding demonstrates that the framers had intended the nation to be a secular state.¹⁰² As scholar Thio Li-ann notes, '[o]riginalists underscore the secular nature of the Constitution, which Article 4(1) declares supreme' while "revisionists" ... defy precedent and constitutional history in contending that Article 3 has broader practical significance'.¹⁰³

Outside the academy, reference to the framers and constitutional founding occur frequently and forcefully in political and social discourse and are part of the national conversation on a variety of issues.¹⁰⁴ What seems clear is that constitutional history is an unwritten constitutional feature that has popular salience in Malaysia: it is the subject of legal and academic debates and occupies a significant space in public discourse.

13.5. REFLECTIONS ON MALAYSIA'S INVISIBLE CONSTITUTION

The story of Malaysia's religion clauses and the invisible features of the Constitution give rise to several broader observations. In this section, I end with three concluding reflections on the observations gained from the Malaysian example for wider comparative constitutional understandings.

First, the constitutional jurisprudence surrounding Malaysia's religion clauses adds to accounts regarding the use of constitutional history and

¹⁰⁰ *Muhammad Hishman bin Idham v. Kerajaan Malaysia* [2011] 6 Malayan Law Journal 507.

¹⁰¹ For proponents of Islam's supremacy in the Malaysian constitutional order, see e.g., Bari, *Supra* note 29; Shariff, *Supra* note 29; Faiza Thamby Chik, 'Malay and Islam in the Malaysian Constitution' (2009) 1 Malayan Law Journal cxxix, cxlii.

¹⁰² See e.g., Fernando, *Supra* note 4; Tommy Thomas, 'Is Malaysia an Islamic State?' (2006) 4 Malayan Law Journal xv; Dawson and Thiru, *Supra* note 30, 160; Li-ann, *Supra* note 30, i, xi–xii.

¹⁰³ Thio Li-ann, 'Jurisdictional Imbroghio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution,' in Andrew Harding and H. P. Lee (eds.) *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007* (Kuala Lumpur: LexisNexis, 2007), 197.

¹⁰⁴ See e.g., 'DAP Firmly against the Idea of Islamic State' *New Straits Times* (Malay.) (12 July 2001) 8 (Opposition figure Karpal Singh called the issue of setting up an Islamic state 'an affront to the solemn will of the framers of the Constitution, who, undoubtedly, had as their objective Islam as the religion of the country in the context of a secular state'); see also Malik Mump, 'Is Malaysia an Islamic or Secular State?' *New Straits Times* (Malay.) (16 November 2012) www.nst.com.my/opinion/columnist/is-malaysia-an-islamic-or-secular-state-1.171584; Art Harun, 'Secular or Non-secular: What History Tells Us' *Malaysian Insider* (8 November 2012); David Tih, 'Uphold Founding Fathers' Legacy' *New Straits Times* (Malay.) (31 August 2010) 40.

originalist arguments.¹⁰⁵ In the United States, the originalist movement arose out of frustration with the perceived rights-expansive judicial activism of the Warren and Burger Courts.¹⁰⁶ As a result, originalism in America has been closely associated with a conservative political movement and the promotion of judicial restraint.¹⁰⁷ The inverse phenomenon is apparent in Malaysia: originalism is frequently the domain of political liberals seeking to increase the courts' oversight of the legislative process or judicial expansion of individual rights.¹⁰⁸ Originalist arguments in Malaysia tend to be employed in service of a more rights-expansive constitutional adjudication approach than the status quo, and are not associated with judicial constraint. Constitutional history is used to support the protection – in many cases, the expansion – of constitutional rights. Secularists in Malaysia routinely reach back to the founding premises of the Constitution to argue for more robust protection of religious freedom and other individual rights. The constitutional history and founding premises in Malaysia facilitate a form of originalism that envisages a Constitution based on a more robust vision of fundamental rights protection that can be applied in a manner that accommodates legitimate constitutional change.

Originalist discourse in Malaysia is characterised by a focus on constitutional history and the intent of the framers, rather than text.¹⁰⁹ Original intent dominates the Malaysian courts' originalist jurisprudence.¹¹⁰ Originalist arguments in the Malaysian context have not centred on the textual public meaning of the Constitution at the time of drafting; rather, interpretation of the Constitution is strongly influenced by the constitutional history surrounding

¹⁰⁵ I explore this argument in greater length in Yvonne Tew, 'Originalism at Home and Abroad' (2014) 52 *Columbia Journal of Transnational Law* 780, 801–18, 832–49.

