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Malaysia ranks sixth out of 175 countries worldwide in the degree of state regulation of religion. The Malaysian state enforces myriad rules and regulations in the name of Islam and claims a monopoly on the interpretation of Islamic law. However, this should not be understood as the implementation of an 'Islamic' system of governance or the realization of an 'Islamic state'. Rather, the Malaysian case provides a textbook example of how government efforts to monopolize Islamic law necessarily subvert core epistemological principles in the Islamic legal tradition. As such, Malaysia provides an important opportunity to rethink the relationship between the state, secularism and the politics of Islamic law.

Malaysia ranks sixth out of 175 countries worldwide in the degree of state regulation of religion.[1] Only Egypt, Iran, Jordan, Saudi Arabia, an4.1(B)ut over an
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[3] From this vantage point, Malaysia appears as a

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[1] This is the ranking for the year 2002 according to the cross-national Government Involvement in Religion measure developed by Jonathan Fox. It should be noted that Fox's study may underestimate the level of regulation in Malaysia, as several indicators appear to be miscoded, including the appointment and funding of clergy, forced observance, religious education, religious basis of personal status laws and restrictions on the publication of religious materials, among others. Jonathan Fox, *A* (CUP 2008).

[2]

religious state, at least for the 60% of Malaysian Muslims who are subject to such rules and regulations.[4] Likewise, if secularism is understood as the strict separation of religion from governance, Malaysia appears to be the antithesis of a secular state.

Few would disagree that aspects of religion and governance are intertwined in contemporary Malaysia, but the simple secular-versus-religious dichotomy tends to obfuscate the ways that religious law is transformed as a result of incorporation as state law. The imposition of select fragments of (Islamic jurisprudence) should not be understood as the implementation of an 'Islamic' system of governance, or the achievement of an 'Islamic state', for no such ideal-type exists.[5] Instead, Malaysia provides a textbook example of how core principles in - (Islamic legal theory) are as a result of state appropriation.[6] Malaysia thus provides an important opportunity to rethink the relationship between the state, secularism, and the politics of Islamic law.

This study proceeds in three parts. First, I provide the reader with a brief primer on Islamic legal theory, focusing on core features such as the locus of innovation, the place of human agency, its pluralist orientation, and the mechanisms of evolution over time. Against that backdrop, I examine how the Malaysian government institutionalized fragments of (Islamic jurisprudence) as state law in ways that mark a significant departure from core epistemological commitments in the Islamic legal tradition. With this historical and institutional context on the table, I return to the broader theoretical import of the study: the 'impossibility' of Malaysia's Islamic state, and the difficulty of effectively challenging the state monopoly on religious authority through a strictly secular frame of reference.[7]

## 1. *I L*

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.[8] For guidance, Muslims must consult the textual sources of authority in Islam: the Qur'an, which Muslims believe to be the word 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

[4] Approximately 40% of the Malaysian population is non-Muslim (19% of the national population is

inevitably produced a pluralistic legal order. In the first several centuries of Islam, schools of jurisprudence formed around leading scholars ( ') of Islamic law. Each school of jurisprudence ( ) developed its own distinct set of methods for engaging the central textual sources of authority in an effort to provide relevant guidance for the Muslim community. Techniques such as analogical reasoning ( ) and consensus ( ), the consideration of the public interest ( ), and a variety of other legal concepts and tools were developed to constitute the field of - . The legal science that emerged was one of staggering complexity and rigor, both within each 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.[9]

The engine of change within each school of jurisprudence was the private legal scholar, the , who operated within the methodological framework of his or her to perform , the disciplined effort to discern God's law. The central instrument of incremental legal change was the , a non-binding legal opinion offered by a qualified in response to a question in Islamic law.[10] Because are typically issued in response to questions posed by individuals in specific social situations, they responded to the evolving needs of particular Muslim communities in their own specific contexts.[11] In this sense, the evolution of Islamic jurisprudence was a bottom-up, not a top-down process.[12]

The Muslim legal community maintained unity within diversity through a critical conceptual distinction between the (God's way) and (understanding).[13] Whereas the was considered immutable, the diverse body of juristic opinions that constitutes was acknowledged as the product of human engagement with the textual sources of authority in Islam. In this dichotomy, God is infallible, but human efforts to know God's will with any

