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Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia

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Abstract:

Drawing on original survey research, this study examines how lay Muslims in Malaysia understand foundational concepts in Islamic law. The survey finds a substantial disjuncture between popular legal consciousness and core epistemological commitments in Islamic legal theory. In its classic form, Islamic legal theory was marked by its commitment to pluralism and the centrality of human agency in Islamic jurisprudence. Yet in contemporary Malaysia, lay Muslims tend to understand Islamic law as being singular, fixed, and purely divine in nature, with a single 'correct' answer to any given question. The practical implications of these findings are demonstrated through examples of efforts by women's-rights activists to reform family law provisions in Malaysia. The examples illustrate how popular misunderstandings of Islamic legal theory hinder the efforts of those working to reform family law codes while strengthening the hand of conservative actors wishing to maintain the status quo. This paper is forthcoming in [*Law and Social Inquiry*](#).

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Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia¹

In most Muslim-majority countries throughout the world, the laws governing marriage, divorce, and other aspects of Islamic family law have been codified in a manner that provides women with fewer rights than men (Na'im 2002; Mayer 2006). Yet despite this fact, the complex legal tradition of Islamic law is not inherently incompatible with contemporary notions of liberal rights, including equal rights for women (Sachedina 2009; Na'im 2008). This divergence between Islamic law in theory and Islamic law in practice is the result of how Islamic family law was written into state law in the 19th and early 20th centuries throughout the Muslim world. A growing body of scholarship suggests that the process of legal codification was both selective and partial (Hallaq 2009; Tucker 2008). Far from advancing the legal status of women, legal codification actually narrowed the range of rights that women had access to, at least in theory, in classical Islamic jurisprudence (Quraishi and Vogel 2008; Sonbol 2008).

As a result, some of the most promising initiatives for expanding women's rights in the Muslim world today lie with the efforts of activists who explain that the Islamic legal tradition is not a uniform legal code, but is instead a diverse body of jurisprudence that affords multiple guidelines for human relations, some of which are better suited to particular times and places than others. This represents a new mode of political engagement. While women's rights initiatives were almost invariably advanced through secular frameworks through most of the 20th century, efforts to affect change in family law from within the framework of Islamic law have gained increasing traction in recent years. To varying degrees, women have pushed for family law reform within the framework of Islamic law in Egypt (Singerman 2004, Zulficar 2008), Iran (Osanloo 2009; Mir-Hosseini 2008), Malaysia (Othman 2005; Badlishah 2003, 2008), Morocco (Dieste 2009), and many other Muslim majority countries, opening up a new terrain for popular discourse and in some cases producing concrete and progressive legal reforms (Singerman 2004; Mir-Hosseini 2008; Moghadam 2002).

When women's rights organizations push for the reform of family law codes, however, they almost invariably encounter stiff resistance due to the widespread but mistaken understanding that Muslim family laws, as they are codified and applied in Muslim majority countries, represent direct commandments from God that must be applied by the state. As leading Muslim women's rights activist Zainah Anwar explains, "[v]ery often Muslim women who demand justice and want to change discriminatory law and practices are told 'this is God's law' and therefore not open to negotiation and change" (2008b: 1). For the majority of the population, the state's selective codification of Islamic law is understood as the faithful implementation of divine command, full stop. As a result, family laws cannot easily be questioned or debated without being considered blasphemy. When this occurs, the laws concerning marriage, divorce, child custody, and a host of other issues critical to women's wellbeing are effectively taken off the table as matters of public policy. Popular (mis)understandings of core conceptual issues in Islamic law therefore have a tremendous impact on women's rights.

This difficulty faced by women's rights activists is symptomatic of a larger problem that scholars of Islamic law have been concerned with for quite some time. Specialists in Islamic jurisprudence and Islamic legal history are often dismayed by the disjuncture between Islamic legal theory and popular understandings of Islamic law. In its classical form, Islamic legal theory (*usul al-fiqh*) was marked by its flexibility, its commitment to pluralism, and most notably, the fact that it was not binding as state law (Hallaq 2009; El Fadl 2001; Peters 2006; Jackson 1996; Kamali 2008; Weiss 1992). Yet in contemporary political discourse, large segments of lay Muslim publics are swayed by the notion that Islamic law is uniform and static, that it should be enforced by the state, and that neglecting such a duty constitutes a rejection of God's will. These informal obstacles to family law reform underline the critical importance of "legal consciousness," defined by Merry (1990: 5) as "the way people conceive of the 'natural' and normal...their commonsense understanding of the world."

Such 'commonsense' understandings of Islamic law obscure important distinctions that are made in classical Islamic legal theory (*usul al-fiqh*) between the *shari'a* (God's way) and *fiqh* (human understanding). While the *shari'a* is regarded as immutable, *fiqh* is the diverse body of

legal opinions that is the product of human reasoning and engagement with the foundational sources of authority in Islam, the Qur'an and the Sunnah.² In this dichotomy, God is considered infallible, while humankind's attempt to understand God's way is imperfect and fallible. Islamic legal theory holds that humans can and should strive to understand God's way, but human faculties can never deliver certain answers; they can merely reach reasoned deductions of God's will. This distinction between God's perfection and the fallibility of human understanding is of critical importance because recognition of human agency serves as the basis for a strong normative commitment within classical Islamic legal theory towards respect for a diversity of opinion as well as temporal flexibility in jurisprudence (El Fadl 2001). Since the vast corpus of Islamic jurisprudence is the product of human agency, scholars of Islamic law recognize Islamic jurisprudence as open to debate and reason, and subject to change as new understandings win out over old.³

While this foundational principle is taken for granted among those experts trained in Islamic jurisprudence, the conceptual distinction between shari'a and fiqh is not always so clear to lay Muslims without a background in Islamic legal theory. For lay Muslims, it is all too easy to conflate the two, particularly when political and social actors work to obscure such distinctions. When such conflation occurs, the implications are far reaching because it extends sacred authority to human agents. The flexible, plural, and open nature inherent in Islamic jurisprudence is replaced by singular and fixed understandings of God's will (El Fadl 2001). Debate and deliberation are discouraged, and both state and non-state actors can more easily claim fixed interpretations of Islamic law.

