3

Islam and Liberal Rights in the Federal Constitution

Constitutions are foundational documents. They are meant to organize institutions of governance, entrench fundamental rights, and serve as important expressions of national identity. Agreement on these foundational principles is considered crucial among experts in constitutional design. But even in the best of circumstances, when compromise is forthcoming at the time of drafting, any constitutional text will serve as both an object and an instrument in future political struggles. Conflict is inevitable because the aims and objectives of political actors evolve over time, and because constitutional provisions are often left vague or discordant to overcome divergent interests in the constitution-writing process (Lerner 2011). This chapter provides the historical context for understanding the origins of the major provisions in the Federal Constitution concerning religion and liberal rights. I examine the political context of British Malaya with a focus on the key players and the competing interests that became entrenched in the new constitutional order.[1] This "constitutional ethnography" is essential for understanding (a) the legal construction of race and religion in British Malaya, (b) the dual constitutional provisions for liberal rights and Anglo-Muslim law and, (c) the formation of separate jurisdictions for Muslims and non-Muslims in areas of personal status and family law. In subsequent chapters, I examine how each of these legal features fuels the judicialization of religion.

THE LEGAL CONSTRUCTION OF RACE AND RELIGION IN BRITISH MALAYA

As a major crossroads for centuries, the Malay Peninsula has a long history of ethnic diversity and cross-fertilization. Parts of the Peninsula, particularly those coastal areas with the most exposure to trade routes, were already multiethnic by the time the British arrived. But economic forces from the middle of the nineteenth century accelerated the rate of demographic change. British commercial interests recognized the tremendous potential for tin production. With the assistance of Malay rulers and ethnic Chinese business interests, laborers were brought from China by

[1] For a comparative study of constitution writing and religion, see Bâli and Lerner (2017).

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the hundreds of thousands to work in tin mines. Likewise, with the rubber industry booming by the turn of the twentieth century, British commercial interests turned to South Asia for laborers to work on vast rubber plantations. The bulk of Indian migrants were Tamil laborers, but smaller numbers of non-labor migrants had already been brought from Ceylon and South India to work for the colonial administration. Still more Indian lawyers, doctors, and merchants immigrated, resulting in a mix of highly educated professionals and desperately poor laborers.

While most accounts of immigration to the Malay Peninsula focus on the influx of Chinese and Indian workers, it is important to note that, by 1931, as many as 244,000 of the 594,000 Malays in the former protectorates were either first-generation arrivals from the Netherlands, East Indies, or descendants of Indonesian migrants who had arrived after 1891 (Andaya and Andaya 2001: 184).[2] And just as Chinese and Indian migrants were a mix of various linguistic groups, "Malay" migrants were similarly diverse. Contemporary Malaysia is overwhelmingly a nation of immigrants.

Colonial policy tended to overlook the tremendous ethnic and linguistic diversity internal to each of these groupings. Each "race"[3] was treated as a homogeneous block, and census categories were merged over time, producing new legal and social identities (Hirschman 1986, 1987). As in other times and places, the legal construction of racial boundaries served economic and political objectives (Mamdani 2012; Mawani 2009; Merry 2000). A case in point is the now-taken-for-granted term "Malay," which was socially, politically, and legally constituted through specific policies of colonial governance, such as land law (Shamsul A. B. 2001; Milner 1998). The first legal definition of Malay came by way of the Malay Reservations Act,[4] which defined a Malay as "a person belonging to any Malayan race who habitually

[2] Immigration from Indonesia and elsewhere continues to the present day. Critics of the Malaysian government claim that these immigrants are extended citizenship to boost the proportion of Malay/Muslims vis-à-vis other ethnic and religious communities. For more background on one aspect of these claims, see Royal Commission of Enquiry on Immigrants in Sabah (2014).

[3] The term "race" may raise eyebrows among some readers. It is used here for analytical rather than normative purposes to mark a distinct shift in the way that difference was encoded in state law beginning in the colonial period as a means to justify the social and economic hierarchies that were part and parcel of the colonial project. Bashi (1998) and Gomez (2010) explain the analytical utility of the term "race" with the observation that "both race and ethnicity are about socially constructed group difference in society [but] race is always about hierarchical social difference, whereas ethnicity may be non-hierarchical, depending on the social context" (Gomez 2010: 490–491). The term "race" thus captures a power dimension that tends to fall out of the picture in discussions of "ethnicity." In using the term, it is important to be clear that I subscribe to the three components of the constructionist view of race outlined by Gomez: (1) a biological basis for race is rejected; (2) race is viewed as a social construct that changes along with political, economic, and other contexts; and, (3) "although race is socially constructed . . . [it] has real consequences."

