

# *Judging in God's Name: State Power, Secularism, and the Politics of Islamic law in Malaysia*

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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.<sup>1</sup> Only Egypt, Iran, Jordan, Saudi Arabia, and the Maldives have higher levels of state regulation. State 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.<sup>2</sup> But over and above these and myriad other substantive 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 the public expression of alternate views is prohibited.<sup>3</sup> From this vantage point, Malaysia appears as a

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<sup>1</sup> 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 World Survey of Religion and the State* (CUP 2008).

<sup>2</sup> In the Federal Territories, the Syariah Criminal Offences Act criminalizes failure to perform Friday prayers (Art 14), breaking one's fast during Ramadan (Art 15), gambling (Art 18), drinking (Art 19), and 'sexual deviance' (Arts 20–29). State-level enactments mirror most of these federal-level statutes.

<sup>3</sup> A *fatwa* (pl *fatawa*) is a non-binding opinion provided by a qualified scholar of Islamic law in response to a question in Islamic law. However, as examined in this study, the Malaysian state institutionalized the *fatwa* as an instrument of state law in a manner that fundamentally subverts this principle. Once a *fatwa* is gazetted, it immediately acquires the force of law.

religious state, at least for the 60% of Malaysian Muslims who are subject to such rules and regulations.<sup>4</sup> 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 *fiqh* (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.<sup>5</sup> Instead, Malaysia provides a textbook example of how core principles in *usul al-fiqh* (Islamic legal theory) are *subverted* as a result of state appropriation.<sup>6</sup> 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 *fiqh* (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.<sup>7</sup>

## 1. *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.<sup>8</sup> 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

<sup>4</sup> Approximately 40% of the Malaysian population is non-Muslim (19% of the national population is Buddhist, 9% Christian, 6% Hindu, and 5% of other faiths). Non-Muslims are not subject to the jurisdiction of the shariah courts.

<sup>5</sup> A number of scholars have advanced different versions of this argument, from the prominent Egyptian shariah court judge and al-Azhar scholar 'Ali 'Abd al-Raziq in 1920s Egypt, to recent academic work by Sherman Jackson, Abdullahi an-Na'im, Wael Hallaq, and others. See Sherman A Jackson, *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (Brill 1996); Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press 2008). Wael B Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press 2012).

<sup>6</sup> *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.

<sup>7</sup> I recognize the possibility that other institutional configurations may be able to preserve the integrity classical modes of reasoning. For an exploration of these possibilities in the Egyptian context, see Intisar A Rabb, 'The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism' (2013) UCLA J Int'l L Foreign Affairs.

<sup>8</sup> There are exceptions such as Ismailis, but they represent a tiny minority among the worldwide Muslim community.

inevitably produced a pluralistic legal order. In the first several centuries of Islam, schools of jurisprudence formed around leading scholars (*fuqaha*) of Islamic law. Each school of jurisprudence (*madhhab*) 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 (*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 field of *usul al-fiqh*. The legal science that emerged was one of staggering complexity and rigor, 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.<sup>9</sup>

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 qualified *mujtahid* in response to a question in Islamic law.<sup>10</sup> Because *fatwas* 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.<sup>11</sup> In this sense, the evolution of Islamic jurisprudence was a bottom-up, not a top-down process.<sup>12</sup>

The Muslim legal community maintained unity within diversity through a critical conceptual distinction between the *shariah* (God's way) and *fiqh* (understanding).<sup>13</sup> Whereas the *shariah* was considered immutable, the diverse body of juristic opinions that constitutes *fiqh* 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 degree of certainty are imperfect and fallible. This norm was so deeply ingrained in the writings of classical jurists that they concluded their legal opinions and discussions with the statement *wa Allahu a'lam* (and God knows best). This phrase acknowledged that no matter how sure one is of her or his analysis and argumentation, only God ultimately knows which conclusions are correct. This distinction between God's perfection and human fallibility required jurists to acknowledge that competing legal opinions from other scholars or other schools of jurisprudence may also be correct. As Hallaq relates, 'for any eventuality or case, and for every particular set of facts, there

<sup>9</sup> 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% of the worldwide Muslim population.