This disjuncture between fundamental principles in Islamic legal theory and popular understandings of Islamic law among lay Muslims has long been assumed by specialists in the field.⁴ To date, however, there have been no attempts to systematically assess popular understandings of core conceptual principles in Islamic law by way of survey research.⁵ This study therefore represents the first step in mapping popular understandings of fundamental conceptual principles of Islamic jurisprudence among lay Muslims. By way of questions related to the distinction between shari'a and fiqh, I examine how Malaysian Muslims understand the

relationship between divine revelation and human agency, the nature of religious authority, and whether Islamic law is understood as singular and fixed versus plural and dynamic.

The survey confirms that there is a significant disjuncture between fundamental conceptual principles in Islamic legal theory and how those concepts are understood among lay Muslims in Malaysia. The study illustrates the practical implications of these findings through grounded examples of the efforts of women's rights activists to reform family law codes. The examples demonstrate how popular misunderstandings of core principles in Islamic legal theory limit the possibilities for political mobilization for some political trends while facilitating political mobilization for others. Popular legal consciousness is thus shown to be a critical constitutive element of the broader political environment.

This article proceeds in three parts. In the first section, I provide a brief overview of core principles in classical Islamic legal theory for readers without a background in Islamic law. Next, I examine the codification of Islamic law and the institutionalization of Islamic legal institutions in Malaysia. I argue that codification and institutionalization undermined the flexible, plural, and dynamic nature of classical Islamic legal theory by collapsing the crucial distinction between the shari'a and fiqh. In part three, I present the findings from an original survey of Islamic law in public legal consciousness, conducted in Malaysia in December 2009. By way of specific examples, I show how public legal consciousness works against the efforts of Muslim women's groups to reform Muslim family law, even for those activists who explicitly work within the framework of Islamic law. In the conclusion, I sum up the significance of the survey findings and outline possibilities for further comparative research.

Shari'a vs. Fiqh in Islamic Legal Theory

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 in the way that we are familiar with, for example, in the Catholic Church.⁶ For guidance, Muslims must instead consult the textual sources of authority in Islam – the *Qur'an*, which Muslims believe to be the word of God, revealed to the Prophet Muhammad in the 7th century, and the *Sunnah*, the normative example of the Prophet.

This absence of a centralized institutional authority inevitably produced a pluralistic legal order. In the first several centuries of Islam, schools of jurisprudence formed around leading scholars (*‘ulama*) of Islamic law (Hallaq 2005). 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*), consensus (*ijma*), public welfare (*maslaha*), and a variety of other legal concepts and tools were developed to constitute the field of *usul al-fiqh* (Islamic legal theory).⁷ 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.⁸

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.⁹ Because *fatwas* are typically issued in response to questions posed by individuals in relation to specific social situations, they respond to the evolving needs of particular Muslim communities in their own particular context.¹⁰ In this sense, the evolution of Islamic jurisprudence was thus a bottom-up, not a top-down process (Masud et al. 1996: 4).

The Muslim legal community maintained unity within diversity through a critical conceptual distinction between the *shari‘a* (God’s way) and *fiqh* (understanding).¹¹ Whereas the *shari‘a* 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 is imperfect and fallible. This norm was so deeply engrained 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). The statement acknowledged the fact that no matter

how sure an individual 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, and other schools of jurisprudence, may also be correct. As Hallaq 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..." (2009: 27). This disagreement and diversity of opinion (*ikhtilaf*) among jurists was 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" (Hallaq 2001: 241). In both theory and practice, Islamic law is a pluralist legal system to its very core.

The conceptual distinction between the *shari'a* 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 a certain statement about the will of God. Lay Muslims were therefore encouraged to seek out the guidance of learned religious scholars, but they alone were ultimately responsible for their actions before God.¹² It is therefore incumbent upon lay Muslims to carefully consider the guidance of religious scholars to the best of their ability. This includes evaluating the qualifications and sincerity of the scholar as well as the quality of their reasoning. If an individual believes that the reasoning of another scholar or even another school of jurisprudence is closer to the will of God, they are obliged to follow their conscience, as they alone must ultimately answer to God (El Fadl 2001: 50-53). The *fatwa* of the religious scholar was not legally binding upon the individual.¹³

The plural nature of Islamic jurisprudence and the conceptual distinction between the *shari'a* and *fiqh* provided for the continuous evolution of Islamic law (El Fadl 2001; Hallaq 2009; Johansen 1999; Weiss 1992). Whereas the *shari'a* 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.¹⁴ 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’” (2001: 166).

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 were no administrative apparatus that applied uniform legal codes in the way that we have become so thoroughly accustomed to in the modern era (Jackson 1996). This is not to say that Islamic law was never applied by rulers 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, a foundational distinction between *fiqh* versus *siyasa* was critical in this regard.¹⁵ 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.¹⁶ 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 *shari‘a* 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.

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, due in large part to the limited administrative capacity of rulers. This would soon change, however, as rulers rapidly built modern bureaucracies and, with them, their ability to project state power.¹⁷ Beginning in the late 18th century, legal codification and administrative reforms allowed the state to regulate daily life in a far more systematic and disciplined manner.¹⁸ As we will see in the following section regarding the specific case of Malaysia, the distinctions between *shari‘a* and *fiqh*, as well as the distinction between *fiqh* and *siyasa*, collapsed as a result of the rapid

expansion of state power, the formalization of Islamic legal institutions, and the codification of Islamic law.

