

The Pursuit of the Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State

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Islamic law changed radically in the last century and a half. It was codified and limited to the domain of personal and family law in almost all majority and minority Muslim states. The argument of this article is that this remarkable change in Islamic law began in the colonial state. Islamic law, as it functions within postcolonial Muslim states, is a product of negotiations between colonial and local elites over law, religion, culture, ethnicity, and the identity of the Muslim subject. In the case of colonial Malaya, this resulted in a codified, institutionalized legal system within a colonial state, which was critical in constructing Malay ethnic and religious identities and interpretations of Islam that prevail today.

INTRODUCTION

In the Constitution of postindependence Malaysia, “a Malay” is defined as “a person who professes the religion of Islam, habitually speaks the Malay language . . . [and] conforms to Malay custom” (Fed. Const. Malaysia art., 160, cl. 2). This racial and religious category confers particular rights and privileges upheld by the Constitution and embodied in other areas of law. The incorporation of Islamic identity and Islamic legal institutions within the modern state continues to pose questions for scholars of comparative politics, law, and society: How did Islamic law become part of the domain of the modern state? What were the mechanisms of its incorporation, what effects did the meeting of Islamic law and modern state have upon local political and social structures,

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and which actors drove this process? This article argues that a pivotal moment for the making of both Islamic law and the modern Muslim state occurred during the colonial encounter, and it addresses these questions in the context of British colonial Malaya in the late nineteenth and early twentieth centuries.

The theoretical tools offered by law and society and state in society approaches dovetail in this project with comparative legal and Islamic legal studies, where Islamic law and colonialism are more common subjects. We begin with a historical introduction that locates this project within a place, time, and politics, followed by a section that lays out the argument of the article and the potential application of its themes to the study of Islamic law, colonialism, and Muslim identity. Three major concepts run through this article and provide its central structure: power as a negotiation, law as a process, and state and subject as mutually dependent. These make possible a critique of legal pluralism as an analytic concept, and I offer as a conclusion an alternative model for legal development in the colonial and postcolonial Muslim state: legal hybridity. Using the case of Malaya, where relatively little scholarly attention has been paid to law and society, this project opens the possibility for comparison with other imperial sites in South Asia and the Middle East, arguing that Islamic law today must be understood in the context of the political history of its incorporation within the modern state.¹

The Pursuit of the Perak Regalia

It began, as many colonial stories do, with a succession dispute. The chiefs in Perak, a state on the western coast of the Malay peninsula, could not come to agreement over who was to become sultan, and their disagreements were bringing the state into civil war, thereby disrupting the lucrative tin trade. The British were anxious to broker a peace that would make the region safe for trade, at the same time seeing an opportunity to install a sultan who would be receptive to British interests. Raja Abdullah, the less-favored candidate for the Perak throne, invited British colonial officials into the dispute. On January 20, 1874, the Treaty of Pangkor was signed between some Malay chiefs and Sir Andrew Clarke, the Governor General of the Straits Settlements, installing Abdullah as Sultan of Perak and alongside him a British Resident, whose advice the sultan would seek on everything except matters of religion and custom.² The treaty provided that “the Resident’s

1. Roff (1967), Hooker (1984), and Peletz (2002) are exceptions to this. To my knowledge, however, this study is unique in its use of original archive research (in Malaysia, Singapore, and the United Kingdom) in both Malay and English documents to study the making of Islamic law in Malaya.

2. Cowan (1961), Gullick (1992), Parkinson (1960). The Straits Settlements were Penang, Melaka, and Singapore, procured by the East India Company between 1786 and 1826 and ruled through the Governor General.

advice must be asked and acted upon (in Perak) on all questions other than those relating to Malay religion and custom, and that the collection and control of all revenue and the general administration of the country must be regulated under the advice of these Residents” (Parkinson 1960, 323–25).

Hence a British colonial administrator gained executive power over a Malay state. The history of the precolonial Malay world featured the development of geographically based sultanates organized around a particular court, part of an evolving notion of identity: Malayness organized by affiliation to a court, its sultan, and its laws.³ Ethnic identity during this time was fluid and amorphous, and only became more concrete through the methods and motivations of colonial governance. During the early colonial encounter, Malay identity was posited against the claims of the various sultanates as well as against the encroachment of European power. The earlier half of the nineteenth century saw competition between Malay elites, who were proponents of “Malayness” with its traditional *adat* (from the Arabic, meaning “customary practice”) law and its affiliations to royal figures, and advocates for Muslim identity and Islamic law.⁴

Within the century, four Malay states had Residents, and by the early twentieth century, all of peninsular Malaya was part of the British Empire. Told in this way, the progression from autonomous Malay states to colonial territories ruled by a sultan and his British Resident “advisor” seems relatively straightforward.⁵ However, viewed from a different angle, the story seems

3. “Sultan” connotes the apex of the royal power pyramid in the Malay states and carried with it Islamic authority through its association with other sultanates in the Muslim world. While there was a hereditary succession to the sultanate, this position was also subject to the collective agreement of other power-holders in the states, notably the rajas, who ruled over smaller areas within the sultan’s purview.

4. British officials commented in the early 1800s on finding in “almost every state . . . (a) constant struggle between the adherents of the Old Malay usages and the Hajis, and other religious persons, who are desirous of introducing the laws of the Arabs” (Milner 1991, 114). The growth of European influence in Southeast Asia coincided with the reign of the Ottoman Sultan Abdulhamid (1876–1908), whose dwindling power in the European sphere and support from the Muslim world led some to believe that he “hoped to make up in Asia for the influence he could not retain in Europe” (Reid 1967, 279). Reid also notes the mission sent to Southeast Asia in 1881, comprised of several important Meccan imams (*ibid.*).

5. “Malaya” here refers to peninsular Malaya, today corresponding with West Malaysia. The four federated states of Malaya were: Perak (1874), Selangor (1874), Pahang (1888), and Negri Sembilan (1895, itself a collection of nine states, the first of which, Sungei Ujong, sought British Residency in 1874). These federated states were Protectorates, technically independent states each with its own British Resident, and by 1896, a Resident General who was also the governor of the Straits Settlements (comprised of Singapore, Penang, and Malacca; procured by the East India Company between 1786 and 1826). Four northern states were signed over by Siam to be British Protectorates in 1909 as unfederated states: Perlis, Kedah, Kelantan, and Trengganu. A fifth, Johore, accepted a British advisor in 1914.

What was referred to as “British Malaya” was comprised of the Straits Settlements, the four federated states and the five unfederated states. The Settlements were ruled as a crown Colony directly from London after 1867, whereas the Malay states were Protectorates, governed by the doctrine of “indirect rule,” i.e., a British “advisor” whose realm of control was anything beyond the “matters of religion and custom” ceded to the Sultans in the Pangkor Treaty (Parkinson 1960, 323–25).

quite different. Each state that came under the rule of the British did so through its own struggles. In Perak, the first Resident, James Birch, was assassinated by a group of Malay chiefs almost immediately after his appointment. British reprisals during the Perak War of 1875 included the exile of Sultan Abdullah to the Seychelles in 1877 and Raja Ismail and a number of others to the state of Johore.

Contributing to the conflict behind this drama was the fact that the English and Malay texts of the Treaty of Pangkor are reported to have been subtly but crucially different: Raja Abdullah agreed to “ask and accept” the advice of a Resident. The British believed that the wording of the treaty meant that the Resident’s advice had to be acted upon by the Raja, whereas the Raja’s interpretation leaned more heavily on the notion that the Resident’s role was consultative rather than executive. The Malay rulers found later that the English version of the treaty documents were far more assertive about the rights and powers of the Resident than the Malay version.⁶ Perhaps the fact that the treaty was signed on the deck of a British ship (H.M.S. Pluto) hid some reluctance on the part of the chiefs to resolve a succession dispute in quite the way the British had arranged (Cowan 1961).

