

THE ISLAMIC LEGAL SYSTEM IN MALAYSIA

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Abstract: This article describes the historical evolution and the current structure of the Islamic legal system in Malaysia. The structure of the modern Malaysian state has its roots in the region's colonial history. By the end of the nineteenth century the territory that comprises contemporary Malaysia had been subjected to British colonial authority. The British did not, however, rule the region as a single colonial unit. In the directly ruled colonies most matters were governed by English common law, and while Islamic doctrine governed family law, it was applied by colonial courts that were staffed by British or British-trained judges. In the colonies subject to indirect rule an English resident exercised authority over matters of British interest while Malay sultans retained their hereditary titles, and local courts exercised the sultan's authority in matters of Malay *adat* (custom) and Islam. When the state of Malaysia was created in 1957, the constitution established a federal structure that reflected the pluralistic colonial system. Malaysia is currently comprised of 13 states and three federal territories. Under the constitution, most areas of life are governed by a uniform body of federal law applied by a system of national courts. However, the constitution grants the states the power to apply a version of Islamic law on certain topics enumerated in the constitution, and to create Shari'a courts to adjudicate disputes involving Muslims relating to matters of Islamic law. The subjects included within the states' legislative power include, in addition to personal law and matters related to religious practice, offenses deemed to be against the precepts of Islam. All of the states have exercised the powers granted by the constitution to legislate on matters related to Islam, and every state has established Shari'a courts to adjudicate disputes based on Islamic legislation. A constitutional amendment approved in 1988 eliminated the power of civil courts to hear appeals from decisions of the Syariah courts. At the same time that they are achieving greater autonomy, the Shari'a courts are also seeking to "upgrade" in ways that emulate the civil courts.^{††}

I. INTRODUCTION

Between 1957 and 1963, a number of colonized states in peninsular Malaysia and Northern Borneo united to form the new, independent

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^{††} In accordance with the policies of the *Pacific Rim Law & Policy Journal*, foreign words that have entered common English usage will not be italicized. Foreign words that are not in common usage will be italicized. Arabic words will not use diacritical marks such as macrons. However, apostrophes and reverse apostrophes will be employed to signal the letters *hamza* and *'ayn*, respectively. The Malaysian equivalent of "Shari'a," "Syariah," is generally used in this article.

Federation of Malaysia.¹ The legal system in the independent Federation of Malaysia reflected the plural model that had emerged in Britain's Malay colonies. Most areas of life were to be regulated by a common body of federal law. Federal law at the time of independence was based primarily on British models. A few aspects of Muslim life, however, were to be regulated not by federal law but by state Islamic-based law referred to locally as Syariah law. In this context, the states were permitted to establish their own state Islamic court systems, known locally as Syariah courts, to apply this law.

As part of the global wave of Islamization that has taken place since the 1970s, some factions in Malaysia have called for an expansion of the role of Islamic law in the Malaysian legal system. Some have called for the federal government to revise federal law in order to make it more consistent with Islamic norms. This approach has had, at best, mixed success. Others have urged Malaysia's state governments to take advantage of a constitutional provision allowing them to regulate the lives of Muslims within their borders according to Islamic law. The champions of this approach have been more successful, and various states have interpreted their powers under these provisions ever more broadly over recent decades. They have established increasingly large bureaucracies, issuing and enforcing an expanding range of Islamic statutes. State governments have also invested heavily in establishing and regularly "upgrading" the state court systems that have jurisdiction over cases arising under Islamic law. The federal government has accepted the growing role of Islamic law, as defined by the sub-national state governments of Malaysia, and the growing power of the state courts that apply this law. Indeed, the Federal Constitution has recently been amended to strip from the federal courts most of their traditional powers to hear appeals from state Syariah courts.²

In each of the sub-national states of Malaysia, significant parts of Muslim life are now regulated by Islamic laws developed by the governments of that state and applied by Islamic courts established by it. Thus, while attempts to "Islamize" federal law have been less than fully successful, attempts to carve out an autonomous Islamic area of the legal system have been more successful. This article will describe the evolving nature of the legal systems in the areas that now make up Malaysia from the colonial period to the present. Noting that different states in Malaysia have developed somewhat different interpretations of Islamic law and somewhat

¹ For an overview of the history of the Malaysian legal system, see Zanur bin Zakaria, *The Legal System of Malaysia*, in ASEAN LEGAL SYSTEMS 77 (1995).

² PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 121.

different systems of enforcing it, it will also describe the institutions that are trying to promote further harmonization. This article will thus provide useful background for those reading the subsequent articles in this special issue—articles which discuss in detail the increasingly homogenized forms of training that judges and lawyers in the state Syariah courts today undergo.

II. THE EVOLVING ROLE OF ISLAMIC LAW IN MALAYSIA

Muslim sailors and traders have been a presence in trading ports across Southeast Asia, including the Malay Peninsula, since the early centuries of Islamic history. By the end of the thirteenth century, the first Islamic sultanate was established in the region. Over the centuries that followed, other Muslim port polities were established across the region.³ Our knowledge of the political and legal systems of these sultanates is severely limited by a lack of primary sources. The few extant documents that do survive from the early period suggest, however, that in a number of sultanates on the Malay Peninsula various forms of Islamic law came to be applied to resolve some disputes within the sultanates.⁴ European travelers and British officers also reported that some substantive rules of Islamic law were applied in the Malay sultanates.⁵

By the sixteenth century, European powers had begun to establish a presence in the Malay world and established colonies in areas that would eventually become part of Malaysia. By the nineteenth century, the British had expanded their sphere of influence in the region, and by the end of the century controlled, either directly or indirectly, all the sultanates of the peninsula. European intervention in the Malay world doubtlessly changed the dynamics of the application of Islamic law in the region. However, we still have little understanding of exactly how these legal processes unfolded in the pre-colonial era. Early sources tend to describe the court system in only general terms, indicating only that the sultan and state officials asserted the power to adjudicate disputes.⁶ The first detailed description of an Islamic court system in the Malay Peninsula is for the Sultanate of Kelantan, and it appears only in the nineteenth century.⁷

³ SYED MUHAMMAD NAGUIB AL-ATTAS, *ISLAM DALAM SEJARAH DAN KEBUDAYAAN MELAYU* (1972). For discussion on the date of arrival of Islam, see S.Q. FATIMI, *ISLAM COMES TO MALAYSIA* (1963).

⁴ See LIAW YOCK FANG, *UNDANG-UNDANG MELAKA 32* (1976); *ISLAMIC LAW IN SOUTH-EAST ASIA* 15 (M.B. Hooker ed., 1984).

⁵ *THE LAWS OF SOUTH-EAST ASIA* (M. B. Hooker ed., 1986).

⁶ *SEJARAH MELAYU: THE MALAY ANNALS: MS RAFFLES NO. 18, 221-22* (Abdul Rahman Haji Ismail & Boon Kheng Cheah eds., 1998).

⁷ ABDULLAH ALWI HAJI HASSAN, *ISLAMIC LAW IN KELANTAN 14* (1996).

The British colonies in Malaysia were not a single colonial unit. Rather, they were a patchwork of territories under various forms of direct and indirect rule, which were often implemented idiosyncratically with regard to diverse local particularities. In general, however, there were two major ways in which the British extended their control over the sultanates in the region. The first was to acquire land and place it under direct British control through purchase or conquest.⁸ Through these processes, the British gained control of the “Straits Settlements,” which included the ports of Penang, Malacca, and Singapore. In the Malay territories that were under direct British control, the British applied British law as far as local circumstances would admit.⁹ In applying this principle, the British decided that most issues involving criminal and commercial law would be resolved by British common law.¹⁰ However, certain issues, including issues concerning Muslim family matters, were to be governed by Islamic law. Such disputes were resolved by the same courts that resolved questions of civil law, which were staffed by British or British-trained judges, who were instructed to apply Islamic law as best they could.

In other parts of the region, where they could not gain direct control, the British exerted indirect control over other Malay states by entering into treaties with the sultans. These treaties left the sultans in place nominally as heads of state, while placing British officials (“Residents”) in control of state policy in all areas of interest to the British.¹¹ Among the very few areas over which the sultans were allowed to retain power were Malay *adat* (custom) and Islam.¹² In indirectly colonized sultanates, British Residents insisted that civil courts be established to apply common law to many issues. However they also permitted local courts to use Islamic law to resolve numerous legal questions, including questions of family law among Muslims.¹³

⁸ For example, the Island of Penang was ceded to the British in 1786.

⁹ See generally JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF THE BRITISH EMPIRE* 662-82 (2001); Zakaria, *supra* note 1.

¹⁰ See generally Zakaria, *supra* note 1.

¹¹ The British entered into the Pangkor Treaty with the Sultanate of Perak in 1874. Negeri Sembilan had already accepted the Resident system in 1873. Selangor accepted the Resident system in 1875. Penang accepted it in 1888. These united in 1895 to form the Federated Malay States. Johor accepted a British Resident in 1885, but did not join the Federated Malay States. In the early 20th Century, Kelantan, Terengganu, Kedah, and Perlis were ceded by Siam to Britain whereupon, their sultans also accepted the basic “deal” of the British Resident system. For history of the Malaysian legal system, see Zakaria, *supra* note 1.