¹⁰⁶ See Keith E. Whittington, 'The New Originalism' (2004) 2 *Georgetown Journal of Law and Public Policy* 599, 601 (noting that 'originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts'); Thomas B. Colby, 'The Sacrifice of the New Originalism' (2011) 99 *Georgetown Law Journal* 713, 716 (explaining that originalism 'arose as a by-product of the conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts').

¹⁰⁷ See Colby, *Supra* note 106, 714 (observing that 'originalism was born of a desire to constrain judges').

¹⁰⁸ See Yvonne Tew, 'Comparative Originalism in Constitutional Interpretation in Asia,' (2017) *Singapore Academy Law Journal* 719, 726–9.

¹⁰⁹ Tew, *Supra* note 105, 817, 845–9.

¹¹⁰ See *Che Omar Bin Che Soh v. Pub. Prosecutor* [1988] 2 *Malayan Law Journal* 55, 56; *Teoh Eng Huat v. Kadhi Pasir Mas (Susie Teoh)* [1990] 2 *Malayan Law Journal* 300, 301; *Meor Atiqulrahman bin Ishak v. Fatimah bte Siti* [2000] 5 *Malayan Law Journal* 375, 384f; *Lina Joy v. Majlis Agama Islam Wilayah & Aior* [2004] 2 *Malayan Law Journal* 119 (H.C.), 129 [18]; *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan* [2007] 3 *All Malay. Rep.* 585 (F.C.), 3; *Lee Kwan Woh v. Pub. Prosecutor* [2009] 5 *Malayan Law Journal* 301, 311.

its drafting.¹¹¹ Secularists and Islamists do not battle over distinctions between the framers' intent and the original meaning of the text, but over whether constitutional history supports their particular originalist interpretation. The overriding theme that emerges from originalist practice in Malaysia is that it is focused on historical understandings and the intent of those involved in the framing of the Constitution.

The Malaysian experience suggests that the form of originalist methodology that takes hold in certain nations is profoundly influenced by the orientation of its constitutional culture toward the authority of the past. In countries where the founders or framers have popular resonance in the nation's constitutional narrative, originalist arguments thrive because of their historicist appeal.¹¹² The comparative perspective sheds light on how the approaches a nation takes towards the written and unwritten aspects of its Constitution – and the salience of originalist arguments to its constitutional interpretation – is deeply connected to a country's particular constitutional culture and history.

The second observation concerns the relationship between the unwritten constitution and constitutional change.¹¹³ Part of the appeal of originalist arguments in the Malaysian context is also connected to the *formal* features of its Constitution, such as its constitutional amendment procedure. The United States Constitution is highly difficult to amend, which lends weight

¹¹¹ Historical evidence is viewed favourably as an extrinsic interpretive aid to determine the actual intentions of individual framers. For example, in *Zambry bin Abd Kadir v. Mohammad Nizar bin Jamaluddin* [2009] 5 Malayan Law Journal 464 (C.A.), the Court of Appeal relied on an academic article published in the *Cambridge Law Journal* written by Professor Ivor Jennings – one of the framers of the Malaysian Constitution – as extrinsic evidence in deciding how to interpret constitutional provisions about the head of state's right to dismiss a chief minister. Justice Zainun Ali exhorted the Court 'have regard to extraneous matters such as [the Jennings'] article ... in order to distill the original and true intent behind constitutional provisions'. *Ibid.*, 534.

¹¹² In the United States, originalism – whether focused on intent or meaning – has also been characterised by constitutional historicism. The original intent of the framers dominated the first wave of American originalist jurisprudence and the United States' 'constitutional practice continues to privilege intentionalism'. Jamal Greene, 'The Case for Original Intent' (2012) 80 *George Washington Law Review* 1683, 1686. Although academic originalist theory has shifted away from original intent toward original public meaning, historicist original understanding continues to matter in practice and popular discourse because of the central role the framers play in America's constitutional culture and national identity. See *ibid.*, 1696–7. As Jack Balkin observes, '[d]espite the dominance of original public meaning originalism in academic theory, lawyers ... continue to treat particular members of the founding generation differently than a dictionary or concordance'. Jack M. Balkin, 'The New Originalism and the Uses of History' (2013) 82 *Fordham Law Review* 641, 653.