And while the Treaty of Pangkor seemed to guarantee a new sultan and a Resident for Perak, there is also the struggle H. S. Barlow (1995) entitled “The Pursuit of the Perak Regalia”; having appointed a new Resident by treaty, the new sultan had to be confirmed by coronation.⁷ With twists, turns, and absurdities worthy of a Gilbert and Sullivan operetta, the soon-to-be Resident Birch and his aide Swettenham traveled in a small boat up and down the waters off the western coast of Malaya, attempting to persuade Raja Ismail, who would have been the Sultan of Perak if not for the British,

6. “Fasal yang ke-enam—arakan maka ada-lah Yang di-Pertuan Perak itu mahu terima dan buat sa-buah rumah yang layak bagi tempat duduk suatu tuan yang di-bawah perintah British Gobermen gelaran-nya Tuan Residen Negeri Perak menjadi orang kerajaan govermen. Akan Yang Di-Pertuan itu mahu-lah menempah dengan-nya dahulu daripada fasal sekalian perkara dan pekerjaan Negeri Perak itu melainkan tiada boleh ia masuk daripada fasal Ugama Islam dan Adat Melayu itu ada-nya.”

The English translation provided by the sons of Sultan Abdullah in 1915 reads: “Clause 6—the sultan of Perak shall receive and make a suitable house for a residence for the officer who is under the British Government called the Resident of Perak and is accredited to the Sultan’s Court. The Sultan shall consult with him first on all matters and administration in the State of Perak except that he, the Resident, may not intervene in matters of the Mohammedan religion and Malay customs” (Gullick 1992, 31).

The Malay translation of the English text of the Treaty, published in the *Singapore Daily Times* shortly after the signing, reads: “hendaklah di-tuntut apa-apa nasihat daripada-nya mengikut ajaran-nya pada membuat apa-apa” [(the Sultan) shall ask his (the Resident’s) advice and follow his direction before undertaking any action.].

7. H. S. Barlow’s (1995) biography of Swettenham (1850–1946), contains a chapter entitled “The Pursuit of the Perak Regalia,” which narrates the journeys taken by Swettenham and Birch trying to persuade Raja Ismail to agree to hand over the symbols of kingship to the new British-supported Sultan Abdullah. This episode occurred early in his career as a colonial administrator, which included arranging the Federation of the Malay States.

to hand over the symbols of rightful kingship. For these British officers, the regalia were instruments of power, objects to be handed from ruler to ruler. For the Malay rajas, the regalia did not just represent power, they held power themselves and required careful treatment.⁸ For these reasons, and well aware of their significance as political and symbolic assets, Raja Ismail refused to pass the regalia to his rival through British officers. Without the ceremonial instruments, the weapons of precious metal or the royal elephants, there could be no coronation for Abdullah. Without a coronation, the Treaty of Pangkor and the world it envisioned, an orderly regime of obedient monarchs and benevolent British advisors, could not be much more than an English fiction.

LAW, ELITES AND THE COLONIAL STATE

The struggle behind the Treaty of Pangkor illustrates a number of crucial points about the colonial project: while it proceeded along the lines of economic and strategic interest, it relied heavily upon legal documents and the consent of local elites for its success. And even when the consent of local elites was successfully arranged and the proper documents signed, the language of colonial power continued to be resisted, and the symbolic and material elements of colonial rule had to be procured through entirely different struggles. This article will explore these insights into the colonial project through the development of law in Malaya during the period 1874–1904,

8. As Skeat (1953) writes, sources from the period show that royal regalia were treated with extreme reverence: At Alor Setar (Kedah), “not even the Sultan could safely walk in front of these instruments . . . and that they should be moved only on the rarest occasions, such as when the Sultan had to meet another ruler of higher rank than himself. . . . They should not be moved when the Sultan was travelling alone, almost as if it would be lese-majeste [an offense against dignity/majesty, usually of a sovereign/state] to disturb them for so little: they were the servant greater than the master. To ignore these conditions . . . could prove speedily fatal. . . . On no account should one come too near them. A Chinese . . . who had gone up the stairs in spite of all warnings . . . had swollen up like a puffer-fish, and died, bloated (it was said)” (27).

Birch’s Report on Perak, April 2, 1875 indicates the extent to which he misunderstood the political situation in Perak and the meaning of the regalia to the Malay chiefs: “As regards the regalia, the country can get on very well without it, or, as soon as it can afford it, a new set can be procured, but it is difficult to convince these native chiefs of this. They are, however, getting more alive to the fact that they must wait for it. As to fighting for it, the sultan and his aides are not in a position to do so, and, however big (they) may talk, I am certain they would not risk a conflict with the people of the interior, for, though some of the Chiefs and a large number of the ryots [peasants, agricultural tenants] up the river are actually in favour of Abdullah, they are so situated by position that they would be compelled to join the force of Ismail and Yusuf. . . . It is not the possession of the regalia, therefore, that need give any anxiety, but the fact that Ismail still holds it leads the people, or many of them, to believe the assertions of Yusuf and other interested persons that Ismail is still, and ever has been, Sultan de facto. . . . Whenever Ismail joins the Treaty and receives his money, all difficulties in the Government of the country will disappear” (CO 273/88, Birch to Colonial Office: Report on Perak, April 2, 1875).

focusing on the laws over which the Treaty of Pangkor had given the Malay Sultans autonomous power—laws over religion and custom.

This article argues that “Islamic law,” as a concept, needs to be problematized and that the political contexts of its formation at various historical junctures are crucial for understanding what Islamic law is, what actors and institutions are involved in it, and how it functions within the modern state. In this article, Islamic law will be understood as a textual, institutional, and discursive product: as a combination of *shari’ah* (the “sacred law” of Islam, comprising of *Qur’an* (Koran), *sunna* (the authoritative traditions), and *fiqh* (jurisprudence)),⁹ and of the institutional forms these textual and discursive elements were given as they were interpreted, given force, or limited by local actors and institutions. As it gained currency during the colonial period as a symbol of state legitimacy and a resource for the exercise of Malay elite power, Islam itself underwent changes, as did what it meant to be Muslim. According to Nathan Brown (1997), the meanings of *shari’ah* and of Islamic law changed in the modern state, and

the result has been an increased understanding of *shari’a* as meaning law in the narrow sense . . . The degree to which the *shari’a* is seen as prevailing is connected less with the institutions and practices formerly associated with it than with the degree to which the law in force conforms to *shari’a* norms.” (371)

I would add that the scope of Islamic law was progressively limited in scope to the sphere of “private” religious practice and family law, and its authority allied to, and eventually co-opted by, state institutions and actors.

The major argument of this article is that the definition of “matters of religion and custom” (Treaty of Pangkor, in Parkinson 1960, 323–25) as an autonomous Malay space, even in theory, had profound consequences for the development of law and the colonial state as well as for the domains of Islam and Malay identity themselves.¹⁰ In this development, the relationship between local and colonial elites was one of negotiation rather than dominance of one over the other, and these negotiations resulted in a new kind of legal system, a hybrid system. Since the founding document for British intervention in the Malay states constructed an autonomous space for Malay rulers surrounding matters of religion and custom, the definition of Islam and Malay custom became a central arena for the negotiation of elite power. The involvement of specific Malay elites in the colonial project benefited

9. *Shari’ah* comes from the Arabic root for “path to water,” or “root”; it is a term whose definition is itself a complex matter for Islamic legal scholars. A pertinent issue for the purposes of this article is whether the *shari’ah* is a body of rules or a system of reasoning that encompasses an ethic for life (see Hallaq 2005; Mayer 1990).

10. The formula “matters of religion and custom” was used in many British documents to refer to the autonomous domain of Malay rulers. From this point on in the article, it will be used without quotations.

their power within the colonial state in formation at the same time that it shaped the state and its subjects through their interpretation and use of the autonomy granted them by law over matters of religion and custom. Malay identity and the basis of the discourse of Malay nationalism were constructed during the colonial encounter, between local Malay elites and British colonial officials, whose involvement in the colonial project profoundly affected the shape of institutions and interests in the colonial context.

Through legal documents like the Treaty of Pangkor, the British gained a foothold by which to exert control over the economy, politics, and society of the Malay Peninsula. However, the Treaty of Pangkor and very similar state treaties that followed it also established that the Malay sultans could retain autonomy for themselves in matters of religion and custom. By making Malay sultans guardians and arbiters of religion and custom, legal negotiations over the control of the Malay peninsula placed local rulers at the center of Malay ethnic and Muslim religious identity during the colonial period and made legal codes and institutions a key instrument of their power. Islamic law came to occupy the center of Malay elite legitimacy, and a unified Malay ethnicity and Muslim religious identity became closely identified.