[4] The Malay Reservations Act of 1913 applied in the Federated Malay States and was followed by comparable enactments in Kelantan (1930), Kedah (1931), Perlis (1935), Johore (1936), and Terengganu (1941). The Act was preceded by the Selangor Land Code of 1891, which required that "the original customary land holder must be Mohammedan" and prohibited the land from being sold or mortgaged to non-Muslims. The Selangor Land Code illustrates one of the earliest examples of the conflation of race and religion by the British (Andaya and Andaya 2001: 183).

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speaks . . . any Malayan language and professes the Moslem religion" (Voules 1921: 506). The original purpose of the Reservations Act was to set land aside for traditional agricultural pursuits, first among them rice cultivation. The Act was made in the name of preserving Malay interests and "way of life," but the reality had more to do with limiting the expansion of ethnic Chinese business interests, barring Malays from rubber production, and preserving adequate food supplies in the colony. While the official and unofficial bases for the legal definition of "Malay" were context-specific and ultimately short-lived, the legal category remained virtually intact until today, as enshrined in Article 160 (2) of the present-day Federal Constitution.

Racial designations became increasingly important for access to government jobs and education. As always, the political context is crucial. By the turn of the twentieth century, ethnic Chinese and ethnic Indian communities comprised nearly half the total population of British Malaya. It was also clear that the vast bulk of the Malay community had missed out on the economic boom. The British sought to make good (at least symbolically) on their stated policy of protecting the interests of the Malays through targeted initiatives. The Malay College was established in 1905 to provide English education to the children of Malay elites, and a Malay Administrative Service was created around the same time to assist the Malayan Civil Service (Means 1972: 34). Non-Malays were barred from these institutions regardless of any qualifications that they might have had. These race-based concessions were designed to address Malay grievances and bolster the position of the Malay elite as a strategic ally to the British vis-à-vis the increasingly large and dynamic ethnic Chinese community.[5]

Even with these concessions, Malay nationalists believed that their community faced an existential threat. It is not difficult to understand why. In the Federated Malay States, the ethnic Chinese community tripled in size (from 163,422 to 433,244) in the two decades from 1891 to 1911, while the ethnic Indian community increased more than eight times (from 20,154 to 172,465) in the same period (Puthucheary 1978: 8). The 1911 census records Malays as comprising only 51 percent of the total population, and this figure declined further to 49.2 percent in the 1931 census (Noor 2004: 18). An Aliens Ordinance was issued by the colonial administration to regulate the entry of new workers beginning in 1933, but the Malay share of the population remained less than half of the total population (49.5 percent) by the time of the 1947 census. The ethnic Malay community was frightfully concerned that, with independence, they would be a vulnerable minority, subject to domination by the ethnic Chinese and (to a far lesser extent) ethnic Indian communities.

[5] Increasing numbers of Malay elites in the civil service also helped to relieve administrative pressures on the colonial administration.

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THE FORMATION OF RACE-BASED POLITICAL PARTIES

Following the Second World War, Britain began to prepare Malaya for eventual independence. A "Malayan Union Plan" was issued in 1945, in the form of a White Paper. It proposed a unitary state, including the Federated Malay States, the Unfederated Malay States, Penang, and Melaka. Under the Plan, the Sultans would retain their positions but lose their formal sovereignty. Citizenship would be extended to all residents of Malaya and citizens would enjoy equal rights, with no preferential treatment by race. Varying responses to the Malayan Union Plan exposed the complex and competing interests of the ethnic Malay, Chinese, and Indian elite, as well as complex class and ideological dimensions within each group.[6] Fearful that the Malay community would be overwhelmed by the economic might of the Chinese community under the terms of the plan, Malay nationalists mobilized in opposition. Out of this effort emerged the United Malays National Organization (*Pertubuhan Kebangsaan Melayu Bersatu*), more popularly known by its acronym, UMNO. The Malayan Union Plan was swiftly defeated, and UMNO was transformed into a formidable political party. Later that year, the Malayan Indian Congress (MIC) was founded, followed by the Malayan Chinese Association (MCA), which was established mainly as a counterweight to the (Chinese) Malayan Communist Party. These three race-based parties would soon dominate in the independence period.

