2

The Secular Roots of Islamic Law in Malaysia

"In a nation-state, the state is itself the only true repository of legal authority, the monopolization of which, by definition, it ever so zealously guards."

– Sherman Jackson (1996: xiv)

" . . . not every divergent understanding of law is sufficient to withstand the coercive power of the state."[1]

– Robert Cover (1983: 51)

Malaysia ranks sixth out of 198 countries worldwide in the degree of restrictions on the free practice of religion, surpassing even Saudi Arabia (Pew Research Center 2017). In another measure, the Government Involvement in Religion Index, only ten countries worldwide have a higher ranking than Malaysia.[2] Malaysian law requires Muslims to attend Friday prayer, to fast during Ramadan, and to abide by dietary restrictions all year long. Drinking, gambling, and "sexual deviance" are prohibited, as is interfaith marriage and conversion out of Islam.[3] But over and above these rules and regulations, it is the state's monopoly on religious interpretation that is the most striking feature of Malaysian law. Once recorded in the official Gazette, *fatwas* from state-appointed officials assume the force of law and public expression of alternate views is criminalized.[4] From this vantage point, Malaysia appears as a religious state,

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[2] This is the ranking for 2008 (the most recent year for which data is available in the Government Involvement in Religion Index at the time of publication). See http://www.religionandstate.org and Fox (2008).

[3] In the Federal Territories, the Syariah Criminal Offences Act criminalizes failure to perform Friday prayers (Article 14), breaking one's fast during Ramadan (Article 15), gambling (Article 18), drinking (Article 19), and "sexual deviance" (Articles 20–29). State-level enactments mirror most of these federal-level statutes. Enforcement of these laws varies widely depending on the type of offence.

[4] A *fatwa* (pl. *fatawa*) is a non-binding legal opinion provided by a qualified scholar of Islamic law in response to a question. As examined later in this study, however, the Malaysian state has institutionalized the *fatwa* in a manner that fundamentally subverts this principle. Once published in the official gazette, a *fatwa* acquires the force of law.

at least for the 60% of Malaysian Muslims who are subject to these laws. To be sure, the idea that the shariah courts apply religious law while the civil courts apply secular state law is a notion that is widely accepted in contemporary Malaysia, both among advocates for Islamic law and staunch secularists alike. In elite and popular discourse, it is difficult to escape the binary trope of a secular legal sphere juxtaposed beside (or against) an autonomous religious sphere. However, this binary elides the way that religion and religious authority are constituted by way of state law in the first place. The shariah courts did not drop from the heavens. Rather, they are creatures of state law and the codes that they apply are little more than what the state declares Islamic law to be. The state monopoly on religious interpretation and the imposition of select fragments of *fiqh* should not be taken as the straightforward "implementation" of Islamic law, or the adoption of an "Islamic" system of governance, or the achievement of an "Islamic state," as the government periodically claims.[5] There are no such ideal-types.[6] What Malaysia does offer is an instructive example of how efforts to regulate religion in this fashion come in tension with core epistemological commitments of Islamic legal theory.

In making this argument, I risk entering contested terrain in the field of Islamic legal studies. In recent years, one of the foremost authorities in the field, Wael Hallaq, has drawn fire for arguing that Islamic law and the modern state are fundamentally incompatible. Hallaq (2009; 2014) contends that the methodological and substantive pluralism of the Islamic legal tradition, along with its core internal logics, developed outside the context of the modern state and that these constitutive features cannot be sustained under the legal monism that is part and parcel of contemporary statecraft.[7] Other scholars, primarily historians, challenge these claims. They contend that proto-state institutions were not only central to the development of Islamic law well before the advent of the modern state, but also that rulers were always important constitutive agents in both the application and development of Islamic law (Baldwin 2017; Burak 2015; Ibrahim 2015; Stilt 2011). The debate between Hallaq and his critics may ultimately reflect a difference of focus and approach. Hallaq appears to privilege the idealized self-conception of jurists, as presented through their doctrine.[8] His critics, on the other hand, consider the political realities that often ran roughshod over the pure legal reasoning articulated by jurists. Whether the advent of the modern state precipitated an irreversible rupture in the Islamic legal tradition, as Hallaq contends, or whether rulers had

[5] Another way to put it is that any claim to Islamic law, or an "Islamic" system of governance, or an "Islamic state" must contend with myriad competing claims for other formations of Islamic law. No single formation is the sole or exclusive instantiation of Islam or Islamic law.

[6] See Abd al-Raziq (1925), Ali (2009), and An-Na'im (2008).

[7] For lengthy critiques of Hallaq's work, see Fadel (2011) and March (2015).

[8] Rumee Ahmed (2012: 154) describes the pure legal reasoning of jurists as the construction of a "subjunctive world." That is, an idealized vision of " . . . how the world can be, or perhaps how the world should be." Ayesha Chaudhry articulates a similar conception with the term "idealized cosmology" (2013: 11).

always played a central role in the development of the Islamic legal tradition as suggested by his critics, these questions are ultimately for historians to settle.[9] My objective is different. My aim in the forthcoming chapters is to examine *the politics of claims-making* around Islam and Islamic law in contemporary Malaysia by the government, the courts, interest groups, the religious establishment, and everyday citizens.

This goal entails still more risks and liabilities. I am sympathetic to Baudouin Dupret's view that "Islamic law is what people consider as Islamic law, nothing more, nothing less, and it is up to theologians, believers, and citizens, not social scientists, to decide whether something does conform or not to some 'grand tradition'" (2007: 79). I am also mindful of Dupret's insistence that social scientists do not occupy a position " . . . vis-à-vis the social that would allow them to 'reveal' to 'self-deceived people' the truth that is concealed from them because of their 'lack of critical distance', 'ignorance' and/or 'bad faith'" (2007: 79). Yet the fact remains that politics and religion are "mutually infused" (Camaroff 2009) in contemporary Malaysia. A detailed examination of this mutual infusion is therefore necessary if one wishes to better understand just about any aspect of Malaysian politics, including the strident debates around shariah versus civil court jurisdictions, the intensifying construction of binaries between Islam and liberal rights, the politics of ethnic and religious polarization, the prospects for women's rights in Muslim family law, perceptions of government legitimacy, and much more.