While legal pluralism has provided useful ways of understanding the combination of British colonial, Islamic, and Malay customary law, I argue that the sum of these systems was not merely British law working in tandem with “traditional” elements in the fields of personal law. The manner of their combination, the interests that led to British control over some areas of law and Malay elite control over others, the interpretation of Islamic law and Malay custom, constructed a hybrid system of law, with particular effects upon Malay identity, state power, and elite authority.

My use of the word *state* refers to the network of cooperation, competition, and dispute through which power was exercised in early colonial Malaya. The utility of the state concept is that it allows us to speak of this network, amorphous as it is, in terms of an evolving unit, and ask:

What are the guiding cultural and political principles behind organization and process in the state that promote the existence of some kinds of institutions and not others? Are these guidelines and principles cohesive and unifying, or are they . . . fragmented, tending to gather around opposing symbols of legitimacy like metal particles around the poles of a magnet? (Lev 1972, 3)

The relationship between colonizer and colonized has been the subject of long study—this article draws upon the work of scholars who have assumed that that the colonial project functioned upon a basis of accommodations, bargains, and mutual benefit to a larger extent than force (Robinson 1972; Mamdani 1999; Comaroff 1991; Mitchell 1991; Merry 2000; Migdal 2001).

In this account, Malay and British actors are treated as strategic individuals, the range of values and interests that inform their preferences and

decisions deeply embedded in quite separate worldviews. This presents an added complexity to any theory that aims to describe and analyze their calculus, one in which civilization and monarchy reside in British perceptions of just imperial order, white racial superiority, and ideas of “the native,” another in which Islam, Hinduism, and long-standing local beliefs are laid over the geo-strategic realities of a cosmopolitan island region facing new European colonial incursions.¹¹ One advantage of the assumption of the individual capacity for strategic action is that it avoids the image of colonized peoples as either passive victims of European power or altruistic heroes of nationalist myth. While British and Malay elites had different and often competing interests in Malaya, it would be incorrect to assume that either represented the interests of the Malay peasant.¹²

James Scott’s studies of Malay peasant strategies of resistance (1985) and the modernist program of the nation state (1998) have deeply influenced this project and provided a productive point of departure for my work. I differ with his theoretical assumptions on two points: his characterization of the distinction between the modern state and its past as a shift from decentralized power and local autonomy in the past to centralized and monolithic power in the modern state, and his arguments on the avenues resistance can take in situations of power asymmetry. In *Seeing Like a State* (1985), Scott characterizes and almost romanticizes the preindustrial past as a diverse, locally vibrant, and autonomous idyll. Precolonial Malaya was indeed less centralized, but the actions of Malay elites after the coming of colonial power indicates that this was not through lack of desire to consolidate the power of the state and the wealth of the region. The rise of the Malay sultanates vis-a-vis their competitors—the chiefs and nobles—was made possible by taking advantage of the opportunity afforded by allying with the British to consolidate their power.

This understanding of power as constantly in the balance, as contested and shared, is crucial to the argument of this article. Looking at Muslim personal status code in colonial Malaya as the product of a bargain between elites acknowledges the fact of British colonial power over the forms, application, and jurisdiction of personal status law. It also accounts for the endurance of Malay rulership and its influence on the language, content, and meaning of personal status. However, it also presents methodological and conceptual problems. For example, how is it possible to speak of negotiation between Malay and British elites when it is clear that one group holds significant

11. The assumption of a strategic individual does not preclude the importance of meaning and discourse within individual and group calculations of value. Language, the theater of law, and the construction of meaning through the struggle over law are equally important constituents of this understanding of individual interests (Lynn Mather and Barbara Yngvesson (1980), for example, discuss the construction of meaning as a sociolegal enterprise).

12. Various law and society scholars have assumed individual rationality, while also assuming that individuals have varying power under the law, and that the law favors institutional actors (cf. Marc Galanter, 1974). In this analysis, the process that creates the law is also the process that defines an institutional actor or an individual actor with rights to law.

power over the other? How is it possible to speak of strategic action on the part of Malay and British elites who do not share a system of language, meaning, expectation, and whose interactions with each other feature such misunderstanding and mistaking? The answer may lie in the fact that each party to the negotiation could not do without the other.

The identification of religious and ethnic identity is widely seen as an aspect of the nationalist and modern state in postcolonial countries: here, it is argued that the institutional and discursive foundations for this development lie in the colonial encounter itself. Islamic law, as it functions within the Muslim postcolonial state, has often been treated as if it were family law or the continuation of “traditional” Islamic practices: I argue that the identification of Islamic law with ethnic customary law, and its containment within the European categories of family or personal status law, are themselves colonial constructions. Both these arguments can be made, I believe, in the context of many other Muslim states, since the overwhelming majority of these states practice a form of Islamic law within a national legal system whose origin is European and colonial.¹³ Mahmood Mamdani (1996, 1999), for example, has made a compelling case for understanding the postcolonial African state in terms of the complex relationships between local elites and colonial powers in the colonial state. The role of an authoritarian version of customary law in indirect rule, and the prominence of local chiefs in this system of rule, is especially significant in this analysis.¹⁴

Law played an important role in the colonial state, by laying down new rules for the ordering of civility, criminality, and resource allocation. The establishment of laws was a priority within the colonial project, because it marked the colonized space as a civilized space and arranged hierarchies within that space. Postcolonial theorists of the law, such as Peter Fitzpatrick

13. The terms “Muslim state,” “Muslim country,” and “Islamic law” are used here generally as markers of self-identification. A Muslim country is one that either identifies itself, culturally or politically as Muslim, or has a majority of citizens who do so. Of these, the states that possess written legal codes that are not based on Western legal systems in form and content are Saudi Arabia, which practices some areas of Western commercial law, and Iran, whose state structure is Republican and Islamic. Islamic law here refers to the body of legal discourse, code, and jurisprudence derived from Islamic sources—the *Qurʾān*, the traditions of the Prophet Muhammad and the communities that followed him, and the practices of Muslim societies.

14. Mamdani (1999) writes, “Customary justice was administratively driven . . . while the notion of rights codified in civil law bounded the authority of the state and disabled it beyond specified limits, the enabling effect of customary law tended to render authority arbitrary. This is clear if we return to our discussion of how custom was defined with regard to two spheres of social life: the family and the economy (development). When it came to regulating relations between men and women, as between generations, customary law privileged one of several points of views—a view both male and senior—as traditional and enforced it as law. But when it came to “development” measures—such as compulsory crops, terracing, culling cattle—the only “tradition” it could highlight was that of obeying the chief. In case of failure to do so, the response was force, claimed to be equally ‘traditional.’ In this case, “custom” masked the will of a colonizing power” (859–87).

(1994) and Mindie Lazarus-Black and Susan Hirsch (1994), locate much of the power of the colonial state in the patterning of behavior through carefully located incentives, often couched in the language of progress, modernity, and autonomy. Joan Vincent (1994, 119) points to “hegemonic moments” during which the symbolic resources and structures of an old order become subsumed into the processes and patterns of the new. In Malaya, these included ceremonies of state using British-secured regalia, British judges presiding over Islamic courts, rulers, and Residents meeting in council to discuss matters of state, all rehearsing and creating new understandings of what the state was to be.

The conceptual tools of this argument apply in other Muslim contexts, but this article deals specifically with the case of Malaya. The Southeast Asian experience of colonialism and Islam has been studied significantly less than that of the Middle East or South Asia, little or not at all in the fields of law and society or state in society, and so this project offers an opportunity for the discovery of new material and approaches. The Malayan example also offers an opportunity for comparisons with Middle Eastern and South Asian cases, since British colonial influence and personnel spread from India into Southeast Asia and parts of the Middle East in the same period, with many of the same strategic interests, encountering along the way different local power networks and legal and religious cultures.

Matters of Religion and Custom

This article discusses the construction of matters of religion and custom as a domain of law, dealing with the manner in which these matters were defined and divided among colonial and Malay elites. The content of these domains of law, their codification and implementation, and their interactions with larger Malay society, are a subject for a separate article. Similarly, while legislation had effects on many levels, this article focuses on elites in the colonial state. Recent law and society work has emphasized the need to understand law at the many levels within which it functions, through class and power, but in this article the discussion of jurisdiction is necessarily a discussion of elite discourse, within which the everyday function of the courts and the behavior of judicial officials were marginal elements, much less their treatment of ordinary litigants and cases.¹⁵

With few exceptions, all Muslim states today possess legal codes that are amalgamations of European and Islamic law, reflecting the continuing impact of European colonialism upon the geography, content, and meaning

15. In this analysis, the experiences of the people of Malaya under the laws and institutions created by these negotiations will not receive the attention they deserve. *Personal status* law would not remain an elite subject in Malaya for long, however; in the twentieth century, it became an important focus for the galvanization of identity and resistance in Malaya, as it did throughout the colonial Muslim world.

of the Muslim world. The Treaty of Pangkor gave the Malay sultans autonomous authority over matters of religion and custom, but the nature and extent of this autonomy continued for decades after to be a major source of friction between colonial officials and Malay elites. What is unclear in both scholarship on law in the context of colonized Muslims and in the body of the law itself is how it was determined when a person was to be judged based on being Muslim and when based on being a colonial subject. How, for example, did Islam come to govern the Malayan Muslim's marriage but not his labor?