In lieu of the Malayan Union, British officials negotiated an interim agreement with UMNO leaders and with the Sultans. The result was the Federation of Malaya Agreement of 1948, which cut against the spirit of the Malayan Union Plan on virtually every count. Requirements for citizenship were made more restrictive, the sovereignty of the Sultans was preserved, and a federal structure was established with powers reserved for the states (Andaya and Andaya 2001: 268). The Federation of Malaya Agreement also required that the British High Commissioner "safeguard the special position of the Malays and the legitimate interests of the other communities" (Clause 19 (1) (d)). Accordingly, the colonial administration continued to allocate civil service positions exclusively to Malays.[7] Scholarships, special business permits, and licenses were also reserved for Malay business and tradespersons (Huang-Thio 1964).

Despite strong cross-pressures, UMNO, the MCA, and the MIC had sufficient mutual interest to cooperate as a coalition ("The Alliance") in the 1955 election.[8] The Alliance sidestepped communal differences and focused their campaign on the immediate goal of independence. Their cooperation paid off. The Alliance won

[6] For a detailed account of the elite-pacted authoritarian institutions that were crafted in response to pressures from below, see Slater (2010: 75–93). Also, see Andaya and Andaya (2001: 264–267).

[7] One-fifth of civil service positions were allotted to non-Malays beginning in 1953. For more detail, see Puthucheary (1978).

[8] UMNO and the MCA had previously won 226 of 268 municipal and town council seats between 1952 and 1954. Their victory at the local level demonstrated that cooperation was both possible and fruitful (Andaya and Andaya 2001: 275–276; Noor 2004: 79).

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a stunning 81 percent of the popular vote and all but one of 52 constituencies (Andaya and Andaya 2001: 276). In the process, they had discovered a winning formula: Each of the component parties was race-based, and each spoke in the name of its respective community. Inter-communal differences were managed through behind-the-scenes bargaining and compromise. The promise of continued success at the ballot box proved a sufficient incentive for the race-based parties to continue to work together. This delicate balancing act soon constituted a fundamental feature of Malaysian politics: Race-based parties generate political mileage by playing to their communal base, yet brinkmanship requires constant backroom political management, lest differences spin out of control. The strong Alliance mandate in the 1955 elections was an encouraging sign that political elites could overcome significant inter-communal differences. But the most profound challenge facing the Alliance was agreeing on the basic contours of an independence constitution. Thorny issues such as the status of Malay privileges and the requirements of citizenship had been stumbling blocks in the past. To secure independence, the Alliance needed to work constructively with the Reid Commission, which was charged with drafting the Independence Constitution. The final shape of the Independence Constitution, including clauses on Islamic law and liberal rights, reflected the compromises that were struck to bridge the competing interests of the major stakeholders.

EQUAL CITIZENSHIP VS. RACE-BASED PRIVILEGES IN THE MALAYAN CONSTITUTION

One of the most significant bargains in the new constitution concerned citizenship for ethnic Chinese and ethnic Indian migrants. The Federation of Malaya Agreement extended citizenship only to those who declared permanent settlement, could establish that they were residents for fifteen of the previous twenty-five years, and had competence in English or the Malay language.[9] By these criteria, Andaya and Andaya (2001) estimate that less than 10 percent of ethnic Chinese qualified for automatic citizenship (268). A more relaxed citizenship requirement was therefore among the most important objectives for the ethnic Chinese and ethnic Indian communities. In a departure from the Federation of Malaya Agreement, the Independence Constitution extended citizenship to all those who were born in the Federation or who satisfied certain other requirements.[10] The number of non-Malay citizens soared as a result of this

[9] The name "Federation of Malaya" was retained until 1963 when Sabah, Sarawak, and Singapore (for two years only) joined in political union. For more comprehensive accounts of the political maneuvers, lobbying, and compromise that occurred in the drafting of the Federal Constitution, see Fernando (2002). For more on Article 3 specifically, see Fernando (2006) and Stilt (2015).

[10] For a precise description of the requirements of citizenship, see the Second Schedule of the Federal Constitution.

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concession.[11] In return, Malay special privileges were affirmed in the new Constitution.[12] Article 153 reproduced the wording of the Federation of Malaya Agreement almost verbatim, declaring "It shall be the responsibility of the Yang di Pertuan Agong [the Supreme Head of State] to safeguard the special position of the Malays and the legitimate interests of other communities . . . ."[13] The text simply replaced the British High Commissioner with the Supreme Head of State as the authority entrusted with safeguarding Malay rights.[14] Article 153 details these privileges, which include quotas for Malay entry into the civil service (clause 2), quotas for Malay business licenses and permits (clauses 6 and 8), special scholarships and educational facilities for Malay students (clause 2), and quotas for Malay students at universities (clause 8a, added in 1971). Additional provisions entrenched other privileges. Article 89, for example, carried over the colonial policy of allocating tracts of land for the exclusive ownership and use of Malays.