This chapter traces the legal construction of religious authority in the Malay Peninsula from the colonial era through to the present. I first offer a brief primer on Islamic legal theory, focusing on core features such as the locus of innovation, the place of human agency, internal mechanisms of change, and its pluralist epistemology. Against this backdrop, I examine the construction of religious authority by way of state law in contemporary Malaysia. Specifically, I investigate how state and federal authorities enacted select fragments of *fiqh* while jettisoning core epistemological commitments of *usul al-fiqh*.[10]

CORE PRINCIPLES IN THE ISLAMIC LEGAL TRADITION

One of the defining features of Islam is that there is no "church." That is, Islam has no centralized institutional authority to dictate a uniform doctrine as might be found, for example, in the Catholic Church.[11] For guidance, Muslims consult the textual sources of authority in Islam: The Qur'an, which Muslims believe is the word

[9] I also recognize the possibility that other institutional configurations may be able to preserve the integrity of classical modes of reasoning. For an exploration of these possibilities, see Rabb (2013).

[10] *Usul al-fiqh* carries the literal meaning "the origins of the law" or "the roots of the law" but it can also be translated as "principles of understanding" or "Islamic legal theory" in that it constitutes the interpretive methodology undergirding Islamic jurisprudence.

[11] There are exceptions, such as the Ismailis, but they represent a tiny minority among the worldwide Muslim community.

of God, as revealed to the Prophet Muhammad in the seventh century, and the Sunnah, the normative example of the Prophet. The absence of a centralized institutional authority resulted in a pluralistic religio-legal tradition. In the first several centuries of the faith, schools of jurisprudence formed around leading religious scholars (*fuqaha'*). Each school of jurisprudence (*madhhab*) developed its own distinct set of methods for engaging the central textual sources of authority to guide the Muslim community. Techniques such as analogical reasoning (*qiyas*) and consensus (*ijma*), the consideration of the public interest (*maslaha*), and a variety of other legal concepts and tools were developed to constitute the interpretive methods of *usul al-fiqh*, from which Islamic jurisprudence is derived. The legal science that emerged was one of tremendous complexity, both within each *madhhab* and amongst them. Dozens of distinct schools of Islamic jurisprudence emerged in the early centuries of the faith. However, most died out or merged over time, eventually leaving four central schools of jurisprudence in Sunni Islam that have continued to this day: the Hanafi, Hanbali, Maliki, and Shafi'i.[12]

The engine of change within each school of jurisprudence was the private legal scholar, the *mujtahid*, who operated within the methodological framework of his or her *madhhab* to perform *ijtihad*, the disciplined effort to discern God's law. The central instrument of incremental legal change was the *fatwa*, a non-binding legal opinion offered by a *mujtahid*.[13] Because *fatwas* are typically issued in response to questions posed by individuals in specific social situations, *fatwas* responded to the diverse contexts of different Muslim communities.[14] In this sense, the evolution of Islamic jurisprudence was a bottom-up, not a top-down process (Masud, Messick, and Powers 1996: 4).

Differences among jurists inevitably produced vigorous doctrinal debates. As if to guard against the centripetal force of their disagreements, jurists valorized diversity of opinion (*ikhtilaf*) as a generative force in the search for God's truth. The proverb, "In juristic disagreement there lies a divine blessing" underlined this aspiration (Hallaq 2001: 241). To be sure, reality frequently diverged from this ideal. Historians will point to examples throughout history where jurists were harshly repressed, with the complicity of their fellow legal scholars. Nonetheless, *ikhtilaf* was idealized as a core normative ethos.

Diversity of opinion was also sustained through a conceptual distinction between *shari'a* (God's way) and *fiqh* (understanding). Pre-modern jurists did not use the specific terms "*shari'a*" and "*fiqh*" – these terms came about in the contemporary

[12] Ja'fari *fiqh* constitutes another branch of Islamic jurisprudence in Shi'a Islam. For the sake of simplicity, I focus only on Sunni Islam, which comprises approximately 85 percent of the worldwide Muslim population, including the Muslim population of Malaysia.

[13] The *fatwa* is often incorrectly translated as a religious "edict," but fatwas are merely non-binding legal opinions that do not, by themselves, carry the force of law.

[14] Less commonly, muftis could pose hypothetical questions, followed by a legal opinion on the matter. For more on the *fatwa* in Islamic law and society, including dozens of historical and contemporary examples, see Masud, Messick, and Powers (1996).

era – but their writings clearly demonstrate recognition of this *conceptual* distinction. Whereas jurists consider the *shari'a* as immutable, they acknowledge the diverse body of *fiqh* opinions as the product of human engagement with the textual sources of authority in Islam. In this dichotomy, God is infallible, but human effort to know God's Will with any degree of certainty is imperfect and fallible. The norm was so valorized in the writings of jurists that they concluded their legal opinions and discussions with the statement "*wa Allahu a'lam*" (and God knows best). The phrase was meant to acknowledge that no matter how sure one is of her or his analysis and argumentation, only God ultimately knows which conclusions are correct. The distinction between God's perfection and human fallibility asked of jurists to acknowledge that competing legal opinions from other scholars, or from other schools of jurisprudence, may also be correct. As Hallaq (2009: 27) relates, "for any eventuality or case, and for every particular set of facts, there are anywhere between two and a dozen opinions, if not more, each held by a different jurist... there is no single legal stipulation that has monopoly or exclusivity."

But what are lay Muslims to do with so many differing opinions on offer? Most jurists hold that lay Muslims are obliged to follow the fatwas of their chosen school of jurisprudence through the principle of *taqlid*, a term that means "to follow (someone)."[15] The principle recognizes the fact that lay Muslims do not have the requisite expertise to engage in *ijtihad*, leaving them dependent on the guidance of scholars who do.[16] Nonetheless, the conceptual distinction between the *shari'a* and *fiqh* helps delimit the relationship between experts in Islamic jurisprudence and lay Muslims. Because human understanding of God's Will is unavoidably fallible, the authority of a scholar can never be understood as absolute. A *fatwa* merely represents the legal opinion of a fallible scholar; it is not considered an infallible statement about the Will of God.