<sup>10</sup> 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.

<sup>11</sup> 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 Muhammad Khalid Masud, Brinkley Messick, and David S Powers (eds), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Harvard University Press 1996).

<sup>12</sup> Masud and others (ibid) 4.

<sup>13</sup> It is important to note that jurists in the classical era did not use the terms 'shariah' and 'fiqh' to denote this distinction. These specific terms were developed in the contemporary era. Nonetheless, the writings of jurists in the classical era clearly demonstrate that they recognized this as an important conceptual distinction.

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.<sup>14</sup> The resulting disagreements and diversity of opinion (*ikhtilaf*) among jurists were not understood as problematic. On the contrary, difference of opinion was embraced as both inevitable and ultimately generative in the search for God's truth. Adages among scholars of Islamic law underlined this ethos, such as the proverb, 'In juristic disagreement there lies a divine blessing.'<sup>15</sup> In both theory and practice, Islamic law developed as a pluralist legal system to its very core.

The conceptual distinction between the *shariah* and *fiqh* was also critical in defining the relationship between experts in Islamic jurisprudence and lay Muslims. Because human understanding of God's will was recognized as unavoidably fallible, religious authority was not absolute. A *fatwa*, by definition, merely represented the informed legal opinion of a fallible scholar; it was not considered an infallible statement about the will of God.<sup>16</sup>

The plural nature of Islamic jurisprudence and the conceptual distinction between the *shariah* and *fiqh* provided for the continuous evolution of Islamic law.<sup>17</sup> Whereas the *shariah* was understood by Muslim jurists as immutable, *fiqh* was explicitly regarded as dynamic and responsive to the varying circumstances of the Muslim community across time and space.<sup>18</sup> 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 notion that the law is subject to modification according to 'the changing of the times or to the changing conditions of society.'<sup>19</sup>

Conspicuously absent from this brief synopsis is any mention of the state. This is because the modern state, as we know it, did not exist for roughly the first twelve centuries of Islam. While specific forms of rule varied across time and place, as a general principle there was no administrative apparatus that applied uniform legal codes in the way that we have become so thoroughly accustomed to in the modern era. This is not to say that rulers never applied Islamic law in the pre-modern era, but that the nature of its application was wholly different, both in theory and in practice. In Islamic legal theory,

<sup>14</sup> Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (CUP 2009) 27.

<sup>15</sup> Wael B Hallaq, *Authority, Continuity, and Change in Islamic Law* (CUP 2001) 241.

<sup>16</sup> Following on this, some scholars contend that lay Muslims are obliged to seek out the guidance of learned religious scholars, but they must, to the best of their ability, evaluate a jurist's qualifications, sincerity and reasoning. If an individual believes that the reasoning of another scholar or even another school of jurisprudence is closer to the will of God, that individual is obliged to follow his or her conscience, as he or she alone must ultimately answer to God. Most classical jurists, on the other hand, held that lay Muslims are religiously obliged to follow *fatwas* through the principle of *taqlid*. In both views, however, the *fatwa* of the religious scholar is not directly binding on the individual as a matter of state law.

<sup>17</sup> Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill Academic Publishers 1999); Bernard G Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf Al-Din Al-Amidi* (University of Utah Press 1992); Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oneworld Publications 2001); Hallaq (n 14).

<sup>18</sup> '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, *Speaking in God's Name*, 76.

<sup>19</sup> Hallaq (n 15) 166. For more on legal maxims in the Islamic legal tradition, see Intisar A Rabb, 'Islamic Legal Maxims as Substantive Canons of Construction: Hudud-Avoidance in Cases of Doubt' (2010) 17 *Islamic Law and Society* 63–125.