The Institutionalization of Islamic Law in Malaysia

Although Islam spread throughout the Malay Peninsula beginning in the 14th century, the institutionalization of Islamic law as state law is a far more recent development.¹⁹ As in other parts of the Muslim World, the colonial period was the key turning point for the institutionalization of religious authority in Malaysia (Horowitz 1994; Roff 1967; Hooker 1984; Hussin 2007). With British assistance and encouragement, *fiqh* was formalized through a process of legal codification. A *shari'a* court administration was 'rationalized', expanded, and later placed under the direction of new, state-level Religious Councils (*Majlis Agama Islam*) and Departments of Religious Affairs (*Jabatan Agama Islam*). According to one of the most important histories of this period, the institutional transformations under British rule 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 Malaysia was equipped with extensive machinery for governing Islam (Roff 1967: 72-73).

This institutionalization of Islamic law continued after Malaysia received independence in 1957 and accelerated in the 1980s under the leadership of Mahathir Mohammad. A shrewd politician, Mahathir sought to co-opt an ascendant Islamist movement to harness the legitimizing power of Islamic symbolism and discourse (Nasr 2001; Liow 2009). During his 22 years of rule, the Islamic bureaucracy expanded at an unprecedented rate and Islamic law was 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, Malaysia (*Institut Kefahaman Islam Malaysia*, IKIM) and the International Islamic University Malaysia (IIUM). Primary and secondary education curriculum was revised to include more material on Islamic civilization, and

radio and television content followed suit (Barr & Govindasamy 2010; Camroux 1996). But it was in the field of law and legal institutions that the most consequential innovations were made.

The Administration of Islamic Law Act (1993) created new authorities with a monopoly on religious interpretation, backed by the power of the state.²⁰ These include the Islamic Religious Council (*Majlis Agama Islam*), the office of the Mufti, and the Islamic Legal Consultative Committee.²¹ Most of the staff for these bodies are not required to have formal training in Islamic jurisprudence, yet the powers provided to these authorities are extraordinary.²² Most significantly, the Mufti is empowered to issue *fatwas* that, upon publication, are “binding on every Muslim resident in the Federal Territories....”²³ Accordingly, *fatwas* in the Malaysian context do not serve as nonbinding opinions from religious scholars as in classical Islamic jurisprudence. Rather, *fatwas* enter into law and are backed by the full power of the Malaysian state.²⁴

The Administration of Islamic Law Act not only endows *fatwas* with legal force, but this law-making function completely bypasses legislative institutions such as the Parliament.²⁵ Other elements of transparency and democratic deliberation are also excluded by explicit design. For example, article 28 of the Act declares that “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.

The Act also establishes a hierarchy of judicial authority in the *shari‘a* court system akin to the institutional structure that one would find in common law and civil law systems. Articles 40-57 establish Shari‘a Subordinate Courts, a Shari‘a High Court, and a Shari‘a Appeal Court. Finally, the Administration of Islamic Law Act 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 appointment and discipline of local imams (articles 76-83).

The Shari‘a 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:

- (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.
- (2) The Court may order that any book, pamphlet, document or recording referred to in subsection (1) be forfeited and destroyed, notwithstanding that no person may have been convicted of an offence connected therewith.

The Shari‘a Criminal Offences Act also criminalizes a number of substantive acts including 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).

The Shari‘a Criminal Procedure Act (1997) and the Shari‘a 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.

Placed side by side, one can see the extraordinary similarity between the documents, with whole sections copied verbatim. Abdul Hamid Mohamed, a legal official who eventually rose to be Chief Justice of the Federal Court, was on the drafting committees for the various federal and state *shari'a* procedures acts in the 1980s and 1990s. He candidly described the codification of *shari'a* 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.

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." (2008, 1-2, 10)²⁶

It should be noted that Abdul Hamid Mohamed and most other legal personnel involved in the codification of *shari'a* court procedures *did not* have formal education in Islamic jurisprudence. Mohamed'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 *shari'a* 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*. The relative lack of familiarity with Islamic legal theory was likely the reason why these officials were able to subvert Islamic legal theory, perhaps unknowingly, with the conviction that they were serving Islam as much as their own political gain. Mahathir Mohammad, the most important individual responsible for accelerating the process of state Islamization, is perhaps the best example of this phenomenon. But below him were many more secular-educated state officials such as Abdul Hamid Mohamed who had a zeal for formalizing and institutionalizing Islamic law as state law.

In line with this extensive program of formalizing *shari'a* court functions, family law was similarly codified, narrowing the scope of rights that women had access to in classical Islamic jurisprudence. The Islamic Family Law Act of 1984 (Federal Territories) provides women with

fewer rights than men in marriage, divorce, and child custody.²⁷ The Act makes it far more difficult for women to secure divorce than men, places women in a weaker position in the division of matrimonial assets, and provides women fewer rights in terms of child custody and maintenance (Badlishah 2003; Anwar and Rumminger 2007).²⁸ Malaysian women's groups operating within the framework of Islamic law are at pains to articulate how the specific codifications of the Islamic Family Law Act have closed off many of the legal entitlements that women could access in classical Islamic jurisprudence (Badlishah 2000, 2008; Anwar 2008; Othman 2005).