The provision of public resources along racial lines required a legal definition of "Malay." Once again, colonial-era frameworks provided a ready model for adoption. Article 160 (2) of the Constitution defines a Malay as "a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom . . . ." This definition was virtually identical to the legal provisions in the Malay Reservations Act of 1913, where colonial authorities had defined a Malay as "a person belonging to any Malayan race who habitually speaks . . . any Malayan language and professes the Moslem religion." As a result, the legal conflation between Malay and Islam was carried over and entrenched in the Independence Constitution.

ISLAM AS THE RELIGION OF THE FEDERATION

Another key passage in the Constitution is Article 3 (1). It reads, "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation." It is no surprise that UMNO pressed for a religion clause as

[11] New citizens were required to affirm their exclusive loyalty to the Federation through a written oath, stating "I absolutely and entirely renounce and abjure all loyalty to any country or State outside the Federation, and I do swear that I will be a true, loyal and faithful citizen of the Federation, and will give due obedience to all lawfully constituted authorities in the Federation." The constitution was amended in 1962 to require allegiance to "His Majesty the Yang di-Pertuan Agong" rather than "all lawfully constituted authorities in the Federation." This amendment points to the ways in which some aspects of the constitutional bargain were subsequently altered.

[12] "UMNO's final acceptance of this provision was only obtained in exchange for a guarantee of Malay Privileges" (Andaya and Andaya 2001: 276).

[13] The Constitution would later be amended to include the "natives of any of the States of Sabah and Sarawak."

[14] Article 153 also requires the Supreme Head of State to protect "the special interests of other communities," but details on how competing interests should be balanced were not specified. These mechanisms were almost certainly vague by design.

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an expression of Malay identity. Malays were equated with Islam by way of state law as far back as the Malay Reservation Act of 1913. According to state law and popular convention, to be Malay was to be Muslim. This conflation of race with religion in the popular imagination is most clearly demonstrated by the term used to describe conversion itself. An individual who converts to Islam is said to have "masuk Melayu" (entered or become Malay). For UMNO, a religion clause would serve as an expression of state identity that was synonymous with race.

What is remarkable about the inclusion of Article 3 (1) in the Independence Constitution is that UMNO had gained the consent of its partners in the Alliance, the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC). This cooperation partly reflected UMNO's dominant position within the Alliance. But equally, the support of the MCA and the MIC was part of a complex political bargain struck between political elites in the critical years leading up to independence. The Alliance submitted a joint memorandum to the Reid Commission requesting that, "The religion of Malaysia shall be Islam." The memorandum further specified that "the observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions, and shall not imply that the State is not a secular State" (Fernando 2006: 253). No doubt, this proviso was necessary to secure agreement from the MCA and the MIC, the non-Muslim, non-Malay component parties of the Alliance.

Ironically, resistance to a religion clause came from those figures who were meant to be the guardians of Islam: the Sultans. As it turns out, the Sultans were concerned that a religion clause would impinge on their mandate as the religious leaders of their respective states. This political posture was a direct legacy of colonial bargains, going back to the Treaty of Pangkor where the Sultans were granted jurisdiction over matters of religion and custom while relinquishing the rest of their authority (see Chapter 2). The fact that the Sultans opposed a religion clause, while the non-Muslim MCA and MIC were willing to oblige, further suggests that the inclusion of Article 3 had little to do with religion qua religion, and more to do with the complicated bargain being negotiated.

The Reid Commission initially rejected the Alliance proposal, based on objections that had come from the Sultans. However, the tide changed through UMNO's persistence, lobbying from within the Reid Commission by Justice Abdul Hamid (who had proved to be a vociferous advocate for a religion clause), and substantive compromises among stakeholders.[15] The Sultans ultimately agreed to

[15] For details on how these negotiations evolved, see Stilt (2015) and Fernando (2002; 2006). Interestingly, in his formal appeal to include a religion of the state clause, Justice Abdul Hamid pointed to the many other countries that had already adopted similar clauses: "Not less than 15 countries of the world have a provision of this type entrenched in their constitutions. Among the Christian countries, which have such a provision in their Constitutions, are Ireland (Art. 6), Norway (Art. 1), Denmark (Art. 3), Spain (Art. 6), Argentina (Art. 2), Bolivia (Art 3), Panama (Art. 1), and Paraguay (Art. 3). Among the Muslim countries are Afghanistan (Art. 1), Iran (Art. 1), Iraq (Art. 13), Jordan (Art. 2), Saudi Arabia (Art. 7), and Syria (Art. 3) .... If in these countries a religion has been