a foundational distinction between *fiqh* and *siyasa* was critical in this regard.<sup>20</sup> Whereas *fiqh*, as explained earlier, is the diverse body of legal opinions produced by legal scholars, *siyasa* constituted the realm of policy. In classical Islamic jurisprudence, rulers could give legal force to particular *fiqh* opinions. However, this was considered an expression of the ruler's *siyasa* powers, not a direct exercise of religious authority. The distinction between *fiqh* and *siyasa* helped to demarcate the sphere of religious doctrine from the sphere of public policy. Just as the distinction between *shariah* and *fiqh* helped to distinguish divine will from human agency, the distinction between *fiqh* and *siyasa* 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. *Fiqh* 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.<sup>21</sup> 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.<sup>22</sup>

## 2. The Transformation of Islamic Law

### A. Codification as the Death of Pluralism

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.<sup>23</sup> To the extent that Islamic law was practiced in the pre-colonial era, it was part and parcel of *adat* (custom) and was marked by tremendous variability across time and place.<sup>24</sup> Religious leaders were 'those members of village communities who, for reasons of exceptional piety or other ability, had been chosen by the community to act as imam of the local mosque, or the court imam. . . .'<sup>25</sup> As in other parts of the world with substantial Muslim

<sup>20</sup> For more on the relationship between *fiqh* and *siyasa*, see Frank E Vogel, *Islamic Law and the Legal System: Studies of Saudi Arabia* (Brill 2000); Asifa Quraishi, 'Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence' (2006) 28 *Cardozo L Rev* 67–121; Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (OUP 2011).

<sup>21</sup> In the Ottoman Empire, legal codification and a variety of administrative reforms were introduced to face the rising threat of emergent European powers. In other cases, such as that of Malaysia, the processes of legal codification and state-building were intimately related to colonial rule.

<sup>22</sup> This process is examined across the Muslim-majority world by Hallaq (n 14) 371–498.

<sup>23</sup> Nonetheless, the form and nature of Islamic law in the pre-colonial period are matters of debate. Those who wish to see an expanded role for (a conservative) Islam in the Malaysian legal system have adopted the narrative that Islamic law must be 'brought back in' to reverse the impact of colonial rule. For example, see Muhammad Haniff Bin Hassan, 'Explaining Islam's Special Position and the Politic [sic.] of Islam in Malaysia' (2007) 97 *The Muslim World* 97.

<sup>24</sup> Donald L Horowitz 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change' (1994) 42 *Am J Comp L* 233–93. Peletz goes so far as to say that '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'. Michael G Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton University Press 2002) 62.

<sup>25</sup> William R Roff, *The Origins of Malay Nationalism* (Yale University Press 1967) 67.

communities, the colonial period marked a key turning point for the institutionalization of religious authority on the Malay Peninsula.<sup>26</sup>

The British gained control of port cities for the purpose of trade and commerce in Penang (1786), Singapore (1819), and Malacca (1824).<sup>27</sup> 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, *adat* 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.<sup>28</sup> 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.<sup>29</sup> With British assistance and encouragement, similar Muhammadan marriage and divorce enactments went into force in Perak (1885), Kedah (1913), Kelantan (1915), and most other states of British Malaya.<sup>30</sup> Additional laws were subsequently issued that organized court functions and specified select criminal offenses.<sup>31</sup>

The introduction of codified law, new legal concepts and categories, and English style legal institutions all marked a significant departure from the customary 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 characterized this peculiar mix 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 contained fragments of Islamic jurisprudence that were applied to Muslim subjects. As such, Anglo-Muslim law was an entirely different creature from classical Islamic law. By the beginning of the 20th 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'.<sup>32</sup> Passages from the Qur'an and Sunna may be cited in court ruling to support particular decisions, but the mode of legal analysis is

<sup>26</sup> Hallaq (n 14) provides the most comprehensive overview of the transformation of Islamic law in various Muslim majority countries.

<sup>27</sup> Britain gained control of Malacca as a result the Anglo-Dutch Treaty, which divided the Malay Archipelago between Britain and the Netherlands.

<sup>28</sup> Straits Settlements Enactment 5 of 1880. The first iteration of this ordinance carried the spelling 'Mahomedan' while later iterations carried the spelling 'Muhammadan'.

<sup>29</sup> Horowitz (n 24) 256.