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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.'[14] The resulting disagreements and diversity of opinion ( ) among jurists were not understood as problematic. On the contrary, difference of opinion was embraced as both inevitable and ultimately generative in the

a foundational distinction between and was critical in this regard.[20] Whereas , as explained earlier, is the diverse body of legal opinions produced by legal scholars, constituted the realm of policy. In classical Islamic jurisprudence, rulers could give legal force to particular opinions. However, this was considered an expression of the ruler's powers, not a direct exercise of religious authority. The distinction between and helped to demarcate the sphere of religious doctrine from the sphere of public policy. Just as the distinction between and helped to distinguish divine will from human agency, the distinction between and helped to preserve the integrity of Islamic jurisprudence as an independent sphere of activity, separate from governance.

Perhaps more important than what Islamic legal theory had to say on the matter were the more practical realities of pre-modern governance. *F* had thrived, in all its diversity, largely due to the limited administrative capacity of rulers. This would soon change, however, as rulers built modern bureaucracies and expanded their ability to project state power.[21] Beginning in the late 18th century, legal codification and administrative innovations enabled the state to regulate individuals in a far more systematic and disciplined manner.[22]

## 2. *I L*

### A. *C D*

Although Islam spread through the Malay Peninsula beginning in the 14th century, the institutionalization of Islamic law in its present form is a far more recent development.[23] To the extent that Islamic law was practiced in the pre-

communities, the colonial period marked a key turning point for the institutionalization of religious authority on the Malay Peninsula.[26]

The British gained control of port cities for the purpose of trade and commerce in Penang (1786), Singapore (1819), and Malacca (1824).[27] Together, the three outposts formed the Straits Settlements, which were later ruled directly as a formal 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. By the early 20th century, all of the territory of the Malay Peninsula was brought under similar agreements as Britain sought to extend its control and local rulers sought accommodation as a means to consolidate their own power vis-à-vis local competitors.

With a free hand in the Straits Settlements, was formalized and recast as 'Muhammadan law'. A Muhammadan Marriage Ordinance was issued in 1880 to regulate Muslim family law, and courts for Muslim subjects were established as a subordinate part of the judicial system beginning in 1900.[28] Jurisdiction of the Muslim courts was limited to family law matters, and rulings were subject to appeal before the High Courts, which functioned according to English common law.[29] With British assistance and encouragement, similar

English common law, not - . Hooker explains, ‘it is not fanciful to suggest that the classical syarî’ah is not the operative law and has not been since the colonial period. ‘‘Islamic law’’ is really Anglo-Muslim law; that is, the law that the state makes applicable to Muslims.’[33]

A second wave of Muslim law enactments began with the Administration of Muslim Law Enactment of Selangor (1952). The Selangor enactment provided a unified code to govern all aspects of law that applied to Muslims, replacing earlier legislation that had been issued in piecemeal fashion. The Enactment delineated the membership, functions and powers of a

no similar requirement. Article 59 denies 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 make it simple and straightforward for a husband to divorce his wife (even outside of court), while a woman is faced with lengthy court procedures to earn a divorce without her husband's consent. Article 84 grants 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 details conditions under which a mother can lose her right to custody due to reasons of irresponsibility, whereas no such conditions are stipulated for fathers.[39] It should be emphasized that these stipulations are not unambiguously 'Islamic'. Indeed, Muslim women's rights activists field powerful arguments for why these and other provisions must be understood as betraying the core values of justice and equality in Islam.[40]

This third wave of Muslim family law statutes was arguably even further from the classical tradition in the sense that the statutes were far more detailed than those they replaced, leaving less room for judicial discretion. As late as the 1980s, the Muslim courts had demonstrated 'a pronounced concern with consensus, reconciliation, and compromise ( , , - )...'.[41] But the vastly increased specificity in Muslim family law beginning in 1984 suggests that judges may have enjoyed less discretion as a result. The training of shariah court judges followed suit, with a focus on the mastery of legal codes and their proper application, rather than the ability to engage in classical modes of reasoning in the Islamic legal tradition.[42]

## B. *C I L*

In addition to codification and increased specificity in the law, there was an important shift in the way that Anglo-Muslim law was presented to the Malaysian public beginning in the 1970s. Until that time, Anglo-Muslim family law was understood as being grounded in some substantive aspects of custom and (Islamic jurisprudence), but there was no formal pretense that the laws

[39] These provisions are in tension with Art 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, Art 8(5)(a) of the Federal Constitution specifies, 'This Article does not invalidate or prohibit any provision regulating personal law.' As a result of this legal bracketing, women are unable to challenge the constitutionality of these provisions.