¹² See Perak Treaty of 1874 (Treaty of Pangkor) in 1 *A COLLECTION OF TREATIES AND OTHER DOCUMENTS AFFECTING THE STATES OF MALAYSIA 1761-1963*, 390 (Allen, Stockwell & Wright eds., 1981).

¹³ See John Griffiths, *What Is Legal Pluralism?*, 24 *J. LEGAL PLURALISM* 1 (1986).

Ultimately, four of the indirectly ruled sultanates made significant collective efforts to harmonize their governmental policies and Islamic legal systems. In these states, special Islamic courts were established to adjudicate Islamic cases. Appeals from these courts went to the civil courts which, as we have seen, tended to be staffed by British or British-trained judges.¹⁴ In five other indirect-rule sultanates, the residents required the sultans to establish civil courts to adjudicate issues according to British common law. Although the sultans in these states were also permitted to establish Islamic courts to adjudicate family law cases involving Muslims, inheritance from a deceased Muslim, and Muslim religious endowments (“*wakaf*”),¹⁵ interpretations of Islamic law differed from state to state, as did the structure of the Islamic courts. Nonetheless, in order to ensure that Islamic law was not interpreted and applied in a manner that conflicted with British understandings of justice, residents tried to ensure that decisions from Islamic courts could be appealed to civil courts staffed by British-trained judges.

In sum, by the early twentieth century, Britain controlled, directly or indirectly, a hodgepodge of states with plural legal systems. In all of them, most types of disputes were resolved according to common law in courts that were, for the most part, staffed by English or English-trained common law judges, while laws governing Islamic ritual and Islamic family law were governed by Islamic law.¹⁶ Each of these states, however, embraced slightly different interpretations of Islamic law and used their own particular kinds of courts to adjudicate Islamic cases.

In 1957, eleven of the thirteen British colonies in the region were granted independence and signed a constitution establishing a new federal nation that would eventually be called Malaysia. Each of the states in this new nation were given the constitutional right to identify an interpretation of Islamic law that would be applied to Muslims in their territory and the right to establish courts to adjudicate disputes involving Muslims and arising under those laws.¹⁷

¹⁴ The British introduced specialized and restricted religious courts in the Courts Enactment of 1918. Enactment 14 of 1918, § 4 (Federated Malay States). The Enactment provided for a Supreme Court (consisting of a Court of Appeal and courts of judges), courts of magistrate first class, courts of magistrate second class, courts of *kathi* (or *qadi*), courts of assistant *kathi*, and courts of *penghulu* (village level Islamic official). In this single hierarchy of courts, the courts of *kathi* was put as the second to last court in the hierarchy and had jurisdiction over Muslim affairs.

¹⁵ Iza Hussin, *The Pursuit of the Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State*, 32 LAW & SOC. INQUIRY 759, 765 (2007).

¹⁶ RAMSAY MUIR, *THE EXPANSION OF EUROPE* (1917).

¹⁷ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, sched. 9, list II (State List), item 1.

The states also donated land to create the federal territories of Kuala Lumpur, Putrajaya, and Labuan (“Federal Territories”), which came to be the seat of the new nation’s capital. The Federal Territories constitute a twelfth unit of the Federation, one that is not a state, but is rather a territory under the direct control of the federal government.

In 1963, two former British colonies located on the north coast of Borneo, Sabah and Sarawak, were granted independence and joined the Federation.¹⁸ In that same year, the Straits Settlement of Singapore was also granted independence, and from 1963 to 1965 was joined to Malaysia.¹⁹ In 1965, however, Singapore broke off to become an independent state, leaving Malaysia with its current configuration of fourteen units: thirteen states and the special unit called the Federal Territories. Of the thirteen states, nine have hereditary sultans as their formal heads of state.²⁰ Four—Malacca, Penang, Sarawak and Sabah—do not.

The Constitution of Malaysia established a legal system that resembles, in general terms, the plural legal system that the British established during the colonial era.²¹ Most areas of life in Malaysia are regulated by federal law that applies consistently throughout the nation. Included are most of the issues that, during the colonial period, would have been resolved by civil court judges applying British common law. Each of the states, however, was given the constitutional right to identify an interpretation of Islamic law that would be applied to Muslims in their territory and the right to establish courts to adjudicate disputes involving Muslims and arising in a range of areas, including:

Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious endowments, institutions, trusts, charities, and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah

¹⁸ C. L. Lim, *Race, Multi-Cultural Accommodation and the Constitutions of Singapore and Malaysia*, SING. J. LEGAL. STUD. 117, 129 (2004).

¹⁹ *Id.*

²⁰ Nine states—Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor, and Terengganu—have hereditary rulers. In all but two of these states the hereditary ruler holds the title of Sultan. *Background Note: Malaysia*, UNITED STATES DEPARTMENT OF STATE <http://www.state.gov/r/pa/ci/bgn/2777.htm> (last visited Oct. 30, 2011).

²¹ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 74, sched. 9, list I (Federal List), item 6(e).

and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.²²

According to this provision, each state is free to enact its own version of Islamic law, and is free to establish its own state Islamic courts to adjudicate disputes arising under the state's Islamic laws. In recent decades all the states that make up Malaysia have chosen to exercise their power to create Islamic laws more assertively and have established an increasing number of regulations that are binding on Muslims within their borders.

As a formal matter, this provision does not apply to the Federal Territories, which are under the plenary control of the federal government.²³ Nevertheless, the federal government has chosen, as it is authorized to do, to develop its own body of Islamic law that will govern the lives of Muslims located within the Federal Territories and establish courts to administer those laws.

Over time, constitutional amendments have given state courts that adjudicate disputes arising under Islamic law an increasing amount of autonomy. At the time of Malaysia's independence, decisions issued by the states' Syariah courts could be appealed to the civil courts—allowing the federal government's civil courts, through their appellate jurisdiction, to impose nationwide a homogenized (and arguably Anglicized) version of Islamic law that had been developed in the civil courts of colonial Malaya.²⁴ In recent decades, states have begun to aggressively interpret the scope of their power to regulate the affairs of Muslim citizens located within their boundaries. This has led to an increasing amount of Islamic legislation being passed by Malaysian states. Furthermore, as will be discussed below,

²² *Id.* art. 74, sched. 9, list II (State List), item 1.

²³ *Id.* art. 74, sched. 9, list I (Federal List), item 6(e).

²⁴ Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change*, 42 AM. J. COMP. L. 233, 254-58 (1994).

a recent constitutional amendment has eliminated the right of appeal from a state Syariah court to the federal civil courts.²⁵ Each state's Syariah court is thus now effectively a self-contained system.

The stripping of federal appellate review over state Syariah Court decisions prevents the federal government from guaranteeing the uniform application of Islamic law across different states. The possibility of divergence has caused pressure to create alternative institutions, other than the civil courts, that can encourage consistent interpretation of Islamic law. One way is to create model statutes that the federal authorities hope will be adopted by all states, creating a single rule that applies to Muslims in all Malaysian states and the Federal Territories. There are also efforts to promote a common understanding of Islamic legal terms and concepts among judges in the Syariah courts of different states and the Federal Territories, thereby ensuring more uniform interpretation and application of Islamic law across the country.²⁶

III. THE STRUCTURE OF THE MALAYSIAN ISLAMIC JUDICIARY

Disputes involving federal law are generally resolved in the civil courts established by the federal government to apply a uniform body of federal law.²⁷ Within the civil court system, the Federal Court is the highest court of appeal. Beneath it sits a Court of Appeals. Below the Court of Appeals are two high courts,²⁸ below which are a number of subordinate courts.²⁹ Federal law in Malaysia is often referred to as "secular law" and the civil courts are often described as "secular courts." It is worth noting, however, that the federal government of Malaysia could, without violating the Constitution, choose to apply throughout the country an Islamized body of law and could in theory choose to require that its judiciary be trained in Islamic law.³⁰ Malaysian law is thus not constitutionally secular.

²⁵ Constitutional (Amendment) Act, Act A704 of 1988; *see also* Ahmad Ibrahim, *The Future of the Syariah and Syariah Courts in Malaysia*, 20 JURNAL UNDANG-UNDANG [J. MALAY. & COMP. L.] 41, 41-49 (1993).

²⁶ *See, e.g.*, MALAYSIA DEPARTMENT OF ISLAMIC DEVELOPMENT (JAKIM) <http://www.islam.gov.my/en/about-jakim> (last visited Oct. 23, 2011); Horowitz, *supra* note 24, at 258-61.

²⁷ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 74, sched. 9, list I (Federal List), item 4.

²⁸ *Id.* art. 121.

²⁹ *Id.* art. 121(1A). The Subordinate Courts Act, Act 92 of 1948 (revised 1972) establishes magistrates' courts and sessions courts.

³⁰ The Malaysian Constitution declares Islam to be the religion of the Federation in the Constitution. PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 3; *see also* ABDUL AZIZ BARI, *ISLAM DALAM PERLEMBAGAAN MALAYSIA* (2005). Other constitutional provisions also suggest that Islam has a special place in the Malaysian legal system. *See* PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, arts. 3, 8, 12, 121; Ahmad Ibrahim, *The Principles of an Islamic Constitution and the Constitution of*

That said, even if Malaysia is constitutionally permitted to Islamize its corpus of federal laws, the Government has not demonstrated any real desire to do so. In fact, a federal court has held that Malaysia's national laws do not have to conform to Islamic principles.³¹ To the disappointment of some Islamist sectors in the Malaysian polity, Malaysia's leaders have, from independence to the present day, not shown any earnest desire to Islamize the federal legal system.