<sup>30</sup> There were exceptions. Johore adopted a version of the Ottoman Mejlle in the early 20th century, 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.

<sup>31</sup> For an example, see the Muhammadan Offenses Enactment of Selangor (1938).

<sup>32</sup> MB Hooker, 'Islamic Law in South-East Asia' (2002) 4 *Asian Law* 218.

English common law, not *usul al-fiqh*. Hooker explains, ‘it is not fanciful to suggest that the classical *syari’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.’<sup>33</sup>

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 *Majlis Ugama Islam dan Adat Istiadat Melayu* (Council of Religion and Malay Custom); regulations concerning marriage, divorce and criminal offenses; and the functions and procedures of the religious courts. Selangor’s new enactment provided a template for other states. Similar enactments were subsequently adopted in Terengganu (1955), Pahang (1956), Malacca (1959), Penang (1959), Negeri Sembilan (1960), Kedah (1962), Perlis (1964), and Perak (1965).<sup>34</sup>

The most recent iteration of family law enactments, those which are in force today, grew out of an endeavour to provide more consistency across state jurisdictions.<sup>35</sup> 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. The magnitude of this shift is apparent in the word count of the relevant section in the Islamic Family Law Act (1984) which replaced the Selangor Administration of Muslim Law Enactment (1952) in the newly created Federal Territories.<sup>36</sup> The 1952 Selangor Enactment carried 3400 words in the section dealing with family law while the 1984 Islamic Family Law Act carried more than 20,000 words—nearly a sixfold increase.

Women’s rights advocates welcomed many of the provisions in the new Islamic Family Law Act as progressive advances for women.<sup>37</sup> However, subsequent amendments introduced regressive provisions 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.<sup>38</sup> For example, Article 13 requires a woman to have her guardian’s consent to marry (regardless of her age) while men have

<sup>33</sup> *ibid.* It should be noted that just as ‘Anglo-Muslim’ law was applied to Muslim subjects, Anglo-Hindu and Chinese customary law were applied to Chinese and Hindu subjects. However, unlike Anglo-Muslim law, the separate personal status laws for non-Muslims were repealed in the Marriage and Reform Act of 1976. For more on Anglo-Hindu and Chinese customary law in British Malaya, see MB Hooker, *Legal Pluralism* (Clarendon Press 1975) 58–84, 158–81.

<sup>34</sup> Administration of Muslim Law Enactment of Trengganu (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).

<sup>35</sup> Lack of uniformity created problems such as forum shopping on issues such as divorce and registration of polygamous marriages.

<sup>36</sup> 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 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.

<sup>37</sup> Zainah Anwar, ‘Advocacy for Reform in Islamic Family Law’ in Asifa Quraishi and Frank. E. Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Harvard University Press 2008).

<sup>38</sup> N Badlishah, *Islamic Family Law and Justice for Muslim Women* (Sisters in Islam 2003); Z Anwar and JS Rumminger, ‘Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform’ (2007) 64 Wash & Lee L Rev 1529–49.

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.<sup>39</sup> 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.<sup>40</sup>

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 (*muafakat, persuaaian, persejujuan*)...'.<sup>41</sup> 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.<sup>42</sup>

## B. Naming as a Means of Claiming Islamic Law

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 *fiqh* (Islamic jurisprudence), but there was no formal pretense that the laws

<sup>39</sup> 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.

<sup>40</sup> 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, *Marriage and Divorce: Law Reform within Islamic Framework* (International Law Book Services 2000) and 'Legislative Provisions and Judicial Mechanisms for the Enforcement and Termination of the Islamic Marriage Contract in Malaysia' in Asifa Quraishi and Frank Vogel (eds), *The Islamic Marriage Contract* (n 37) 183–98; Norani Othman (ed), *Muslim Women and the Challenge of Islamic Extremism* (Sisters in Islam 2005); and Anwar (n 37) 275–84).

<sup>41</sup> Peletz (n 24) 85. Peletz goes on to say 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.'