The distinction between the *shari'a* and *fiqh* also provides a rationale for change over time (Johansen 1999; Weiss 1992; Abou El Fadl 2001; Hallaq 2009). Whereas God's Way is considered immutable, *fiqh* is regarded as dynamic and responsive to the varying circumstances of the Muslim community across time and space.[17] According to Hallaq, "Muslim jurists were acutely aware of both the occurrence of, and the need for, change in the law, and they articulated this awareness through such maxims as 'the fatwa changes with changing times'... or through the explicit

[15] The specific *mathhab* that one follows is often a function of geography and one's local religious community. In some regions, there may be a dominant or "official" *mathhab*, while there may be several in other regions.

[16] Abou El Fadl (2001: 50–53) maintains that this religious authority is not unconditional and that it is incumbent on lay Muslims to evaluate a scholar's qualifications, sincerity, and reasoning to the best of their ability. If an individual believes that the reasoning of another scholar or even another school of jurisprudence is closer to the Will of God, he is obliged to follow his conscience, as he alone must ultimately answer to God.

[17] "Shari'ah as a moral abstract is immutable and unchangeable, but no Muslim jurist has ever claimed that *fiqh* enjoys the same revered status" (Abou El Fadl 2001: 76).

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notion that the law is subject to modification according to 'the changing of the times or to the changing conditions of society.'"[18]

Another conceptual distinction, this time between *fiqh* and *siyasa*, is also worth noting.[19] Whereas *fiqh* is the diverse body of legal opinions produced by scholars primarily outside of the state, *siyasa* constituted the realm of policy, backed by coercive political authority. The *fiqh/siyasa* distinction is probably best understood as a longstanding doctrinal concern rather than an accurate description of law in action. The distinction is itself likely an artifact of how jurists wished to see themselves and their work (as independent from the machinations of power) rather than an accurate representation of realities on the ground. The *fiqh/siyasa* distinction is, in other words, part of the "idealized cosmology" (Chaudhry 2013: 11) developed by jurists.

In any case, more important than what Islamic legal theory had to say about pluralism and legal change were the practical realities of pre-modern governance. State capacity was limited in the pre-modern era. This began to change, however, with new technologies of governance. In the Ottoman Empire, legal codification and a variety of administrative reforms were introduced to repel rising European powers and incipient challenges from within the Empire. In other cases, such as that of Malaya, legal codification and state-building were intimately tied to colonial rule (Hussin 2016; Massoud 2013). Legal codification and administrative innovations enabled states to regulate their societies in a far more systematic and disciplined manner. To be sure, a growing body of scholarship suggests that proto-state institutions had already shaped the development and application of Islamic law well before the arrival of the modern state (Baldwin 2017; Burak 2015; Ibrahim 2015; Stilt 2011). But there was no administrative apparatus that applied uniform legal codes in the way that we now take for granted (Jackson 1996). The speed and extent of this transformation is evident in the rapid expansion of state power on the Malay Peninsula in the 19th and 20th centuries.

CODIFICATION AS THE DEATH OF PLURALISM

Although Islam spread through the Malay Peninsula beginning in the fourteenth century, the institutionalization and bureaucratization of Islamic law is a more recent development.[20] Religious and customary norms were primarily socially embedded at the local level in the pre-colonial era. Religious leaders were "those members of village communities who, for reasons of exceptional piety or other

[18] Hallaq 2001: 166.

[19] For more on the relationship between *fiqh* and *siyasa*, see Vogel (2000), Quraishi (2006), and Stilt (2011).

[20] According to Peletz, "despite the references to Islamic law that exist in fifteenth-century texts such as the *Undang-Undang Melaka*, there is little if any solid evidence to indicate widespread knowledge or implementation of such laws in the Malay Peninsula prior to the nineteenth century" (2002: 62).

ability, had been chosen by the community to act as imam of the local mosque, or the court imam . . . ."[21] The colonial period marked an important turning point for the institutionalization, centralization, and bureaucratization of religious authority in the Malay Peninsula.[22]

The British first gained control of port cities for trade and commerce in Penang (1786), Singapore (1819), and Malacca (1824).[23] Together, the three outposts formed the Straits Settlements, which were later ruled directly as a Crown colony beginning in 1867. Separately, Britain established protectorates in what would come to be known as the Federated Malay States of Perak, Negeri Sembilan, Pahang, and Selangor, and the Unfederated Malay States of Johor, Kedah, Kelantan, Perlis, and Terengganu. The British first established its system of "indirect rule" in Perak. There, the British recognized Raja Abdullah as the Sultan of Perak in return for an agreement that the advice of a British Resident "must be asked and acted upon on all questions other than those touching Malay religion and custom . . . ." (Maxwell and Gibson 1924: 28–29; See Hussin 2007; 2016 for additional context). The Treaty of Pangkor and analogous treaties left local rulers to oversee religious and customary law, while English common law governed all other aspects of commercial and criminal law. By the early twentieth century, the whole of the Malay Peninsula was brought under similar agreements, as Britain extended its control and local rulers accommodated to consolidate their power vis-à-vis local competitors (Hussin 2016).

With a free hand in the Straits Settlements (which were ruled directly), the British issued a "Muhammadan Marriage Ordinance" in 1880. Special courts for Muslim subjects were established as a subordinate part of the judicial system in 1900.[24] Jurisdiction of the Muslim courts was limited to family law matters, and decisions were subject to appeal before the High Courts, which functioned under British common law (Horowitz 1994: 256). With British assistance and encouragement, similar Muhammadan marriage enactments went into force in Perak (1885), Kedah (1913), Kelantan (1915), and most other states of British Malaya.[25] Additional laws organized court functions and specified select criminal offenses.[26] State-level religious councils (*Majlis Agama Islam*) and departments of religious affairs (*Jabatan Agama Islam*) were also established. According to Roff (1967: 72), these institutional

[21] "In the realm of religious belief, as in that of political organization, the Malay state as a rule lacked the resources necessary for centralization of authority" (Roff 1967: 67).