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a constitutional provision stating that Islam is the religion of the federation in return for their own constitutionally entrenched right to administer Anglo-Muslim law at the state level. Article 3 of the Constitution was finally drafted to read, "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation." In addition to the second part of the clause safeguarding the practice of other religions, additional provisions were meant to ensure that Article 3 would not infringe on the rights of non-Muslims. Clause 4 of Article 3 guarantees, "Nothing in this Article derogates from any other provision of this Constitution." Article 8 (1) declares "all persons are equal before the law and entitled to equal protection of the law." Article 8 (2) expands upon this guarantee by specifying "... there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law ...." Article 11 directly addresses freedom of religion by further guaranteeing that "Every person has the right to profess and practice his religion ...." These specifications were no doubt meant to underline the commitment that Article 3 would not deprive citizens of fundamental liberties provided for in the Constitution. Despite these various guarantees, the vague phrase "religion of the Federation" would become the subject of contention decades later.

Ironically, all the provisions that were meant to secure fundamental rights would eventually become instruments and objects of litigation. Even within the same constitutional provisions, we can identify axes of legal tension. For example, Article 8 (1) declares "all persons are equal before the law and entitled to the equal protection of the law." Clause 5 of the same article carries the additional proviso that "[t]his Article does not invalidate or prohibit any provision regulating personal law ...." Thus, the Anglo-Muslim, Anglo-Hindu, and Chinese customary law regimes – all of which were discriminatory against women – were exempt from the Constitution's commitment to guarantee equal protection under the law.[16] Similarly, Article 11, which addresses freedom of religion, provides that, "*Every person* has the right to profess and practice his religion ...." However, the third clause of the same article states that "*every religious group* has the right to manage its own religious affairs ...." Article 11 thus provides for individual rights (the right of the individual to practice in accordance with his or her religious conviction) while it gestures to collective rights (the right of each religious community to manage its religious affairs). This celebration of rights on paper did not anticipate the significant legal tensions that this framework would produce between conflicting visions of individual and communal rights to "freedom of religion." Compromise among the

declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody, no harm will ensue if such a declaration is included in the Constitution of Malaya." Report of the Federation of Malaya Constitutional Commission 1957 (London: Her Majesty's Stationery Office) Colonial No. 330.

[16] As previously noted, there had existed five separate family law statutes until all of those for non-Muslims were unified into a single legal framework by the Law Reform (Marriage and Divorce) Act of 1976.

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drafters of the Constitution only sowed the seeds for protracted legal battles decades later.[17]

SUBSTANTIVE PROVISIONS OF ANGLO-MUSLIM LAW

Leaving aside the contested symbolism of Article 3, more clearly defined arrangements for the administration of Anglo-Muslim law are specified elsewhere in the Constitution. The Ninth Schedule establishes the basic institutional foundation, by delineating the powers of the states vis-à-vis the federal government. The states were granted jurisdiction over:

> Muslim law and personal and family law of persons professing the Muslim religion, including the Muslim law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, legitimacy, guardianship … mosques or any Muslim public place of worship, creation and punishment of offences by persons professing the Muslim religion against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Muslim courts, which shall have jurisdiction only over person professing the Muslim religion and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the Muslim religion; the determination of matters of Muslim law and doctrine and Malay custom … [18]

The administration of religion is a state-level enterprise because of the separate treaties that the British had forged with local rulers. The Sultans had managed to preserve their role as the heads of religion within the federal structure of the Federation of Malaya Agreement of 1948, and later they managed to entrench those powers in the Independence Constitution.[19] A comparison of these consecutive legal frameworks reveals a high degree of path dependence. The bifurcated legal system that first emerged in the state of Perak in 1874, as a product of the Treaty of Pangkor (later replicated in other Malay protectorates), came to be entrenched in the Federation of Malaya Agreement. Later still, similar wording was carried over into the Independence Constitution (now the Federal Constitution). In this bifurcated legal system, the federal courts came to administer all matters of civil, criminal, and administrative law, whereas state jurisdiction was limited to issues of personal status law within the Muslim community, including such matters as marriage, divorce, child custody, religious status.

[17] Indeed, these disharmonies are what fuel the construction of constitutional identity (Jacobsohn 2010).

[18] This is the original wording from The Ninth Schedule, List II (1), of the Independence Constitution of 1957. Some of this language changed through constitutional amendments, as detailed later. See *Malayan Constitutional Documents*, published by the Government Printer, Kuala Lumpur (1958).

[19] Federation of Malaya Agreement, Article 5.