The Department of Islamic Development of Malaysia (Jabatan Kemajuan Islam Malaysia or "JAKIM"), was established in 1997 to further develop Islamic institutions and the administration of Islamic law, and has spearheaded the standardization of Islamic legislation.³² In 1998, the Department of Syariah Judiciary Malaysia ("JKSM") was established to streamline the administration of justice in Syariah courts, and to improve their infrastructure, procedure, and quality of service.³³ It offers financial assistance to states wishing to improve infrastructure or increase the remuneration of judges and legal officers of Syariah courts. The states who accept assistance subscribe to a "joint service scheme," where judges and legal officers may be promoted and transferred between different state and federal Syariah courts.³⁴

JKSM is headed by the Director-General who is also a Chief Syariah Judge. Under him is the Department of Syariah Judiciary for the Federal Territories. JKSM also has a pool of Syariah appeals court judges who can hear cases from the Federal Territories' Syariah courts or cases from states that have entered into the joint service scheme.³⁵

Since independence, national law has been drawn primarily from statute and from judge-made common law. Admittedly, some judges have tried to draw upon Islamic principles as well as common law precedents when interpreting statutes or developing common law.³⁶ Furthermore, some

Malaysia: A Comparative Analysis, 1 IIUM L.J., no. 2, 1989 at 1. Citing these provisions, the courts have explicitly said that the Malaysian government might, if it chose, apply laws of general application that are explicitly derived from Islamic principles. See Meor Atiqulrahman bin Ishak & 2 Yg Ln lwn Fatimah binti Sihi & 2 Yg Ln [2000] 1 AMR 366.

³¹ Che Omar Bin Che Soh v. Public Prosecutor [1988] 2 MLJ 55.

³² See JAKIM, *supra* note 26.

³³ DEP'T OF SYARIAH JUDICIARY MALAYSIA, PRIME MINISTER'S DEP'T, E-SYARIAH: NOW AND THE FUTURE 1-2 (2004), available at <http://pdffinder.net/E-SYARIAH-:-NOW-AND-THE-FUTURE>. See also *Vision, Mission, Objectives*, DEP'T OF SYARIAH JUDICIARY MALAYSIA (JKSM), http://www.jksm.gov.my/jksmv2/index.php?option=com_content&view=article&id=47&Itemid=114&lang=en (last visited Oct. 30, 2011).

³⁴ See JKSM, *Vision*, *supra* note 33.

³⁵ *Id.*

³⁶ Farid Sufian Shuaib, *Towards Malaysian Common Law: Convergence between Indigenous Norms and Common Law Methods*, 13 JURNAL UNDANG-UNDANG [J. MALAY. & COMP. L.] 158 (2009); Horowitz, *supra* note 24, at 256-57.

cases falling under the jurisdiction of the civil courts involve questions of Islamic law. For example, financial transactions are within the legislative competence of the federal government rather than state governments.³⁷ As Islamic finance has become increasingly important in Malaysia, the federal government has had to regulate it, and the federal courts have had to resolve questions of Islamic finance. Similarly, the Federal Constitution regulates freedom of religion. Thus, constitutional cases involving alleged violations of Muslims' right to exercise their religion are adjudicated in the federal courts and not in the state Syariah courts. Nevertheless, most of the cases in Malaysia dealing with laws that are understood to be derived from Islamic law are not cases arising under federal law and are not adjudicated in federal courts. Rather, they are cases arising under state law, and are adjudicated in state Syariah courts.³⁸

While the federal government has legislative power over most areas and its courts have jurisdiction over most types of disputes, there are areas in which Muslims are subject to a version of Islamic law that is developed by their state government or, if they live in the Federal Territories, by the federal government. Disputes arising under these laws are heard in the courts of the state or, in the Federal Territories, in federal court.

A. *What Is the Jurisdiction of the Syariah Courts?*

The Malaysian Constitution permits states to establish courts with jurisdiction over Muslims, and recently has given them exclusive power to adjudicate matters of their state's Islamic laws.³⁹ State Syariah courts can adjudicate cases arising under "Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, [and] guardianship[.]"⁴⁰ The Syariah courts refer to Islamic family laws enacted by the states.⁴¹

State governments also have the authority to establish their own body of Islamic law to regulate inheritance. To date, however, there is no

³⁷ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 74, sched. 9, list I (Federal List), item 7.

³⁸ *Id.* art. 74, sched. 9, list II (State List), item 1. See ABDUL AZIZ BARI & FARID SUFIAN SHUAIB, CONSTITUTION OF MALAYSIA: TEXT AND COMMENTARY 22 (3d ed. 2009).

³⁹ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 74, sched. 9, list II (State List), item 1.

⁴⁰ *Id.*

⁴¹ Islamic Family Law (Federal Territories) Act 1984, Act 303 of 1984; Enakmen Undang-Undang Keluarga (Negeri Selangor) 2003 [Islamic Family Law (State of Selangor) Enactment 2003], Enactment 2 of 2003.

codification of substantive Islamic inheritance law in any state, although several states do enact regulations concerning certain aspects of Islamic inheritance law.⁴²

Since federal law controls property rights, Syariah courts and civil courts must cooperate in cases of Muslim inheritance. When a Muslim dies intestate and leaves an estate of less than two million Malaysian ringgit, the matter may be resolved by Syariah courts alone without the need to go to the civil courts. However, in cases where the value of a deceased Muslim's estate is more than that, the civil court will issue a letter of administration of the estate or a letter of probate under the Probate and Administration Act of 1959⁴³ and the Small Estate (Distribution) Act of 1955.⁴⁴ The common pattern of cooperation between the courts in such cases is that the Syariah court certifies the allotted shares of the property to be distributed, and the civil court carries out the prescribed division of shares in effecting the transfer of property.

Administration of *wakaf* (Islamic religious endowments) is conducted by the state's Islamic religious council ("Majlis Agama Islam"), and disputes regarding *wakaf* are resolved in Syariah courts. State governments can establish the laws and regulate *wakaf* and other trusts, charities and charitable institutions operating wholly within the state.⁴⁵ Likewise, state governments are able to establish their own regulations governing *zakat* (obligatory charitable giving) and similar Islamic methods of raising revenue to support Islam and the Muslim community.

States also have authority to regulate mosques and Islamic public places of worship.⁴⁶ The administration of *zakat* and the mosque comes under the Majlis Agama Islam.⁴⁷

Beyond matters of religious observance and personal status law, the states also have some power to enact and enforce Islamic criminal law. Criminal law is generally under the jurisdiction of the federal government,⁴⁸

⁴² Administration of Islamic Law (Certificate of Faraid Fees) (Federal Territories) Regulation 2008 (P.U. (A) 418 of 2008); Peraturan-Peraturan Pentadbiran Agama Islam (Fi Perakuan Faraid) [Administration of the Religion of Islam (Certificate of Faraid Fees)], Sel. P.U. 22 of 2004 (Selangor).

⁴³ Act 97 of 1959.

⁴⁴ Act 98 of 1955.

⁴⁵ See, e.g., Enakmen Wakaf (Negeri Selangor) 1999 [Wakaf (State of Selangor) Enactment 1999], Enactment 7 of 1999; Administration of Wakaf (Wakaf Forms) (State of Selangor) Rules 2001 (Sel. P.U. 5 of 2001); Wakaf (State of Malacca) Enactment 2005, Enactment 5 of 2005.

⁴⁶ Enakmen Pentadbiran Agama Islam (Negeri Selangor) [Administration of the Religion of Islam (State of Selangor) Enactment], Enactment 1 of 2003, §§ 86-88, 96-105; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, §§ 60-84.

⁴⁷ For more on this institution, see FARID SUFIAN SHUAIB, POWERS AND JURISDICTION OF SYARIAH COURTS IN MALAYSIA 74-76 (2d ed. 2008).

⁴⁸ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, sched. 9, list I (Federal List), item 1.

but at the same time, state governments can create their own laws to cover “offences by persons professing the religion of Islam against precepts of that religion—except in regard to matters in the Federal List.”⁴⁹ Difficulties arise, however, in determining where, constitutionally, criminal law ends and “offenses against the precepts of religion” begin.⁵⁰ As a practical matter, the power of state governments to effectively enact and enforce Islamic criminal law is defined by the Syariah Courts (Criminal Jurisdiction) Act of 1965, as amended in 1984.⁵¹ This federal law confers jurisdiction to the Syariah courts with respect to offenses against the precepts of Islam by any written law.⁵² It limits, however, the sentences that can be imposed. Prior to 1984, the maximum sentences were six months imprisonment, or a fine of 1,000 ringgit, or both. After amendment in 1984, the statute limits sentences to three years imprisonment, 5,000 ringgit, and six strokes of the cane.⁵³

B. What Are the Various Courts That Make up the Islamic Judiciary?

Generally, the states in Malaysia have chosen to exercise legislative and judicial power to the maximum extent permitted by the Constitution. Each state (and the Federal Territories) has enacted an Islamic family law enactment or act, a Syariah offense enactment or act, a Syariah criminal procedure enactment or act, a Syariah court civil procedure enactment or act, a Syariah evidence enactment or act, and an administration of Islamic law enactment or act.⁵⁴ There are thus fourteen different bodies of Islamic

⁴⁹ *Id.* sched. 9, list II (State List), item 1.