[22] See Roff (1967), Hooker (1984), Horowitz (1994), Hussin (2007), Lindsey and Steiner (2012).

[23] Britain gained control of Malacca by way of the Anglo-Dutch Treaty, which had divided the Malay Archipelago between Britain and the Netherlands.

[24] Straits Settlements Enactment 5 of 1880. The first iteration of this ordinance carried the spelling "Mahomedan" while later iterations used the spelling "Muhammadan."

[25] There were exceptions. Johore adopted a version of the Ottoman Mejelle in the early 20th century (Horowitz 1994: 255), which underlines the fact that the move towards codification was not simply a function of colonial rule, but was rather a function of state-building through this period more generally.

[26] For an example, see the Muhammadan Offenses Enactment of Selangor (1938).

transformations produced "an authoritarian form of religious administration much beyond anything known to the peninsula before."

> A direct effect of colonial rule was thus to encourage the concentration of doctrinal and administrative religious authority in the hands of a hierarchy of officials directly dependent on the sultans for their position and power . . . . By the second decade of the twentieth century Malaya was equipped with extensive machinery for governing Islam. (Roff 1967: 72–73)

The introduction of codified law, new legal concepts and categories, and English-style legal institutions all marked a significant departure from practices that had varied widely across the Malay Peninsula. The new legal regime was also incongruent with core epistemological assumptions of *usul al-fiqh*. The term "Anglo-Muslim law" is used to describe this peculiar melding of legal traditions. The law was "Anglo" in the sense that the concepts, categories, and modes of analysis followed English common law, and it was "Muslim" in the sense that it applied to Muslim subjects. As such, Anglo-Muslim law was an entirely different creature from classical Islamic law.[27] As Hooker explains, by the beginning of the twentieth century, "a classically-trained Islamic jurist would be at a complete loss with this Anglo-Muslim law" whereas "a common lawyer with no knowledge of Islam would be perfectly comfortable" (Hooker 2002: 218). Passages from religious texts were sometimes cited to support the rationale for particular court decisions, but the mode of legal analysis was English common law. Hooker explains, "'Islamic law' is really Anglo-Muslim law; that is, the law that the state makes applicable to Muslims" (2002: 218).

Islam was not the only religious tradition that was appropriated by the state in this fashion. Just as "Anglo-Muslim law" was applied to Muslim subjects, "Anglo-Hindu law" and "Chinese customary law" codes were developed for ethnic Chinese and ethnic Indian subjects.[28] The tremendous ethnic, linguistic, and religious diversity within each of these communities was flattened by these monolithic legal categories, at least for the purpose of state law.

"Muhammadan law" may have been an invention of colonialism, but a second wave of "Muslim law" enactments from the early 1950s to mid-1960s carried Anglo-Muslim law into the independence period. The Administration of Muslim Law Enactment of Selangor (1952) provided a unified code to govern all aspects of law that applied to Muslims, replacing earlier legislation that had been issued in a piecemeal fashion. The Enactment delineated the membership, functions, and powers of a *Majlis Ugama Islam dan Adat Istiadat Melayu* (Council of Religion and

[27] Hussin (2007: 777) explains that " . . . the particular type of plurality that was achieved looked less like the coexistence of separate but equal elements of different legal systems within one structure than it resembled a peculiar legal Frankenstein creature – different functional elements pieced together to achieve a singular and unique purpose, the other parts of each system discarded by design."

[28] For more on Anglo-Hindu and Chinese customary law in British Malaya, see Hooker (1975: 158–181).

Malay Custom); regulations concerning marriage, divorce, and criminal offenses; and the functions and procedures of the courts. Similar enactments were adopted in Terengganu (1955), Pahang (1956), Malacca (1959), Penang (1959), Negeri Sembilan (1960), Kedah (1962), Perlis (1964), and Perak (1965).[29]

All of this is not to say that there were no other visions of Islam and Islamic law from this point forward. It is only to say that state institutions demonstrated an increasing capacity to define, authorize, and enforce Anglo-Muslim law over other formations.

NAMING AS A MEANS OF CLAIMING ISLAMIC LAW

In addition to codification and vastly increased specificity in the law, there was an important shift in the way that Anglo-Muslim law was presented to the public beginning in the 1970s. Until that time, Anglo-Muslim family law had been grounded in substantive aspects of custom and *fiqh*, but there was little pretense that the laws themselves constituted "shariah." For example, the 1957 Federal Constitution outlined a role of the states in administering "Muslim law" as did the state-level statutes that regulated family law. However, a constitutional amendment in 1976 replaced each iteration of "Muslim law" with "Islamic law."[30] Likewise, every mention of "Muslim courts" was amended[31] to read "Syariah courts."[32] The same semantic shift soon appeared in statutory law. The *Muslim* Family Law Act became the *Islamic* Family Law Act; the Administration of *Muslim* Law Act became the Administration of *Islamic* Law Act; the *Muslim* Criminal Law Offenses Act became the *Syariah* Criminal Offenses Act; the *Muslim* Criminal Procedure Act became the *Syariah* Criminal Procedure Act, and so on.[33]

Why is this important? In these amendments, the new terminology exchanged the *object of the law* (Muslims) for the purported *essence of the law* (as "Islamic"). This semantic shift is an example of what Erik Hobsbawm (1983) calls "the invention of tradition." The authenticity of the Malaysian "shariah" courts is premised on fidelity to the Islamic legal tradition. Yet, the Malaysian government constituted Islamic law

[29] Administration of Muslim Law Enactment of Terengganu (1955), Administration of Muslim Law Enactment of Pahang (1956), Administration of Muslim Law Enactment of Malacca (1959), Administration of Muslim Law Enactment of Penang (1959), Administration of Muslim Law Enactment of Negeri Sembilan (1960), Administration of Muslim Law Enactment of Kedah (1962), Administration of Muslim Law Enactment of Perlis (1964), Administration of Muslim Law Enactment of Perak (1965).