¹¹³ Yvonne Tew, *Stealth Theocracy*, 58 *Virginia Journal of International Law* (forthcoming 2018).

to the concern that interpreting the Constitution according to its original understandings binds contemporary society to the dead hand of the past.¹⁴ By contrast, the Federal Constitution of Malaysia is easily amendable in practice. The most common amendment rule is a requirement for at least a two-thirds legislative majority in Parliament;¹⁵ the dominance of the ruling coalition has meant that the government can, and often has, revised the Constitution at will.¹⁶

In Malaysia, the threat to democratic legitimacy does not stem from the people's perceived inability to change a rigid inherited Constitution; instead, it lies in the monopoly possessed by the dominant ruling party over amending the Constitution. Until recently, the *Barisan Nasional* coalition has been in power since the nation's independence and has controlled more than two-thirds of the majority in Parliament for much of Malaysia's history.¹⁷ Executive ability and willingness to use the amendment process have given rise to many constitutional amendments that undermine institutional safeguards.¹⁸ In a dominant party system with circumstances like these, the Constitution risks being altered out of line with the framer's vision and the original framework

¹⁴ See e.g., Henry Paul Monaghan, 'Doing Originalism' (2004) 104 *Columbia Law Review* 32, 35 (describing the United States Constitution as 'practically unamendable').

¹⁵ The general rule is that a constitutional amendment of the Constitution of Malaysia must be supported by a two-thirds majority of the total membership of each House of Parliament Fed. Const. (Malay.), Article 159(3). Const. of the Rep. of Sing., Article 5(2). There are some exceptions to this rule. In Malaysia, some constitutional provisions can be amended by ordinary law without the requirement for a two-thirds parliamentary majority, such as amendments to restrict freedom of movement and freedom of speech, assembly and association; and to legislate against subversion and pass emergency laws so as to override constitutional provisions. Fed. Const. (Malay.), Article 9(2)-(3), Article 10(2)-(3), Article 149(1), Article 150(5). A number of constitutional provisions, such as those affecting the privileges and positions of the Rulers, cannot be amended without the consent of the Conference of the Rulers. *Ibid.*, Article 158(5).

¹⁶ More than fifty constitutional amendment Acts and 700 individual textual amendments have been passed in Malaysia since its independence in 1957. Cindy Tham, 'Major Changes to the Constitution,' *Sun* (17 July 2007) www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html.

¹⁷ Until its stunning upset in Malaysia's historic 2018 national elections, the *Barisan Nasional* coalition has been the dominant ruling party in power since Malaysia's independence. It has also controlled more than a two-thirds majority in Parliament for much of Malaysia's history, until it lost its super majority in the 2008 general elections.

¹⁸ Following executive frustration with several judicial decisions in the 1980s, for example, the Malaysian Parliament amended the Federal Constitution to remove the reference to the judicial power being 'vested' in the courts; the altered Article 121(1) provision now states that the courts 'shall have such jurisdiction and powers as may be conferred by or under federal law'. Fed. Const. (Malay.), Article 121(1). For further detail, see Yvonne Tew, 'On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' (2016) *Washington International Law Journal* 673, 678-1.

established at the nation's independence. For secularists, recourse to the original Constitution provides a safeguard for the Malaysian Constitution's basic structure and minimum core.

My third point involves the link between the unwritten constitution and constitutional identity. Secularists and Islamists in Malaysia battle so deeply over the unwritten features of the constitutional provisions on religion because of its profound relationship to conceptions of the nation's identity. Argumentation over the invisible core underlying the Constitution's text provides a way for a society to articulate and cement constitutional narratives about itself.¹¹⁹ The use of originalist arguments in Malaysia is not primarily about interpretive method; rather, historicist arguments of this kind are best understood as an argument about constitutional *ethos*.¹²⁰ Originalism has popular appeal in a nation conditioned by particular cultural and political influences to identify with its constitutional history. As Jamal Greene has observed of the United States, originalism is an argument 'driven by a narrative about the American ethos'.¹²¹ In Malaysia, too, originalist arguments have salience because of the historical and political traditions associated with the nation's independence and constitutional founding. In contexts like these, 'the deeper power of originalist argument sounds in the romance of national identity'.¹²²

Malaysia's invisible Constitution is not confined to the courts; it has a distinctly popular dimension. Constitutional arguments over the nation's constitutional identity as secular or Islamic have public salience. Debate over the interpretation of the Article 3(1) Islamic declaration clause extends well beyond the judicial sphere; and originalist arguments have rhetorical potency in the political and popular discourse.¹²³ Judges, lawyers, scholars, politicians, journalists and civil society activists mobilise constitutional arguments in debates over Islam's position because of the public appeal of such arguments.

¹¹⁹ See Carolyn Evans, 'Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia' (2009) 23 *Emory International Law Review* 437, 438 ('[C]onstitutional narrative in this context is a culturally and legally created story about the role, purpose, history, and relevance of the constitution in a particular society').

¹²⁰ Tew, *Supra* note 105, 834-6.

¹²¹ See Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1, 84 (arguing that originalist argument is a species of ethical argument, i.e., an argument 'driven by a narrative about the American ethos'.)

