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Branding Islam: Islam, Law, and Bureaucracies in Southeast Asia

Kerstin Steiner

Abstract: Islam plays a pivotal political role in Southeast Asian countries, where the governments that have ruled since independence have been concerned with influencing the trajectory, content, hermeneutic and style of the legal traditions of their Muslim citizens and reconciling them with the states' wider policy objectives. This contribution looks at one particular tool for this form of 'guiding' Islam – the codification of Islam – comparing the codes in two Muslim-majority countries (Malaysia and Brunei) and two Muslim-minority countries (Singapore and the Philippines). Utilising comparative law methodologies, this article explores the structure, style and content of the codes in order to explicate their explicit and implied function. These codes are less concerned with being a statement of substantive Islamic law than with setting up a state-sanctioned bureaucracy for the administration of law for Muslims. These bureaucratic institutions were the key instruments for the states to develop their own brand of Islam. In doing so, the state's approach towards socially engineering Islam oscillates among appropriation, accommodation, control and subjugation of Islam in different political and legal frameworks.

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Keywords: Singapore, Malaysia, Brunei, Philippines, Islam, Codes for Muslims

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1 Introduction

A common characteristic of Singapore, Malaysia, Brunei, and the Philippines is that, upon obtaining independence, they had to negotiate their own approach to accommodating and controlling Islam in their respective legal and political frameworks.

The working hypothesis for this article¹ is that the states sought to achieve this by utilising bureaucratic institutions, which resulted in the development of a special brand of Islam. The numerous possible definitions of bureaucracy are mostly based on discipline-specific perspectives or used for specific purposes, some of which are explored in this special issue. For the purposes of this article, bureaucratisation focuses on a very specific legal conceptualisation of bureaucracy; that is, the state-sanctioned framework and institutions that are required in order to administer Islam.

This article focuses on one of the instruments used to achieve this, namely the different codes for the administration of law for Muslims. While these countries have arguably borrowed from each other's codes, I have deliberately not covered the issues of legal transplant, legal transfer or legal harmonisation as such,² focusing instead on a micro-comparison of those codes. I take, from a comparative legal methodological perspective, what has been described as an arguably pragmatic “methodological mishmash” (Michaels 2006: 362), looking at factors such as structure,

1 This article draws in part on research for the two monographs on *Islam, Law and the State in Southeast Asia*, Volume II, Singapore and Volume III Malaysia and Brunei co-authored by Lindsey and Steiner (2012a and 2012b).

I would like to thank Professor Tim Lindsey and Professor M B Hooker for the use of some material from our joint current research project on *Islam, Law and the State in the Philippines*, funded by an ARC Discovery Project.

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I am also grateful to Dominik M. Müller and the anonymous reviews from *JCSAA* for their helpful suggestions on earlier drafts. The views in this article are the author's and are not meant to represent any other individual or institution.

2 There is an extensive literature on this matter; see, for instance, the contributions in the edited volumes by Hoecke (2004); Legrand and Munday (2003); Nelken and Feest (2001). For a compilation on comparative legal studies in Asia; see, for example, Biddulph and Nicholson (2008).

terminology and general content in order to investigate the bureaucratic framework for Islam.

The codes lay the foundation for state control over Islam and define the content of Islam through institutions of administration and enforcement. In exploring these points of convergence and divergence of this state bureaucracy, I will explore three key themes: (1) *what is regulated in these codes* (subdivided into the topics of the *scope and sources of Islamic law* and *the bureaucratic and judicial institutions* required to administer and enforce it); (2) *which enables an elucidation of the explicit and implied functions of these codes*; and finally (3) *an evaluation of how that function is fulfilled*.

The remainder of this article is divided into two parts. The first part will provide an overview of the context of Islam in Southeast Asia while the second part will address the above-mentioned themes, thus exploring the different forms of state bureaucratisation.

2 The Context of Islam, Law and the State in Singapore, Malaysia, Brunei and the Philippines

The Philippines, Singapore, Malaysia and Brunei share a plural legal system in which Islamic law and ‘civil’³ law coexist, to varying degrees. This coexistence of different normative systems is a result of the histories of these countries, where local laws, Islamic law and colonial laws have intermingled.

Islam reached the Malay Peninsula by the 14th century and spread with the territorial expansion of the Malacca Sultanate during the 15th century (Tregonning 1972: 16–21). Islam became deeply imbedded into the political landscape of Southeast Asia. In pre-colonial Malaysia, the sultans of their respective states were the political leaders but also the heads of religion. In this sense, there was no separation between politics, Islam and law.⁴ This changed during the British colonial period, when the status of Islam in the British colonial territories varied.

The Straits Settlement,⁵ which included Singapore, was a crown colony whose sovereignty rested with the British. Therefore, Islam was

3 I use the adjective ‘civil’ in order to refer to secular law and/or the non-religious laws in those four countries.

4 For an account of this relationship, see, for instance, Milner (1985).

5 The Straits Settlement consisted of Malacca, Penang, and Singapore as well as Labuan (from 1907). It was established in 1826 by the British East India Com-

not the official religion (see Means 1969: 275) and the authority of Islam depended on the Charter of Justice, statute and precedent and the accommodation it made for Islam. Thus, unlike in its neighbouring Malay states, Islamic law was never the law of the land. Singapore's road to independence is, arguably, influenced partly by the ruling elite's attitude toward Islam. In 1959, the island became self-governing and held official elections. The People's Action Party (PAP) won these elections – and has won every subsequent election until the time of writing. In 1963, Singapore merged with the Federation of Malaya, only to leave 23 months later and become an independent nation. Leaving the Federation of Malaya was a result of persistent disagreement between the Chinese-dominated PAP and Malaya's ruling Malay-dominated Alliance. This disagreement was partially caused by religious concerns, in particular the role that Islam was to play within the state. Islam was supposed to be the official religion of the Federation of Malaya, as it still is today in Malaysia. This approach did not sit well within non-Muslim majority Singapore. In addition, communal tension between the majority non-Muslim population and the Muslim minority in Singapore rose during the 1950s and 60s (Lindsey and Steiner 2012b: 239–244). Therefore, it is no surprise that the Republic of Singapore maintained a model for the administration of law for Muslims built largely upon the colonial experience. This meant that Islam was to be accommodated into a secular system,⁶ restricting religion to the personal sphere and, consequently, limiting Islamic law to private matters. It also meant subjugating Islam to the interests of the ruling party (Steiner 2015b).

The legal framework for regulating religion in Singapore can be found in several pieces of legislation, the most important being the Maintenance of Religious Harmony Act (MRHA), (cap 167A, No 26 of 1990, rev ed 2001) a statute based around a notion of 'religious harmony' defined in terms of state security; the Internal Security Act (ISA) (cap 143, No 18 of 1960, rev ed 1985); and the Sedition Act (cap 290, No 14 of 1948, rev ed 2013) (Steiner 2011a).

At the core of the legal infrastructure for control of Islam, and thus Muslims in Singapore, is the Administration of Muslim Law Act (AMLA) (cap 3, No 27 of 1966, rev ed 2009) (hereafter called AMLA (Singapore), which sets out the various institutions responsible for shaping the state-

pany and became a crown colony in 1867. The territories are now part of the modern nations of Singapore and Malaysia.