[30] As per Article 160A of the Federal Constitution, the official version of the Constitution is in English. Article 160B provides that the Yang di-Pertuan Agong can prescribe a Bahasa Malaysia version as authoritative, but Article 160B has not been utilized to date.

[31] Act A354, section 45, in force from August 27, 1976.

[32] In Malaysia, "shariah" is transliterated "syariah." For simplicity and reader familiarity, I use "shariah" except when citing a direct quotation, or when referring to federal acts and state enactments.

[33] I refer here to the Acts currently in force in the Federal Territories, but the same shift in terminology is evident in most state jurisdictions.

in ways that are in significant tension with the plural and open-ended orientation of *usul al-fiqh*. It should be remembered that the distinct form of Anglo-Muslim law is less than a century old. But every reference to state "fatwas" or the "shariah courts" serves to strengthen the state's claim to embrace the Islamic legal tradition. Indeed, the power of this semantic construction is underlined by the fact that even in a critique such as this, the author finds it difficult, if not impossible, to avoid using these symbolically laden terms. As Shahab Ahmed (2016: 107) explains: "How and when we use the word 'Islamic' is important because the act of naming is a meaningful act: the act of naming is an act of identification, designation, characterization, constitution, and valorization." When naming the shariah court system or examining court cases in subsequent chapters, I must use the terms "shariah high court," "fatwa committee," "state mufti," and so on. It is with the aid of semantic shifts and visual cues that the government presents the shariah courts as a faithful rendering of the Islamic legal tradition.[34] Indeed, they are presented as the *only* possible rendering of Islam, as underlined by the criminalization of differing views. Walton (2001) shows that "persuasive definitions" such as these have considerable power when they are "deployed to serve the interest of the definer."[35]

It is instructive that at the same moment the Malaysian state recast Anglo-Muslim law as "Islamic law," the government was getting out of the business of regulating religious/customary law for non-Muslims by way of the Marriage and Divorce Act of 1976. As previously noted, there had existed five separate statutes on marriage and customary law for ethnic Chinese, Hindus, and natives of Sabah and Sarawak. In place of this pluri-legal arrangement, family law for *all* non-Muslims was henceforth governed by a unified civil family law code. Only Anglo-Muslim family law (now "Islamic law") remained on a separate judicial track, rebranded as state level "shariah courts."[36]

This semantic shift was likely an effort to endow Muslim family law and Muslim courts with a more pronounced religious facade to burnish the government's religious credentials. The change in terminology came during a period when the *dakwah* movement was picking up considerable steam in Malaysian political life. The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s.[37] The Malaysian Islamic Youth Movement (*Angkatan Belia Islam Malaysia* – more popularly known by its acronym, ABIM) also formed in August 1971, heralding a new era of grassroots opposition. UMNOs central political challenge was to defend itself

[34] My focus here is on terms such as "Islamic law" and "syariah courts," but the courts themselves are replete with visual symbols that are designed to achieve the same effect. For parallel examples in corporate settings, see Sloan-White (2017) on the corporate *sharia* elite.

[35] See also, Stevenson (1944) and Schiappa (2003).

[36] For more context on the formation of a unified, non-Muslim family law code, see Siraj (1994).

[37] PAS entered into the Alliance coalition in the 1974 elections but nonetheless continued to press for further Islamization within the ruling coalition.

against the constant charge that the government was not doing enough to advance Islam.

UMNO began to pursue its own Islamization program in the mid-1970s with the establishment of a Federal Religious Council, an Office of Islamic Affairs, and an Islamic Missionary Foundation (Noor 2004: 267).[38] Initiatives such as these only accelerated in the 1980s under the leadership of Mahathir Mohammad (1981–2003). A shrewd politician, Mahathir sought to co-opt the ascendant *dakwah* movement to harness the legitimizing power of Islamic symbolism and discourse (Nasr 2001; Liow 2009). During his twenty-two years of rule, the religious bureaucracy expanded at an unprecedented rate and Islamic law was institutionalized to an extent that would have been unimaginable in the pre-colonial era (Hamayatsu 2005). The National Council for Malaysian Islamic Affairs was enlarged and elevated into a division within the Prime Minister's office in 1985. It was then elevated and expanded once more in 1997, taking the current name, the Department of Islamic Development Malaysia (*Jabatan Kamajuan Islam Malaysia*), better known by its acronym JAKIM. New state institutions proliferated, such as the Institute of Islamic Understanding (*Institut Kefahaman Islam Malaysia*, IKIM) and the International Islamic University of Malaysia (IIUM). Primary and secondary education curricula were revised to include more material on Islamic civilization, and radio and television content followed suit (Camroux 1996; Barr and Govindasamy 2010). But it was in the field of law and legal institutions that the most consequential innovations were made.

THE STATE'S MONOPOLY ON ISLAMIC LAW

A plethora of new legislation was issued at the state and federal levels in the 1980s and 1990s that formalized substantive and procedural aspects of Anglo-Muslim law even more than the second wave of Muslim law enactments from the 1950s and 1960s.[39] The most recent iteration of family law enactments (those in force today) grew out of an effort to provide more consistency across state jurisdictions. The effort to forge a uniform family law ultimately failed, but state governments vastly increased the level of specificity in their Muslim family law codes in the process.[40]

The magnitude of this shift is apparent in the word count of the relevant section of the Islamic Family Law Act (1984), which replaced the Selangor Administration of Muslim Law Enactment (1952) in the newly created Federal Territories.[41] The 1952

[38] The Islamic Missionary Foundation is charged with promoting Islam at home and abroad.

[39] I focus on the acts in force in the Federal Territories, for the sake of brevity and because state-level enactments are modeled on federal-level acts.

[40] The effort to forge a uniform family law was an attempt to provide more consistency across state jurisdictions to prevent forum shopping on issues such as divorce and registration of polygamous marriages.