¹²² Richard Primus, 'The Functions of Ethical Originalism' (2010) 88 *Texas Law Review* 79, 80.

¹²³ 'Turkey provides another comparative example for originalism abroad. Ozan Varol observes that in Turkey originalism is 'not confined to the judicial sphere' and that '[e]ven the Turkish politicians' criticisms of the judiciary feature heated debates over originalism'. Ozan O. Varol, 'The Origins and Limits of Originalism: A Comparative Study' (2011) 44 *Vanderbilt Journal of Transnational Law* 1239, 1274.

Like in the United States, where the Constitution – and originalism – occupies a prominent place in its political and popular culture,¹²⁴ Malaysia's Constitution has public salience and its constitutional founding is frequently invoked in popular discourse.¹²⁵ The popular perception of the Malaysian Constitution goes beyond its text; it is influenced by unwritten features like the historical and political traditions associated with the nation's founding and perceptions of the social contract struck at the constitutional framing. In constitutional cultures like Malaysia, where the nation's founding is central to its constitutional narrative, the invisible Constitution may feature prominently – both in the judicial and popular sphere – because of its role in linking constitutional history and national identity.

13.6. CONCLUSION

The history of the contest between secular and Islamic constitutional ideas over the Article 3(1) Islamic declaration clause illustrates the profound extent to which invisible means can impact a nation's constitutional identity. At the same time, the Malaysian story provides an insight into how such invisible influences may be more open to gradual renegotiation and change – and by more diffuse actors and processes – than formal mechanisms of constitutional change, like the amendment process controlled by the dominant ruling party.

Malaysia's religion clauses illustrate how the deepest struggles over a nation's constitution often go beyond the visible constitutional text. The battle over the soul of the Malaysian Constitution continues in contemporary Malaysia. Secularists and Islamists collide over their competing visions of Malaysia's invisible Constitution, which they attempt to construct through using non-textual means to elevate Islam's supremacy or by inviting a return to the Constitution's original secular basis. The invisible aspects of the Constitution are crucial to understanding the continuing struggle over the meaning of the words contained in the written Constitution and its constitutional commitments.

¹²⁴ See Jamal Greene, 'Selling Originalism' (2009) 97 *Georgetown Law Journal* 657, 672–96.

¹²⁵ See e.g., Malik Intiaz, 'Latifah Mat Zin: Reaffirming the Supremacy of the Constitution,' *Disquiet Blog* (29 July 2007) malikintiaz.blogspot.com/2007/07/latifah-mat-zin-reaffirming-supremacy.html; David Tih, *Supra* note 104, 40; Malik Munip, *Supra* note 104; Art Harun, *Supra* note 104.

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Contributors

Gabrielle Appleby is Associate Professor and Associate Dean (International and External Engagement) at the University of New South Wales, Faculty of Law.

Simon Butt is Professor of Indonesian Law and Associate Director of the Centre for Asian and Pacific Law at the University of Sydney Law School.

Eoin Carolan is Professor and Director of the Centre for Constitutional Studies at University College Dublin.

Johannes M. M. Chan is Professor of Law and former Dean of the University of Hong Kong, Faculty of Law.

Albert H. Y. Chen is Cheng Chan Lan Yue Professor of Constitutional Law at the University of Hong Kong, Faculty of Law.

Patrick Emerton is Associate Professor at Monash University, Faculty of Law.

Jeffrey Goldsworthy Emeritus Professor of Law, Monash University; Adjunct Professor of Law, The University of Adelaide; and Professorial Fellow, University of Melbourne Law School.

Caitlin Goss is Lecturer at the University of Queensland, TC Beirne School of Law.

Jongcheol Kim is Professor at Yonsei Law School.

P. Y. Lo is Barrister and visiting fellow of the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong.

Russell A. Miller is the J. B. Stombock Professor of Law at the Washington and Lee University School of Law.

Iddo Porat is Associate Professor of Law at the College of Law and Business, Israel.

David Schneiderman is Professor of Law and Political Science at the University of Toronto, Faculty of Law.

Lawrence B. Solum is the Carmack Waterhouse Professor of Law at the Georgetown University Law Center.

Irene Spigno is Professor of Comparative Constitutional Law and Human Rights at the Inter-American Academy of the Autonomous University of Coahuila, Mexico.

Yvonne Tew is Associate Professor of Law at the Georgetown University Law Center.

Gábor Attila Tóth is Alexander von Humboldt Fellow at the Humboldt University, Berlin and an associate professor of Law at the University of Debrecen.

Laurence H. Tribe is the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard Law School.

Han Zhai is an associate research fellow at the Research Institute of Law and Policy, School of Law and Policy, School of Law, Wuhan University.