In sum, from the beginning of British colonial rule in 1874 to the late 20th century, Islamic law was transformed almost beyond recognition in Malaysia. While the codification of personal status law was common in most Muslim-majority countries, Malaysia went substantially further in terms of building state institutions with a monopoly on religious interpretation. The Religious Councils, the *shari'a* courts, and the entire administrative apparatus are Islamic in name, but in terms of function, they bear little resemblance to anything that existed prior to the arrival of the British. Islamic law was transformed from being pluralistic, flexible, and society-centered in the pre-modern era, to being singular, codified, institutionalized, and backed by the full power of the state. Moreover, the Administration of Islamic Law and the Shari'a Criminal Offenses Acts make it illegal to differ with the state's specific codification of *fiqh*. 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 (Mohamad 2010). The implications of this transformation are far reaching, because it collapses the crucial distinction in Islamic legal theory between the *shari'a* (God's way) and *fiqh* (human understanding). What is more, any distinction between the *shari'a* and *fiqh* is increasingly tenuous in the public's understanding of Islamic law. This is borne out by the results of a nationwide survey of popular legal consciousness in Malaysia.

Islamic Law in Public Legal Consciousness

Survey Method

In order to assess lay Muslim understandings of Islamic law, a first of its kind nationwide survey of popular legal consciousness in Malaysia was designed by the author. The survey presented a series of questions and statements, each of which affirms or contradicts fundamental conceptual principles in Islamic jurisprudence. The survey was designed to assess the extent to which lay Muslims conceive of Islamic law as a legal method that is pluralistic, flexible, non-binding, and shaped by human agency or, alternately, as a legal code that is uniform, fixed, legally binding, and purely divine in origin.

The survey questions were designed by the author. Execution of the telephone survey, including the sampling of respondents, was conducted by the Merdeka Center for Opinion Research, the leading public survey research group in Malaysia.²⁹ The survey was nationwide in scope with appropriate sampling techniques to ensure that respondents represent the composition of the Muslim community in Malaysia across relevant demographic variables including region, sex, and urban/rural divides. The sampling population was drawn from the national telephone directory, which comprises all households with fixed line telephones. In stage one of sampling, a random number generator was used to produce a sample of 3 million fixed line telephone numbers from the national directory. The resulting list was then checked to ensure that it was proportional to the number of Muslim residents in each state according to 2006 Malaysian census figures. In stage two, a randomly generated respondent telephone list was prepared, comprising five times the desired sample size of 1,000 respondents. In stage three, interval sampling was applied to the respondent telephone list. One respondent was then contacted in each household.³⁰ Respondents were balanced to ensure an equal number of males and females. The random stratified sample of 1,043 Malaysian Muslims ensures a maximum error margin of ± 3.03 percent at a 95 percent confidence level.

Sharia vs. Fiqh: Conflating Divine Will with Human Agency

The first statement posed to respondents was, "Islamic law changes over time to address new circumstances in society." As previously explained, this statement represents a core concept

in Islamic legal theory. Yet those surveyed did not reach anything close to a consensus on whether it was a factual statement, with only slightly more respondents agreeing (50.5 percent) than disagreeing (48 percent). The next statement in the survey approached the issue in a more direct and strongly worded fashion: “Islam provides a complete set of laws for human conduct and each of these laws has stayed the same, without being changed by people, since the time of the Prophet (s.a.w.)” An overwhelming 82 percent of respondents agreed with the statement, a remarkable result given that Muslim jurists and historians would strongly dispute the claim. A third statement was designed to probe the same issue in more grounded terms: “Each of the laws and procedures applied in the [Malaysian] *shari‘a* courts is clearly stated in the Qur’an.” It is striking that 78.5 percent of respondents agreed with the statement, while only 15.3 percent disagreed. As indicated in the previous section, very few of the laws and virtually none of the procedures applied in the Malaysian *shari‘a* courts are found in the Qur’an. Rather, the laws applied in the *shari‘a* courts are at most a codified version of *fiqh*, which itself is not uniform on most principles of law and is the product of human reason, not direct divine command. In all three questions, therefore, the understandings of lay Malaysian Muslims diverge sharply from both the historical record and core axioms in Islamic legal theory.

Table 1: The Nature of Islamic Law in Public Legal Consciousness

| <i>Statement</i> | <i>Agree</i> | <i>Disagree</i> | <i>Do not know</i> |
|--|--------------|-----------------|--------------------|
| Islamic law changes over time to address new circumstances in society. | 0.505 | 0.479 | 0.015 |
| Islam provides a complete set of laws for human conduct and each of these laws has stayed the same, without being changed by people, since the time of the Prophet (s.a.w.). | 0.820 | 0.176 | 0.005 |
| Each of the laws and procedures applied in the <i>shari‘a</i> courts is clearly stated in the <i>Qur’an</i> . | 0.785 | 0.153 | 0.059 |

These misconceptions are not merely significant in a religious sense. Because Islamic law is used extensively as an instrument of public policy, popular misconceptions about basic features of Islamic jurisprudence have significant implications for democratic deliberation on a host of substantive issues – women’s rights provide but one important example. When the public

understands the *shari'a* courts as applying God's law, unmediated by human influence, those laws cannot be easily questioned or debated without being considered blasphemy. Indeed, it is the presumed divine nature of the laws applied in the *shari'a* courts that provides the rationale for criminalizing the expression of alternative views in the Shari'a Criminal Offenses Act. As a result, laws concerning marriage, divorce, child custody, and other issues critical to women's wellbeing are difficult to approach as matters of public policy. The Malaysian women's rights organization, Sisters in Islam, has identified public misunderstandings of core principles in Islamic law as the most formidable obstacle that they face in their pursuit of progressive family law reform. For this reason, they conduct a variety of public education programs with a central focus on reconstructing the critical distinction between *shari'a* and *fiqh* in public legal consciousness.³¹

Islamic Law as Legal Method or Legal Code?

A second and related set of survey questions probed whether Malaysian Muslims conceive of Islamic law as uniform in character, with a single "correct" answer to any given issue, or alternately, whether Islamic law is understood as providing a framework through which Muslims can arrive at equally valid, yet differing understandings of God's will. Perhaps the best way of approaching this issue is by assessing popular understandings of the convention of the *fatwa*. For scholars of Islamic law, a *fatwa* is readily understood as a non-binding opinion by a religious jurist on a matter related to Islamic law. For any given question, jurists are likely to arrive at a variety of opinions, all of which should be considered equally valid assuming they follow accepted jurisprudential methods and approaches of one of the four schools of jurisprudence. But do lay Muslims understand the institution of the *fatwa* in the same way?