<sup>42</sup> Horowitz (n 24) 261 observed that when the International Islamic University of Malaysia (IIUM) was established in the 1980s, a one-year training and certification program was launched for shariah court judges, but these courses were themselves taught by retired civil court judges with no background in Islamic legal theory. Since that time, it appears that there is more training in *usul al-fiqh* in some degree granting programs, but the overwhelming emphasis still appears to be on the application of legal code. See Najibah M Zin, 'The Training, Appointment, and Supervision of Islamic Judges in Malaysia' (2012) 21 *Pacific Rim Law & Policy Journal* 115. For similar examples of this general trend outside of the Malaysian context, see Monique C Cardinal, 'Islamic Legal Theory Curriculum: Are the Classics Taught Today?' (2005) 12 *Islamic Law and Society* 224.

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 *each iteration* of 'Muslim law' with 'Islamic law'. Likewise, *every mention* of 'Muslim courts' was amended<sup>43</sup> to read 'Syariah courts'.<sup>44</sup> 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.<sup>45</sup>

Why is this important? In all of these amendments, the shift in terminology exchanged the *object of the law* (Muslims) for the purported *essence of the law* (as 'Islamic'). This semantic shift, I argue, is a prime example of what Erik Hobsbawm calls 'the invention of tradition'.<sup>46</sup> 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 it 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.<sup>47</sup> 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 syariah court authority require a collective amnesia vis-à-vis the Islamic legal tradition.<sup>48</sup>

This semantic shift was likely an effort to endow Muslim family law and Muslim courts with a religious personality in order to brandish the government's religious credentials. The shift in terminology came during a period when the *dakwah* (religious revival) movement was picking up considerable

<sup>43</sup> Act A354, s 45, in force from 27 August 1976.

<sup>44</sup> 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.

<sup>45</sup> I refer here to the Acts currently in force in the Federal Territories, but the same shift in terminology can be seen in most state jurisdictions.

<sup>46</sup> Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (CUP 1983).

<sup>47</sup> My focus here is on terms such as 'Islamic law' and 'syariah courts', but the courts themselves are also replete with visual symbols that are designed to achieve the same effect.

<sup>48</sup> It is instructive to note that in the same year the Malaysian government was recasting Anglo-Muslim law as 'Islamic law', the government was *decoupling* state law from religious/customary law for non-Muslims by way of the Marriage and Divorce Act of 1976. Until that time, there had existed five separate statutes on marriage, three for the dissolution of marriage, and customary laws for Chinese, Hindus and natives of Sabah and Sarawak. Family law for non-Muslims was henceforth governed by a unified family law code. Only Muslim family law (now 'Islamic law') remained on a separate judicial track, which were rebranded as 'shariah courts'.

steam in Malaysian political life.<sup>49</sup> The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s.<sup>50</sup> 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. 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.<sup>51</sup> 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 *dakwah* movement to harness the legitimizing power of Islamic symbolism and discourse.<sup>52</sup> 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 (*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.<sup>53</sup> 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 and federal levels in the 1980s and 1990s that formalized substantive and procedural aspects of 'Islamic law' even more than the second wave of Muslim law enactments from the 1950s and 1960s.<sup>54</sup>

### C. The State's Monopoly on Religious Law

One of the most striking features of the Malaysian legal system is the extent to which the state and federal authorities claim a monopoly on religious

<sup>49</sup> The term *dakwah* comes from the Arabic, *da'wah*, which carries the literal meaning of 'making an invitation'. In Islamic theology, *da'wah* is the practice of inviting people to dedicate themselves to a deeper level of piety. The term is used in contemporary Malaysian politics to stand in for the various manifestations, both social and political, of the piety movement.

<sup>50</sup> UMNO is the United Malays National Organization (*Pertubuhan Kebangsaan Melayu Bersatu*). PAS is the Pan-Malaysian Islamic Party (*Parti Islam Se-Malaysia*). PAS enter into the Alliance coalition in the 1974 elections but nonetheless continued to press for further Islamization within the ruling coalition.

<sup>51</sup> Farish Ahmad Noor, *Islam Embedded: The Historical Development of the Pan-Malaysian Islamic Party PAS, 1951–2003* (Malaysian Sociological Research Institute 2004) 267.

