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Resetting neoliberal values:
Lawmaking in Malaysia's Islamic finance

Jessie P.H. Poon,
University at Buffalo,
Buffalo, New York.
Jesspoon@buffalo.edu

Jane Pollard,
Newcastle University.
jane.pollard@ncl.ac.uk

Yew Wah Chow
Department of Business,
SUNY Buffalo State College
chowy@buffalostate.edu

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Abstract

In economic geography and cognate disciplines, a good deal of attention has been paid to the roles of investors, lenders, analysts, advisors, actuaries, and other skilled financial professionals in forming and reproducing financial and other markets. Relatively neglected, by contrast, is the work of lawyers, judges and other legal agents. This article redresses this imbalance by making two contributions. First, we highlight the role of legal labor in financial market formation in Malaysia, specifically the role of Shariah jurists and translators in institutionalizing the (re)production of Islamic values in market life. Second, drawing on cases of financial litigation and interviews with Shariah scholars, we argue that Malaysia's strategy to develop its Islamic financial governance institutions, to bolster its international stature and extend the regional, national and international reach and mobility of its Islamic values, is intrinsically geographical in nature. The strategy involves a rescaling and consolidation of legal spaces and institutions - including the Central Bank, the juridical system, Islamic universities, research think-tanks, and their Shariah bureaucrats and professionals - to facilitate the geographical mobility of Malaysian sharia expertise to otherwise secular legal spaces. Yet, we argue that this strategy has not led to a retreat from neoliberal influence but rather a re-ordering of market values and norms that collateralizes moral risks in addition to market risks.

Keywords: *Malaysia, Islamic finance, neoliberalism, Shariah, lawmaking.*

Introduction

While it is generally recognized that neoliberal capitalism has rendered dissociated market relations the dominant form of social relations in many countries today, economic geographers and other scholars have insisted on the provincialization of such relations in two senses. One strand of provincialization has been to stress the unevenness of neoliberalizing projects and the unattainability of frictionless market rule (Brenner et al. 2010). From Japan's alliance capitalism (Gerlach 1992) and Asia's developmental capitalism (Johnson 1982, Glassman and Choi 2014) to the varieties of capitalism (Hall and Soskice 2001) and variegated capitalism (Peck and Theodore 2007), significant conceptual effort has been devoted to delineating the imperfect spatial and institutional realization of neoliberal markets. It may be tempting to add Islamic capitalism to the hybrids. Islamic finance exemplifies a suite of economic practices that can arguably challenge neoliberal market relations. A second strand of provincialization has pushed economic geographical scholarship to internationalize its analytical and empirical foci (Pollard and Samers 2007, Pollard et al. 2009, Vira and James, 2011). In devising knowledge and institutional assets that contradict, or are offered as an alternative to western norms and values, Islamic finance provides one avenue for unsettling neoliberal distinctions between persons and things, self-interest and altruism, and freedom and obligation¹. For all the heterogeneity of Islamic finance, its core prohibitions of *riba* (interest) and *gharar* (excessive risk) mark it out as committed – at least in principle - to work against usury and unethical behavior.

¹ Graeber's (2001) distinction between persons and things locates human exchanges as the exchange of persons. In the context of this paper, personhood is relational: individual agency is immersed in moral communities, constituted inside rather than outside of religious relations, and bound by ethics of altruism and obligatory reciprocity (Piot, 1999).

This article interrogates such unsettling drawing on Malaysia's attempts to collateralize Shariah values, in the sense of transforming the social and religious relations of individuals and their communities into accountable legal "things". We examine this proposition in the context of Malaysia which is emerging as a global leader in Islamic finance (Lai and Samers 2017; Bassens *et al.* 2012). In so doing, the article makes two contributions to economic geographical literatures. First, it highlights the role of Shariah jurists and translators in financial market formation. Historically, markets, in liberal and neoliberal forms, have relied on legal and institutional practices to establish and maintain economic order. In economic geographical literatures, however, lawmaking and its agents are often relegated to a supporting role (see also Riles, 2016) and legal norms, and their material realization, remain something of a black box yet to be studied as the center of "claims-making" in economic geography (Martin *et al.* 2010). Second, drawing on Islamic financial litigation cases and interviews with Shariah scholars, we argue that strategies to thicken institutions of Islamic market governance are intrinsically geographical; they involve rescaling Shariah norms and opening up secular jurisdictional spaces to Shariah jurisprudence and its legal scripts. This rescaling, we argue, is strategic for Malaysia's ambition to be an international Islamic financial center. Paradoxically, however, such a juridical project does not lead to a retreat from neoliberal influence but rather the re-ordering of market values and norms to collateralize moral as well as market risks.