⁵⁰ See, for example, the passing opinions of Abdul Hamid Mohamad JCA (as he then was) in *Latifah bte Mat Zin v. Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101. See also Shuaib, *supra* note 36, at 172-177.

⁵¹ Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984, Act A612 of 1984, § 2.

⁵² Syariah Courts (Criminal Jurisdiction) Act 1965, Act 355 of 1965, § 2.

⁵³ *Id.* § 2 (as amended by Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act 1989, Act A730 of 1989).

⁵⁴ Enactments refer to statutory laws in respective States while Act refers to statutory laws in Federal Territories. For examples of each, see Islamic Family Law (Federal Territories) Act 1984, Act 303 of 1984; Enakmen Undang-Undang Keluarga Islam (Negeri Selangor) 2003 [Islamic Family Law (State of Selangor) Enactment 2003], Enactment 2 of 2003; Syariah Criminal Offences (Federal Territories) Act, Act 559 of 1997; Enakmen Jenayah Syariah (Selangor) 1995 [Syariah Criminal Offences (Selangor) Enactment 1995], Enactment 9 of 1995 [hereinafter Syariah Criminal Offences (Selangor) Enactment 1995]; Syariah Criminal Procedure (Federal Territories) Act 1997, Act 560 of 1997; Enakmen Tatacara Jenayah Syariah (Negeri Selangor) [Syariah Criminal Procedure (State of Selangor) Enactment], Enactment 3 of 2003; Syariah Court Civil Procedure (Federal Territories) Act 1998, Act 585 of 1998; Enakmen Tatacara Mal Mahkamah Syariah (Negeri Selangor) 2003 [Syariah Court Civil Procedure (State of Selangor) Enactment 2003], Enactment 4 of 2003 [hereinafter Syariah Court Civil Procedure (State of Selangor) Enactment 2003]; Syariah Court Evidence (Federal Territories) Act, Act 561 of 1997; Enakmen Keterangan Mahkamah Syariah (Negeri Selangor) 2003 [Syariah Court Evidence Enactment (State of Selangor) 2003], Enactment 5 of 2003; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993; Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 [Administration of the Religion of Islam (State

family law—one for each state and one for the Federal Territories. There are also fourteen different court systems each tasked with the responsibility to interpret and apply the Islamic law of its state or territory.

IV. APPOINTMENT OF JUDGES

A. *What Are the Qualifications for Appointment as a Judge?*

While the structure of courts is common to all Malaysian states, the states do not all impose the same requirements for appointment to a judicial position on a Syariah court. Administrative regulations, however, generally require that Syariah judges hold relevant educational qualifications such as a bachelor's degree in Syariah, or an LL.B. (Syariah) from the International Islamic University Malaysia (“IIUM”).⁵⁵ These regulations also require them to obtain a Diploma in Administration of Islamic Judiciary (“DAIJ”) offered by IIUM.⁵⁶ Only Muslims may be appointed as Syariah court judges. Syariah court judges are overwhelmingly male, but recently the first two women have been appointed, following a ruling by the National Fatwa Committee permitting their appointment.⁵⁷

Statutes also set out more specific qualifications for appointment as a Syariah high court judge. For example, in the Federal Territories and Selangor, Syariah high court judges (including the chief Syariah judges) must meet the following requirements: they must be citizens of Malaysia, and, for a period of not less than ten years preceding their appointment, they must have served as a judge of a Syariah high court, a registrar, or a Syariah prosecutor of a state.⁵⁸ Furthermore, administrative regulations require that

of Selangor) Enactment 2003], Enactment 1 of 2003 [hereinafter Administration of the Religion of Islam (State of Selangor) Enactment 2003].

⁵⁵ JABATAN PERKHIDMATAN AWAM MALAYSIA [PUBLIC SERVICE DEP'T OF MALAYSIA], SURAT PEKELILING PERKHIDMATAN BILANGAN 4 TAHUN 2002 [JUDICIAL AND LEGAL SERVICE CIRCULAR 4 OF 2002].

⁵⁶ The specifics of the DAIJ and other IIUM Islamic legal educational programs are discussed in Najibah Mohd Zin's contribution to this volume. Najibah Mohb Zin, *The Training, Appointment, and Supervision of Islamic Judges in Malaysia*, 21 PAC. RIM L. & POL'Y J. 115, 121-25 (2012).

⁵⁷ As decided in the discussion of the National Fatwa Committee on 4-6 April 2006. *Hukum Melantik Wanita Sebagai Hakim Syar'ie*, E-FATWA.GOV.MY, <http://www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-melantik-wanita-sebagai-hakim-syarie> (last visited Oct. 8, 2011); *Women Appointed Syariah Court Judges for the First Time*, THESTAR.COM.MY, <http://www.thestar.com.my/news/story.asp?file=/2010/7/3/nation/20100703200133&sec=nation> (last visited Oct. 8, 2011).

⁵⁸ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 42; Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 [Administration of the Religion of Islam (State of Selangor) Enactment 2003], Enactment 1 of 2003, § 57.

they also have the educational qualifications required of Syariah subordinate judges.⁵⁹

Interestingly, some statutes require less of a Syariah appeals court judge than they do of a Syariah high court judge—only requiring that the judge be Muslim.⁶⁰ Although proponents of judicial independence might consider the situation sub-optimal, Syariah appeals court judges are appointed for three-year terms with a possibility of reappointment.⁶¹ The law does not provide explicitly for the subordinate Syariah court judges' terms of service. Since there is not yet a specific service commission for Syariah court judges, they are subject to the federal Public Service Commission or its equivalent at the state level, and regular public service rules and regulations apply.⁶² There are efforts to improve their tenure by making it on par with civil court judges, who cannot be removed except by the Head of State on the recommendation of a specific tribunal. However, this goal has yet to materialize.⁶³

B. *What Is the Procedure for Appointing Judges?*

Not only do different states require different credentials of their Syariah judges, but they also establish different procedures for appointing them. In each state, judges are appointed by the head of the religion of Islam, namely the sultan of the state or the Yang di-Pertuan Agong (the Supreme Head of the Federation).⁶⁴ As a matter of law, the Yang di-Pertuan Agong, the sultan, and the Yang di-Pertua Negeri (the chief executive of a state with no hereditary sultan) are required to follow the advice given by⁶⁵ (in the Federal Territories) the federal minister responsible for Islamic affairs and the Majlis Agama Islam⁶⁶ or (for the Syariah subordinate court) the chief Syariah judge.⁶⁷ In Malacca, it is also the Yang di-Pertuan Agong who

⁵⁹ JABATAN PERKHIDMATAN AWAM MALAYSIA [PUBLIC SERVICE DEP'T OF MALAYSIA], SURAT PEKELILING PERKHIDMATAN BILANGAN 4 TAHUN 2002 [JUDICIAL AND LEGAL SERVICE CIRCULAR 4 OF 2002].

⁶⁰ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, §§ 41, 43; Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 56.

⁶¹ See SHUAIB, POWERS & JURISDICTION, *supra* note 47, at 60.

⁶² PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 139.

⁶³ For provisions on security of tenure for civil court judges, see *id.* arts. 125, 127.

⁶⁴ It is worth noting that although the head of Islam in each state (and in the Federal Territories) is formally obliged to follow the "advice" provided him on questions of judicial appointments, as a practical matter much deference is given to the sultans and the Yang di-Pertuan Agong in such matters.

⁶⁵ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 40(1A), sched. 8, item 1(1A); Dato' Seri Anwar Ibrahim v Public Prosecutor [2000] 2 CLJ 570; BARI & SHUAIB, CONSTITUTION OF MALAYSIA, *supra* note 38, at 87-91.

⁶⁶ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, §§ 41-43.

⁶⁷ *Id.* § 44.

appoints Syariah judges, but on the advice of the Majlis Agama Islam and the chief Syariah judge.⁶⁸ In Sabah and Sarawak, however, it is the Yang di-Pertua Negeri who appoints Syariah judges on the advice of the Majlis Agama Islam and the chief Syariah judges.⁶⁹ In Selangor, judges are appointed by the sultan. The Selangor chief Syariah judge is appointed by the sultan on the advice of the Majlis Agama Islam.⁷⁰ The sultan appoints Syariah appeals court judges and Syariah high court judges on the advice of the Majlis Agama Islam and the chief Syariah judge.⁷¹ Syariah subordinate court judges are appointed by the sultan on the advice of only the chief Syariah judge.⁷² The other states have basically the same appointment processes as Selangor.

V. AUTHORITY OVER AND SUPERVISION OF ISLAMIC COURTS

A. *Who Has Appellate Authority over the Syariah Courts?*

During the period of British colonialism, cases involving Muslim family law or inheritance law might have been resolved in the first instance by a local Islamic court, but all cases were generally subject to appellate review by a British civil court to ensure that the ruling did not offend British notions of justice. For many years after independence, the civil courts asserted the right to exercise appellate review of trial court decisions.⁷³ This was controversial, however, and in 1988 the Constitution was amended as follows to limit the practice.