6 For details on the Singaporean approach towards secularism and the Muslim minority, see Steiner (2011a).

sanctioned interpretation of Islamic law. Introduced in 1966, AMLA provides the overall legal framework for Islamic law in Singapore.

During colonial times in the Federated Malay States, the Unfederated Malay States and Brunei, Islam was present via the treaties and the sovereignty of the Sultan.⁷ The difference was that, with the colonial administration, these sultans lost – to various degrees depending on the colonial status of their respective territories – their political power but retained their religious power. Thus, Islam is part of the political, ideological and constitutional framework in Malaysia and Brunei (Lindsey and Steiner 2012a).

In 1957, the Federation of Malaya became independent of British colonial rule and, in 1963, Singapore (initially), British North Borneo and Sarawak joined in order to form Malaysia. Malaysia's Federal Constitution was promulgated on 31 August 1957, creating a federal parliamentary democracy with a constitutional monarchy. Islam is a prominent feature of the Federal Constitution, with article 3(1) providing that Islam is the religion of the federation and article 3(2) stating that the ruler of each state is the head of the religion. The result of this constitutional framework is a politically and socially hotly contested debate: whether Malaysia is an Islamic state or not.⁸ Moreover, two of the main political parties – UMNO (United Malays National Organisation, *Pertubuhan Kebangsaan Melayu Bersatu*) and PAS (*Parti Islam Se-Malaysia*, Pan-

7 Means (1969: 274), quoting the first agreement, the Pangkor Engagement, which stated that the Ruler 'receive and provide a suitable residence for a British Officer [...] whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom.'

8 Globally there is no theoretical consensus about what constitutes an Islamic state; for an overview of the different possibilities of defining Islamic state in the context of Malaysia, see Harding (2002). Tunku Abdul Rahman, who later became Malaysia's first Prime Minister, commented that "this country is not an Islamic state as it is generally understood [...] Islam shall be the official religion of the state" and that "unless we are prepared to drown every non-Malay, we can never think of an Islamic Administration" (Ahmad Ibrahim 1985: 213) and (von der Mehden 1963: 73). In 2011, the Prime Minister at that time, Dr Mahathir Mohamad, declared that Malaysia should be regarded as an Islamic state. In 2007, this sentiment was partially re-asserted by Deputy Prime Minister Najib Razak who declared that Malaysia was never a secular state (*Bernama* 2007). For an overview of the current status of the debate, albeit in German, see Steiner (2017).

Malaysian Islamic Party) – regularly try to out-Islamicise each other (Noor 2004; Lindsey and Steiner 2012a: 13–16).⁹

The bureaucratisation of Islam continued in post-independence Malaysia, a development that was unprecedented before British arrival. Adding to the complexity of this discourse is the federal structure of independent Malaysia. State governments were granted legislative prerogative over Islamic matters, as prescribed by the Ninth Schedule, List II of the Federal Constitution of Malaysia. The states in Malaysia have now passed multiple pieces of Islamic legislation, dealing with the limited matters of substantive law (particularly family law and criminal offences) and procedural law (particularly Syariah court evidence, criminal procedure and civil procedure). These enactments are not necessarily uniform but do share common elements.¹⁰ Thus, for the purpose of this article, the regulatory framework of the Federal Territories will be used, the main one being the Administration of Islamic Law Act (Federal Territories), No 505 of 1993.¹¹

Brunei is one of the few absolute monarchies in the world, with the current Sultan, Hj Hassanal Bolkiah Mu'izzaddin Waddaulah, holding the positions of King, Prime Minister, Minister of Defence, Minister of Finance and, more recently, Minister of Foreign Affairs and Trade. He is also the official “guardian and protector” of Islam and tradition in Brunei. According to article 3(2) and (3) of Brunei’s Constitution, the Sultan is Head of the Religion and is advised by the Islamic Religious Council. In consultation with the Sultan, the Religious Council is the highest religious authority in Brunei. As such Islam, politics and law are even more intertwined than in neighbouring Malaysia. In Brunei, Islam is part of the Brunei Malay Muslim Monarchy (*Melayu Islam Beraja* or MIB). As Lindsey and Steiner (2012a: 345) commented, “MIB conflates sovereignty and political legitimacy with the Sultanate, Islam and Malay identity” and, to a certain degree, the underpinning ideas of MIB are a continuum from the colonial period, “when pre-colonial notions of authority of the Crown were relied upon as a tool of British colonial rule”.

9 Mauzy (1983–1984) used this expression in order to refer to the political competition between UMNO and PAS under the Mahathir administration. It still holds true today.

10 See for example Steiner (2011b) on zakat; Steiner (2013) on unilateral conversion of children; and Lindsey and Steiner (2012a) on apostasy.

11 Hereafter called the Administration of Islamic Law Act (Federal Territories). Some reference is made to other states where deemed necessary to illustrate points of divergence.

However, the scope of law for Muslims has greatly expanded in Brunei since independence, with Islam taking centre stage. As in neighbouring Malaysia, there are numerous acts and orders dealing with the administration of laws for Muslims.¹² The main one – the Religious Council, State Custom and Kathis Courts Enactment of 1955 – came into force four years before Brunei’s Constitution was promulgated and the Sultanate of Brunei Darussalam became a self-governing state. It is reminiscent of the legislation that was passed in Kelantan, one of Malaysia’s states. It is far more comprehensive than any previous colonial legislation on the administration of law for Muslims in Brunei (Hooker 1984: 177). In 1984, a revised version was enacted and the Religious Council and Kadis Courts Act, cap 77, of 1984.¹³ The revised version left much of the previous enactment intact, introducing some structural rearrangement of the provisions on substantive matters, the broadening of the jurisdiction of the Syariah courts was the main change. In the late 1990s, further reforms to the Syariah courts were passed, albeit through Syariah Courts Emergency Order of 1998, which was enacted on 31 October 2000 as the Syariah Courts Act, cap 184, of 2000.

The Philippines, it shares some commonalities with the previously discussed Anglo-Malay countries of Southeast Asia. As in Singapore, Muslims are the minority in the Philippines. The Philippines is the largest Catholic country in Southeast Asia and has the third-largest Catholic population in the world. However, there were long-established and flourishing Muslim kingdoms across the islands, including the powerful Sultanate of Sulu,¹⁴ when Spanish conquest – and Christian conversion – began in the late 16th century. As in the Anglo-Malay countries, colonial policies were established to lay down policies regarding how matters of Islam were supposed to be dealt with. The Spanish considered Islam to be “a noxious weed” and for three centuries under the Spanish, and then under American occupation in the first half of the 20th century, Muslims (known as ‘Moros’ or Moors by the Spanish) “suffered systematic ne-

12 Technically, Brunei has been in a perpetual state of emergency since 1962 which is renewed every two years. As such the Sultan is authorised to pass “Orders” under his emergency powers in Section 83(3) of the Constitution. “Acts” are enacted through processes involving the Legislative Council. The intention is that the emergency orders will be eventually promulgated as acts over time. However, Acts are also frequently replaced by orders, making it difficult to recognise any trends for institutional changes.

13 Hereafter called Religious Council and Kadis Courts Act (Brunei).

14 This Sultanate covered parts of Mindanao, parts of Palawan and north-eastern Borneo thereby crossing the modern nation borders of the Philippines and Malaysia.

glect and discrimination in the context of hundreds of years of struggle for self-rule” (Stephens 2011: 3–4).