<sup>52</sup> Seyyed Vali Reza Nasr, *Islamic Leviathan: Islam and the Making of State Power* (OUP 2001); Joseph Chiyong Liow, *Piety and Politics: Islamism in Contemporary Malaysia* (OUP 2009).

<sup>53</sup> David Camroux, 'State Response to Islamic Resurgence in Malaysia: Accommodation, Co-option, and Confrontation' (1996) 36 *Asian Survey* 852–68; Michael D Barr and Anatha Raman Govindasamy, 'The Islamisation of Malaysia: Religious Nationalism in the Service of Ethnonationalism' (2010) 64 *Aust J Int'l Aff* 293–311.

<sup>54</sup> I focus on the Acts in force in the Federal Territories, for the sake of brevity and because state-level enactments are modelled on federal level Acts, therefore mirroring them to a great extent.

interpretation. The institutionalization of religious authority can be traced back to the colonial era when state-level religious councils (*Majlis Agama Islam*) and departments of religious affairs (*Jabatan Agama Islam*) 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'.<sup>55</sup> 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.<sup>56</sup> The Islamic Religious Council (*Majlis Agama Islam*), the office of the Mufti, and the Islamic Legal Consultative Committee wield absolute authority in this regard.<sup>57</sup> Yet, surprisingly, those who staff these bodies are not required to have formal training in Islamic jurisprudence.<sup>58</sup> Only 6 of the 21 members of the Islamic Religious Council are required to be 'persons learned in Islamic studies'.<sup>59</sup> 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.<sup>60</sup> Even the office of the Mufti merely specifies that officeholders should be 'fit and proper persons' without further explanation.<sup>61</sup>

Despite these vague requirements, the powers provided to these 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'.<sup>62</sup> Accordingly, *fatwas* in the contemporary Malaysian context do not serve as non-binding 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.<sup>63</sup> Moreover, the Administration of Islamic Law Act allows this lawmaking function to

<sup>55</sup> '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.' William R Roff, *The Origins of Malay Nationalism* (Yale University Press 1967) 72–73.

<sup>56</sup> These statutes are currently in force.

<sup>57</sup> 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 Supreme Head of State (*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 (Art 32). Finally, an Islamic Legal Consultative Committee is charged with assisting the Mufti in issuing *fatwas* in Article 37.

<sup>58</sup> 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.'

<sup>59</sup> 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.

<sup>60</sup> The Islamic Legal Consultative Committee consists of '(a) the Mufti, as Chairman; the Deputy Mufti; (c) two members of the Majlis nominated by the Majlis; (d) not less than two fit and proper 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'.

<sup>61</sup> Article 32.

<sup>62</sup> Article 34.

<sup>63</sup> 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'.

completely bypass legislative institutions such as the Parliament.<sup>64</sup> 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 (*usul al-fiqh*), 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 *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.' Article 13 criminalizes the distribution or possession of a view contrary to Islamic laws issued by religious authorities: '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.' In sum, the government commands a complete monopoly over the interpretation of Islamic law.

#### D. State Socialization and Enforcement

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

<sup>64</sup> 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, *fatwas* 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).<sup>65</sup> More than this, federal and state agencies dictate the content of Friday sermons (*khutbah*).<sup>66</sup> For the Federal Territories, sermons are written and distributed by the Department of Islamic Development Malaysia (*Jabatan Kemajuan Islam Malaysia*—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.<sup>67</sup> 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.<sup>68</sup>

The state also wields disciplinary institutions to enforce its state sanctioned version of Islamic law.<sup>69</sup> 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,<sup>70</sup> 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 *political* 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’.<sup>71</sup> It should be further noted that this is precisely the *opposite* 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.<sup>72</sup>

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

<sup>65</sup> 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.

<sup>66</sup> The complete text of sermons for the Federal Territories is archived online at <<http://www.islam.gov.my/en/khutbah-online>> (accessed 3 November 2012).