The amendment to article 121(1A) of the Federal Constitution in 1988 stated that the federal government's civil courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts"⁷⁴ but did not resolve all conflicts. On the one hand, it has clearly precluded civil courts from questioning a state Syariah court's interpretation of Islamic law. Thus, if a question requires the interpretation and application of Islamic law, such as whether a person had left the religion of Islam, the civil court would

⁶⁸ Enakmen Pentadbiran Agama Islam (Negeri Melaka) 2002 [Administration of the Religion of Islam (State of Malacca) Enactment 2002], Enactment 7 of 2002, §§ 44-47.

⁶⁹ Syariah Court (State of Sabah) Enactment, Enactment 6 of 2004, §§ 5-7, 9; Ordinan Majlis Islam (Sarawak) 2001 [Syariah Court Ordinance (Sarawak) 2001], Ordinance 42 of 2001, §§ 5, 6, 8.

⁷⁰ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, §56.

⁷¹ *Id.* §§ 57-58.

⁷² *Id.* § 59.

⁷³ *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265; *Tengku Mariam & Anor v. Comm'r for Religious Affairs, Trengganu & Ors* [1969] 1 MLJ 110.

⁷⁴ Constitutional (Amendment) Act, Act A704 of 1988; See Ahmad Ibrahim, *The Future of the Syariah and Syariah Courts in Malaysia*, 20 JURNAL UNDANG-UNDANG [J. MALAY. & COMP. L.] 41-49 (1993).

leave it to the Syariah court to decide.⁷⁵ On the other hand, the civil courts could consider constitutional issues related to state law and the state Syariah court's decisions. Thus, whether the law on apostasy in Islam itself is against the freedom of religion guaranteed under the Federal Constitution is a legitimate question to be decided by the civil court.⁷⁶

Malaysian Islamists have welcomed the evolution of large (and largely autonomous) state Islamic legal institutions. Indeed, they have pushed the federal government to encourage state governments and reward them for creating more efficient, modern Islamic legal systems. The supporters of a voluntary but federally subsidized program of upgrading are animated by a number of different factors. Some are clearly concerned about the lack of uniformity among the Islamic legal systems of the various states—a lack of uniformity that could not be resolved after 1988 by federal appellate review. Thus, influential figures have pressed the federal government, with considerable success, to establish bureaucracies that will encourage cooperation among the states on questions of Islamic law. The goals of these efforts are a) to harmonize the statutes that set forth the Islamic law in force in the different states, b) to harmonize the structure of Syariah courts in different states, and c) to “upgrade” the courts in the different states—a process that involves improving both the infrastructure of the Syariah courts and the training of their judges.⁷⁷

B. What Is the Structure of Administrative Supervision of the Islamic Courts?

State Syariah courts are regulated by their respective state's Department of Syariah Judiciary.⁷⁸ While historically there were considerable differences between the structures of court systems in different units of the country, today they have adopted a common structure. As noted above, however, important constituencies want to see convergence among the states' Syariah legal systems, and the federal government has thus created a number of institutions that are designed to act as coordinating and

⁷⁵ Kamariah bte Ali dan Lain-Lain v. Kerajaan Negeri Kelantan dan Satu Lagi [2005] 1 MLJ 197; Lina Joy v. Majlis Agama Islam Wilayah Persekutuan dan Lain-lain [2007] 4 MLJ 585.

⁷⁶ Kamariah bte Ali dan Lain-Lain v. Kerajaan Negeri Kelantan dan Satu Lagi [2005] 1 MLJ 197.

⁷⁷ Judith Nagata, *Religious Correctness and the Place of Islam in Malaysia's Economic Policies*, in *CULTURE AND ECONOMY: THE SHAPING OF CAPITALISM IN EASTERN ASIA* (Timothy Brook et al. eds., 1997).

⁷⁸ *Carta Organisasi [Organizational Chart]*, JABATAN KEHAKIMAN SYARIAH NEGERI SELANGOR [SELANGOR SYARIAH JUDICIARY DEPARTMENT], http://www.jakess.gov.my/v1/jakess/carta_organisasi.htm (last visited Oct. 30, 2011).

supporting bodies for the state Syariah courts. This has led to some commonalities both in legislation and in court structure.

In 1984, the states in Malaysia began harmonizing the structure of their Syariah courts. All states today have established a three-tier structure of Syariah courts: the Syariah subordinate courts are the courts of first instance, the Syariah high courts are the intermediate courts of appeal, and the Syariah appeals courts are the final courts of appeal for questions of Syariah law.⁷⁹

In each state that has adopted the three-tier system, similar rules apply. Syariah subordinate courts are presided over by a single Syariah subordinate court judge. Syariah high courts are presided over by a single Syariah high court judge. Each Syariah appeals court is presided over by a panel of Syariah appeals court judges that is chaired by a chief Syariah judge.⁸⁰

VI. THE JURISDICTION AND POWERS OF THE ISLAMIC COURTS

A. *What Are the Legal Sources of the Courts' Jurisdiction and Powers?*

Nine of the thirteen states in Malaysia have sultans as their formal heads of state. In these states, as a formal matter, the final authority on questions of Islamic law is the sultan. In states that do not have a sultan, the final arbitration of Islamic religious issues is handled by a specific institution that was created upon the independence of the Federation of Malaysia—the Yang di-Pertuan Agong.

According to the Malaysian Constitution, the nine sultans shall elect one of their own for a fixed term to serve as the “Supreme Head of the Federation” (“Yang di-Pertuan Agong”).⁸¹ In states that have no sultan of their own and in the Federal Territories, the Yang di-Pertuan Agong serves as the head of the religion of Islam. His responsibilities include establishing a body to determine Islamic law for that state and creating a state court system to apply Islamic law.⁸²

Over the past thirty years, state governments, with the support of Islamist groups and guided either by their own sultan or by the Yang di-Pertuan Agong, have acted assertively to regulate the lives of Muslims under

⁷⁹ See, e.g., Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, §§ 63, 64, 67; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 40.

⁸⁰ See, e.g., Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, §§ 41, 43, 44; Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, §§ 56-59.

⁸¹ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 32(3).

⁸² *Id.* art. 3.

their jurisdiction. Following their lead, the federal government has also enacted Islamic statutes to regulate Muslim family law and inheritance issues within the Federal Territories. At the same time, the sultans in their respective states and the federal government acting in its capacity as administrator of the Federal Territories have developed a variety of different institutional structures both to create and enforce Islamic laws in their respective states. They have also established a number of slightly different types of Islamic court systems.

At both the federal and the state levels, either the executive branch or members of the legislature may propose draft Islamic statutes. At the federal level, the Attorney General's Chambers (the legal department of the government) is generally responsible for drafting all legislation on instruction from the cabinet.⁸³ The ministry responsible for the regulation of a particular matter may comment on the draft during the process. After a draft of the bill has been accepted by the relevant ministry, and after the Attorney General's Chambers give its final approval, the Cabinet sends the proposed bill to the federal government's law-making organs. After approval and publication in an official gazette, the proposed statute enters into force.

In the Federal Territories, the law-making organs are the Legislature (consisting of a House of Representatives and a Senate)⁸⁴ and the Yang di-Pertuan Agong.⁸⁵ At the state level, statutes are proposed by the state's legal advisor and approved by the state's executive council before being sent to the state's law-making organs. The structure of the law-making organs depends on whether the state has a hereditary ruler or not. In the nine states with a hereditary ruler, the law-making body consists of a legislative assembly and the ruler. In the four states that do not have a hereditary sultan, the law-making body consists of a legislative assembly and the Yang di-Pertua Negeri.⁸⁶ The Yang di-Pertua Negeri is a figure appointed by the Yang di-Pertuan Agong in consultation with the head of government of the states.⁸⁷

Once submitted to the law-making organ, a bill is debated in the legislature. If it is passed, the bill is sent to the head of state of that state for

⁸³ DRAFTING DIVISION, ATTORNEY GENERAL'S CHAMBERS OF MALAYSIA, 2007-2008 ANNUAL REPORT 57 (2008), available at <http://www.agc.gov.my/pdf/annualreports/tri07-09/drafting.pdf>.

⁸⁴ The House of Representatives consist of members elected during the general election or a by-election, and the Senate consist of members appointed by the federal and state authority. See PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, arts. 45, 46.

⁸⁵ *Id.* art. 44.

⁸⁶ *Id.* sched. 8, item 3.

⁸⁷ *Id.* sched. 8, item 19A.

assent—either the ruler of the state, the Yang di-Pertuan Agong or the Yang di-Pertua Negeri as the case may be.⁸⁸ Even if the head of state fails to give his assent, however, the passed bill will be considered accepted after the lapse of one month's time.⁸⁹ Once assented to by the head of state, or deemed assented to by time lapse, a bill will be published in the official gazette of the respective state or federal authority. Generally, the statutes enter into force immediately upon being published in the official gazette.⁹⁰

B. *What Is the Subject Matter Jurisdiction of the Islamic Courts?*

Malaysia's state governments are constitutionally empowered to create Islamic laws to regulate some aspects of the lives of Muslims under their jurisdiction. A state's Syariah courts have jurisdiction over Muslims in civil cases arising under these states' Islamic laws and over all other matters "in respect of which jurisdiction is conferred by any written law."⁹¹

Similarly, the federal government has enacted laws for the Federal Territories to regulate Muslims in all of these areas and has established courts that have jurisdiction over Muslims in matters relating to these Islamic laws.