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SHARIAH COURT VERSUS CIVIL COURT JURISDICTION

One of the distinct institutional legacies of the colonial period was the formation of Muslim courts (later renamed "shariah" courts) that applied Muslim law (later rebranded "shariah" law). Shariah court decisions were subject to review by the civil courts. However, the government amended Article 121 in 1988. A new clause specified that the High Courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts." The new provision, Article 121 (1A), was meant to demarcate a clear division between the functions of the civil courts and the duties of the shariah courts. Muslims would henceforth be subject to the exclusive jurisdiction of the shariah courts in matters of religion. In practice, however, dozens of high-profile cases presented difficult legal conundrums (Chapter 4). These cases generated enormous political controversy and became important focal points for civil society mobilization (Chapter 5). The spectacle ultimately shaped popular understandings of Islam and its place in Malaysian politics and society (Chapter 6, 7). Because Article 121 (1A) plays a central role in this litigation, it is useful to provide context on the origins of the amendment itself.

Before the 1988 constitutional amendment, the civil courts exercised jurisdiction in matters related to the shariah courts, but only on occasion. For example, in *Myriam v. Mohamed Ariff*, a Muslim woman initiated a civil suit to challenge her ex-husband's custody of their two children.[20] In *Boto v. Jaafar*, another Muslim woman sued her ex-husband in a civil court for equal division of matrimonial assets rather than settle for three months of maintenance, according to the provisions that applied in the Muslim courts.[21] But these sorts of cases were less frequent than one might expect.[22] Generally speaking, the civil courts adjudicated family law cases between Muslims only when there was a solid legal basis.[23] Even then, it appears that the civil courts overturned shariah court decisions only with reluctance.[24] Figure 3.1 illustrates the total number of High Court decisions that concerned Islam between 1936 and 2014. One notes that there were very few High Court rulings similar to *Myriam v. Mohamed Ariff* or *Boto v. Jaafar*. In other words, these decisions were the rare exceptions, not the rule. In fact, before the adoption of Article 121 (1A), High Court decisions mentioning Islam were

[20] *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265.

[21] *Boto' Binti Taha v. Jaafar Bin Muhamed* [1985] 2 MLJ 98.

[22] Additional examples include *Nafsiah v. Abdul Majid* [1969] 2 MLJ 174; *Roberts v. Ummi Kalthom* [1966] 1 MLJ 163.

[23] For example, in exercising jurisdiction in *Myriam v. Mohamed Ariff*, the presiding judge cited a provision of the Selangor Administration of Muslim Law Enactment (1952) that allowed the civil court review of shariah court decisions. Article 45 (6) of the Selangor Administration of Muslim Law Enactment of 1952 stated, "Nothing in this Enactment contained shall affect the jurisdiction of any civil court and, in the event of any difference or conflict arising between the decision of a court of the *Kathi Besar* or a *Kathi* and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail."

[24] In *Boto v. Jaafar*, the presiding judge cites the "celebrated" writing of Islamic law advocate Professor Ahmad Ibrahim. This was very likely an effort to legitimize its review of a shariah court decision.

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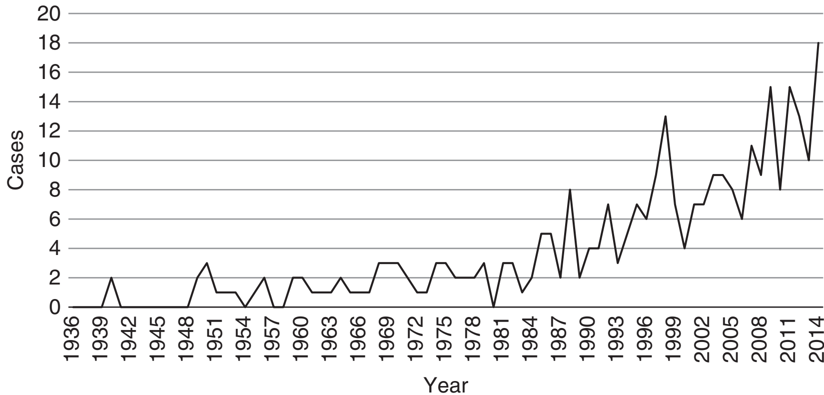

FIGURE 3.1: Reported Civil Court Decisions Referencing Islam, by Year
Source: Data compiled from the *Malayan Law Journal* and the *Current Law Journal*.[25]

fewer than two per year on average, and the total number of decisions touching on Islam never surpassed five in one year. It is one of the great ironies that High Court decisions touching on Islam increased significantly only *after* the passage of Article 121 (1A), for reasons examined later.