To explore this issue, respondents were asked a series of questions focused on the convention of the *fatwa*. First, respondents were asked, "If two religious scholars issue conflicting *fatwas* on the same issue, must one of them be wrong?"³² The majority (54.2 percent) of respondents answered yes while 39.5 percent answered no. In one sense, this majority response is in harmony with Islamic legal theory: most *fiqh* scholars believe that there is a correct answer to any given question, but humans can never know God's will with certainty in

this lifetime. However, a second survey question suggests that this is not a distinction that is made by most lay Muslims in Malaysia. The same respondents were asked, “Is it appropriate in Islam for the *‘ulama* to issue differing *fatwas* on the same issue?” Here, 40.5 percent of respondents answered yes, while the majority, 54.2 percent, this time answered no. Taken together, responses to the two questions suggest that most lay Muslims believe that there is a single ‘correct’ answer for any given issue and that religious scholars can and should arrive at the same ‘correct’ answer in the here and now. In other words, the majority of lay Muslims in Malaysia tend to understand Islamic law as constituting a single, unified code rather than a body of equally plausible juristic opinions.³³

Table 2: Uniformity or Plurality of Islamic Law in Public Legal Consciousness

| <i>Question</i> | <i>Yes</i> | <i>No</i> | <i>Do not know</i> |
|---|------------|-----------|--------------------|
| If two religious scholars issue conflicting <i>fatwas</i> on the same issue, must one of them be wrong? | 0.542 | 0.395 | 0.062 |
| Is it appropriate in Islam for the <i>‘ulama</i> to issue differing <i>fatwas</i> on the same issue? | 0.405 | 0.542 | 0.050 |

The finding that most lay Muslims understand Islamic law as *legal code*, providing only one correct answer to any given religious question, rather than a legal method that is capable of producing equally plausible opinions from different scholars, is a testament to how comprehensively the modern nation-state, with its codified and uniform body of laws and procedures, has left its imprint on public legal consciousness. Only about 40 percent of the population appears to conceive of the possibility that two or more opinions can be simultaneously legitimate on any matter in Islamic law, a remarkable divergence from core axioms in Islamic legal theory. As in the previous set of questions, this finding has deep implications beyond private religious belief. Because important matters of public policy are legitimized through the framework of Islamic law, the vision of Islamic law as code rather than Islamic law as method narrows the scope for public debate and deliberation.

This dynamic is again illustrated in concrete terms in regards to the challenges faced by women’s rights advocates in Malaysia. The non-governmental organization Sisters in Islam works to advance women’s rights within the framework of Islamic law by drawing on the rich

jurisprudential tradition within Islam.³⁴ Rather than accepting the specific codifications of *fiqh* that have been enacted as state law, Sisters in Islam examines the variety of positions in Islamic jurisprudence on any given issue, as well as the core values of justice and equality that are emphasized in Islam. For example, Sisters in Islam has lobbied the government to recognize the right of women to stipulate in their marriage contract the right to divorce in the event that a husband marries a second wife. While the Shafi'i *madhhab* does not afford women the opportunity to make such stipulations in the marriage contract, the Hanbali *madhhab* does (Badlishah 2008: 190). Why, Sisters in Islam asks, must Malaysian family law conform to the Shafi'i *madhhab* on this point of law when the Hanbali *madhhab* affords a more progressive opportunity to expand women's rights?³⁵ These women's rights advocates highlight the fact that *fiqh* is not a uniform legal code. Rather, it is a diverse body of jurisprudence that affords multiple guidelines for human relations, some of which are better suited to particular times and places than others. In a state where Islamic law has been codified as an instrument of patriarchal public policy, Sisters in Islam thus engages conservatives on their own discursive terrain. The common response to women's rights activism that "this is God's law" is thus challenged by the powerful rejoinder that, on most questions of law, Islam simply does not provide a single legal opinion.³⁶

Unfortunately, this approach is again stymied by popular misconceptions of Islamic law. To the extent that Islamic law is understood as a fixed and uniform code, with only one 'correct' answer for any particular issue, women's rights advocates face an uphill battle in convincing the public about the possibilities for legal reform, even within the framework of Islamic law. The fact that 78.5 percent of lay Muslims in Malaysia believe that each of the laws and procedures applied in the *shari'a* courts is clearly stated in the Qur'an, which Muslims believe is the direct word of God, is a clear indicator of the weak grasp that the public has of basic principles in Islamic jurisprudence and in the bases of Malaysian public law. The collapse of the distinction between *shari'a* and *fiqh* in popular legal consciousness makes alternate interpretations, even when they are equally legitimate in Islamic law, a hard sell with the general public.³⁷

Religious Authority in Popular Legal Consciousness

The next pair of questions was designed to assess how lay Muslims understand religious authority in Islam. As explained in the first section of this paper, Islam has no centralized institutional authority to dictate a uniform doctrine. Although individuals may turn to religious scholars for guidance, each individual alone must answer to God. Nevertheless, the Malaysian state, like other Muslim majority states, applies a codified version of Islamic law through state institutions. Moreover, the Malaysian state has gone further than others by taking the extraordinary step of making religious authority directly binding on all Malaysian Muslims through the Administration of Islamic Law Act and the Shari‘a Criminal Offenses Act, both of which represent major departures from classical principles in Islamic jurisprudence.