[40] Malaysian women's groups operating within the framework of Islamic law face the challenge of explaining how the specific codifications of the Islamic Family Law Act have closed off many of the legal entitlements that women could legitimately claim in classical Islamic jurisprudence (Nik Noriani Nik Badlishah, *D : L I F* (International Law Book Services 2000) and 'Legislative Provisions

themselves constituted 'shariah'. The 1957 Federal Constitution, for example, outlined a role for the states in administering 'Muslim law' as did the state-level statutes that regulated family law. However, a constitutional amendment in 1976 replaced of 'Muslim law' with 'Islamic law'. Likewise, of 'Muslim courts' was amended[43] to read 'Syariah courts'.[44] The same semantic shift soon appeared in statutory law: the Family Law Act became the *I* Family Law Act; the Administration of Law Act became the Administration of *I* Law Act; the Criminal Law Offenses Act became the Criminal Offenses Act; the Criminal Procedure Act became the Criminal Procedure Act and so on.[45]

Why is this important? In all of these amendments, the shift in terminology exchanged the (Muslims) for the purported (as 'Islamic'). This semantic shift, I argue, is a prime example of what Erik Hobsbawm calls 'the invention of tradition'.[46] The authenticity of the Malaysian 'shariah' courts is premised on fidelity to the Islamic legal tradition. Yet, ironically, the Malaysian government reconstituted Islamic law in ways that are better understood as a subversion of the Islamic legal tradition. That distinct form of Anglo-Muslim law, it must be remembered, is little more 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 is difficult, if not impossible, to avoid using these symbolically laden terms. It is with the aid of such semantic shifts that the government presents the syariah courts as a faithful rendering of the Islamic legal tradition, rather than as a subversion of that tradition.[47] In this regard, a parallel may be drawn to nationalism. Just as nationalism requires a collective forgetting of the historical record in order to embrace a sense of nation, so too does shariah court authority require a collective amnesia vis-à-vis the Islamic legal tradition.[48]

steam in Malaysian political life.[49] The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s.[50] The Malaysian Islamic Youth Movement (*A B I* —more popularly known by its acronym, ABIM) also formed in August 1971, heralding a new era of grassroots opposition. UMNO's central political challenge was to defend itself against the constant charge that the government was not doing enough to advance Islam.

UMNO began to pursue its own Islamization programme in the mid-1970s with the establishment of a Federal Religious Council, an Office of Islamic Affairs and an Islamic Missionary Foundation.[51] Initiatives such as these accelerated in the 1980s under the leadership of Mahathir Mohammad (1981–2003). A shrewd politician, Mahathir sought to co-opt the ascendant movement to harness the legitimizing power of Islamic symbolism and discourse.[52] This was perhaps most famously demonstrated in his speech of 29 September 2001, when Mahathir declared that Malaysia was an Islamic state. During his 22 years of rule, the religious bureaucracy expanded at an unprecedented rate, and aspects of Islamic law were institutionalized to an extent that would have been unimaginable in the pre-colonial era. New state institutions proliferated, such as the Institute of Islamic Understanding (*I K I* , 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.[53] But it was in the field of law and legal institutions that the most consequential innovations were made.

The new Islamic Family Law Act and parallel state-level enactments were only the tip of the iceberg. A plethora of new legislation was issued at the state

interpretation. The institutionalization of religious authority can be traced back to the colonial era when state-level religious councils ( *A I* ) and departments of religious affairs (*J A I* ) were established in most states of British Malaya. According to Roff, these institutional transformations produced 'an authoritarian form of religious administration much beyond anything known to the peninsula before'.[55] This centralization of religious authority continued after independence.