Dichotomies, such as private and public, religious and secular, traditional and modern, custom and law, while prevalent in scholarship on legal pluralism and comparative law, were not part of the understanding of law and state in Malaya at the beginning of the colonial period.¹⁶ These were categories in the process of construction, whose boundaries remain unclear even in the contemporary state, and whose meanings continue to be contested. Roberto Unger (1976) saw in a society's legal arrangements "the innermost reaches of the manner in which it holds men together," and in conflicts among types of law, conflicts between "different ways of ordering human groups" (47). In this analysis, "every act leads a double life: it constitutes conformity or disobedience to custom at the same time that it becomes part of the social process by which custom is defined" (*ibid.*). Laws regulating and defining religion and custom, through their claim to govern both the inner lives of Muslims in the Malay colonial state and their central position in the struggle between Malay and British elites, reveal a society at a moment of transformation.

Law and legal codes are not treated here simply as written documents, but as performances of values and authority, aimed at particular audiences. Legal development is seen as the development of discourses as well as a negotiated institutional outcome among elites, British and native, within the inequalities of the colonial state. Legal codes were products of negotiations between elites, and legal institutions were political arrangements that benefited some Malay elites and not others. Both British colonial agents and the Malay sultans knew, for example, that the Treaty of Pangkor could be signed by all the Malay chiefs, and therefore be legal as a contract, but it would not be socially or politically viable without a coronation, which would confer the new sultan both with legitimacy in the eyes of his subjects and at least the nominal consent of his chiefs.

The Treaty of Pangkor reflected a negotiation about which actors in Malaya had jurisdiction in each area of law and under which terms British participation would be possible. "Jurisdiction" in this case refers to the authority to speak the law, and to speak to the law, as well as the ability to change the law. It is a particularly appropriate term for discussion of colonial law

16. Malay texts of the period consulted for this paper include: Abdullah bin Abdul (1834); Ali Haji ibn Raja Ahmad (1847); Rahman (1986); Wilkinson (1908).

because it encompasses rights as well as territory, the exercise of judicial power as well as the legitimacy of that power.¹⁷ Careful to establish their legitimacy as commercial and secular “advisors” to Malay and Muslim rulers, British officials in Malaya kept the arena of religion, custom, and traditional practice explicitly out of their scope of authority. In dividing territories of governance among themselves and the Malay rulers, however, religious and racial identity, not previously a major part of Malay elite legitimacy or discourse, became the center of the Malay elite domain, and the key to their survival.

The Negotiation of Law and State

Recent law and society understandings of the law have encouraged the reading of legal codes and the institutions that enforce them within the context of power and meaning in which they operate (cf. Moore 1978; Comaroff and Comaroff 1991; Merry 2000). The legal systems of most postcolonial states acquired their current forms during the period of colonization: unified hierarchies of state officials working with written legal codes that themselves are part of a national legal system. The process being described in this article is not limited to Muslim populations or Islamic law. The colonial period for most Muslim countries was a time during which “Islamic law” became a codified, state-administered system of laws and courts that functioned within what was essentially a European legal structure (cf. Anderson 1967; Rosen 1989, 2000; Charrad 2001.)¹⁸ This section deals with some of the first legal issues to face negotiation between local and colonial elites and that helped define the boundaries of matters of religion and custom for the developing Malayan state: taxation, slavery, land tenure, and local enforcement of laws.

The history of the Pangkor Engagement indicates that negotiation between the British Residents and Malay sultans was an involved and important part of both British and Malay statecraft. The Residents were constrained by the doctrine of indirect rule from asserting absolute power, even if they had possessed it; Parliament, the Colonial Office, and the British public monitored developments in the Empire particularly closely during this

17. “Jurisdiction” as defined in the *Oxford English Dictionary* is derived from words meaning “law” and “to say, to declare.” It refers to: “(1.) Administration of justice; exercise of judicial authority, or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power. (2.) Power or authority in general; administration, rule, control. (3.) The extent or range of judicial or administrative power; the territory over which such power extends. (4.) A judicial organization; a judicature; a court, or series of courts, of justice.” *Oxford English Dictionary*, 1989, 2nd ed., Oxford University Press, <http://dictionary.oed.com.offcampus.lib.washington.edu/cgi/entry/00181778> (accessed March 30, 2007).

18. In Malaya, colonial intervention structured through documents, such as the Pangkor Engagement, gave rise to opportunities for local and colonial elites to reconfigure and reinterpret Islamic and Malay legal institutions. Colonial intervention is not a necessary condition for the incorporation of one form of Islamic legal practice within a state bureaucracy, as work on noncolonized Muslim states has shown (see also Abou El Fadl 2001).

period. Correspondence between the Malay sultans, and with the Residents, indicates that the sultans did believe they had influence in matters of law and state and exercised it in various ways. Often, Malay negotiating tactics featured avoidance and resistance, and policies that were disliked were often delayed indefinitely through the mechanism of disappearing into deliberations at court and never emerging from them.

It is quite clear that both the British and the new sultan saw the importance of fulfilling the symbolic and ceremonial requirements of rulership over Malays, as did their opponents. The history of accommodations between Malay rulers and British colonizers during this period is full of episodes in which the Malay rulers relied upon their ceremonial forms to avoid compliance with British demands and then capitulated under British military force. This rupture of ceremony was often followed by a different ceremonial performance, with some Malay rulers attending, often with drawn British arms behind them.¹⁹

There were limits to British action beyond which violence and at times war would erupt; the Perak War of 1875 began as a reaction to British attempts to take over revenue collection and end debt-bondage, and over the peremptory and absolute actions of the first Resident to Perak, James Birch, who was assassinated by a group of Malay chiefs. While the treaties between the British government and the Sultans concentrated Malay elite power in the specific domain of religion and custom, several incidents during the first three decades of British indirect rule reveal that this domain was not what the sultans themselves considered their natural and proper jurisdiction. Within months of the Pangkor Treaty, major legal conflicts between local Malay and British colonial elites occurred over issues outside the British definition of religion and custom, taxation and slavery, whose unsatisfactory handling led to the killing of the first British Resident in Malaya and the Perak War, the aftermath of which gave rise to yet another legal conflict, the trial of most of the major figures in the Perak ruling class for conspiracy to murder the British Resident.

The issue of taxation was the first to cause major friction between chiefs and colonial officers after the Pangkor Treat. Taxes were being collected by chiefs and other elites in the Malay states as a right of their position, to fund their households and activities, and as implicit acknowledgment of the roles they performed in the areas under their control: the provision of defense, the maintenance of public order, the maintenance of ceremony, ritual, and custom, the resolution of disputes, and the exercise of moral and religious authority. After the Pangkor Treaty, the newly appointed British Resident, James Birch, claimed sole rights on behalf of the sultan and his government. The Perak chiefs were granted state incomes through the Treaty of Perak, which were to replace their main source of revenue—taxes they collected on goods and trade, mainly along the river courses.

19. For an account of the Pangkor proceedings, at which the agreement of Malay rulers was elicited on a British warship, see Barlow (1995, 47). For evidence provided by some Malays present at the plenary session, see CO 273/87, 392.

Birch seems to have prioritized the implementation of the new tax regime before paying pensions to the chiefs, by force if necessary, to which one powerful chief, the Dato Bandar, responded, that if “Mr. Birch wanted to take the collection of taxes on himself by force he would have to reduce Kota Stia to ashes first” (CO 273/70, 276). The sentiments of the Dato Bandar were not dissimilar to those of the sultan, who felt in Birch’s methods a high-handedness he did not believe the Pangkor Treaty allowed.²⁰ After the Perak War, the sultan took a more prominent role in taxation, whose collection was carefully justified in terms of public welfare and order.²¹ While taxation continued to benefit from the legitimacy of the sultan, it came increasingly under the jurisdiction of the Residential bureaucracy.