Nonetheless, a handful of activists, academics, and government officials advocated for the adoption of a constitutional amendment that would prevent the federal civil courts from overturning state-level shariah court decisions. The most important advocate for such a change was Ahmad Mohamed Ibrahim (1916–1999) who was the most prominent early advocate for an increased role of Islamic law in the Malaysian legal system. It is useful to know something of Ahmad Ibrahim's formative years to understand his approach to Islam in the Malaysian legal order. Ibrahim was born in Singapore and studied law in the United Kingdom. Upon returning to Singapore, Ibrahim served as a chief lawyer in the infamous Maria Hertogh (Natrah) child custody case.[26] The case precipitated riots when the colonial administration of Singapore ruled that a girl who had been adopted into a Muslim family must be returned to her Dutch biological parents.[27] For nationalists at the time, the Natrah case symbolized the colonial administration's complete disregard for Islam. Ibrahim was thirty-four years of age at the time, and his work on the case is said to have had a profound effect on his outlook. When he immigrated to Malaysia in 1969, he became an early and outspoken advocate for a more expansive role for Muslim law

[25] This data was generated by running the search terms "Islam" or "Muslim" in the *Malayan Law Journal* and the *Current Law Journal*, followed by the secondary search term "religion" within the search results. Decisions were then reviewed to exclude false positives. The data is meant to provide a general notion of the volume of High Court decisions that mention Islam over time.

[26] Colonial Singapore was part of British Malaya, but it was administered separately as a Crown colony.

[27] *Adrianus Petrus Hertogh and Anor v. Amina Binte Mohamed and Ors.* [1951] 1 MLJ 12; *Amina Binte Mohamed v. HE Consul-General for the Netherlands* [1950] 1 MLJ 214.

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and the formalization of Muslim court functions vis-à-vis the civil courts. As a professor of law at the University of Malaya and later as the Dean of the Faculty of Law at the International Islamic University of Malaysia (IIUM), Ibrahim advocated the introduction of a constitutional amendment that would safeguard the jurisdiction of the shariah courts vis-à-vis the federal civil courts. He wrote of the instances in which the civil courts had overturned shariah court decisions, citing them as evidence of the need to expand and defend the role of the shariah courts in the Malaysian legal system.

In Ahmad Ibrahim's account, the government formed a committee headed by Tan Sri Syed Nasir Ismail to examine "the unsatisfactory position of the shariah courts ... and suggest measures to be taken to raise their status and position" (Ibrahim 2000: 136). The committee stressed the need to improve the physical infrastructure of the shariah courts, improve the training of judges, and raise the stature of the shariah courts vis-à-vis the civil courts. One of several committee recommendations for raising the stature of the shariah courts was to oust the civil courts from shariah court jurisdiction by way of a constitutional amendment. Mahathir Mohammed endorsed the proposal and, in 1988, introduced a constitutional amendment declaring that the High Courts of the Federation "shall have no jurisdiction in any respect of any matter within the jurisdiction of the shariah courts." Opening debate in the *Dewan Rakyat*, Mahathir explained that this amendment was necessary to protect the jurisdiction of the shariah courts vis-à-vis the federal civil courts:

> One thing that has brought about dissatisfaction among the Islamic community in this country is the situation whereby any civil court is able to change or cancel a decision made by the shariah court. For example, an incident happened before where a person who was unhappy with the decision of the shariah court regarding child custody brought her charges to the High Court and won a different decision. The Government feels that a situation like this affects the sovereignty of the shariah court and the execution of shariah law among the Muslims of this country. It is very important to secure the sovereignty of the shariah court to decide on matters involving its jurisdiction, what is more if the matter involves shariah law. Therefore, it is suggested that a new clause be added to Article 121 – clause (1A), which will state that the courts mentioned in the Article do not have any jurisdiction over any item of law under the control of the shariah court.[28]

For the record, no primary source evidence from the period supports Mahathir's contention that civil court decisions had produced "a feeling of dissatisfaction among Muslims in the country." The civil courts rarely overturned shariah court rulings and, in the rare cases when they did, these decisions were *not* covered extensively in the press. A review of Malay language newspaper coverage revealed that, among the four cases most often cited by Ahmad Ibrahim as examples of civil

[28] Minutes of the *Dewan Rakyat*, March 17, 1988, page 1364.

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court interference, the newspapers covered none of them.[29] The discussion did not go far beyond the small circle of legal professionals who had promoted Article 121 (1A) to elevate the symbolic stature of the shariah courts vis-à-vis the federal civil courts.