The Administration of Islamic Law Act and parallel state-level enactments impose a state monopoly on religious interpretation.[56] The Islamic Religious Council ( *A I* ), the office of the Mufti, and the Islamic Legal Consultative Committee wield absolute authority in this regard.[57] Yet, surprisingly, those who staff these bodies are not required to have formal training in Islamic jurisprudence.[58] Only 6 of the 21 members of the Islamic Religious Council are required to be 'persons learned in Islamic studies'.[59] Similarly, although the Islamic Legal Consultative Committee is charged with assisting the Mufti in issuing , committee members are not required to have formal training in Islamic law.[60] Even the office of the Mufti merely specifies that officeholders should be 'fit and proper persons' without further explanation.[61]

Despite these vague requirements, the powers provided to these authorities are extraordinary. Most significantly, the Mufti is empowered to issue

completely bypass legislative institutions such as the Parliament.[64] 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 Syariah 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 , 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 : ‘Any person who gives, propagates or disseminates any opinion concerning Islamic teachings, Islamic Law or any issue, contrary to any 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.’ Article 13 criminalizes the distribution or possession of a view contrary to Islamic laws issued by religious authorities: ‘Any person who ( ) 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 ( ) 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.’ In sum, the government commands a complete monopoly over the interpretation of Islamic law.

## D. *E*

The Malaysian government has also constructed a significant legal and administrative infrastructure to shape the understanding of everyday Malaysians as to the nature of Islamic law itself. In the Federal Territories, for example, the Administration of Islamic Law Act establishes a monopoly on the administration of mosques, including the trusteeship and maintenance of

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

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).[65] More than this, federal and state agencies dictate the content of Friday sermons ( ).[66] For the Federal Territories, sermons are written and distributed by the Department of Islamic Development Malaysia (*J K I* —JAKIM), while parallel agencies perform similar roles for each state respectively. Most of the sermons address moral and ethical issues that one would expect to find in any religious setting, but others are explicitly political in orientation. Imams, already on the government payroll and licensed by the state, are monitored and disciplined if they veer too far from state-proscribed mandates.[67] Combined with the extensive reach of the state in other areas, such as public education, state television and radio programming, and quasi-independent institutions such as IKIM (Institute for Islamic Understanding), the government controls a formidable set of resources for shaping public understandings of Islam.[68]

The state also wields disciplinary institutions to enforce its state sanctioned version of Islamic law.[69] As examined earlier in the context of family law, 'shariah' courts apply the state's monopoly interpretation of Islamic law, which are, by definition, select readings of a wide body of classical jurisprudence. Yet the judicial institutions through which these rules are applied operate according to an English common law model. That is, 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. Articles 40 through 57 of the Act establish Shariah Subordinate Courts, a Shariah High Court and a Shariah Appeal Court. While the concept of appeal is not completely alien to the Islamic legal tradition,[70] there is little or no precedent for the hierarchical structure of the shariah judiciary from within the Islamic legal tradition. It is important to note that there is a logic to judicial hierarchy in the common law tradition, upon which the shariah courts are modelled. Judicial hierarchy is designed to achieve uniformity and 'the downward flow of command'.[71] It should be further noted that this is precisely the dynamic of what we observed in the Islamic legal tradition, where the evolution of jurisprudence is bottom up and pluralistic, rather than a top-down and uniform.[72]

It is not only the structure of the shariah court system that resembles the English common law model. Procedural codes also follow suit. The Syariah

[65] For similar dynamics in other Muslim majority countries, see Quintan Wiktorowicz, 'State Power and the Regulation of Islam in Jordan' (1999) 41 J Church & State 677–96; Tamir Moustafa, 'Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt' (2000) 32 Int'l J Mid E Stud 3–22.

[66] The complete text of sermons for the Federal Territories is archived online at <http://www.islam.gov.my/en/khutbah-online> S0'4(fur)-38.451706 0 T657.6(8.9(F7.6(8.9(No*[6 0 Tmbe(t)0(he2-41127.4718 0 0 4.6485 63.0425 135.

Criminal Procedure Act (1997) and the Syariah Civil Procedure Act (1997) borrow extensively from the framework of the civil courts in Malaysia. The drafting committee literally copied the codes of procedure wholesale, making only minor changes where needed. When they are placed side by side, one can

of secularism itself.

interpretation, codifying select fragments of