Economically disadvantaged and politically neglected by comparison to other regions in the Philippines, the historical aspirations for Moro independence are tied to resentment at their history of repression and neglect by governments in the north, and a sense that the southern kingdoms were once major powers in the region.

This combination of minority status, lost glory and poverty has proved toxic, with resentment and armed secessionist violence remaining strong (Chiarella 2012). Government policies on the Moro have taken many different forms, ranging from armed intervention, and failed attempts at integration to peace negotiations and various largely unsatisfactory attempts at political and religious accommodation. They have also included mediation by a range of international actors, which led to the creation of an Autonomous Region in Muslim Mindanao (ARMM), a special national government body established to represent Muslim interests, and the 1977 Code of Muslim Personal Laws (CMPL),¹⁵ a revision of an earlier, unsuccessful attempt in 1974 to pass an Administration of Muslim Law Code based on similar statutes in Singapore and Malaysia.

The next part of this article will look at these codes in more detail, for a micro-comparison of their structure, content and function.

3 The Southeast Asian Codes for Muslims

Hooker (n.d.: 3) wrote that these “codes in Southeast Asia have more in common than not. Judges from one state would find themselves pretty well at home with the Codes of one or more of the others.” Indeed, the four codes share several common elements, including structure and terminology. In addition, these codes all have a similar purpose, which is to establish a framework providing for the accommodation of Islam in the respective plural legal systems. However, there are also certain significant differences, particularly regarding how this purpose is achieved. The result is slightly different approaches towards the bureaucratisation of Islam.

3.1 At First Glance: The Structure of the Codes

At first glance, the three codes of Singapore, Malaysia and Brunei share a more or less common structure, starting with a preliminary part defining

15 Hereafter called 1977 CMPL (Philippines).

the purpose and providing general definitions. This is followed by several parts that establish the main administrative bureaucratic institutions – a council and courts, both required to administer and adjudicate on matters of Islam – and the rules governing the activities of these institutions.

In the case of Singapore, this is followed by various parts containing a narrow range of substantive rules for Islamic law that are given legal force. These rules pertain to personal laws for Muslim-governing matters, such as procedures for betrothal, marriage, divorce, property and offences if the procedures set out in AMLA (Singapore) are not followed. In short, one could describe AMLA (Singapore) as a ‘one-stop shop’ for law for Muslims in Singapore. Given the political and social context in Singapore, it is not surprising that this more streamlined approach was chosen. Malaysia and Brunei have fewer of those ‘substantive’ rules, mainly because they are covered in additional codes.¹⁶

The 1977 CMPL in the Philippines diverts partially from this structural formula. The code is divided into five books, starting with ‘General Provisions’, which defines terms and sources of law, followed by several books that provide for a narrow range of substantive rules for Islamic law in the Philippines that is reminiscent of the Singaporean approach.

The state bureaucratic framework, which featured heavily at the beginning of the codes for Muslims in Singapore, Malaysia and Brunei, is covered in Book Four ‘Adjudication and Settlement of Legal Disputes and Rendition of Legal Opinions’. This book is relatively short compared to the other codes, as only 31 articles are required to lay the foundation for a very limited number of administrative institutions; namely, the Syariah courts and the jurisconsult or *mufiti*. It is striking that, unlike the other Southeast Asian codes, the 1977 CMPL did not establish a religious council, which will be discussed in detail below.

These structural differences are interesting to note because the Philippines had a draft that was much more similar to the codes in Singapore, Malaysia and Brunei in the sense that it emphasised the bureaucratic structure required to administer Muslim personal law. The short-lived 1974 Codification Research Staff Report had a very different focus. The Research Staff, led by Datu Michael Mastura and Musib M Buat, was

16 In the Federal Territories of Malaysia, these include the Islamic Family Law Act, No. 303 of 1984 (Federal Territories) for the more substantive rules on Islamic law; the Syariah Court Civil Procedure Act, No. 585 of 1999 (Federal Territories); and the Syariah Criminal Offences Act, No. 557 of 1997 (Federal Territories) for laying down the procedural rules for the Syariah courts. In Brunei, examples are the Islamic Family Law Emergency Order of 1999 and the Syariah Courts Civil Procedure Order of 2005.

appointed under Memorandum Order No. 370 (13 August 1973) with following instructions:

1. To survey, collect and gather materials on Muslim laws from all available sources with particular emphasis on current Philippine laws affected by Islamic laws;
2. To collect and reconcile Philippine laws with Muslim laws [...]
3. To prepare a preliminary draft of the proposed Code of Philippine Muslim laws (Shari'ah, Fiqh, Adat etc.) and its implementing agencies.¹⁷

Less than a year later, on 4 April 1974, the report was submitted to the office of the president. The accompanying memorandum was at pains to reconcile the comprehensiveness of the envisioned administrative system and the extensiveness of the sighted material, on one hand, with the limitations of the substantive rules, on the other.

It must be underscored that the *draft Code does not seek to codify Muslim or Islamic Substantive Law* for this should be another product of the codification effort, a second stage, if we may.[...] The Research Staff has examined the practical mechanics of administration of Muslim law in other jurisdictions like Malaysia (Malacca and Negri Sembilan), Singapore, Sri Lanka, Pakistan, India, Nigeria, Lebanon, Indonesia and many other countries. It was far from the intention of the Staff to introduce into our jurisdiction something that may be found irrelevant to our existing conditions and situations for we have developed in our own Muslim communities the rudiments of Islamic or Muslim law and customary adat law. (emphasis in original)¹⁸

Indeed, this draft was much more closely aligned to the neighbouring codes of Singapore and Malaysia. Regarding its structure, the draft consisted of nine chapters, which again covered preliminary matters before providing provisions for a council (*Majlis*), the Syariah courts and then the narrow scope of 'substantive' matters including property, marriage and divorce. As in Singapore, those 'substantive' matters were much more concerned with procedural issues and the ways in which disputes in those areas were to be adjudicated. The reason why the 1977 CMPL diverted from this well-trodden path will be further explored in the sec-

17 Research Staff for the Codification of Muslim Personal Laws (1974: 210).

18 Research Staff for the Codification of Muslim Personal Laws (1974: 20), as cited in Bentley (1981: 56).

tion below on the rationale and function of the codes. Arguably, one could surmise that the 1977 CMPL inverted the structure of the prevailing formula in Southeast Asia, preferring to provide for limited ‘substantive’ provisions at the beginning.

The next section will further explore the substance of the codes, looking at the content and purpose together.

3.2 Exploring the Content and Purpose of the Codes

While the chosen structure of the codes already provided hints about the intent and purpose of the codes, this can be much better elucidated by looking at the content of those codes. As previously mentioned, the codes fulfil the dual purpose of establishing the scope of Islamic law and the bureaucratic and judicial institutions required to administer it.