<sup>67</sup> For a recent example, see *Malaysiakini*, 3 August 2012. ‘Jais monitoring 38 “hot mosques” following protest.’

<sup>68</sup> Such efforts are likely the principal reason why the majority of ‘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 Tamir Moustafa, ‘Islamic Law, Women’s Rights, and Popular Legal Consciousness in Malaysia’ (2013) 38 *Law and Social Inquiry* 168–88.

<sup>69</sup> Fifty-six ‘deviant’ sects had been outlawed by 2009, including Shi’a Islam.

<sup>70</sup> David S Powers, ‘On Judicial Review in Islamic Law’ (1992) 26 *Law & Society Review* 315.

<sup>71</sup> Martin Shapiro, ‘Appeal’ (1980) 14 *Law & Society Review* 629 at 643.

<sup>72</sup> Masud and others (n 11) 4.

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 see the extraordinary similarity between the documents, with whole sections copied verbatim. Abdul Hamid Mohamad, a legal official who eventually rose to be Chief Justice of the Federal Court, who was on the drafting committees for the various federal and state shariah procedures acts in the 1980s and 1990s 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.'<sup>73</sup> Mohamad acknowledged that the similarity between the shariah criminal and civil procedure are 'to a large extent, the same as those used in the common law courts'. So much so that '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"'.<sup>74</sup>

It should be further noted that Abdul Hamid Mohamad and most other legal personnel involved in the codification of shariah court procedures did not have formal education in the Islamic legal tradition. Mohamad's degree was from the National University of Singapore where he had studied common law, yet he was centrally involved in the entire process of institutionalizing the shariah courts. The 'Islamization' of law and legal institutions in Malaysia was, ironically, more the project of state officials who lacked any formal training or in-depth knowledge of Islamic legal theory rather than the traditional '*ulama*.'

### 3. *State Power, Secularism and the Politics of Islamic Law*

This study opened with the observation that Malaysia ranks among the top six 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 60% of Malaysian Muslims who are subject to such rules and regulations. Indeed, former Prime Minister Mahathir Mohammad famously declared Malaysia an 'Islamic state' and government officials have subsequently repeated the claim. Yet despite the fact that aspects of religion and governance are clearly intertwined, the Malaysian case illustrates how the simple dichotomy of 'secular' versus 'religious' obfuscates more than it reveals. As recent work on secularism shows, the secular-versus-religious dichotomy leaves unexamined the troubled genealogy

<sup>73</sup> Abdul Hamid Mohamad related the same details in a personal interview on 17 November 2009.

<sup>74</sup> Abdul Hamid Mohamad, 'Harmonization of Common Law and Shari'ah Law in Malaysia: A Practical Approach', Lecture delivered on 6 November 2008 at Harvard University Law School.

of secularism itself.<sup>75</sup> Most important for our purposes, the dichotomy takes its own starting point for granted and overlooks the ways that *both* categories were constructed as mirror opposites with the expanding regulatory capacity of the modern state.

The Malaysian case illustrates why the secular-versus-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 in studies of Islam and politics in contemporary Malaysia depict an otherwise secular state capitulating to pressure and adopting Islamic law, or, alternately, proactively harnessing Islamic law for political advantage.<sup>76</sup> While both readings capture important dynamics in the competition over religious authority, these sorts of arguments tend to present Islamic law in an 'additive' manner. That is to say, 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'.<sup>77</sup> This is not to deny the fact that Malaysians have diverse (and often 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-versus-religious schema too often assumes a unidimensional and ahistorical conception of Islamic law and thus tends to take the state's claim to Islamic law for granted. In other words, anxiety over 'how much' Islamic law is incorporated as state law too often assumes that the outcome is consistent with the Islamic legal tradition in the first place. What drops out of the picture are the specific ways that state incorporation of Islamic law, at least in the fashion documented here, subverts the Islamic legal tradition itself.