Slavery was another point of conflict: slavery and debt-bondage were common practices among Malay elites in the late 1800s, whereas among the British officials, the memory of prominent abolitionist movements at home was still fresh. Birch’s attitude towards slavery was one of moral outrage and outright disregard for Malay elite claims: he openly encouraged debt-slaves

20. The Sultan said, “Mr. Birch was doing what he chose with regard to the collection of taxes, and was in fact acting as if he had superior authority to him instead of being under him”; Long Mahnoon testimony, “They spoke as if they thought that the white men had no right to collect taxes in the country. On another day I heard Abdullah say that unless the white people were turned out of Bandar Bahru they (the Sultan and chiefs) could not get the taxes” (CO 273/87, 229, July 4, 1876). The Sultan’s assessment of Birch’s attitude was borne out by reports sent by Birch himself to the Colonial Office: “It really concerns us little what were the old customs of the country, nor do I consider they are worthy of any consideration in dealing with the present taxation of the country” (CO 273/88, 518–49, December 14, 1874). Even the Colonial Office could not fully defend these actions—the Committee of Inquiry into Birch’s death concluded: “It must be admitted that provocation was given to the Sultan and his Chiefs. The late Mr. Birch was a most zealous and conscientious officer. He was however much thwarted from the outset, and there is reason to believe that his manner may at times have been overbearing. It must also be admitted that, in some instances, he showed a want of respect for Malay custom. It was also injudicious to interfere with local taxes before the generous scale of allowances had been fixed in lieu of them. These are circumstances which may tend to palliate the criminality of the acts, but they cannot in the opinion of the Council be held to justify them” (Barlow 1995, 171).

21. “This Proclamation from Us, the Yang Dipertuan Abdussamad, who now sit upon the throne of the Kingdom of Salangore and all its dependencies, notifies to the public that it has been made known to Us that persons levy taxes and collect revenue within our country without obtaining authority from Us, which is quite illegal, and have spent them foolishly; consequently our men within our country suffer distress, and foreigners dare not come either to deal or live in our country. Wherefore we propose to make arrangements with reference to the collection of the revenue and the expenditure of our country. We publish this for the general information under the approval of His Excellency Sir William Francis Drummond Jervois, CB, KCMG, the Governor of the three Settlements—Singapore, Penang and Malacca. We have applied to the Residents, Mr. Davidson and Mr. Douglas, about the collection of the revenue of Salangore and all its dependencies; and We have consulted with our Viceroy, Tunku Dia Oodin, as to the carrying out of proper arrangements for the collection of the revenue and its expenditure. Moreover we notify to the public that from the 1st day of Rabil Awal, in the year 1293 (26 March 1876), no man can either collect or receive taxes within our country, but only those who have received authority from the Residents and from our Viceroy. After the date above mentioned, if any do collect or try to collect taxes within our country without obtaining the above mentioned authority he shall be punished rigorously. Of this we give notice. This proclamation was executed on the 27th Moharram 1293 (21 Feb 1876)” (CO 883/3/72).

to abscond, he sheltered runaway slaves, and gave female slaves in marriage without the permission of their masters. Malay custom and Islamic law allowed for slaveholding, and the power of a ruler was judged in part by the size of his retinue, making slavery a key institution of Malay society when the British arrived in Malaya (Barlow 1995, 122; Sadka 1962).

The testimony given by contemporaries of the Malay chiefs during the trial over Birch's killing makes clear that the chiefs saw Birch's actions and attitude as a threat to their positions and their livelihood. Whereas the chiefs clearly considered slaveholding a matter allowed by both their religion and custom, and in fact a matter of their households, British public opinion and policy required its prohibition. After the Perak War, however, this policy was couched in more careful terms: slavery was to be eliminated "with as little delay as is consistent with the necessary caution which is to be observed in the new relations with Perak" (Secretary of State for the Colonies, 1875, as quoted in Barlow 1995, 127). The practice was officially ended with the emancipation of all slaves in Perak on the last day of 1883.

After the Perak War, both sides carried with them the memory and the threat of violence into negotiations, leading a British official to comment, "by the action which his death made necessary, the State of Perak gained in twelve months what ten years of 'advice' could hardly have accomplished" (Swettenham 1906, 246). By October 1876, almost all the major Malay figures in Perak, including the sultan, had been replaced (Barlow 1995, 171), paving the way for new relationships between elites in the state. Despite this, extensive testimony was taken and a trial held in order to establish the guilt of a number of Malay chiefs as well as Sultan Abdullah in the Birch killing.

The trial indicates that while force and diplomacy played important roles in the colonial project in Malaya, the idea of justice also played a crucial role. The importance of maintaining the image and practice of British justice often led to contradictions at every level of the colonial project (Roff 1994).²²

22. Roff (1967) has written persuasively on the contradictions inherent in the Malayan colonial project: "For the officials on the spot, the primary end and purpose of British control was the creation of political stability and ordered government of a Western type, as a necessary precondition of and context for rapid economic and commercial development of the country's natural resources. Secondary to this, but providing a moral rationale for the whole, was an expressed concern for the welfare and advancement of the Malay people within the framework of traditional Malay society. The contradiction inherent in these aims, the one impossible of realisation in terms of existing Malay institutions and the other dedicated to their preservation, led to a fundamental dichotomy in British policy seen at every turn in Malaya's colonial history. The masquerading of direct political and administrative control under the rubric of 'advice,' the insistence that in signing the Federation Agreement of 1895 the rulers would not "in the slightest degree be diminishing the powers and privileges which they now possess nor be curtailing the right of self-government they at present enjoy, the acceptance of Malays into the administrative service but relegating them into minor roles in rural administration, the largely fictitious 'restoration of states' rights' in the late 1920s and early 1930s . . . all testify to the schizoid character of British Malay policy and practice between 1874 and 1942" (12–13).

A stated mission of the colonial government was to bring British methods of government and practices of civilization to native states under British protection; however, maintaining ruler control over religion and custom was a pillar of the policy of indirect rule and seen as representing British imperial regard for the rule of law. The elimination of slavery as an issue of justice came before the maintenance of Malay rulers' prerogatives over religion and custom, just as the British judicial principle of repugnancy allowed British judges working in Malaya to disregard any local legal practices they found to be contrary to the values of British justice, subjecting even matters of religion and custom to the forms and language of Crown law.

These negotiations between the different imperatives of colonial rule and of local authority gravitated towards a new balance after the Perak War and its aftermath. British Residents, whose roles were growing in a number of Malay states, took great care to cultivate the sultans and to incorporate the chiefs into the civil payroll, if not into key roles in government. The sultans and the chiefs voiced their opinions more often in the domains of the colonial state: state councils, consultations with Residents and British officials, and correspondence with the Colonial Office in London. The formation of stable institutions allowed (and in many cases required) opportunities for local elites to make claims and adjustments that were significant for the shape of the Malayan state. After the Perak War, it became even more important for both the British and Malay elites that Malay autonomy over matters of religion and custom was preserved and seen to be upheld, despite its gradual erosion. Some areas of Malay life became more institutionalized, such as the Councils of Muslim Religion and Malay Custom, and the sultans' independence over these areas of governance was made more prominent while their actual decision-making power over other areas was diminished. Both the sultans and the British upheld the traditions of Malay agrarian life, emphasizing the virtue of Malay pastoralism while isolating most Malays in villages.

While most Malay chiefs were given titles and pensions in the new state organization, their actual role in politics diminished during the early period of British Residency. These chiefs, who had previously held power over the sultans through their control of local territory and resources, and whose rivalries constituted much of the dynamics of Malay politics, found themselves increasingly isolated from the sultans by the Residents and from their local domains by individuals and institutions given prominence by the colonial state.

For example, the traditional Malay position of *penghulu*—the village headmen who played important roles prior to colonial intervention—became a central part of the daily local administration of the colonial state: they performed the functions of police, collected taxes, kept the peace, and resolved disputes as well as reported to the Residents on local conditions

and the feasibility of colonial policies. They played, in fact, much the same role they had in Malay society prior to the arrival of the British and the growth of a bureaucratic state, but at the same time their appointments were made official, their salaries were paid by the state and their duties multiplied. So essential were they to the colonial state, in fact, that Residents began to seek ways of establishing a class of Malay administrators and local agents through a new system of education and through encouraging able Malays to enter government service.