As noted above, states have been given some power to enact statutes identifying "offences against Islam" and to establish punishments for Muslims who commit such offenses. The states' Syariah courts have jurisdiction over prosecutions of Muslims under these statutes.⁹² With respect to offenses against the person, some states have defined a fairly limited number of "Islamic offences."⁹³ Many states have used their powers to create "Islamic offences" covering a range of immoral behaviors. State laws prohibit incest,⁹⁴ prostitution,⁹⁵ procuring prostitutes,⁹⁶ sexual intercourse out of wedlock,⁹⁷ acts preparatory to sexual intercourse out of

⁸⁸ *Id.* art. 66.

⁸⁹ In other words, a bill will become law even if the head of state refuses to sign it. *Id.* art. 66.

⁹⁰ Interpretation Acts 1948 and 1967, Act 388 of 1989, § 19.

⁹¹ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 61.

⁹² PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, sched. 9, list II (State List), item 1.

⁹³ Islamic Family Law (Federal Territories) Act 1984, *supra* note 41, § 127; Enakmen Undang-Undang Keluarga Islam (Negeri Selangor) 2003 [Islamic Family Law (State of Selangor) Enactment 2003], Enactment 2 of 2003, § 128.

⁹⁴ *See, e.g.*, Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 20; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 22.

⁹⁵ *See, e.g.*, Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 21; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 23.

⁹⁶ *See, e.g.*, Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 22; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 24.

⁹⁷ *See, e.g., See, e.g.*, Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 23; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 25.

wedlock,⁹⁸ sodomy,⁹⁹ sexual relations between women,¹⁰⁰ women and men found together in circumstances which give rise to suspicion that they were engaged in immoral acts,¹⁰¹ men wearing women's attire and posing as a woman for immoral purposes,¹⁰² and indecent acts in public places.¹⁰³ Laws also prohibit Muslims from accusing another of committing sexual intercourse out of wedlock without procuring witnesses,¹⁰⁴ alleging that a Muslim or a group of Muslims are non-Muslim,¹⁰⁵ and wrongfully labelling non-lawful food to be lawful (*halal*).¹⁰⁶ Others have tried to identify an even more expansive number of Islamic offenses. For example, the state of Terengganu passed a law which defines numerous offenses against the person and against property.¹⁰⁷ Among the acts punishable under this law are theft,¹⁰⁸ robbery,¹⁰⁹ and causing death or bodily injury.¹¹⁰ Due to political, constitutional, and legal reasons (including a possible violation of legal limitations on sentencing power of Syariah courts), this law has yet to be enforced.¹¹¹

State governments (and the Federal Territories) have also criminalized certain forms of belief or ritual. Some, for example, ban any reverence or worship of any person, animal or thing in a manner contrary to Islamic law,¹¹² teaching of false doctrine contrary to Islam,¹¹³ and claiming to be a

⁹⁸ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 24; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 26.

⁹⁹ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 25; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 27.

¹⁰⁰ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 26; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 27.

¹⁰¹ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 27; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 29.

¹⁰² See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 28; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 30.

¹⁰³ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 29; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 31.

¹⁰⁴ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 41; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 36.

¹⁰⁵ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 31; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 6.

¹⁰⁶ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 42; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 38.

¹⁰⁷ The law was passed while the Parti Islam SeMalaysia ("PAS") formed the state government of Terengganu. Enakman Kesalahan Jenayah Syariah (Hudud Dan Qisas) (Terengganu) 2002 [Syariah Offences (Hudud and Qisas) (Terengganu) Enactment 2002], Enactment 4 of 2002.

¹⁰⁸ *Id.* § 19.

¹⁰⁹ *Id.* § 22.

¹¹⁰ *Id.* § 27.

¹¹¹ For details on this, see further SHUAIB, POWERS & JURISDICTION, *supra* note 25, at 169-201.

¹¹² See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 3; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 4.

prophet.¹¹⁴ State Islamic criminal laws often also prohibit insulting or bringing into contempt the religion of Islam or Islamic laws,¹¹⁵ insulting or deriding verses of the Qur'an and the *hadith*,¹¹⁶ teaching Islam without authorization,¹¹⁷ failing to perform obligatory Friday congregational prayer,¹¹⁸ selling foods for immediate consumption or eating publicly during the month of Ramadhan,¹¹⁹ wilfully failing to pay *zakat*,¹²⁰ gambling,¹²¹ and consuming intoxicating drink.¹²²

In the states, Syariah courts have been given jurisdiction over prosecutions under all of these statutes. In the Federal Territories, the federal territorial governments have established Syariah courts with jurisdiction over prosecutions under the territories' Islamic criminal statutes.

C. *What Are the Requirements of Personal Jurisdiction?*

The Federal Constitution explicitly limits the personal jurisdiction of the states' Syariah courts—restricting them to jurisdiction over Muslims within that state.¹²³ State statutes establishing Syariah courts thus generally contain provisions explicitly confining the jurisdiction of Syariah courts to Muslims within that state.¹²⁴

In most cases, there is no controversy about whether the court has jurisdiction over a particular person. All Malaysians are required to have an identification card which identifies their religion,¹²⁵ and accordingly there is

¹¹³ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 4; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 7.

¹¹⁴ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 6; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 8.

¹¹⁵ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 7; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 10.

¹¹⁶ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 8; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 9.

¹¹⁷ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 11; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 14.

¹¹⁸ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 14; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 20.

¹¹⁹ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 15; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 19.

¹²⁰ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 16; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 21.

¹²¹ See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 18; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 17.

¹²² See, e.g., Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 19; Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 18.

¹²³ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, sched. 9, list II (State List), item 1.

¹²⁴ See, e.g., Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 61(3)(b).

¹²⁵ *Identity Card*, MINISTRY OF HOME AFFAIRS, NATIONAL REGISTRATION DEPARTMENT, www.jpn.gov.my/en/identitycard (last visited Oct. 23, 2011).

not much difficulty in ascertaining the faith of a person. Thorny questions arise in cases concerning a state's Islamic law and involving both a Muslim and a non-Muslim party. In such cases, the Muslim will be subject to regulation by the state's Islamic law and under the jurisdiction of the state's Islamic court. The non-Muslim will be subject to regulation under federal law and under the jurisdiction of the federal court. One type of case in which this situation arises involves marriage between a Muslim and non-Muslim. Malaysian law prohibits marriages between Muslims and non-Muslims.¹²⁶ However, it also provides for freedom of religion. After marriage between non-Muslims, one of the spouses may convert to Islam. If, thereafter, disputes on matrimonial matters arise, Syariah courts will have jurisdiction over the converted spouse.¹²⁷ Since the other spouse is a non-Muslim he or she will not fall under the jurisdiction of the Syariah courts.¹²⁸ It is beyond the scope of this article to discuss the struggles of the courts to resolve the complicated jurisdictional questions that arise in such cases.

D. What Are the Courts' Powers?

Historically, Syariah court decisions had to be enforced by the magistrates' court—the lowest court in the hierarchy of civil courts. Even today, Syariah courts lack comprehensive powers. In matters of inheritance, Syariah courts can only issue a certificate certifying the proportion of distribution of an estate among legal heirs. They cannot grant power to administrators to distribute the property.¹²⁹

However, in other areas, more powers are granted to Syariah courts. In cases involving the distribution of immovable property such as land and houses, Syariah court decisions are today equal to those of civil courts.¹³⁰ Syariah court orders are adequate—without the need to revert to a civil court order—for the land registration office to make necessary changes to the land registry. Orders by Syariah courts for further detention of persons arrested by Syariah enforcement agencies for investigation purposes are recognized by the Federal Constitution.¹³¹ Thus, a person could be detained for investigation by the order of the Syariah court alone. Syariah courts also

¹²⁶ See, e.g., Islamic Family Law (Federal Territories) Act 1984, *supra* note 41, § 10; Law Reform (Marriage and Divorce) (Federal Territories) Act, Act 164 of 1976, § 3(3).

¹²⁷ Law Reform (Marriage and Divorce) (Federal Territories) Act, Act 164 of 1976, § 3(3).

¹²⁸ *Id.* § 51 (allowing for the spouse of a person who has converted to Islam to file for divorce).

¹²⁹ Under probate and letter of administration.

¹³⁰ National Land Code, Act 56 of 1965, § 421A, amended by the National Land Code (Amendment) Act, Act A832 of 1992.

¹³¹ PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, art. 5(4), amended by the Constitutional (Amendment) Act, Act A704 of 1988.

have the power to grant declaratory relief.¹³² Applicants have sought declarations, for instance, on the subjects of *wakaf*,¹³³ and religious status.¹³⁴

In procedural matters, Syariah courts have the usual trappings of a court of law such as the power to order discovery of documents and facts,¹³⁵ to issue subpoenas,¹³⁶ to record settlement by consent,¹³⁷ and to order seizure and other modes of enforcing judgments.¹³⁸ In order to ensure smooth administration of justice in Syariah courts, Syariah courts also have powers to punish for contempt of court. The courts may make an order of imprisonment for a period not exceeding six months or a fine of up to 2,000 ringgit over a person guilty of contempt of court.¹³⁹

As discussed above, federal law limits the sentencing powers of the Syariah courts. Prior to 1984, the maximum sentences were six months imprisonment and a 1,000 ringgit fine. The general sentencing powers were increased in 1984 to three years imprisonment, 5,000 ringgit, and six strokes of whipping.¹⁴⁰ Subject to these federally imposed limits, state law determines the sentence for any particular offense.