In the next section, we explore Malaysian Islamic finance and its position in literatures on comparative capitalisms. We then discuss neoliberal ideas about market values and an emerging heterodox body of work on values in market-formation. Specifically, we point to the importance of understanding market value-making as a juridical project. This is demonstrated through an

analysis of the geography of Shariah legalities in Malaysia before concluding with a discussion of our key findings.

Capitalisms, value and law-making

Varieties of Capitalism and Variegated Capitalism

Comparative capitalism has gathered pace with valuable insights from the scholarship on varieties of capitalism (VoC) (Hall and Soskice 2001) and variegated capitalism (VC) (Peck and Theodore 2007). This scholarship highlights institutional similarities as well as differences among developed countries. However, the VoC and VC literature is also foregrounded by writings in the 1980s and 1990s that identified East and Southeast Asian (ESEA) capitalism as distinct from the West in institutional and social organizational form. This body of work, originating from Johnson's (1982) developmental state to its more Neo-Weberian variants (Glassman and Choi 2014), has challenged the World Bank's (1993) neoliberal explanations of the region's economic emergence.²

Whether or not ESEA capitalism may be functionally classified according to Hall and Soskice's (2001) axes of liberal or coordinated market economies, neoliberalism's influence on VoC and VC framing is apparent. Witt (2010), for example, finds that Chinese capitalism is closer to the US-model. Meanwhile Peck and Zhang (2013: 367) raise the question if China may be described to be "tendentially neoliberal" while Crotty and Lee (2006) argue that the East Asian model captures "neoliberal mediocrity". Economists too have joined the comparative

² The well-narrated story of World Bank's (1993) *The East Asian Miracle* associated East Asian countries' economic development to entrepreneurial capacities, that is, export promotion, high levels of savings and investment as well as fiscal practices that moved their economies towards freer market relations and private property rights.

capitalism discourse. Sapir (2006) for instance has identified four models of European capitalism based on countries' levels of social assistance and egalitarianism.

Yeung (2016) argues that the role of the state may be diminishing as lead East and Southeast Asian firms pursue local-transnational strategic coupling in global production networks (GPNs). Others interpret state retreat as the recuperation of neoliberalism (Kim, 1999). It has been suggested that neoliberalism also constitutes a social doctrine that makes certain assumptions about the nature of social relations that are supported domestically by central banks and internationally by the World Bank (Harrison 2005). Institutional agencies' purchase of the term is manifest in increasing professional management that helps change society relations into market-based distanced social relations (see also Blomley 2005). Not surprisingly, Asian capitalism is bolstered by a cadre of technocrats and professionals who have played a significant role in their countries' global integration to trade and investment. In this sense, Asian capitalism may be better captured by Sheppard and Leitner's (2010) "neoliberal supplement" which sees ESEA capitalism less as a neoliberal variety than the broadening of the restrictive definition of neoliberalism.

While the discussions on VOC, VC, neoliberal varieties and supplements have shed much light on comparative capitalisms, they are less focused on the ethical assumptions of neoliberal morality: neoliberalism's foundation of ethics is driven by a Hayekian distaste for authoritarianism (Bloom, 2017). Market relations are said to be ethical because they create social relations that are free from political subjugation. Human values are defined in terms of personal (e.g. self-interest) rather than community wellness. Perhaps for this reason, O'Neill and Weller (2016), Harvey (2005) and Eagleton-Pierce (2016) have called for a better understanding of human well-being to explain motivations for securing resources. Attention to human well-being

is prized in Malaysia's Islamic financial capitalism (IFC) which presents itself as an alternative model with a normative vision of human welfare. This model attempts to challenge neoliberal tendencies to reduce human value to self-interest with little regard for community.