Given the profound impact of Article 121 (1A) on Malaysian law and politics, the brevity of parliamentary debate is striking. The discussion was short partly because seven leading Democratic Action Party (DAP) members (including Lim Kit Siang and Karpal Singh) were being held in detention under the Internal Security Act in the aftermath of Operation Lalang. Discussion of Article 121 (1A) was also overshadowed by the debate on a second constitutional amendment, introduced simultaneously, that weakened the independence of the federal courts vis-à-vis the executive.[30]

One of the few reservations in the parliamentary debate came from Chua Jui Meng of the MCA. He posed the hypothetical question: "If a non-Muslim is falsely accused in the shariah courts, will he be able to appeal to the High Court?"[31] Chua's question proved prescient years later, albeit not in the exact scenario that he posed in Parliament. However, such concerns were quickly brushed aside, and the amendment passed with the support of 142 Members of Parliament.[32] Having passed the *Dewan Rakyat*, the constitutional amendment made its way to the upper house of Parliament, where there were even fewer opposition figures. Deputy Prime Minister Abdul Ghafar bin Baba introduced the amendment in the *Dewan Negara* with the same reasoning that Mahathir had provided previously:

> This amendment is suggested because in the past if people were not satisfied with a decision given by the shariah court, they were able to bring the same case to the High Court with the intention of procuring a different decision. This situation has brought about a feeling of dissatisfaction among Muslims in this country and has affected the sovereignty of the shariah courts. In the government's opinion, the civil court should not question the matters under the jurisdiction of the shariah court anymore, more so because the issues that arise in such cases involve Islamic law.

[29] The four cases that were most often cited by Ahmad Ibrahim as examples of civil court interference are *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265; *Boto'Binti Taha v. Jaafar Bin Muhamed* [1985] 2 MLJ 98; *Nafsiah v. Abdul Majid* [1969] 2 MLJ 174; and *Roberts v. Ummi Kalthom* [1966] 1 MLJ 163. The most prominent Malay-language newspapers were examined for several weeks following each of these court decisions to understand the extent of media coverage or lack thereof.

[30] Both amendments came at a time when Mahathir Mohammad was fighting for his political life. In June 1987, UMNO had an internal party election in which Mahathir retained leadership of the party by a slim majority of 761 to 718 votes. A legal challenge to the election results, combined with several court decisions against the executive, precipitated a purge of the Chief Justice of the Supreme Court, Tun Salleh Abas, and two other Supreme Court justices. As we will see in the next chapter, weakened judicial independence made the civil courts more vulnerable to pressure when the contested jurisdictions became a politically salient topic. For more on the 1988 judicial crisis, see the official inquiry commissioned by the Malaysian Bar Council (2008).

[31] Minutes of the *Dewan Rakyat*, March 17, 1988, p. 1386.

[32] 18 Members of Parliament opposed the bill, 17 of whom were DAP members.

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> In these matters, shariah court judges are competent. This amendment is in line with the government's aspiration of raising the position and sovereignty of our shariah courts.[33]

Several UMNO loyalists voiced their emphatic support. Tuan Haji Hamid Araby bin Haji Md. Salih summed up the praise for the amendment:

> Following what was said by several of my colleagues, the position of the shariah courts will rise with this amendment. In the past, the shariah courts were made a laughing stock because people who did not succeed in the shariah court could bring their case to the civil court and change the shariah court decision. This is a huge mockery to Islam, our official religion. Praise God, our leaders today have come to realize that the shariah court's position must be raised to be on par with the magistrate court and others. Thank goodness this amendment is made.[34]

Despite the colorful praise for the amendment and dogmatic assertions of shariah court dignity, there was surprisingly little press coverage of Article 121 (1A). It is hard to know what to make of this, as one would expect UMNO politicians to trumpet their Islamic credentials in the popular press in the same manner that they had in Parliament. However, it seems that the introduction of Article 121 (1A) was overshadowed by the more immediate spectacle of Mahathir asserting executive dominance over the judiciary.[35] Newspaper coverage focused on Article 121 (1), which weakened judicial independence, but not clause 1A. Thus, clause 1A was adopted with little debate or popular awareness outside of a small number of lawmakers, legal scholars, and practitioners. Two decades later, the Article 121 (1A) cases became the primary focal point of tension concerning the "religious" vs. "secular" identity of the Malaysian state.

[33] Minutes of the *Dewan Negara*, April 4, 1988, p. 43.

[34] Minutes of the *Dewan Negara*, April 4, 1988, p. 103.

[35] For an example of this coverage, see "Pindaan Perjelas Kuasa Hakim," *Berita Harian*, March 18, 1988.

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