VII. OFFICERS OF THE ISLAMIC COURT SYSTEM

A. *The Mufti*

Islamic law can be created not only through the legislative process described above, but also through the seemingly unilateral actions of the

¹³² In the federal system of civil courts, the right to grant declaratory relief is given only to the civil high court. PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 27, 1957, sched. 9, list I, item 4, Specific Relief Act, Act 137 of 1950, § 47. Such a law is not applicable to Syariah court since the law was meant only to regulate the civil court.

¹³³ *Tengku Abdul Kadir bin Tengku Chik dan Seorang Lagi v. Majlis Agama Islam, Kelantan* [1995] 10 JURNAL HUKUM [JOURNAL OF LAW] 34.

¹³⁴ *Dalam Perkara Permohonan Perisytiharan Status Agama Si Mati Mohammad Abdullah @ Moorthy a/l Maniam, Permohonan Ex-Parte Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [2006] 21 JURNAL HUKUM [JOURNAL OF LAW] 210.

¹³⁵ Syariah Court Civil Procedure (State of Selangor) Enactment 2003, *supra* note 54, § 85; Syariah Court Civil Procedure (Federal Territories) Act 1998, Act 585 of 1998, § 85.

¹³⁶ Syariah Court Civil Procedure (State of Selangor) Enactment 2003, *supra* note 54, § 102; Syariah Court Civil Procedure (Federal Territories) Act 1998, Act 585 of 1998, § 102.

¹³⁷ Syariah Court Civil Procedure (State of Selangor) Enactment 2003, *supra* note 54, § 94; Syariah Court Civil Procedure (Federal Territories) Act 1998, Act 585 of 1998, § 94.

¹³⁸ Syariah Court Civil Procedure (State of Selangor) Enactment 2003, *supra* note 54, § 163; Syariah Court Civil Procedure (Federal Territories) Act 1998, Act 585 of 1998, § 163.

¹³⁹ Syariah Court Civil Procedure (State of Selangor) Enactment 2003, *supra* note 54, § 229; Syariah Court Civil Procedure (Federal Territories) Act 1998, Act 585 of 1998, § 229.

¹⁴⁰ The Syariah Courts (Criminal Jurisdiction) Act 1965 as amended in 1989. *See* Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act, Act A730 of 1989: *supra* notes 50-53 and accompanying text.

state's official Mufti. This is an unusual process and deserves some discussion.

In early Islamic history, the title of *mufti* was granted to private scholars who were recognized within the scholarly community as experts in questions of Islamic law. When faced with difficult questions of Islamic law, any Muslim was free to seek advice from a *mufti*. Private citizens, state officials, or judges in state courts could ask any *mufti* they chose for advisory opinions.¹⁴¹ Over time, some empires, such as the Ottoman Empire, created an office of Chief Mufti. In doing so, the government would draw from the reservoir of scholars recognized as *muftis* and appoint one of them as a functionary of the state serving as the final authority on questions of Islamic law.¹⁴² In the contemporary world, some Muslim governments continue to have official Muftis. Among them are Malaysia's federal government and the governments in each of its states.

In contemporary Malaysia, there is some historical evidence of bureaucratized *mufti's* offices as far back as the nineteenth century. One classical Malay text refers to a *mufti* who served as the religious advisor to the Sultan in pre-colonial Malacca.¹⁴³ A later text also describes the appointment of a *mufti* to serve as a religious teacher, an advisor to the sultan, and a supervisor of the religious administration in Kelantan,¹⁴⁴ and there are records since 1895 of an official government Mufti in Johor.¹⁴⁵ It is only in recent decades, however, that the office of Mufti has become fully bureaucratized and incorporated into the formal structure of administration of Islamic law.

In Malaysia, most states have created by statute an official position for a state Mufti and have given this official Mufti a specific and often quite powerful role.¹⁴⁶ In most states the Mufti is appointed by the sultan.¹⁴⁷ In the Federal Territories, the state of Malacca, the state of Penang, and the state of Sarawak the Muftis are appointed by the Yang di-Pertuan Agong,¹⁴⁸

¹⁴¹ See David S. Powers, *On Judicial Review in Islamic Law*, 26 LAW & SOC'Y REV. 315, 328-36 (1992).

¹⁴² *Id.* at 332.

¹⁴³ SEJARAH MELAYU: THE MALAY ANNALS: MS RAFFLES NO. 18, 221-22 (Abdul Rahman Haji Ismail & Boon Kheng Cheah eds., 1998).

¹⁴⁴ Sultan Muhammad I (1800-1837). See ABDULLAH ALWI HAJI HASSAN, THE ADMINISTRATION OF ISLAMIC LAW IN KELANTAN 3-9 (1996).

¹⁴⁵ Noh Gadot, *Pengurusan Fatwa di Malaysia*, in PRINSIP DAN PENGURUSAN FATWA DI NEGARA-NEGARA ASEAN 56 (Abdul Samat Musa et al. eds., 2006).

¹⁴⁶ See, e.g., the Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 32, Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 44.

¹⁴⁷ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 44.

¹⁴⁸ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 32; Enakmen Pentadbiran Agama Islam (Negeri Melaka) 2002 [Administration of the Religion of Islam (State of

while in the state of Sabah, Muftis are appointed by the Yang di-Pertua Negeri.¹⁴⁹ Once appointed, either the Mufti of a state or a state *fatwa* committee can issue interpretations of Islamic law that, once they are published in the official gazette, will be binding on Muslims and enforced by the state's Syariah courts.¹⁵⁰

State statutes also identify persons who are to advise the relevant appointer in making the appointment. In states with sultans, some statutes provide that the Menteri Besar (the chief minister) should advise the ruler in this matter,¹⁵¹ while others provide that the Majlis Agama Islam should provide advice,¹⁵² while still others do not provide explicitly for any person to advise the Ruler.¹⁵³ In the Federal Territories, the Yang di-Pertuan Agong makes the appointment on advice of the Minister responsible for Islamic religious affairs in the Federal Territories.¹⁵⁴ In Malacca, he makes it on the advice of the State Authority in the State of Malacca.¹⁵⁵ Likewise, in Penang, he makes it on the advice of the State Executive Council,¹⁵⁶ and in Sabah, in consultation with the Minister responsible for Islamic religious affairs.¹⁵⁷

While the statutes carefully identify people who should be involved in the appointment of Muftis, they do not provide many details about the qualifications that the state Mufti must have. Requirements for both the office of Mufti and Deputy Mufti for the state generally require only that a "fit and proper" person be appointed.¹⁵⁸ One academic study has examined

Malacca) Enactment 2002], Enactment 7 of 2002, § 32; Enakmen Pentadbiran Agama Islam (Negeri Penang) 2004 [Administration of the Religion of Islam (State of Penang) Enactment 2004], Enactment 4 of 2004, § 44; Ordnan Majlis Islam (Sarawak) 2001 [Majlis Islam (Sarawak) Ordinance 2001], Ordinance 41 of 2001, § 35.

¹⁴⁹ Administration of Islamic Law (Sabah) Enactment 1992, Enactment 13 of 1992, § 33.

¹⁵⁰ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 34, Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 48.

¹⁵¹ Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, Enactment 10 of 2003, § 45.

¹⁵² Enakmen Pentadbiran Agama Islam (Johore) 2003 [Administration of the Religion of Islam (Johore) Enactment 2003], Enactment 16 of 2003, § 44.

¹⁵³ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 44; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 32; Enakmen Pentadbiran Undang-Undang Islam (Pahang) 1991 [Administration of Islamic Law (Pahang) Enactment 1991], Enactment 3 of 1991, § 34; Enakmen Pentadbiran Mahkamah Syariah (Kelantan) 1982 [Administration of Syariah Courts (Kelantan) Enactment 1982], Enactment 3 of 1982.

¹⁵⁴ Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 32.

¹⁵⁵ Enakmen Pentadbiran Agama Islam (Negeri Melaka) 2002 [Administration of the Religion of Islam (State of Malacca) Enactment 2002], Enactment 7 of 2002, § 32.

¹⁵⁶ Enakmen Pentadbiran Agama Islam (Negeri Penang) 2004 [Administration of the Religion of Islam (State of Penang) Enactment 2004], Enactment 4 of 2004, § 44.

¹⁵⁷ Administration of Islamic Law (Sabah) Enactment 1992, Enactment 13 of 1992, § 33.

¹⁵⁸ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 44; Ordnan Majlis Islam (Sarawak) 2001 [Majlis Islam (Sarawak) Ordinance 2001], Ordinance 41 of 2001, §

the paper credentials of current and past muftis, and has found that they have had quite diverse qualifications.¹⁵⁹

Various state governments have established bureaucracies to support their state Mufti in his endeavors. The Mufti sits at the head of an organization that is collectively responsible for creating an official *fatwa*, which will represent a binding interpretation of Islamic law within the state.¹⁶⁰ The Mufti is the chairman of the state *fatwa* committee. The members of this committee will generally include the Mufti, Deputy Mufti, and various other “fit and proper” persons, such as academicians and respected members of the society.¹⁶¹ In order for the *fatwa* to become binding state law, the Mufti, on behalf of the *fatwa* committee, will present the *fatwa* to the Majelis Agama Islam for its deliberation. The Majelis Agama Islam may then recommend that the sultan—as the head of religion of Islam—grant his assent to the *fatwa*.