[41] The Federal Territory of Kuala Lumpur constituted a new, federal-level jurisdiction beginning in 1974. Prior to its incorporation as a federal territory in 1974, Kuala Lumpur was part of the State of

Selangor Enactment carried 3,400 words in the section dealing with family law, while the 1984 Islamic Family Law Act carried more than 20,000 words – nearly a six-fold increase. The main aspect accounting for the difference in length is that the earlier Selangor Enactment had left many provisions to be determined " ... in accordance with Muslim law" while the Islamic Family Law Act and parallel state enactments provided far more specificity on what "Muslim law" entailed. More than ever, judges were required to simply apply legal code and abstain from independent inquiry in pursuit of what "Muslim law" might entail. The vastly increased specificity in Muslim family law and the formalization of shariah court functions suggests that judges began to enjoy less discretion. Indeed, Peletz's (2015) anthropological account of the same court across three decades confirms that these sweeping legal and institutional reforms had profound effects on the day-to-day operation of the shariah courts.[42]

Activists welcomed many of the provisions in the 1984 Islamic Family Law Act as progressive advances for women's rights (Zainah Anwar 2008). But they protested subsequent amendments that made it more difficult for women to secure divorce, placed women in a weaker position in the division of matrimonial assets, and provided women with fewer rights in terms of child custody and maintenance (Badlishah 2003; Zainah Anwar and Rumminger 2007).[43] These provisions were in tension with Article 8 (1) of the Federal Constitution, which states "All persons are equal before the law and entitled to the equal protection of the law." However, Article 8 (5) (A) clarifies that "This Article does not invalidate or prohibit any provision regulating personal law." Because of this constitutional bracketing, women are unable to challenge the constitutionality of these provisions.

It should be emphasized that none of these stipulations are unambiguously "Islamic." Indeed, women's rights activists field powerful arguments from within the framework of Islamic law for why these provisions can and must be understood as betraying the core values of justice and equality in Islam. Yet, with the semantic

Selangor and was therefore governed by the Muslim Law Enactment of Selangor. The 2003 Selangor Islamic Family Law Enactment follows the Act for the Federal Territories almost verbatim.

[42] As late as the 1980s, the Muslim courts had demonstrated "a pronounced concern with consensus, reconciliation, and compromise (*muafakat*, *persesuaian*, *persetujuan*) ... " Peletz goes on to explain that "The Islamic magistrate does, of course, adjudicate the cases brought before him, but before doing so the magistrate and members of his staff try to settle cases through the less formal and less binding processes of mediation and arbitration" (Peletz 2002: 85). The location of this court in Rembau, Negeri Sembilan, suggests that these changes affected the shariah court system not only in urban centers, but in its entirety.

[43] Specifically, Article 13 required a woman to have her guardian's consent to marry (regardless of her age) while men had no similar requirement. Article 59 denied a wife her right to maintenance or alimony if she "unreasonably refuses to obey the lawful wishes or commands of her husband." Articles 47–55 made it easy for a husband to divorce his wife, while women faced lengthy court procedures when they did not have their husband's consent. Article 84 granted custody to the mother until the child reaches the age of seven (for boys) or nine (for girls), at which time custody reverts to the father. Moreover, Article 83 detailed conditions under which a mother could lose her limited custody due to reasons of irresponsibility, whereas no such conditions were stipulated for fathers.

shifts from "Muslim law" to "Islamic law," and "Muslim court" to "Syariah court," the law was endowed with a new religious facade.

Around the same time as these reforms, the training of shariah court judges and lawyers followed suit. The curriculum focused on the mastery of legal codes and their proper application, rather than the ability to engage in classical modes of reasoning.[44] The International Islamic University of Malaysia (IIUM) was the first to establish a formal, one-year training and certification program for shariah court judges in 1986. But rather than bringing scholars with expertise in *usul al-fiqh*, courses were taught by retired civil court judges with no background in Islamic legal theory (Horowitz 1994: 261). More programs were established in the years that followed, but the focus on codes and their proper application remained the primary emphasis for those staffing the shariah courts.[45]

The new Islamic Family Law Act and parallel state-level enactments were only the tip of the iceberg. The most striking features of the Malaysian legal system is the extent to which state and federal authorities claim a monopoly on religious interpretation. The Administration of Islamic Law Act and parallel state-level enactments impose a monopoly on religious interpretation. The Islamic Religious Council (*Majlis Agama Islam*), the Office of the Mufti, and the Islamic Legal Consultative Committee wield absolute authority in this regard.[46] Yet, surprisingly, those who staff these bodies are not required to have formal training in Islamic jurisprudence.[47] Only six of the twenty-one members of the Islamic Religious Council are required to be "persons learned in Islamic studies."[48] Similarly, although the Islamic Legal Consultative Committee is charged with assisting the Mufti in issuing *fatwas*, committee members are not required to have formal training in Islamic law.[49]

[44] This transformation in the curriculum and training in Islamic law is a familiar story elsewhere. See Cardinal (2005).

[45] For a treatment of the training and education of shariah court judges and lawyers in Malaysia, see Whiting (2012) and Zin (2012).

[46] Articles 4–31 of the Administration of Islamic Law Act empower the Islamic Religious Council of the Federal Territories (*Majlis Agama Islam Wilayah Persekutuan*). This Council is composed mostly of officials who are appointed by the Yang di-Pertuan Agong who is elected from among the nine hereditary state rulers. The office of Mufti is similarly appointed by the Supreme Head of State in consultation with the Islamic Religious Council (Article 32). Finally, an Islamic Legal Consultative Committee is charged with assisting the Mufti in issuing *fatwas* in Article 37.

[47] Article 10 states that "The Majlis shall consist of the following members: (a) a Chairman; (b) a Deputy Chairman; (c) the Chief Secretary to the Government or his representative; (d) the Attorney General or his representative; (e) the Inspector-General of Police or his representative; (f) the Mufti; (g) the Commissioner of the City of Kuala Lumpur; and (h) fifteen other members, at least five of whom shall be persons learned in Islamic studies."