3.2.1 *The Scope of Law for Muslims*

All four codes set out the scope of the legislation in their early provision, acknowledging that their function is to “consolidate the law [...] the constitution and organisation of religious authorities”;¹⁹ “a law concerning the enforcement and administration of Islamic Law, the constitution and organisation of the Syariah Courts, and related matters”;²⁰ and “regulating Muslim religious affairs and to constitute a council to advise on matters relating to the Muslim religion in Singapore and a Syariah Court”.²¹ Article 2(c) of the 1977 CMPL (Philippines) also states that the code “provides for an effective administration and enforcement of Muslim personal laws among Muslims” but goes further by stating that it also intends to “codif[y] Muslim personal laws”, article 2(b) 1977 CMPL (Philippines). This is not stated in the codes of Singapore, Malaysia and Brunei. The preface of AMLA (Singapore) has a much vaguer expression of this, noting that it makes “provision for regulating Muslim religious affairs”; it is even broader in Brunei where the codes provides for “regulation of religious affairs”.²²

The Philippines’ code sets out a value system that can be preserved in the Philippines context and focuses on defining these values. This was clearly specified in the report, which acknowledged that while the Islamic legal system is a “complete system”, only parts that were “fundamentally

19 Preface, Religious Council and Kadis Courts Act (Brunei).

20 Preface, Administration of Islamic Law Act (Federal Territories).

21 Preface AMLA (Singapore).

22 Preface Religious Council and Kadis Courts Act (Brunei).

personal were to be codified” and overly complicated matters only had “fundamental principles [...] stated”, with details left to judges. The caveat was that any of those principles that were contrary to the Constitution of the Philippines were not to be incorporated (the report as cited in Bentley 1981: 61).

The next question is where the limited substantive rules for Islamic law are to be sourced from. The codes obviously refer to the classical sources, which are the Qur’an and *hadith*. Regarding the accepted *maddhab* (schools of Islamic thought), different approaches have been chosen. In the Philippines, all four Sunni *maddhab* are accepted; article 6(2) of the 1977 CMPL (Philippines).

Singapore, Malaysia and Brunei favour the Shafi’i *maddhab*, to varying extents. In Singapore, the requirement to “ordinarily follow the tenets of the Shafi’i school of law” unless they are opposed to public interest or are explicitly asked to follow a particular *maddhab* is only explicitly made for the Majlis Ugama Islam Singapura (Islamic Religious Council of Singapore or MUIS) and its legal committee, section 33 AMLA (Singapore). Such an explicit reference is missing for the Syariah courts. The Singaporean Syariah courts have to apply “Muslim law, as varied where applicable by Malay custom” according to section 35(3) AMLA (Singapore), providing them with more flexibility regarding the applicable law.

In Malaysia, section 39(1) of the Administration of Islamic Law Act (Federal Territories) refers to the Shafi’i school of legal thought as the main *maddhab* to be used when giving a *fatwa*, although subsection 2 allows the *Mufti* to use any of the other Sunni *maddhab* where “public interest” so requires. The Shafi’i *maddhab* is not exclusively mentioned as a source for the Syariah courts. Instead, *hukum syarak* (Islamic law) is defined as Islamic law according to any recognised *maddhab*; Section 2 of the Administration of Islamic Law Act (Federal Territories).

The Shafi’i *maddhab* is also more slightly favoured in the legislative provisions, with article 2(1) of the Brunei Constitution stating that “‘Muslim Religion’ means the Muslim Religion according to the Shafeite sect of that religion”. This preference for the Shafi’i *maddhab* is also seen in section 43(1) of the Religious Council and Kadis Courts Act (Brunei).

Steiner (2015a: 611) analysed the usage of those classical sources in the Syariah courts of Singapore, Malaysia and Brunei and concluded that while the regulatory framework is similar, the “frequency of use, and the manner in which they are used, depends very much on the local circumstances.” In the case of Brunei, those sources were cited in order to provide additional legitimacy to state legislation. The classical sources and *maddhab* are instrumentalised and considered part and parcel of the

MIB ideology. Malaysian Syariah courts made most frequent use of the classical sources, sometimes at the expense of national laws. Indeed, historically the Syariah appeal boards have accused some Syariah courts of devaluating national laws (Steiner 2015a: 602). Nowadays, this claim is made by civil society groups and some of the civil courts (see Steiner 2017 for an overview).

Thus, it appears that all the four codes set a clear scope for what constitutes Islam and Islamic law. They also stipulate the sources of Islamic law, with a clear preference for the Sunni interpretation of Islamic law. Regarding the four *maddhab*, there is a preference for the Shafi'i *maddhab* in most countries. It is interesting that the two countries with Muslim-minority populations provide the most flexibility regarding which *maddhab* is to be applied. The rationale for this could be to provide more scope to ensure that Islamic law is indeed compatible with the overall state framework. On the other hand, Brunei provides the least flexibility, probably because Islam is so deeply embedded in the MIB ideology. Thus, flexibility in the interpretation of Islamic law is not encouraged; it is supposed to align with the MIB ideology.

3.2.2 *The Non-Judicial Bureaucratic Institutions: The Islamic Religious Councils (Majlis), the Mufti and Ministries*

Three main non-judicial bureaucratic institutions are utilised to administer Islam in Southeast Asia. These institutions are commonly referred to as the Islamic Religious Council or *Majlis*, the *Mufti* and a ministry of religion or Islam. However, not all countries have all these institutions.

As previously mentioned, only Singapore, Malaysia and Brunei established Islamic religious councils; the Philippines decided not to establish this particular bureaucratic institution. The previously mentioned 1974 Codification Research Staff Report was rejected primarily because of the fear that it might establish a “state within a state” (Bentley 1981: 58). The 1977 CMPL (Philippines) limited the administrative side to prevent the establishment of an extensive bureaucracy that might have functioned as a focus for an alternative power centre.

This is also evident when the position of the *mufti* or jurisconsult is examined. Title III of Book Four, which deals with this position, contains only five articles. The jurisconsult has “on the written request of any interested party [...] the authority to render legal opinions, based on recognized authorities, regarding any question relating to Muslim Law”, article 166(1) of the 1977 CMPL (Philippines). Article 167 of the 1977 CMPL (Philippines) sets the salary at 48,000 PHP per year, which nowa-

days does not even cover half the minimum wage for an unskilled worker in Manila (Stephens 2011: 11). As such, it is unsurprising that this position is often vacant – a situation that is unheard of in any of the neighbouring countries.

Interestingly, the position of the jurisconsult is administratively under the supervision of the Supreme Court of the Philippines, article 164(a) of the 1977 CMPL (Philippines). This is unique in Southeast Asia, where the position of the *mufiti* is usually not embedded within the civil/non-religious bureaucracy. Indeed, this approach is common for the Philippines, where even the Syariah courts are under the supervision of the Supreme Court (see below). All of this supports the point, made above, that the bureaucratic institutions in the Philippines are extremely limited and where they exist, they are deeply embedded in the existing non-religious state bureaucracy.

The situation in Singapore is very similar. There was also a fear of creating independent bureaucratic institutions for Islam. Then-Minister for Culture and Social Affairs, Mr Othman bin Wok (1966: 240–241), made it clear that the Singaporean government would not entertain the

possibility of a fully elected body entirely free from any control or supervision. This, no doubt, would be an ideal to which all of us should strive. But those who are aware of the position in Singapore and how religious issues can be used or abused to create divisions, dissatisfaction and civil strife must agree that, to begin with, at any rate, there must be some control and supervision, not necessarily by the Government but by the most stable elements in Muslim society. The Bill therefore provides for an equal number of elected and appointed members – and this is indeed in line with the compositions of the Councils of Muslim religion in the states of Malaysia. In the present stage of Muslim society in Singapore, also, it would appear that election from the Muslim registered societies in Singapore would, in fact, provide a representative body in Singapore and the power of the President to appoint members will enable the Majlis to be a body more fully representative of the Muslim community.