As select fragments of *fiqh* (Islamic jurisprudence) are constituted within an emerging field of state law, little or no space is left for *usul al-fiqh*, the interpretive method that undergirds Islamic jurisprudence. Stripped of its methodological underpinnings, these transformations subvert the epistemological approach of classical Islamic legal theory (*usul al-fiqh*) by collapsing the important conceptual distinctions between the *shariah* (God's way) and *fiqh* (human understanding), with the ultimate result of facilitating the state's claim to 'speak in God's name'.<sup>78</sup> But more than this, by monopolizing

<sup>75</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press 2003); HA Agrama, *Questioning Secularism: Islam, Sovereignty and the Rule of Law in Egypt* (University of Chicago Press 2012); Saba Mahmood, *Politics of Piety* (Princeton University Press 2002); Saba Mahmood, 'Sectarian Conflict and Family Law in Egypt' (2012) 39 *Am Ethnol* 54–62.

<sup>76</sup> These arguments are well documented in Joseph C Liow, *Piety and Politics: Islamism in Contemporary Malaysia* (OUP 2009).

<sup>77</sup> Hussein Ali Agrama identifies precisely the same anxieties in his important book on secularism in Egypt. Agrama (n 73).

<sup>78</sup> This concept and phrase is borrowed from Abou El Fadl (n 17).

interpretation, codifying select fragments of *fiqh*, and deploying those laws through state institutions, the Malaysian state is 'judging in God's name'. The religious councils, the shariah courts, and the entire administrative apparatus are Islamic in name, but in function they bear little resemblance to the Islamic legal tradition. A deep paradox is therefore 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.

The simple dichotomy of the religious versus the secular papers over this paradox and obscures the ways in which a completely new (and authoritarian) legal form has been created with only tentative connections to the Islamic legal tradition. Ironically, the state's claim to sacred authority rests upon the subversion of the very tradition that the state claims to establish. It is perhaps for this reason that the Malaysian state has paid careful attention to semantics and symbolism. Terms such as 'fatwa', 'shariah court', and myriad others paper over the ways that the Malaysian state's 'Islamic law' marks a radical break from the very tradition that it claims to represent.<sup>79</sup>

The secular-versus-religious schema also tends to invite emotive tropes that further obfuscate agency and effect. In such schemas, secularism is often cast as a fundamental good in the sense that it is understood as providing a space for deliberation and rational discourse, two elements that are considered essential components of democratic governance.<sup>80</sup> Religion, on the other hand, is typically cast as a potential threat to the rational deliberation that democracy requires. In depictions of Malaysian politics that follow this schema—such as in the rendering that is often deployed by the Malaysian government vis-à-vis its Islamist opposition party rival, PAS—the state is cast as a bastion against religious resurgence. This is particularly ironic considering the fact that the government subverts the rationalist and pluralist epistemological stance within the Islamic legal tradition, replacing it with an authoritarian legal form. This familiar trope is enabled by the secular-versus-religious schema, providing the ruling UMNO with a rhetorical tool to undercut political rivals and to bid for the support of liberals, secularists and non-Muslims. Yet, in other renderings of Malaysian politics, the ruling party claims to have delivered an 'Islamic state'. With this pivot, the government highlights its 'Islamic' credentials, in a bid to curry favour with UMNO's Malay Muslim base, and (ironically) to (again) undercut its Islamist party rival, PAS. In each guise—as bulwark against religious resurgence or as the guarantor of an 'Islamic state'—the government seeks to benefit from the emotive tropes that are evoked by way of the secular-versus-religious schema.<sup>81</sup> Perhaps most telling is the fact that even when secularists criticize the adoption of 'Islamic law' as state law, the Malaysian government reaps precisely the sort of religious legitimation that it seeks.

<sup>79</sup> Progressive organizations that actively engage with the Islamic legal tradition thus play a crucial role in questioning these authoritarian legal constructions. In Malaysia, these groups include Sisters in Islam and The Islamic Renaissance Front.

<sup>80</sup> Talal Asad, Judith Butler, and Saba Mahmood, *Is Critique Secular? Blasphemy, Injury, and Free Speech* (University of California Press 2009).

<sup>81</sup> This is not to say that the government always benefits from positioning itself in these ways. At moments, such manoeuvring has proven to be a double-edged sword.