For some British officials, the need for a new Malay administrative class was inseparable from the further reform of law in the Malay states. In 1883, W. E. Maxwell, Colonial Commissioner of Lands, sent a letter to the Colonial Secretary proposing a Bill for the consideration of Parliament

under which it will, I believe, be possible to systematise the administration of the Land Department of the Colony, and to organise a system of district government through native headmen. The two subjects are inseparably connected, and while, on the one hand, no land revenue system can possibly work without the intelligent employment of local native officials, so, on the other hand, the employment of native headmen as a rural police will be of little avail unless they have a local influence founded upon their position as land-owners and land revenue collectors. (Maxwell 1894)

Maxwell, who had been Assistant Resident in Perak after Birch's death, was a vehement proponent of land reform in the Malay states, and his campaign to achieve this illustrates another kind of legal process in Malaya. The major problem for Maxwell was that it was close to impossible to gain a coherent understanding of current Malay practices or customs relating to land tenure; he attempted to solve this problem by himself publishing an account of Malay land tenure based on Malay literary sources and his own observations (*ibid.*). Maxwell pointed out that rights to land, separate from ownership of land, were conferred by continuous usage of the land and that the laws put in place in Malaya by British authorities ignored this in favor of English land law based on medieval concepts.

In 1875, for example, Malay titles to land were acknowledged by the government only as long as leases remained unissued by other parties, a law that facilitated the dispossession of Malay peasants and ran counter to Malay customary law. The 1891 Selangor Land Code assumed that all land belonged to the sultan, despite no evidence for this claim, and labeled Malay smallholdings "Mohammedan customary land" in order to register these small holdings and claim taxation from them. "Customary land" encouraged the Malay peasant to stay on one piece of agricultural *padi* (land) instead of grazing and shifting, a change that was important for the stability of the colonial state; once a peasant had held the land for a decade, it could be

sold (ostensibly to allow for Muslim inheritance practices). The right to hold customary land was changed in 1892 to allow all persons regardless of race or religion to hold and sell it, substantially increasing its value (Gullick 1992, 196).

Maxwell's desire to combine Malay customary land practices with a "modern" system led to his investigation of the possibility of adapting the Torrens system, developed in Australia, to the Malay states.²³ His solution was a fascinating combination of the Torrens system, with an adaptation of what he called a "tithe," an assessment on land allowable under Islamic law. Frank Swettenham, who was then Resident in Selangor, disagreed, arguing that the tithe was part of Malay custom, to which Maxwell replied,

Because Mr. Swettenham and Mr. Rodger have not seen in the Malay Peninsula a Mohammedan government sufficiently civilized and well-organized to collect its taxes properly, they have assumed that the recognized Mohammedan taxes are not leviable. This is an entire mistake. It is also an error to suppose that the Malay cultivator is a serf with no proprietary interest in the land he cultivates, merely because a Malay Raja may be a tyrant . . . Mr. Swettenham in his description of the uncertainty of rights under Malay Government . . . has mistaken these exactions and this oppression for the law, instead of regarding them, as Malays do, as invasions of it, to be submitted to of necessity when the perpetrator is the supreme ruler, and this is all the more remarkable because, under some circumstances, he finds that, their interests and feelings are too important to be disregarded. (Maxwell 1894)

LEGAL HYBRIDITY

This mixed pattern of legal development, where British colonial power could eradicate some practices—like slavery—in law but could proceed slowly and with extreme care in the area of taxation or could only make changes in the system of land tenure through appealing to Islamic law (but not Malay custom), makes any assessment of the true impact of British colonialism on the legal system in the Malay states a difficult matter. In 1874, Malay rulers began negotiations over personal status law with authority over the entire legal system. By the late 1870s, British principles of law and methods of administration had clearly begun to make an impact on the legal system, and by the 1880s, Malays were administering British policy in some areas

23. Introduced in South Australia in 1858, the Torrens title system established a state registry of land titles and indisputable land ownership rights to those registered. "The result was a system of tenure which provided the cultivator with the right of perpetual occupancy and power of alienation, subject to the reassessment of land at regular intervals. This was an ingenious and practical marriage of Malay land tenure to modern land principles" (Lim 1976, 16).

of law, while upholding Malay custom in others, and more often than not using legal reasoning and tools from British, Malay, and Islamic legal systems on a daily basis. In 1891, the Perak state council looked into the implementation of Islamic punishments for adultery, commenting that they were “not such as can be carried out in the present day” (Perak 1899), deciding through this that some areas of Islamic law could not be applied even within the family laws. That same year, “traditional” principles of land tenure were invoked and land codes were drafted that fundamentally changed the structure of landholding and inheritance in many Malay states, while claiming to protect them. This section will explore the manner and meaning of this mixed legal system and its effects on the nature of authority and jurisdiction over matters of religion and culture in the Malay states.

Legal Pluralism

Earlier legal pluralist scholarship has treated the domains that fell under the Pangkor Treaty as matters of religion and custom within the context of the existence, within one national legal regime, of more than one system of laws (Hooker 1975). In doing so, it has acknowledged the various elements within the process of colonial and postcolonial legal systems. Yet the circumstances within which this “plurality” was arrived at were rife with power inequalities, and the particular type of plurality that was achieved looked less like the coexistence of separate but equal elements of different legal systems within one structure than it resembled a peculiar legal Frankenstein creature—different functional elements pieced together to achieve a singular and unique purpose, the other parts of each system discarded by design. I argue that a distinction must be made between legal pluralism as a descriptive concept, as Hooker uses it—the attempt by colonial and state governments to combine elements of various legal systems within one framework—and legal pluralism as an analytic concept.

An analysis of the politics of a mixed legal system must ask: can legal codes that function within a context starkly different than that where they originated coexist within a single national system without distortion of their intent, function, and meaning? When principles of the *shari’ah* are taken to govern women and children, families and property, and placed alongside commercial codes taken from Western legal systems and administrative law created to serve a new nation, plurality may not be the most accurate representation of the relationship between these legal codes. As a product of the colonial period, personal status or family laws that govern Muslims must be understood as part of the colonial project; as negotiated outcomes between elites in the state, these codes and the practices, values and institutions that developed alongside them must be seen in terms of the diverse interests and capacities of each of these groups.

There has been recognition within later legal pluralist scholarship that the coexistence of multiple legal sources and forms within a single national system does not entail their equality within the law (see Merry 1988; Santos 1992). Pluralism, however, implies that these disparate elements still function in tandem, in parallel, as separate strands of a legal system rather than a complex and mutually constitutive web of rules, logics, and signals—as a hybridity. While pluralism implies that Islamic law functions within the personal status law of the postcolonial nation largely as *Islamic law*, autonomous within the national legal system, hybridity would imply that the function and meaning of Islamic law is contingent upon the workings of the entire system of which it is a part. Legal hybridity as an analytic concept demands that attention be focused upon the power relationships between actors in the law and between legal orders.

The Concept of Legal Hybridity

The practice of Islamic law in Malaya prior to the colonial period was itself a hybrid product. In Malaya, Islam was neither an imperial religion nor a totalizing one. Carried by Muslim traders and mystics from the Indian subcontinent and the mercantile centers of the Middle and Near East, it was adopted by rulers and incorporated into the existing body of Malay traditional practices, itself based in part on Buddhist and Hindu influences. Referring to “native” or “local” practices invokes the whole body of these influences, meanings, and practices (Hooker 1984).²⁴ The Melaka laws (*Hukum Kanun Melaka*), which represent a major source of Malay customary law, are a good example of this hybridity—separated into general and maritime law, its forty-four sections dealt with law in various ways: its Islamic law provisions were based on Abu Shuja’s *al-Taqrīb* [*The Approach*] and Ibn Qasim al-Ghazzi’s commentary on *al-Taqrīb*,²⁵ its customary laws were based on *adat temenggong* and a quarter of its provisions allowed for Islamic alternatives to *adat* laws.²⁶ As this corpus of law spread over the other states of

24. Hooker (1984) writes: “The vagueness of the term ‘Islam’ is undoubtedly one of its religious and political strengths, but it is a scholar’s nightmare . . . the term tends to cloak more complexities than it reveals; it refers simultaneously, but on a series of levels, to a cultural heritage and a political inheritance, to a social identity or ontology, to an epistemology, and to a simple faith. Not to recognise these multiple references is to compound confusion, not least in respect of the legal elements of Islamic culture” (3).