The Majlis Ugama Islam Singapore (MUIS) was one of the new key features when AMLA was introduced in 1966. MUIS was established in 1968 when AMLA came into force. It is a statutory body organisationally embedded within the Ministry of Culture, Community and Youth, which is headed by the Minister of Culture, Community and Youth. Neo (2009: 234) observed that MUIS was indeed embedded in this ministry as if it was a bureaucratic arm of that ministry. In addition to this bureaucratic

entrenchment, there has been a cabinet position for a Minister-in-Charge of Muslim Affairs since 1977.

The Council of MUIS is the overall decision-making body and its compilation and appointment illustrate the government's need for assurance and control over Islam. The rules and procedure of appointment to the MUIS council have changed very little since the inaugural Act came into force. Section 7 AMLA prescribes that the council consist of a President, a Chief Executive, the *Mufti*, not more than 7 members appointed by the President of Singapore recommended by the Minister-in-Charge of Muslim Affairs, and no fewer than seven members also appointed by the President of Singapore based on suggestions made by Muslim societies. Interestingly, MUIS itself decides on which Muslim societies are permitted to make suggestions for the membership. This is hardly a democratic process and indeed, directly or indirectly, the government of Singapore has control over the appointments to this council. This was a contentious issue when changes to AMLA (Singapore) were discussed in the early 2000s. The second reading of the Administration of Muslim (Amendment) Act, No 35 of 2005 was delayed in order to facilitate more engagement with Muslim community leaders (Hussain 2005). One of the suggestions was to create the position of a non-executive President who was to be appointed directly or indirectly by the Muslim community. However, this did not come to pass. Additionally, the maximum number of members appointed directly by the President of Singapore increased from five to seven, hardly an improvement of the democratic representation of the Muslim communities. Instead, this shows a continuance of the control exercised by the government over Muslim affairs, particularly when looking at the scope of MUIS responsibilities covering religious, educational, economic and cultural activities of Muslims, as well as specific administrative functions including administering, developing and managing mosques; administering Islamic religious schools and education; issuing *halal* certification; administering and organising the *hajj*; and issuing *fatwa* (Steiner 2015b: 8–9).

The Office of the *Mufti* is also located within MUIS and acts as the secretariat of the Fatwa Committee. The role of the Fatwa Committee is to issue a *fatwa* (or ruling) on any point of the Muslim law upon the request of a Muslim, section 32 AMLA (Singapore).²³ It is interesting to

23 For a detailed account of the *fatwa* process in the context of bureaucracy of Islam in Singapore, see the contribution of Afif Pasuni in this special issue.

note how these *fatawa*²⁴ are treated when they become an issue in the civil courts.

There is a precedent of cases where the fatwa was set aside. Judge Thean, in *Saniab bte Ali and others v Abdullab bin Ali* [1990] 1 SLR(R) 555 at 17, stated:

In my opinion, the fatwa is merely an opinion of the Majlis and is not binding on this court which has full jurisdiction to decide on the matter in issue. [...]
For the reasons I have given and on the construction I have placed on ss 23 and 24 of the CPF Act and s 112(1) of the AML Act, I cannot, with respect, accept the fatawas correct. (emphasis added)

In the case of *Mobamed Ismail bin Ibrabim and Another v Mohammad Taba bin Ibrabim* [2004] SGHC 210 at 64, the judge MPH Rubin was at pains to stress the respect for the *Mufti* and the Fatwa Committee:

I must say in all earnestness that I have the highest regard for Tuan Syed Isa. His sincerity, zeal and dedication to the office he holds in the service of the Muslim community in Singapore are worthy of praise. Similarly, I also hold the members of the Fatwa Committee in high esteem.

On the other hand, the judge did not refrain from criticising the procedure of the Fatwa Committee, commenting that:

There are many troubling questions concerning the manner in which the will of the testator came to be certified, validated and subsequently ratified. Although no negative motive can be attributed to Tuan Syed Isa, his validation of the will on the day it was executed and his predisposition in favour of its construction should have effectively ruled him out from partaking in the deliberation of the Fatwa Committee that upheld its validity. It is an important principle of Western as well as Muslim jurisprudence that a person cannot be a judge in his own cause.²⁵

In the case of *Shafeeg bin Salim Talib and another v Fatimah bte Abud bin Talib and others* [2010] SGCA 11 at 28, the judge held that general law would prevail over Muslim law

24 For the purpose of this paper I will use the spelling *fatawa* to indicate the plural of *fatwa*. An often found alternative spelling is *fatwas*.

25 *Mobamed Ismail bin Ibrabim and Another v Mohammad Taba bin Ibrabim* [2004] SGHC 210 at 55.

Absent such exceptions [where the legislation makes explicit exceptions for Muslims], *legislation must prevail over personal law, such as Muslim law, as even common law prevails over personal law where the circumstances do not require the common law to be modified in favour of personal law.* (emphasis added)

Moreover, the judge stated that *fatawa* were to be treated like “expert opinion on civil law” and thus not necessarily binding on the court.²⁶

The non-judicial bureaucracy in Singapore is deeply entrenched in the state bureaucratic system, which exercises significant control over it. This control allows for certain cooperation within boundaries that are set by the state and carefully monitored by non-religious state institutions, as we have seen in the treatment of *fatawa* by the civil courts.

In Brunei, the religious bureaucracy is similarly deep-rooted in the state bureaucratic system but for very different reasons and through a different mechanism. Article 3(3) of the Brunei’s Constitution of 1959 arranges for the Religious Council to act as the Religious Adviser to the Sultan. The Sultan himself has the exclusive power to appoint members to the Religious Council for such a period as he deems fit (section 13 Religious Council and Kadis Courts Act (Brunei)), as well as make temporary appointments or cancel appointments in case of absence without leave or becomes unfit (sections 15 and 16 Religious Council and Kadis Courts Act (Brunei)). This monopoly in terms of determining the membership is unsurprising given that Brunei is indeed an absolute monarchy, which means that decisions regarding any political, judicial and executive appointments are at the sole discretion of the Sultan. According to section 38 Religious Council and Kadis Courts Act (Brunei), the role of the Islamic Religious Council is to:

on behalf of and under the authority of His Majesty as Head of the Religion of Brunei Darussalam, aid and advise His Majesty on all matters relating to the religion of Brunei Darussalam, and shall in all such matters be the chief authority in Brunei Darussalam, save in so far as may be otherwise provided by this Act. (emphasis added)

The section is interesting as, on one hand, it postulates the subordinate role of the Islamic Religious Council, while on the other declares it the chief authority in all matters of religion. Indeed, the responsibility of the Islamic Religious Council in Brunei is as far-reaching as in Singapore; it is responsible for certain Islamic financial matters and the sole trustee for

26 *Sbafeeg bin Salim Talib and another v Fatimah bte Abud bin Talib and others* [2010] SGCA 11 at 63.

mosques in Brunei. Moreover, the Islamic Religious Council approves any enactment or modification of Islamic law developed by the Islamic Legal Unit in the Ministry of Religious Affairs. It also has the authority to initiate policies for Islamic law. Despite this far-reaching authority, it should not be forgotten that the Sultan has the power to veto any initiative.