[48] The criteria for what constitutes a person "learned in Islamic studies" are not specified, but it is doubtful that formal training in classical jurisprudential method (*usul al-fiqh*) is part of this requirement.

[49] The Islamic Legal Consultative Committee consists of "(a) the Mufti, as Chairman; (b) the Deputy Mufti; (c) two members of the Majlis nominated by the Majlis; (d) not less than two fit and proper

Even the office of the Mufti merely specifies that officeholders should be "fit and proper persons," without further explanation.[50]

Despite these vague requirements, the powers provided to these state religious authorities are extraordinary. Most significantly, the Mufti is empowered to issue *fatwas* that, upon publication, are "binding on every Muslim resident in the Federal Territories."[51] Accordingly, *fatwas* in the contemporary Malaysian context do not serve as nonbinding opinions from religious scholars as in classical Islamic jurisprudence; rather, they carry the force of law and are backed by the full power of the Malaysian state.[52] Moreover, the Administration of Islamic Law Act allows this lawmaking function to bypass legislative institutions such as the Parliament.[53] Other elements of transparency and democratic deliberation are also excluded by explicit design. For example, Article 28 of the Act declares, "The proceedings of the Majlis shall be kept secret and no member or servant thereof shall disclose or divulge to any person, other than the Yang di-Pertuan Agong [Supreme Head of State] or the Minister, and any member of the Majlis, any matter that has arisen at any meeting unless he is expressly authorized by the Majlis." In other words, the Administration of Islamic Law Act subverts not only basic principles of Islamic legal theory, but also the foundational principles of liberal democracy that are enshrined in the 1957 Constitution, by denying public access to the decision-making process that leads to the establishment of laws.

The Shariah Criminal Offences Act (1997) further consolidates the monopoly on religious interpretation established in the Administration of Islamic Law Act. Article 9 criminalizes defiance of religious authorities:

> Any person who acts in contempt of religious authority or defies, disobeys or disputes the orders or directions of the Yang di-Pertuan Agong as the Head of the religion of Islam, the Majlis or the Mufti, expressed or given by way of *fatwa*, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Article 12 criminalizes the communication of an opinion or view contrary to a *fatwa*:

> Any person who gives, propagates or disseminates any opinion concerning Islamic teachings, Islamic Law or any issue, contrary to any *fatwa* for the time being in force in the Federal Territories shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

persons to be appointed by the Majlis; and (e) an officer of the Islamic Religious Department of the Federal Territories to be appointed by the Majlis, who shall be the Secretary."

[50] Article 32. [51] Article 34.

[52] Article 34 goes on to state "[a] fatwa shall be recognized by all Courts in the Federal Territories as authoritative of all matters laid down therein."

[53] The Malaysian Parliament passed the Administration of Islamic Law Act into law, implying that this elected body maintains an oversight function. Practically speaking, however, fatwas acquire legal force without public scrutiny or periodic review by Parliament.

Article 13 criminalizes the distribution or possession of a view contrary to Islamic laws issued by religious authorities:

> (1) Any person who *(a)* prints, publishes, produces, records, distributes or in any other manner disseminates any book, pamphlet, document or any form of recording containing anything which is contrary to Islamic Law; or *(b)* has in his possession any such book, pamphlet, document or recording, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

This state monopoly is also advanced through the structure of the shariah court system itself, which is meant to achieve uniformity in legal application. The Administration of Islamic Law Act and parallel state-level enactments establish a hierarchy in the shariah court judiciary akin to the institutional structure that one would find in common law and civil law systems.[54] Articles 40 through 57 of the Administration of Islamic Law Act establish Shariah Subordinate Courts, a Shariah High Court, and a Shariah Appeal Court. While the concept of appeal is not entirely alien to the Islamic legal tradition, there is little precedent for hierarchical judicial structures prior to the emergence of the modern state (Powers 1992). This innovation is far from trivial given that hierarchy in judicial institutions is designed to achieve a political logic: appellate court structures secure legal uniformity and "the downward flow of command" (Shapiro 1980: 643; Shapiro 1981: 51–52). This is precisely the opposite dynamic of that which we observe in the Islamic legal tradition, where jurisprudence evolved in a bottom-up and pluralistic manner, rather than top-down and uniform (Masud, Messick, and Powers 1996: 4).

It is not only the structure of the shariah court system that resembles the English common law model. Procedural codes also follow suit. The Shariah Criminal Procedure Act (1997) and the Shariah Civil Procedure Act (1997) borrow extensively from the framework of the civil courts in Malaysia. The drafting committee copied the codes of procedure wholesale, making only minor changes where needed. Placed side by side, one can see the extraordinary similarity between the documents, with whole sections copied verbatim. Abdul Hamid Mohamad, a legal official who eventually rose to Chief Justice of the Federal Court, was on the drafting committees for the various federal and state shariah procedures acts and enactments in the 1980s and 1990s. He candidly described the codification of shariah procedure as follows:

> We decided to take the existing laws that were currently in use in the common law courts as the basis to work on, remove or substitute the objectionable parts, add whatever needed to be added, make them Shari'ah-compliance [sic] and have them enacted as laws. In fact, the process and that "methodology," if it can be so called, continue until today.

[54] State-level administration of Islamic law enactments largely mirrors the Administration of Islamic Law Act in force in the Federal Territories. For simplicity, I refer only to the federal act.

> The provisions of the Shari'ah criminal and civil procedure enactments/act are, to a large extent, the same as those used in the common law courts. A graduate in law from any common law country reading the "Shari'ah" law of procedure in Malaysia would find that he already knows at least 80% of them . . . a common law lawyer reading them for the first time will find that he is reading something familiar, section by section, even word for word. Yet they are "Islamic law." (Mohamad 2008: 1–2, 10)[55]

Abdul Hamid Mohamad and others involved in the codification of shariah court procedures did not have formal education in Islamic jurisprudence or Islamic legal theory. Abdul Hamid's degree was from the National University of Singapore where he studied common law, yet he was centrally involved in the entire process of institutionalizing the shariah courts. Ironically, the "Islamization" of law and legal institutions in Malaysia was not a project of the traditional *'ulama*. Rather, it was a project of state officials like Abdul Hamid Mohamad, who lacked formal training or in-depth knowledge of Islamic legal theory.[56] The relative lack of training and familiarity with *usul al-fiqh* may be one reason why these officials pursued such reforms with the conviction that they were advancing the position of Islam in the legal system.