A duly-assented-to *fatwa* may then be published in the official gazette of the state.¹⁶² Upon publication in the official gazette, it becomes binding law to be applied in the Syariah courts of the state.¹⁶³ The importance of officially published *fatwas* is considerable. Many states have enacted statutes making it an offence to propagate opinions contrary to or act in contempt of any *fatwa*.¹⁶⁴ The substantial role of the Mufti in defining Islamic doctrine within a particular unit of the federation, and the willingness of states to prosecute individuals for contempt of *fatwas* is illustrated by the prosecution, in 1997, of three beauty pageant contestants in the Selangor Syariah Court for ignoring a *fatwa* prohibiting Muslim women from taking part in beauty pageants.¹⁶⁵ More recently, Muslims have been

35; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 32; Administration of Islamic Law (Sabah) Enactment 1992, Enactment 13 of 1992, § 33; Enakmen Pentadbiran Undang-Undang Islam (Pahang) 1991 [Administration of Islamic Law (Pahang) Enactment 1991], Enactment 3 of 1991 (Pahang), § 34.

¹⁵⁹ AZMAN AB RAHMAN ET AL., BIOGRAFI MUFTI-MUFTI MALAYSIA (2008).

¹⁶⁰ See, e.g., Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 46; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 37; Enakmen Pentadbiran Agama Islam (Johore) 2003 [Administration of the Religion of Islam (Johore) Enactment 2003], Enactment 16 of 2003, § 46; Enakmen Pentadbiran Agama Islam (Negeri Melaka) 2002 [Administration of the Religion of Islam (State of Malacca) Enactment 2002], Enactment 7 of 2002, § 34.

¹⁶¹ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 46.

¹⁶² See, e.g., Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 48.

¹⁶³ See, e.g., Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 49; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 34(3).

¹⁶⁴ Syariah Criminal Offences (Selangor) Enactment 1995, *supra* note 54, § 13; Syariah Criminal Offences (Johore) Enactment 1997, Enactment 4 of 1997, § 12; Syariah Criminal Offences (Sembilan) Enactment 1992, Enactment 4 of 1992, § 51; Syariah Criminal Offences (Federal Territories) Act 1997, Act 559 of 1997, § 9.

¹⁶⁵ *Pendakwa Syari'e v. Fahyu Hanim Ahmad dll* [2000], 8(1) JURNAL SYARIAH 137.

prosecuted for following the teachings of Ayah Pin and Abdul Kahar in the states of Terengganu and Selangor respectively. These were individuals who declared themselves Muslim prophets and taught doctrines that were contrary to orthodox Islamic doctrines. After *fatwas* were issued declaring their teaching to be false in the respective states, these teachers and their followers were detained and prosecuted under the offenses of deviationist teachings, spreading false beliefs, and violating *fatwas*.¹⁶⁶

Because each unit of the Federation has its own office of the Mufti, it is possible that different state Muftis will interpret Islamic law differently, meaning that a teaching deemed deviationist in one state will be considered acceptable in another. In order to guarantee harmony between the versions of Islamic law that are applied in different units, some have suggested that there should be a “Grand Mufti for the Federation of Malaysia,” whose opinions would bind all Muslims in Malaysia.¹⁶⁷ However, this suggestion has not met with much positive response. The Federal Constitution provides that Islamic legal matters fall within the competency of the states.¹⁶⁸ Thus, the federal government could not establish such an office unless the states voluntarily agree to subordinate their Muftis to a federal Mufti—something that the states have resisted. There is however, at present, a National Fatwa Committee, which was set up in 1970 and is currently placed within the Department of Islam of Malaysia in the Prime Minister’s Office. This Committee may deliberate on issues relating to Islam but its recommendation, by itself, is not binding on the states.¹⁶⁹ Nonetheless, some state laws stipulate that the state *fatwa* committee should adopt the advice or recommendation of the National Fatwa Committee after it has been decided to be applicable to the whole of the Federation.¹⁷⁰

In short, different states use slightly different institutions to create Islamic law that is binding within the state. Not surprisingly, they enact statutes that reflect their own various interpretations of Islamic law. The next section will shift attention to how they enforce the law, and what steps have been taken to try and facilitate the harmonization of state Islamic law across Malaysia.

¹⁶⁶ Sulaiman Takrib v. Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354.

¹⁶⁷ Mohd Hisham Mohd Kamal, *Office of the Mufti in Malaysia: Legal History and Constitutional Role*, 3 SYARIAH L. REP. 20, 39-40 (2009).

¹⁶⁸ See SHUAIB, POWERS & JURISDICTION, *supra* note 47, at 70.

¹⁶⁹ Ahmad Fauzi Abdul Hamid, *The Implementation of Islamic Law in Contemporary Malaysia: Prospects and Problems*, 6 (S. Rajaratnam School of International Studies Singapore, Working Paper No. 169, Jan. 29, 2009), available at <http://www.rsis.edu.sg/publications/WorkingPapers/WP169.pdf>.

¹⁷⁰ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 52; Administration of the Religion of Islam (Malacca) Enactment 2002, Enactment 7 of 2002, § 40.

B. *The Prosecutor*

State Islamic law tends to fall within the sphere of private law. States are, however, given some latitude—just how much continues to be debated—to prohibit Muslims from engaging in un-Islamic activities. These Islamic criminal laws are enforced by a state prosecutor. The federal government, in its capacity as administrator of the Federal Territories, has also chosen to enact Islamic criminal laws that are applicable within those territories.

In most states, the chief Syariah prosecutor is appointed by the sultan on the advice of the Majlis Agama Islam. The qualifications for the chief Syariah prosecutor generally must be equal to that of a Syariah high court judge as described above.¹⁷¹ In most states, the Majlis Agama Islam is supposed to appoint “fit and proper” persons to serve as Syariah prosecutors who can assist the chief Syariah prosecutor.¹⁷²

All of Malaysia’s states (and the Federal Territories) have a chief Syariah prosecutor with discretionary power over all prosecutions for violation of the state’s Islamic criminal codes.¹⁷³ He is assisted in his work by assistant Syariah prosecutors.¹⁷⁴ The chief Syariah prosecutor makes decisions about prosecutions based on the investigation conducted by a special Syariah enforcement agency that is run by the state. However, decisions on whether to prosecute a particular case are ultimately made by the chief Syariah prosecutor.

VIII. CONCLUSION

The role of Islamic law has evolved in Malaysia in recent decades, and so too has the structure of the institutions that create and apply Islamic law. Of course, when one looks at the role that Islamic law plays in the legal system of the country, one sees the traces of that history. Thirteen colonies, administered by Britain, have become thirteen states in a federation that also includes a fourteenth sub-national unit, the Federal Territories. As in the colonial period, most areas of Malaysian life are regulated according to a

¹⁷¹ See, e.g., Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 78; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 58.

¹⁷² Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 78. In the Federal Territories, it provides that the Chief Syariah Prosecutor appoints Syariah prosecutors. Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 58.

¹⁷³ Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 78; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 58.

¹⁷⁴ For an example of a typical statute creating such a position, see the Administration of the Religion of Islam (State of Selangor) Enactment 2003, *supra* note 54, § 78; Administration of Islamic Law (Federal Territories) Act 1993, Act 505 of 1993, § 58.

consistent body of national law that is applied consistently throughout the region. Although some of this national law is consciously derived from the Islamic legal tradition, most is not. In colonial Malaysia, the different colonies each developed and applied a version of Islamic law to regulate some aspects of the lives of their Muslim citizens. In independent Malaysia, each sub-national unit continues to have the power to develop a body of Islamic law to regulate the lives of Muslims within its territory in matters of family law, inheritance, *wakaf*, and punishment for un-Islamic behavior. Each unit today is also allowed to establish its own body of special Syariah courts with the power to resolve cases among Muslims that implicate that unit's Islamic law.

Notwithstanding these broad similarities, much has changed over the past few decades. In recent decades, the role of Islamic law has grown in Malaysia. This has come about primarily through the growth and evolution of the state Islamic legal systems. The federal government has largely resisted pressure from Islamists to make Malaysia's national law more Islamic. However, all of Malaysia's states (and the Federal Territories) have begun to exercise more aggressively their constitutional power to regulate the lives of Muslims within their territory. Furthermore, the national courts have been stripped of their traditional power to review state Syariah courts' interpretation of their own state's Islamic law. This last development is significant. From independence until 1988, federal courts, staffed by judges trained in British common law, had regularly asserted the right to review a state court's interpretation of state Islamic law. This provided them, at least theoretically, the power to harmonize the versions of Islamic law that are applied in the different states and to do so in a way that favored Anglicized, self-styled "liberal" interpretations of Islamic law. In 1988, a constitutional amendment stripped the federal courts of their power to review a state court's interpretation of the state's Islamic law.

As state Islamic regulations have grown more pervasive, and as state courts have become autonomous from the federal courts, there has been a new focus on improving the mechanisms by which Islamic law is developed and applied. Among these is a concerted effort to "upgrade" the various Syariah court systems around the country. This is supposed to professionalize the operation of the courts. It is also supposed to promote harmonization of Islamic law as applied in Malaysia's different sub-national units—a harmonization that will not be forcibly imposed by federal judges but voluntarily embraced by a new, highly professional class of Islamic legislators, *muftis* and judges.