As with the previous set of questions, perhaps the best way of uncovering how Muslims conceive of religious authority in Islam is to probe popular understandings of the convention of the *fatwa*. Respondents were asked, “Are Muslims required by their religion to obey all *fatwas* issued by religious authorities?” Nearly three times as many respondents (68.8 percent) answered yes to the question as compared with those who answered no (26.1 percent).³⁸ A solid majority of Malaysian Muslims thus believe that it is a *religious* duty, and not just a legal duty, to adhere to *fatwas*. Respondents were also asked whether they agreed with the statement, “Muslims without extensive training in the Islamic Shari‘a **should never** question the *‘ulama*.” Over three quarters of respondents (75.8 percent) agreed while only 22.6 percent disagreed.

Table 3: Religious Authority in Popular Legal Consciousness

| <i>Questions and Statements</i> | <i>Yes/Agree</i> | <i>No/Disagree</i> | <i>Do not know</i> |
|---|------------------|--------------------|--------------------|
| Are Muslims required by their religion to obey all <i>fatwas</i> issued by religious authorities? | 0.688 | 0.261 | 0.050 |
| Muslims without extensive training in the Islamic <i>shari‘a</i> should never question the <i>‘ulama</i> . | 0.758 | 0.226 | 0.013 |
| Because the <i>‘ulama</i> are imperfect humans, their views on some issues may be wrong. | 0.757 | 0.217 | 0.026 |
| Are <i>fatwas</i> sometimes issued to advance political interests? | 0.538 | 0.393 | 0.064 |

Once again, these expectations and understandings among lay Muslims diverge from fundamental principles in Islamic jurisprudence. As we have seen previously, it is not only possible for lay Muslims to think critically about fatwas to the best of their ability, it is their religious duty. While lay Muslims are encouraged to seek out the guidance of those knowledgeable in religion, they are not to follow blindly, as they alone are answerable to God.

Despite the apparent willingness to accept religious authority in these two questions, it is notable that the majority of respondents polled in this survey also recognize that the *'ulama* do not have perfect access to God's will and that, as fallible humans, they are prone to make errors. The majority (75.7 percent) of those surveyed agreed with the statement "Because the *'ulama* are imperfect humans, their views on some issues may be wrong." Similarly, the majority (70.3 percent) of respondents agreed with the statement, "Even the best among the *'ulama* do not know God's will with absolute certainty." Likewise, respondents were clearly not naïve to the political roles that *fatwas* can sometimes serve. 53.8 percent of respondents answered affirmatively to the question, "Are *fatwas* sometimes used to advance political interests?" Faith in the purity and perfection of Islam and Islamic law thus sits side-by-side with political cynicism.

Arguably, it is healthy for the public to be sober about the imperfect knowledge of the *'ulama* and the potential subjective biases that are reflected in *fatwas*. Such cynicism is a necessary, if not sufficient, condition for the public to be critical consumers and to be mindful of potential abuses of religious authority. But the findings to these questions are particularly interesting when paired with the previous questions probing the possibility of multiple "correct" answers to any given matter in Islamic law. A reasonable interpretation of these two sets of findings is that most respondents believe that conflicting *fatwas* are inevitably the result of poor religious training or subjective political bias. The persistent belief that there remains a single "correct" answer to any religious question remains a serious misconception that narrows the possibility for pluralism in Islamic law.

Conclusions

It is important to reiterate that these survey results represent popular understandings of Islamic law in contemporary Malaysia only. The same survey questions, asked in other Muslim-

majority countries (or in Malaysia at another point of time) will likely yield a different outcome. The results should therefore not be extrapolated to the lay Muslim public in other locales. As with any country, Malaysia has a very specific set of social, political, and institutional dynamics that undoubtedly shape public understandings of the requirements of Islamic law. Nevertheless, the results presented here corroborate the general concerns of experts in Islamic law who fear that “the remnants of the classical Islamic jurisprudential heritage are verging on extinction” (El Fadl 2001: ix). While the path-breaking scholarship of El Fadl (2001), Hallaq (2001; 2009), Peters (2005), and others provide detailed accounts of how classical Islamic legal theory was undermined and transformed by the state-building process over the 19th and 20th centuries, this survey shifts the focus of inquiry from the production to the consumption of religious knowledge.

The data suggest that there is a significant gap between the epistemological commitments of Islamic legal theory and how Islamic law is understood among lay Muslims in Malaysia. The findings indicate fundamental misunderstandings of basic principles in Islamic jurisprudence – misunderstandings that blur the distinction between *shari‘a* and *fiqh*. Whereas Islamic jurisprudence is marked by diversity and fluidity, Islamic law is understood among most Muslims in Malaysia today as being singular and fixed. Implementation of a codified version of Islamic law through the *shari‘a* courts is understood as a religious duty of the state, and indeed it appears that most Malaysians believe that the *shari‘a* courts apply God’s law directly, unmediated by human agency. Likewise, unquestioned deference to religious authority is assumed to be a legal and religious duty among most Malaysians.

Given the nature of popular legal consciousness in Malaysia, it is no wonder that women’s rights activists have encountered such difficulty in mobilizing broad-based public support in their efforts to reform of Muslim family law codes. It is also little surprise that women’s rights activists often find themselves on the losing end of debates with conservatives, regardless of the strength of the arguments that they field. Women’s rights activists – even those operating within the framework of Islamic law – are easily depicted by their opponents as challenging core requirements of Islamic law, even Islam itself. Conversely, the discursive position of conservative actors is strengthened as a result of popular misunderstandings of

epistemological commitments in Islamic law. Religious officials, political parties, and civil society groups working to preserve the status quo easily position themselves as defenders of the faith given popular understandings of Islamic law as being singular and fixed.

Of course, Islamic law is also deployed as an important instrument of public policy in other issue areas beyond women's rights. Popular legal consciousness therefore has far-reaching implications for a variety of other substantive public policy issues. Islamic law has been used in Malaysia as the pretext for outlawing "deviant" sects,³⁹ policing public morality,⁴⁰ and curtailing freedom of expression.⁴¹ In each of these areas, Islamic law is not only cast in a conservative vein – perhaps more significantly, Islamic law is consistently deployed in a manner that closes down public debate and deliberation.