In addition to this binding monopoly on the interpretation of Islamic law, the Malaysian government built a significant infrastructure for delivering its state-sanctioned understanding of Islam. Witness that fifty-six deviant sects (including Shia Islam) have been outlawed. In the Federal Territories, the Administration of Islamic Law Act also establishes a monopoly on the administration of mosques, including the trusteeship and maintenance of all existing mosques (Articles 72 and 74), the erection of new mosques (Article 73), and the appointment and discipline of local imams (Articles 76–83).[57] More than this, federal and state agencies dictate the content of Friday sermons (*khutab*).[58] Imams, already on the government payroll and licensed by the state, are also monitored and disciplined if they veer too far from state-proscribed mandates.[59] Combined with the extensive reach of the state in other areas, such as public education, television and radio programming, and quasi-independent institutions such as IKIM (Institute for Islamic

[55] Abdul Hamid Mohamad related the same details in a personal interview on November 17, 2009.

[56] More on Abdul Hamid Mohamad's background can be found in his autobiography (Abdul Hamid Mohamad 2016).

[57] For similar dynamics in other Muslim-majority countries, see Moustafa (2000) and Wiktorowicz (2001).

[58] (Sing. *Khutbah*, pl. *khutab*). *Khutab* are written by the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia*—JAKIM). Parallel agencies (such as *Jabatan Agama Islam Negeri Selangor* —JAIS) provide additional *khutab* for each state respectively. JAKIM *khutab* are archived at http://www.islam.gov.my/e-khutbah (last accessed 8/1/2016). Earlier, JAKIM archived *khutbah* going back to 2003 at http://www.islam.gov.my/khutbah-online (last accessed April 3, 2015) but this link has since been removed. For an analysis of the content of these *khutab*, see Mohd Al Adib Samuri and Hopkins (2017).

[59] For example, see *Malaysiakini*, August 3, 2012. "Jais monitoring 38 'hot mosques' following protest."

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Understanding), the state plays a prominent role in shaping popular understandings of Islam.[60]

STATE POWER, SECULARISM, AND THE POLITICS OF ISLAMIC LAW

This chapter opened with the observation that Malaysia ranks among the top countries worldwide in the degree of state regulation of religion. From this vantage point, Malaysia appears to be the antithesis of a secular state and the realization of a religious state, at least for the sixty percent of Malaysian Muslims who are subject to such rules and regulations. Aspects of religion and governance are clearly intertwined in Malaysia, but the Malaysian case illustrates how the simple dichotomy of "secular" versus "religious" can obfuscate more than it reveals. As recent work shows (e.g., Asad 2003; Agrama 2011; Dressler and Mandair 2011), the secular/religious binary takes its own starting point for granted and overlooks the ways that *both* categories are constructed as mirror opposites along with the expanding regulatory capacity of the modern state.

This secular/religious dichotomy provides a particularly poor schema through which to understand state incorporation of Islamic law. Perhaps most obviously, the conventional labels of "religious" and "secular" impose a binary with zero-sum properties. At any given point, the religious and the secular are imagined to be in an uneasy truce, a state of simmering tension, or an all-out struggle for supremacy. An advance for one is a loss for the other. Indeed, the two most common narratives of Islam and politics in contemporary Malaysia depict an otherwise secular state capitulating to pressure and adopting Islamic law, or, alternately, proactively and instrumentally harnessing Islamic law for political advantage.[61] While both readings capture important dynamics in the competition over religious authority, these sorts of arguments tend to present Islamic law along a zero-sum continuum. At any given moment Malaysia is understood as being somewhere on a continuum between a "secular" and "religious" state. Media frames and popular political discourse cycle through the same tropes ad nauseam, incessantly asking the anxious question of whether Malaysia is, will become, or was ever meant to be a "secular state" or an "Islamic state."[62] This is not to deny the fact that Malaysians have divergent visions for the future of their country. And this is not to minimize the very real consequences that these political struggles have for individual rights, deliberative democracy, and a host of other important issues. It is only to say that the secular/religious schema too often assumes a unidimensional and ahistorical conception of Islamic law and, therefore, implicitly accepts the state's claim to Islamic law at face value. Anxiety

[60] These efforts are likely an important reason why most "everyday Malaysians" tend to understand Islamic law as being uniform and fixed, rather than pluralistic and responsive to local conditions. For survey results on these and related issues, see Moustafa (2013a).

[61] These arguments are well documented in Liow (2009).

[62] Agrama (2012) identifies precisely the same anxieties in his important book on secularism in Egypt.

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over "how much" Islamic law is incorporated as state law too often assumes that the content is consistent with Islamic legal theory in the first place.

As select fragments of *fiqh* are constituted in state law, no space is left for the interpretive method that undergirds Islamic jurisprudence. These institutional configurations collapse important conceptual distinctions between the *shariah* (God's way) and *fiqh* (human understanding), facilitating the state's claim to "speak in God's name" (Abou El Fadl 2001). By monopolizing interpretation, codifying select fragments of *fiqh*, and deploying those laws through state institutions, the Malaysian state is "judging in God's name" (Moustafa 2014a). The religious councils, the shariah courts, and the entire administrative apparatus are Islamic in name, but they are modeled on the Malaysian civil courts. A deep paradox is at play: the legitimacy of the religious administration rests on the emotive power of Islamic symbolism, but its principal mode of organization and operation is fundamentally rooted in the Weberian state. What is commonly taken for Islamic law in Malaysia is simply what the state declares Islamic law to be. Seen in this light, the intense controversies around shariah versus civil court jurisdictions (examined in Chapters 4–6) should not be taken as the product of an essential or inevitable conflict between Islam (or Islamic law) and liberal rights, but rather as a tension between two parallel tracks of state law.