25. Both these texts were and remain important works of Islamic jurisprudence for Malay and Indonesian Islamic institutions: *Taqrīb* (*Al-ghaya wa’l-taqrīb*, also known as *Mukhtasar* [Summary], by Abu Shuja’ al-Isfahani (d. 1197 C.E.) and its commentary *Fath al-qarīb* [The Imminent Victory] by Ibn Qasim al-Ghazzi (d. 1512 C.E.) (Van Bruinessen 1990).

26. Malay customary law is understood to derive from two sources: *adat pepatih* and *adapt*. *Adat pepatih* developed among the matrilineal *Minangkabau* of Sumatra and *Negeri Sembilan*; *adat temenggong* developed from Malay, Islamic, and Hindu influences, is widely perceived as favoring patriarchy and patrilinearity, and was the traditional law for most of the Malay states.

Malaya, some local customs and interpretations of Islamic law were substituted for others in varying degrees (Jusoh 1991, 5). Malay rulers were Islamic rulers, but until the colonial period, their governance over Islam was not a central part of their authority.

As Malay identity and Muslim legitimacy became more unified, traditional customary practices that did not align with the dominant interpretation of Islamic law began to be replaced with Islamic legal practices codified by British elites. The matriarchal laws of the *Minangkabau* of West Sumatra began to be replaced by more patriarchal *adat temenggong*, and British interpretations of Islamic law from India came to be accepted legal practice for some areas of Malay religion and custom: marriage and divorce, for example. Land was another area where the law was hybrid: during the colonial period, land shifted from being governed through traditional practices, some of them Islamic and some not, to being administered almost entirely through colonial codes that dealt preferentially with Malays as indigenous people.

As a model for analyzing legal development and Islamic law in the colonial and postcolonial state, legal hybridity views legal development as a process and a performance aimed at a particular audience. Power is a negotiation between variously motivated elites in the colonial state; state and society are mutually dependent and constructive. Race and ethnic identity, previously the province of small local elites, became part of the construction of Islamic legitimacy and the beginnings of the nation. Resources for the building of legitimacy and the control of justice and institutions of the state became concentrated in the hands of fewer elites, local and colonial. Similarly, the content of legal practices and community values became more unified. It would be logical to expect, from this model, that opposition to the state would arise in terms of ethnic identity and that Islam would become a major source of resistance and contestation against the old elites. Indeed, opposition was made more possible in the era of national independence and after by the concentration of elite power and legitimacy, which made an obvious target for nationalists (cf. Mamdani 1999).

Islam, Ethnicity, and Elite Power

The structure and administration of Islamic and customary law continued to be an area of contestation between Malay sultans and British colonialists during the period under discussion. Whereas before 1896 the sultans were the final court of appeals in the Federated Malay States, after 1896 they were replaced by a Judicial Commissioner. The Judicial Commissioner presided over a court hierarchy that placed *kadis* (*shari'ah* judges) and *penghulus* (village headmen) at the bottom of the system and that gradually removed rights of appeal and oversight over capital crimes from both the Resident and the sultan. In 1904 Malay rulers wrested back some of these rights by

claiming a separate institution for the implementation and adjudication of Islamic law and arguing that Islamic law could not rightly be administered by non-Muslim, non-Malay judges.²⁷ Islamic courts were to answer ultimately to the sultan, as head of Islam in each state. Local Muslim *kadis* and other Islamic officials were brought back into the justice system, this time under the umbrella of the state, and positions in administration were given to members of the Malay elite who now demanded a place for themselves in the new order as chiefs, *penghulus*, and local Islamic figures. The British encouraged the training and deployment of this new Malay civil class.

By 1904 the sultanate and most other Malay elite positions had become incorporated within a British colonial state structure. As J. M. Gullick (1992) describes, “the Ruler now stood at the apex of a system of government which included State Councils, a salaried administration of ministers . . . district officers and sub-district headmen (*penghulu*), land officers to regulate the use of agricultural land as a transferable form of property, and an Islamic bureaucracy” (333). The Muhammadan Laws Enactment in the four federated states was both a significant achievement and a recognition of the limitations of the rulers’ power, making the rulers’ authority over matters of religion and custom into a matter of law but at the same time severely limiting the position and application of Islamic and customary law within the overall jurisdiction of the colonial state. In 1905 the rulers suggested that the chief Qadi hear appeals instead of British magistrates with no training in Islamic law, with the rulers themselves hearing final appeals; their recommendations were heard, but then a Supreme Court was established for appeals, and a year later the final appeals option was given to the Privy Council, finally uniting the legal system in Malaya under British authority.

Within the area ceded to their autonomy, the Malay elites had significant amounts of influence. They gained the power to interpret Islamic law, or to choose its interpreters, to dictate who might implement it, and in what areas. They gained, in doing so, the ability to decide who a Muslim was, what being Malay meant, and how both Malay and Muslim society related to each other and the state. They also helped reshape the meaning of the colonial state, removing much of the incentive for Malay elites to be adversarial to government, since they so quickly became identified with it. The role of race and notions of Malays as indigenous peoples with primary and, in some cases, sole rights to the state and its largesse would follow. Malay elites gained the ability to expand the region of personal law, and in their control over matters of religion and custom, they also began to set the terms of the debate on the place of Islam and race in the state. Their use of this power would increase and continue into the postindependence Malaysian state.

27. It seems to have been Colonial and India Office practice to have the most junior officials appointed to adjudicate matters between locals, another reason perhaps for the Malay elites to prefer their own administration of personal status law (Keith 1922, 114–55).

Prior to the Treaty of Pangkor, power was held largely by the chiefs who controlled almost all areas of life within their locality by virtue of their grasp of military might and wealth. This practical power was supported by traditional legal principles. According to Andrew Harding (1976), “the Malay law texts are shot through with the notion that one’s legal rights depend on one’s status, from the Raja down to the slave . . . the entire legal and political structure was based on status; status depended on distinction, and distinction was based on wealth, or at least the display of wealth” (7–8).²⁸ The raja’s wealth and power revolved around a small area ceded to kingship by the chiefs, almost all of it to do with judicial and ceremonial functions: he was the last court of appeal, the symbol of state justice, the power to sentence death, the granter of honors, concessions, and revenue monopolies, the chief actor in foreign relations and military action. His wealth and his power, sustained by gifts, customs duties, and revenues from the royal district, meant the raja was uniquely positioned to benefit from British intervention, and the British were uniquely suited to benefit from what the Raja had to offer.

After the Treaty of Pangkor, power was reoriented around the figure of the raja, and his elevation to the rank of sultan, with its Islamic connotations.²⁹ His position as head of state in cooperation with the British Resident was secured at the expense of the constellation of chiefs that had previously negotiated power in the Malayan kingdoms.³⁰ Changes in the structures of rule in Malaya had effects not only on who held political power but also on the expression of tradition, the operation and significance of symbol, and the meanings of legitimacy among Malays. Finding the mechanical instruments of rulership denied to them, the chiefs and rajas of Malaya resorted more and more to other resources: their legitimacy, exercised through symbol, religion, language, and custom, became all the more important in the face of foreign powers and rationalized government.

The position of sultan was particularly vulnerable to symbolic assault, since the sultan’s power was derived in large part from Islamic legitimacy and Malay ceremony. If entirely excluded from a share of the state, the resistance of traditional elites in the Malay state could pose a significant problem. The Malay chiefs had to be compensated in various ways for being excluded from wielding state power; eventually this led to the formation of a new

28. Harding (1996) refers to the different criteria against which rulers were measured through Malayan history: ancestry, Islamic principles and history, yellow clothing, ceremonial regalia, rules and precedents, magic, and eventually written constitutions on the European model. Milner (1982) points out that in the Malay *hikayat* [chronicles], important sources of Malay custom and public values, the phrase *orang kaya* [rich person] is often used to refer to powerful, public men.

29. See Michael Laffan’s discussion of the position of raja and sultan in Southeast Asia, and their relation to political and religious power during the twelfth to the twentieth century.