This vision of Islamic law as being exclusively divine in origin, void of human agency, and therefore singular, fixed, and binding, is encouraged by the government, the growing religious bureaucracy, the Islamic Party of Malaysia (*Parti Islam se-Malaysia*), and Islamist civil society organizations such as ABIM (Liow 2009; Mohamad 2010).⁴² Such rhetorical positioning is regularly deployed in public policy debates because "speaking in God's name" repeatedly proves to be the most effective and expedient avenue for conservative state and non-state actors to make assertions and undercut opposition. More generally, popular legal consciousness constitutes the underlying socio-legal context that fuels the rhetorical one-upmanship around the place of Islam in Malaysia that is so often noted between the ruling UMNO and Islamist party challenger, PAS (*Parti Islam se-Malaysia*).⁴³ It is beyond the scope of this article to examine and document the formal and informal sites where public understandings of Islamic law are shaped, but any analysis would need to account for the many sites of socialization controlled by the state itself, principal among them being religious education in public schools, religious programming on state radio and television programs, and Friday sermons in state-run mosques.

These survey results may leave one with the impression that the reform of Muslim family law is a difficult, if not impossible objective to achieve. Indeed, when the survey results were presented to Sisters in Islam by the author in December 2010, the activists gathered around the table were not at all surprised by the notion that most Malaysian Muslims understand Islamic law as singular, fixed, and purely divine in origin. After all, these rights advocates live the reality of

popular legal consciousness on a daily basis. What they were pleasantly surprised by, however, was the share of the Malaysian public that ‘gets it’. Despite the fact that a smaller share of the general public understands Islamic law as plural, flexible, and shot through with human agency, the survey data provided reassurance that popular legal consciousness is not monolithic. More importantly, the survey data provide valuable insights into how popular legal consciousness varies across levels of income, education, age, sex, region, and urban/rural divides. Armed with such data, women’s rights groups can target their limited resources more effectively. Moreover, they can use the data itself as a public education opportunity, by highlighting the ‘myths and realities’ of Islamic law, women’s rights, and public policy in contemporary Malaysia.

Notes

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² Muslims believe the Qur’an to be the word of God, revealed to the Prophet Muhammad in the 7th century A.D. The Qur’an is the primary source of authority in Islamic jurisprudence. The *Sunnah* is the normative example set by the Prophet Muhammad through his actions and statements, as reported in narrative reports, or *hadith*. The *Sunnah* comprises the second most important source of authority in Islamic jurisprudence.

³ For more on the distinction between *shari‘a* and *fiqh* in classical and contemporary writings, see El Fadl (2001: 32-40), Kamali (2008: 40-42), Hallaq (2001, 2009), Johansen (1999), Weiss (1992: 15-16). Also see the following works, cited in El Fadl (2001: 76): Mahmasani (1961), Abu Zahrah (1957), Zayd (1964), al-Alim (1991), and al-Shawkani (1981).

⁴ For example, Griffel (2007) notes that “Many Muslims today understand Shari‘a as a canonized code of law that can be easily compared with European codes...” (13). Also see El Fadl (2001) and Hallaq (2009) for prominent examples.

⁵ Past surveys have assessed how lay Muslims understand the relationship between the *shari‘a* and democracy, the *shari‘a* and women’s rights, and the *shari‘a* and political violence. However, those studies focus exclusively on substantive rather than conceptual issues in Islamic law. See, for example, Esposito and Mogahed (2008).

⁶ There are exceptions, such as the Ismailis, who make up the second largest sect in Shi‘a Islam. However, their population represents a small minority among the worldwide Muslim community.

⁷ *Usul al-fiqh* can also be translated as “principles of understanding.”

⁸ Ja‘fari *fiqh* constitutes another branch of Islamic jurisprudence in Shi‘ah Islam. For the sake of simplicity, I focus only on Sunni Islam, which comprises approximately 85 percent of the worldwide Muslim population.

⁹ The *fatwa* is often incorrectly translated as a religious “edict” but fatwas are merely non-binding legal opinions which do not, by themselves, carry the force of law.

¹⁰ 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 et al. (1996).

¹¹ “*Shari‘a*” is often incorrectly translated simply as “Islamic law,” which obscures the critical conceptual distinction between the *shari‘a* and *fiqh*.

¹² This is exemplified in verse 21:7 of the Qur’an, “If you do not know, ask the people of religion.”

¹³ This is exemplified in verse 88:21-22 of the Qur’an, “Remind them [the people] for you are nothing but a reminder [to the people]. You do not control them.”

¹⁴ “*Shari‘ah* as a moral abstract is immutable and unchangeable, but no Muslim jurist has ever claimed that *fiqh* enjoys the same revered status” (El Fadl 2001: 76).

¹⁵ The distinction between *fiqh* and *siyasa* is distinct from the *shari‘a/fiqh* dichotomy discussed previously. For more on *fiqh* versus *siyasa*, see Vogel (2000), Stilt (2011), and Quraishi (2006).

¹⁶ For a more nuanced and historically grounded exposition of the relationship between *fiqh* and *siyasa* in both theory and practice, see Stilt (2011).

¹⁷ 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.

¹⁸ This process is examined in great detail in Hallaq (2009: 371-498).

¹⁹ The form and nature of Islamic law in the pre-colonial period is a matter of debate, but we have precious little empirical research on the matter. Islamists 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. However, scholarship on the matter suggests 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” (Peletz 2002: 62). To the extent that Islamic law was practiced in the pre-colonial period, it was thoroughly intertwined with and informed by customary (*adat*) law. Its practice was radically different from the highly institutionalized form that prevails in contemporary Malaysia. See Horowitz (1994) for more on the nature of Islamic law in the pre-colonial Malay Peninsula.