The office of the *mufti* was established in 1962 and, according to section 40 Religious Council and Kadis Courts Act (Brunei), the Sultan has the exclusive right to appoint or revoke the appointment of the *mufti*. To date there have been only two office-bearers, and the changes that this office has seen have concerned its location within the state bureaucratic system. It was originally under the authority of the Ministry of Religious Affairs and, with the appointment of the second *mufti* in 1994, it was relocated as one of five offices under the authority of the Prime Minister – that is, the Sultan himself. Lindsey and Steiner (2012a: 391) observed that this was a reflection of the Sultan’s “increased involvement in the administration of Islam in his kingdom in recent decades”.

This point has also been observed by other scholars. As Müller (2015: 320) aptly stated:

in the absence of democratic institutions or an influential civil society, the Islamic bureaucracy [comprising the Islamic Religious Council and the Ministry of Religion as well as the State Mufti Department] has become the sultanate’s most powerful political actor outside of the royal family.

A link between state, politics and religion can be observed in Malaysia. Islamic law is a state matter under the Ninth Schedule, List II of the Federal Constitution of Malaysia.²⁷ As such, there are bureaucratic institutions at the state level but also some at federal level where coordination is agreed upon by the states or the ruler.²⁸ This means that the au-

27 A result of the federal structure is that there are Islamic institutions at state and federal level. The ones at federal level include the Conference of Rulers, whose religious powers are mostly bureaucratic or ceremonial, and a National Council for Religious Affairs. The latter is a potential competitor for power. However, Section 8 of the National Council for Religious Affairs Ordinance 1987 provides that the State Councils are bound by the advice of the National Council only if it has the support of the Council of Rulers. This is an attempt to minimise potential conflicts.

28 While this article has focused on the institutions at state level, there are of course numerous bureaucratic institutions at the federal level. These include the Council of Rulers, JAKIM (Jabatan Kemajuan Islam Malaysia), the Department for Islamic Development, the National Council for Religious Affairs, the Na-

thority, power and legitimacy of those federal institutions are based on agreement by the states. For the purposes of this article, the focus is on those state bureaucratic institutions as they can be more easily compared to the other institutions in the region.

The constitutional monarch – sometimes also called ruler or sultan of those states – of the state acts as the Head of the Religion of Islam. This is the case in nine of the 13 Malaysian states; the four remaining states (Penang, Melacca, Sarawak and Sabah) are headed by a governor instead of a ruler. In those states, the Yang di-Pertuan Agong, the elected monarch who is head of the state, also acts as the Head of Islam.

The Islamic Religious Councils (*Majlis Ugama Islam* commonly referred to as *Majlis*) in Malaysia are established by those Heads of Religion of Islam. The membership of the Islamic Religious Council consists of a chair and his deputy; the chief secretary to the government or representative; the Attorney General or representative; the *Mufti*; the Commissioner of the City of Kuala Lumpur; and 15 members, five of whom are learned in Islamic studies, section 10(1) Administration of Islamic Law Act (Federal Territories).²⁹ The chair, deputy and members learned in Islamic law are appointed by the Sultan (in some states on the advice of the Chief Minister)³⁰ for a maximum of three years.

The prerogative to appoint the members to the *Majlis* is carefully guarded by the sultans. For instance, in Perak in 2008, the Chief Minister decided to replace the Director of the Islamic Religious Department without consulting the Sultan first. While the Islamic Religious Department is a separate bureaucratic institution, the director also functions as the secretary to the council. In the end the Chief Minister retracted the decision and apologised (Shuaib 2008).

tional Fatwa Committee. For details of their functions, see Lindsey and Steiner (2012a).

29 As stated above, the different states have individual enactments regarding the administration of Islamic law, although the differences are minimal. To compare, the composition of the Islamic religious council in Selangor consists of a Chair and a deputy; five members who hold the offices of Secretary of the State, Legal Adviser of the State, State Financial Officer, the *Mufti* and the Head of State Police; and not more than eight members learned in Islamic law (Section 11 Administration of Muslim Law Enactment, No. 3 of 1952 (Selangor).

30 See Section 10(2) of the Administration of Islamic Law Act, No. 505 of 1993 (Federal Territories); Section 11(2) of the Administration of the Religion of Islam Enactment, No. 1 of 2003 (Selangor). In Johor, the Sultan appoints without the advice of the Chief Minister, Section 11(2) of the Administration of the Religion of Islam Enactment, No. 16 of 2003 (Johor).

The *Majlis* are responsible for advising on all matters relating to the religion of Islam, section 4(1) Administration of Islamic Law Act (Federal Territories), except in matters of Islamic law, as those fall within the purview of the Syariah courts. Everyday administrative and religious matters are handled by a separate Department for Religious or Islamic Affairs, Jabatan Agama Islam. Therefore, these Jabatan Agama Islam are more or less implementing the policies as set by the *Majlis* and the Head of Religion in each state.

The last piece in this intertwined web of state bureaucratic institutions is the *mufti*. The consequences of the federal system and the fact that each state has its own rules is best seen in the appointment process for the *mufti*. The *mufti* is appointed by the Head of Religion of Islam in each state, except for Sabah³¹ and Sarawak.³² The ruler has either sole discretion³³ or acts on the advice of the Council³⁴ or the state executive.³⁵ As in neighbouring Singapore and Brunei, the *mufti* presides over the state's Fatwa Committee and is the head of the department or office of the *mufti*. The role of the department or office of the *mufti* is to pro-

31 In Sabah, the Yang di-Pertua Negeri (Governor) appoints the *Mufti* on the advice of the Minister in Charge of Islamic A, Section 33 of the Administration of Islamic Law Enactment, No 1 of 1999 (Sabah).

32 In Sarawak, the Yang di-Pertuan Agong has the power to appoint the *Mufti*, on the recommendation of the Yang di-Pertua Negeri (Governor), Section 35 of the Islamic Council Ordinance, No 41 of 2001 (Sarawak).

33 Section 6 of the Administration of the Syariah Court Enactment, No 3 of 1982 (Kelantan); Section 34 of the Administration of Islamic Law Enactment, No 3 of 1991 (Pahang); Section 33 of the Administration of the Religion of Islam Enactment, No 4 of 2004 (Perak); Section 9 of the Administration of Muslim Law Enactment, No 3 of 1964 (Perlis); Section 44 of the Administration of the Religion of Islam Enactment, No 1 of 2003 (Selangor); and Section 46 of the Administration of Islamic Religious Affairs Enactment, No 2 of 2001 (Terengganu).

34 Section 44 of the Administration of the Religion of Islam Enactment, No 16 of 2003 (Johor); Section 5 of the Enactment on *Mufti* and *Fatwa*, No 10 of 2008 (Kedah); and Section 45 of the Administration of Islam Enactment, No. 10 of 2003 (Negeri Sembilan).

35 Section 32 of the Administration of Islamic Law Enactment (Federal Territories) states that the Ruler can appoint the *Mufti* on the advice of the Minister and after consultation with the Council.

Section 32 of the Administration of the Religion of Islam Enactment, No 7 of 2002 (Malacca) states that the *Mufti* is appointed on the advice of the State authority and after consultation with the Council.