30. Each Malay state had its own system of naming titles: in this article, *raja* refers in general to the main royal figure in each local region who had titular supremacy but in most cases shared power with various other figures and groups, the chiefs prominent among them.

administrative class, with elite privileges and guarantees in the Malayan federation.³¹ Malay elites were compensated financially through state pensions for the chiefs and state-conferred titles and encouraged to play prominent roles in government administration. While some of these roles acknowledged the position of chiefs, rajas, and sultans in the state with no commensurate power to make or enact policy, other positions in the state were strengthened and incorporated into the mechanisms of state taxation, policing, and justice.

Islam represented resources that, once the sultan became guardian over matters of religion and custom, were increasingly important for the legitimacy of his rule. Malay rulers were allowed autonomy over matters of religion and custom, while educational systems, economic and political incentive structures, and the relationships between state and society were renegotiated. Authority over matters of religion and custom, when it came to the law, in large part meant authority over Islam. Islam was a powerful symbolic and political tool that could be used by the Malay rulers as a shield against British pressure or a gambit to play when the situation could be turned to their favor. The nature of Islamic legal institutions, classically positioned between the people and the state, representing both divine justice and mundane governance, has historically lent them to playing pivotal roles in conflicts between groups within Muslim states. In Malaya, Islam was able to serve as an internal bargaining asset between Malays. Additionally, Islam served as a unifying force in the Malay Archipelago and a key marker of Malay identity, which lent itself to many sites of struggle within and between states, institutions, communities, and individuals. In this process, *ulama* (Muslim religious scholars), whether Malays or members of prominent Arab families (*Sayyids* claiming descent from the Prophet Muhammad, or figures from Hadhramaut, in present-day eastern Yemen), played prominent roles (Freitag and Clarence-Smith (1997); Roff (1985); Riddell (2001)).

In order to benefit from their position as Islamic rulers, however, Malay traditional legal practices had to be recast into the mold of Islamic law. One example of this was the gradual shift within the northern states, which before colonialism practiced a combination of matriarchal Malay customary law (*adat pepatih*) and Islamic law, toward more patriarchal laws of land ownership, marriage, divorce, and women's participation in society in a different corpus of Malay traditional practice, *adat temenggong*.

The compromise reached between British Residents and Malay sultans managed to benefit both sides substantially. The area of policy overlap between them was large, and as personal status legislation continued to be elaborated in the early twentieth century, the number of Malay elites who were encouraged to take advantage of allying with the state, therefore capturing its language and identity as well as economic benefit, increased

31. This development was common to many colonial situations; for another example in the region (see Sutherland 1979).

significantly. While negotiations at each level of law resulted in varied outcomes, the overall pattern within personal status codification in the first three decades of the colonial state was an increase in the degree to which laws and legal institutions appeared to conform to traditional forms of authority under the leadership of the Malay sultans and while both law and the sultans were being incorporated within an ever more encompassing state.

CONCLUSION: THE MAKING OF A SULTAN

When the Perak Regalia was finally turned over by Sultan Ismail at the end of the Perak War, it was with the help of the Sultan of Kedah, who then handed the regalia into the safekeeping of the Straits Settlements.³² A new balance of authority had been constructed, one in which Malay elites had become more narrowly defined, the sultans and *penghulus* playing important roles in the state, while the chiefs held ceremonial roles and state pension. The ability of both local and colonial authorities now depended upon their balancing of two sets of resources: the legitimacy and networks of the Malay sultanate state and the bureaucratic mechanisms and political support of the British government.

The British role in reorienting the hierarchy of local power, while heightening the importance of the maintenance and construction of tradition and custom, is particularly stark in this example: as early as August 1878, the Maharajah of Johore, an important but independent ally of Britain in the Malay states, requested British support for a change in his title to sultan (CO Secret 39 1878). The governor of the Straits Settlements' reply was swift and unequivocal: "most undesirable to recognise Maharajah as Sultan it would be an incendiary to the whole Peninsula and following closely on the question of the Moar succession would greatly complicate our position" (CO Secret 41 1878). However, the Maharajah's influence continued to be so important for British political and economic interests that in 1885, he was granted his request:

Whereas His Highness the Maharajah of Johore has made known to the Governor of the Straits Settlements that it is the desire of his chiefs and people that he assume the title of Sultan, it is further agreed that, in consideration of the loyal friendship and constant affection His Highness has shown to the Government of Her Majesty the Queen and Empress, and of the stipulations contained in this Memorandum, he and his heirs and successors, lawfully succeeding according to Malay

32. The British agent who helped secure the surrender of Sultan Ismail reported that the regalia was secured with him, his two sons, and thirteen attendants. The "regalia is more valuable than it had originally been reported to be, consisting of the personal ornaments, plate, and weapons of the Sultans of Perak . . . (and) twenty-seven elephants" Barlow (1995, 73).

custom, shall in future be acknowledged as His Highness the Sultan of the State and territory of Johore, and shall be so addressed. (CO 882/4/22 1885)

The Pursuit of the Perak Regalia illustrates a number of realities about the colonial project. While the British had force of arms and economics behind them, their success in getting the Treaty of Pangkor to be a legal fact depended in large part upon their ability to chase, by all means available, the symbolic and social resources of legitimate rule. Malay elites used the presence of the British for their own political advantage, while at the same time relying upon Islam and Malay custom for their own legitimacy. Law, as code and treaty, represented the negotiation of important political interests, but as a set of symbols and social relations, it also established a new kind of relationship between state, society, and subject in Malaya, a relationship that unified Islam and Malay ethnic identity and concentrated power over Islamic law and Malay custom in the hands of Malay sultans, who themselves became more embedded within the institutional hierarchy of the colonial state. The making of the Sultan of Johore illustrates this new relationship: the Maharajah's transformation into a sultan, justified through his relationship with the British and the desires of his people, backed by the legitimacy of Malay custom and his agreement to leave foreign affairs and the politics of other Malay states in the hands of the British, was signed not in Johore or any other seat of Malay power but in London at the Colonial Office.³³

The pattern within the Malayan colonial context shows striking similarities to analyses of the colonial situation in parts of South Asia and the Middle East, and it indicates a rich field for studying the effects of colonialism upon not only personal status law but upon local Muslim identities, networks, and the construction of legal institutions. Authority within the colonial context depended upon the control of resources: discursive, economic, and military. Among these resources, those that facilitated some version of legitimate rule among both local and colonial elites were most valuable for the maintenance of the colonial state. In order to maintain legitimate authority, colonial administrators often delegated jurisdiction over matters of religion and custom to local elites, who then redefined social relationships and community values, Islamic and traditional law, to their advantage.

Islamic law in the postcolonial state is a product of these negotiations, a hybrid system whose implications and meaning must be contextualized within the workings of the system of which it is only one part. Legal hybridity includes a view of law as a process and a power in the colonial context as

33. Agreement on certain points touching the relations of Her Majesty's Government of the Straits Settlements with the Government of the Independent State of Johore, made between the Right Hon Frederick Arthur Stanley, Her Majesty's Secretary of State for the Colonies, on behalf of the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and His Highness the Maharajah of Johore (CO 882/4/22).

a negotiated performance of values, language, resources, and violence. In this model, the evolution of the colonial state is inseparable from the social networks that contest, compete with, and capitalize upon it. Islam, Islamic law, and the politics of ethnic identity in the colonial and postcolonial Muslim state continue to be enmeshed in these colonial negotiations of law, state, and society. Legal hybridity offers a new view of Islamic law and of the colonial experience in Muslim states, a view that emphasizes the involvement of local elites and the importance of legitimacy. Islamic law, state identity, and the Muslim subject continue to be remade and reinterpreted based on colonial foundations: understanding the role of elites and colonial power contexts in the construction of legitimacy and the maintenance of the state continues to be important for the study of the Muslim world today.

The growing contemporary debate about the role of Islamic law in the state is built in large part upon an understanding of Islamic law as both a divine legacy and a body of law that can be codified and/or integrated within the modern state. This article argues that the history of Islamic legal development is inextricable from the history of the modern Muslim state, its imperial past, and its local political institutions—just as elite negotiations transformed Islamic law, these transformations in law changed Muslim identity, elite hierarchies, and state relationships in ways that remain important for the Muslim state today. Islamic legal development in the modern state may also be better understood in terms of a network of transmission, interpretation, and application that depended both upon imperial officials and their local elite counterparts. This development is neither specific to Islam nor to Malaya, and a comparative approach to the negotiations of law between local and colonial elites across regions may reveal a rich resource for new understandings of religion, authority, and law in the modern state.

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