²⁰ The Malaysian Constitution provides states with the power to administer religious affairs. However, provisions in state level enactments closely mirror the acts in force in the Federal Territories. The acts reviewed here are all currently in force in the Federal Territories. For a detailed examination of earlier developments in codification and institutionalization that were superseded by the current legislation in force, see Horowitz (1994).

²¹ Articles 4-31 of the Administration of Islamic Law Act empower the *Majlis Agama Islam Wilayah Persekutuan* (Islamic Religious Council of the Federal Territories). This *Majlis* is composed mostly of officials who are appointed by the Yang di-Pertuan Agong (Supreme Head of State who is elected among the nine hereditary state rulers). The office of Mufti is similarly appointed by the Yang di-Pertuan Agong in consultation with the *Majlis Agama Islam* (article 32). Finally, an Islamic Legal Consultative Committee charged with assisting the Mufti in issuing fatwas is established in article 37.

²² Only six of the 21 members of the *Majlis Agama Islam Wilayah Persekutuan* are required to be “persons learned in Islamic Studies” (article 10). Similarly, although the Islamic Legal Consultative Committee is charged with assisting the Mufti in issuing *fatwas*, the formal composition of this committee once again does not guarantee a majority with formal training in Islamic law.

²³ Under article 34 of the Act, *fatwas* are automatically brought into legal force so long as the Mufti has consulted with the Islamic Legal Consultative Committee.

²⁴ Article 34 goes on to state that, “[a] fatwa shall be recognized by all Courts in the Federal Territories as authoritative of all matters laid down therein.”

²⁵ The Administration of Islamic Law Act was passed into law by the 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.

²⁶ The same details were related to me in a personal interview with Abdul Hamid Mohamed on 17 November 2009.

²⁷ Because the administration of Islamic law is organized at the state level, there are thirteen separate Islamic family law enactments and one additional act for the Federal Territories. However, as with other legislation touching on Islam, the Federal Territories Act is the law upon which most state enactments modeled. Divergence from the Federal Territories Act is more prominent in PAS controlled Kelantan.

²⁸ For example, article 13 of the Islamic Family Law Act requires a woman to have the consent of her guardian for marriage (regardless of her age) while it does not for men. Article 8 sets the minimum age for marriage at 18 for men, but 16 for women. Article 59 denies a wife her right to maintenance or alimony if she “unreasonably refuses to obey the lawful wishes of 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 rights to the mother until the child reaches the age of seven years (for boys) and nine years (for girls), at which time custody reverts to the father. Moreover, Article 83 details conditions under which a mother can lose her limited custody due to reasons of irresponsibility, whereas no such conditions are stipulated for fathers.

²⁹ The telephone survey was executed December 9-13, 2009.

³⁰ Of the total 5,824 calls placed, 1,421 respondents did not meet the survey criteria (they were either non-Muslim or under 18 years of age). A further 737 respondents declined to participate in the survey, 34 calls were dropped, and 1,043 completed the survey.

³¹ Sisters in Islam has taken this approach to the global level by linking with dozens of similar women’s rights organizations working in a number of Muslim-majority countries. Their new initiative, *Musawah* (Arabic for “equality”), can be found at www.musawah.org.

³² The terms “religious scholar” and “*ulama*” were used in the survey questions because they are more readily understood by lay Muslims than the term “*mujtahid*.”

³³ An additional statement probed this issue further. The statement, “The laws applied in the *shari’a* courts for marriage and divorce are the same as those applied in other Muslim countries” was agreeable to almost half (49.7 percent) of respondents, while 37 percent disagreed and 13.7 percent answered that they do not know. The majority view on this question likely further reflects the assumption that Islamic law provides a single, ‘correct’ legal code, which is either applied faithfully or not.

³⁴ More information on Sisters in Islam can be found on their website, <http://www.sistersinislam.org.my/>

³⁵ Most codifications of *fiqh* in Malaysia are drawn from the Shafi’i *madhhab*, but the Malaysian government has made departures to other *madhahib* on some points of law based on the concept of *maslaha* (public interest) in Islamic law. There are also whole areas of law, such as Islamic banking, which are not based on the *Shafi’i* *madhhab*.

³⁶ Womens’ rights advocates have fielded similar arguments within the framework of Islamic law in a number of diverse contexts, sometimes with successful results. For examples, see Zulficar (2008), Osanloo (2009), Tucker (2008), and Singerman (2004).

³⁷ Sisters in Islam has been labeled “Sisters Against Islam” on more than one occasion in the popular press, despite the fact that their advocacy campaigns operate within the framework of Islamic law.

³⁸ Survey respondents were also asked, “Are Muslims required *by the law* to obey all *fatwas* issued by religious authorities?” Interestingly, the response was very similar (63.8 percent agreement), further suggesting that institutionalization of Islamic law has blurred any distinction between what is required in Islam and what is required by the state.

³⁹ The Malaysian government has outlawed 56 “deviant” sects including the Shi’a. See SUARAM (2008: 113-116) and Liow (2009: 161-166).

⁴⁰ See Liow (2009: 128-131).

⁴¹ See SUARAM (2008: 69-71).

⁴² ABIM, the Malaysian Islamic Youth Movement (*Angkatan Belia Islam Malaysia*), is the strongest and most organized Islamist civil society organization in Malaysia.

⁴³ UMNO is the United Malays National Organization, the political party that has ruled Malaysia since independence. PAS, the Islamic Party of Malaysia (*Parti Islam se-Malaysia*), is the main challenger to UMNO, at least among the ethnic Malay vote. For more on the rivalry between the two parties and the use of Islam by each, see Liow (2009).

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