Section 44 of the Administration of the Religion of Islam Enactment, No 2 of 2004 (Penang) gives the Ruler the authority to appoint the *Mufti* on the advice of the State Executive Council.

duce *fatawa* – like in Singapore – but also to produce religious books and pamphlets and organise religious programmes (Shuaib, Bustami, and Kamal 2010: 18).

Malaysia has the most extensive bureaucratic structure, due not only to the geographic size of the area or the number of Muslims living in the country. An increasing number of interacting and overlapping bureaucratic institutions have been established at state and federal level since independence. These have been set up as a result in response to calls for more Islamisation, whether because of a genuine wish to embrace Islam or, as Peters (2002: 91) refers to it in a different context, to “take the wind out of the sails of the Islamist opposition”. The motivation is difficult to unearth, but what is clear that these bureaucratic institutions “exercise authority in relation to Muslim religious life that is increasing broad and deep” (Lindsey and Steiner 2012a: 109).

Providing this broad and deep control over Islam through those bureaucratic institutions is not unique to Malaysia – only the competition and overlap between them is; instead, it is a phenomenon we also find in neighbouring Singapore and Brunei. The difference is how deeply the bureaucratic institutions are embedded and streamlined within the state. In Singapore and Brunei, they are much closer entrenched into the political system. This is no surprise as Islam is one of the cornerstones of the political ideology MIB in Brunei. In the case of Singapore, Islam’s potential to be a source of opposition necessitates, at least in the view of the government to strategies of co-option, management and restriction. For all of those, a strong link between the bureaucratic institution and politics is essential.

The next section looks at the ‘final’ bureaucratic institution; that is, the judicial institutions, which provide the final element of how Islam is accommodated. These Syariah courts are the final arbitrator of what exactly constitutes Islamic law.

3.3 The Judicial Bureaucratic Institutions: The Syariah Courts

All four countries have a plural legal system with a civil and religious legal system. Consequently, they also have a plural court system in common, where one adjudicates on civil matters and another on the religious matter. The following section looks at (1) the structure of those courts, (2) their jurisdictions, and (3) the normative hierarchy of civil and religious law in cases where matters can be adjudicated in either of those legal systems.

The structures of the Syariah courts are essentially quite similar and basic. There is at least a two-tier, if not a three-tier system, where decisions are made by a lower court, usually called something along the lines of Syariah court and can then be appealed to the next level. There are only a few noteworthy observations based on the specific country context. In Singapore, the Syariah Court and Syariah Appeal Board draw their authority from AMLA (Singapore) and are therefore outside the civil court structure. Moreover there is a revealing procedure as to how those members of the appeal panel are chosen. The President of Singapore, on the advice of the MUIS, nominates a panel of seven Muslims for three years. From this panel, the President of MUIS then selects three of those panel members to be on the board when an Appeal Board has to convene (section 55(3) AMLA (Singapore)). There is thus no separation between a non-judicial and judicial institution.

In Singapore, the jurisdiction of the Syariah courts in personal matters is confined to disputes where both parties are Muslims and married under Muslim law; section 35(2) AMLA (Singapore). In 2008, the jurisdiction of the Syariah courts was increased to cover certain personal matters such as marriage expenses and the registration of divorces; section 52(3)(a) AMLA (Singapore). Significantly, the AMLA (Amendment) Act (No. 20) of 1999 conferred concurrent jurisdiction on the secular courts and the Syariah Court in certain matters reflecting the new Section 17A of the Supreme Court of Judicature Act, No 24 of 1969. This provision bestowed concurrent jurisdiction on the High Court and the Syariah Court in civil proceedings involving matters of maintenance, custody of children, and disposition or division of property on divorce. In order to avoid a multiplicity of actions, proceedings should remain in the High Court in certain circumstances, such as by consent of the parties or with leave of the Syariah Court, and the High Court will then apply civil law to determine the questions of custody and access to children and the division of matrimonial assets; section 17A(3) of the Supreme Court of Judicature Act. Those changes have been criticised by the Muslim minority, who considered this a way “to opt out of their religion if convenient”; a permission to go “forum shopping”; an “extension of the civil law [...] to Muslims”; or, even worse, a return to colonial times where “non-Muslims were adjudicating on Islamic legal matters” (Steiner 2015b: 12). As in the legal standing of *fatama* in civil courts, it was ultimately the state that had the final say in this decision.

Following independence, the Malaysian states had various different structures for the Syariah courts. The predominant ones were either a two- or three-tier structure; that is, with at least one lower-level Syariah

court and one higher-level Syariah court, which was either called the Syariah High Court or the Syariah Court of Appeal. In 1998, the national Jabatan Kehakiman Syariah Malaysia (Department of Syariah Judiciary Malaysia or JKSM) was established. One of its achievements was the establishment of a Syariah Appeal Court at the federal level. This meant that, following the decision of a Syariah High Court at the individual state level, appeals were to be heard at the federal level. This streamlining and harmonisation of Islamic law has continued since. In 2017, JAKIM established a special committee at national level, the Syariah Courts Empowerment Committee (JKMMS), one of whose tasks is to look at the structure of the Syariah courts (*The Star Online* 2017).

Federal matters also play an important role in determining the jurisdiction of the Syariah courts. As in neighbouring Singapore, the jurisdictional divide between the civil and Syariah courts is equally contested in Malaysia, although this time not between the state and the Muslim community but between the different courts, society and politics. The situation became increasingly complex with the constitutional amendments in 1988. Article 121(1A) of the Federal Constitution (Malaysia) was amended to state that

[t]he courts referred to in clause (1) [that is, the Civil High Court of Malaya and Borneo and the inferior courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court.

The rationale behind this amendment was to prevent decisions from the Syariah courts to be appealed to the civil courts. Nonetheless, this has caused significant problems for the Syariah courts and the civil courts regarding who has jurisdiction of interfaith disputes involving the standing of non-Muslims in the Syariah courts, constitutional rights, as well as review of administrative decisions.³⁶ Faruqi (2007) stated that “with the slightest whiff of Islamic jurisprudence, our superior court abdicates in favour of the Syariah courts even though momentous issues of constitutionality may be at stake or even if one of the parties is a non-Muslim.” Indeed, this seems to have been a problem, particularly in the case of unilateral conversions of minor children to Islam by one parent. In Subashini’s case – where a wife commenced proceedings in the civil courts against her husband who had converted to Islam and subsequently converted the children as well – Judge Suriyadi JCA commented on

36 Numerous different approaches have been used in order to solve this problem, including looking at the parties involved in the dispute, the remedies sought, or the subject matter of the dispute; see Steiner (2013) for a summary.

Subashini's strategy as "want[ing] her day in court" and moreover censured her for:

wanting the civil court to deal with her problems, the appellant [Subashini] had attempted to convince us that a civil court has the jurisdiction and knowledge to deal with her matter even though imbued and intertwined with thick strands of Islamic elements. In short, the appellant wanted the civil court to arrogate the function and duties of the Syariah Court, regardless of the litigant's right of choice, *let alone he had already made his decision*. (emphasis in the original)³⁷

This decision has been criticised for ignoring existing jurisprudence, such as *Latifah binte Mat Zin v Rosmawati binte Sharibun & Anor*³⁸ where the point was made that "*if one of the parties is a non-Muslim, the syariah court does not have jurisdiction over the case, even if the subject matters falls within its jurisdiction*" [emphasis in the original]. This was an issue most recently in the case of *Indira Gandhi*, where the Federal Court³⁹ in early 2018 upheld the decision of the High Court⁴⁰ that had raised exactly this point. One would hope that this latest decision by the highest court in Malaysia now means that this matter is laid to rest. I would personally echo the post-script made by Judicial Commissioner Lee Swee Seng in the previous High Court decision:

[t]his decision is not a victory for anyone but a *page in the continuing struggle of all citizens to find that dynamic equilibrium in a country of such diverse ethnicities*; pursuing peace in less than a homogeneous society, giving space to one another where religious sensitivities are concerned, tolerance and respect to our neighbours in pursuit of the Truth and Reality. (emphasis added)⁴¹

While the decision of the Federal Court cannot be overruled, it remains to be seen whether the principles laid down in it will stand the test of time and the political and social pressure to amend it.

The problem of concurrent jurisdiction is not only a problem in personal law disputes but also affects the implementation of Islamic criminal law. Indeed, it is one of the main obstacles to the implementa-

37 *Subashini Rajasingham v Saravanan Thangathoray & Ors* [2007] 2 MLJ 705 at 738–9.

38 *Latifah bt Mat Zin v Rosmawati bt Sharibun & Anor* [2007] 5 MLJ 101.

39 Currently unpublished decision by the Federal Court, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam*, Civil Appeal No 01(f)-17-06/2016(A) on file with author.

40 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam* [2013] 5 MLJ 552.

41 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam* [2013] 5 MLJ 552.

tion of *budud*, Islamic criminal law in the Malaysian states. A solution to the problem there is even less likely than to one in personal matters.

Brunei now has a similar three-tier system to the Malaysian one, with the Syariah Subordinate Court, the Syariah High Court and a Syariah Appeal Court.

The jurisdiction of the Syariah courts in Brunei has equally undergone significant statutory changes. It was regulated in Religious Council and Kadis Courts Act (Brunei), only to be replaced by the short-lived Syariah Courts Emergency Order of 1998, which was superseded by Syariah Courts Act, cap 184, of 2000. The Act effectively abolished the numerous provisions regarding the judiciary, while other provisions of Religious Council and Kadis Courts Act (Brunei) remain in force unless specifically repealed by another written law. Of importance is section 5 of the Syariah Courts Act of 2000, which invests the Syariah courts with exclusive jurisdiction; that is, where there is a jurisdictional conflict, the Syariah court will now overrule other courts. Moreover, the Syariah courts have recently seen an increase in jurisdiction in criminal matters where certain criminal offences under the Syariah Penal Code 2013 are also applicable to non-Muslims. This means that Syariah courts now explicitly have jurisdiction over non-Muslims in certain matters (see Lindsey and Steiner 2016).

Unlike in neighbouring Malaysia, Singapore and Brunei, in the Philippines there was no acknowledged need to establish religious courts, as colonial policies aimed to establish one single body of law (Bentley 1981: 47). The reluctance to set up those courts remains evident today. While the 1977 CMPL allows for the establishment of the Syariah courts, those courts have only been created and active since the late 2000s (Stephens 2011: 11). While the Syariah courts in the discussed region stand outside the civil judiciary, in the case of the Philippines, the Syariah courts are subject to the administrative supervision of the Supreme Court; article 137 of the 1977 CMPL. Therefore, there is no clear distinction between the court systems, as seen in Singapore, Malaysia or Brunei.

Moreover, the courts are not well accepted by the populace. In 2010, for example, 22 out of 36 courts received no new cases and eight had no new cases at all from 2006 to 2011 (Stephens 2011: 13). They have been neglected by the state in terms of funding, resources, training and prestige and generally suffer from serious “operational woes” (Guerrero 2007: 5). Thus, the perceived neglect of the Moros continues, now through the neglect of the Syariah courts.

4 Concluding Remarks: Rationale and Function of the Codes

The similarities between the codes of Singapore, Malaysia and Brunei are not surprising given their common history and the frequent legal borrowing from one country to another. All these codes served a specific purpose, which is to provide a legislative framework for Islam. As such, they are what Michaels (2006: 351) termed a form of “social engineering” whereby a conscientiously held purpose had to be fulfilled. Islam needed to be accommodated: a framework for the administration of Islam needed to be established and certain guidelines had to be established as to what constitutes Islamic law; that is, the limited scope of ‘substantive laws’.

However, the selected case studies in this article have shown different methods of how Islam is ‘guided’ by the different states in Southeast Asia. The codes in Southeast Asia are generally less of a statement of substantive Islamic law and are rather concerned with setting up a state-sanctioned bureaucracy for the administration of law for Muslims. The methods range from appropriation and accommodation to control and subjugation in the different political and legal frameworks of Singapore, the Philippines, Malaysia and Brunei.

At one end of the spectrum are the secular systems with a Muslim minority: Singapore and the Philippines. Both of those countries have to carefully manage the relationship between state and Islam, majority and minority rights.

AMLA (Singapore) is not concerned with codifying the substance of Islamic law but rather with providing a framework for its administration. As in colonial times, the PAP government preferred to, first, keep Islamic law largely restricted to private law, and secondly, maintain the largely compliant and co-opted character of Muslim religious institutions. It did so by systematically establishing a web of interlocking state institutions – that is, MUIS including the Legal Fatwa Committee and the Syariah court system – with decisive interpretative authority regarding law for Muslims in Singapore and a monopoly on its enforcement (Steiner 2015b). Yet the Singaporean model is not only about control, as it oscillates between co-option, management and restriction.

The approach taken by the Philippines veers in a similar direction of co-option, management and restriction, but there are significant differences. Singapore’s approach appears more subtle, providing for a religious bureaucracy that is still deeply embedded in the civil bureaucracy. Certain institutions of the bureaucracy are linked to the Muslim commu-

nity, albeit to a limited extent. This is not the case in the Philippines. The limited existing religious bureaucracy is part and parcel of the civil bureaucracy subject to its supervision. There is no pretence of the involvement of or accountability to the Muslim minority community. A 'state within a state' was feared back then and is still feared. It thus needs to be prevented.

While the Philippines has chosen a minimalist approach to bureaucracies, Malaysia is at the other end of the spectrum with a multitude of bureaucratic institutions at state and federal level. These numerous institutions came about because of the close link between politics and Islam. One could argue that the fact that Islam fell in the prerogative of the individual sultans resulted in every state taking its own approach towards the administration of Islam. However, the states share certain characteristics and harmonisation initiatives are adding to a streamlining of the administration of Islamic law in Malaysia. The fact that Malaysia is indeed a Muslim-majority country, and the resulting influence that Islam plays in politics and society at large, prevents Islam from being subordinated to the state. Instead, it is a key concern of the state and political parties, one that cannot be controlled but has to be seen as positively accommodated.

This notion of accommodation is taken one step further in Brunei, where Islam is not so much accommodated as appropriated by the state. As the name MIB suggests, Islam is part of the national ideology. Befitting an absolute monarchy, the generally streamlined bureaucracy in Brunei further supports this development.

We thus have a common codification process shared by Brunei, Singapore, Malaysia and the Philippines upon independence. The codes have common elements at first glance yet the result, the approach to how Islam is to 'guided' is depending on the individual country context. There are indeed different forms of state bureaucracies required for the administration of Islam, despite the fact that the institutions and the scope of Islamic law are more or less similar.

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