Neoliberalism and Values

Perhaps the most fervent voice of neoliberal market morality has been Milton Friedman (1962/1982) who argued that markets foster morality in that they enable individuals and firms to freely and rationally dispose of their possessions as they see fit.³ Bhagwati (2011), a stalwart supporter of the neoliberal market, recognizes that self-interest represents an individual's "basest motive" (p. 163), but contends that such motivation nonetheless produces efficient outcomes. Moreover, while conceding that Sapir's (2006) account of communitarian values in more egalitarian European countries illustrates that religion and family may influence national political economic values, he nonetheless conceives such values as non-economic objectives of the utility function.

A utilitarian approach to community and religious value misses the point that the marketplace demands a distinction between persons and things, interest and altruism, and freedom and obligation (Graeber 2001). Social relations in neoliberal markets are de-personalized as exemplified by the crafting of legal scripts and collaterals (e.g. contracts) so that human values (e.g. altruism, generosity) are replaced by market values (Sandel 2013). Such utilitarian values can produce harm by rewarding greed. As Malaysia's Dr. Mahathir Mohamad observed in his criticism of the 2008 financial crisis:

³ See Birch (2016) on how neoclassical economics has influenced financial economics and business schools' understandings of neoliberal markets.

“Capitalism has given many nations prosperity but when capitalism is combined with unbridled greed, the result is what we are seeing today... a market of greedy people cannot be expected to have ethics or even a sense of responsibility to themselves and even less to society.” (Mahathir 2011)

The view that conventional finance draws from a narrow instrumental understanding of human values has influenced Malaysia’s spurning of neoliberal universalizing tendencies, encouraging the country to turn to a more particularizing framing of Islamic financial capitalism.

In economic geography and cognate disciplines, concerns with promoting something other than neoliberal values are captured in a burgeoning and heterodox body of work inspired, variously, by strands of political economy, political ecology and feminist theory (Brenner *et al.* 2010). Feminist scholarship has long been in the vanguard of critiquing the ‘separate self’ assumptions that underpin neoclassical thought and portray individuals as autonomous and impervious to social influences (Beneria 1995). Such work includes newer forms of critical synthesis (for example, Fraser’s 2014 neo-Polanyian framework to encompass the ecological, social and economic) and some new empirical terrain, such as Islamic charitable infrastructure (Pollard *et al.* 2016), as it revisits longstanding normative questions about what ‘counts’ in economic exchange (Harvey 2014). Lee (2006: 415), for example, identifies *value* as “the often banal but vital life-sustaining things, ideas, relations and practices consumed, exchanged and produced in circuits of value”, as distinct from traditional economic interest in *Theories of Value* as “transcendent interpretations of the origins and nature of Value”. Henderson (2013) too is interested in social-political ideas about value (that are not reducible to a theory of capital) and how these shape what and how economies produce, exchange and consume. Explicit in these concerns with values is an attempt to recuperate more plural conceptions of value that recognize -

and take seriously the socio-spatial construction and reproduction of - identity, kin, reciprocity, obligation, equality and social justice.

Despite the above scholarship on value, examining the political economy of markets as a juridical project has been largely neglected in the literature. Yet the role of legal and related agents in norm production through their action and scripts in market formation is of crucial importance; market formation is another important arena for the burgeoning of scholarship in critical legal geographies (see Jones 2016).

Legal scripts and market formation

Neoliberal market exchanges depend on legal scripts, law that is codified, normative and generalizable. Here law is entrusted with the task of mediating economic life so as to preserve orderly exchanges. Yet, law-in-practice also draws from local and community norms and beliefs, shaped by the relational knowledge practices of both legal and extra-legal interest groups. As many sociolegal scholars have shown, scripts of extra-legal actors such as international organizations in the form of guidelines, reports and discursive structures are an integral part of the legal technology of law and rule-making in world markets (Block-Lieb and Halliday 2017). Law, as Comaroff and Camoroff (2006) remind us, can be a coercive, colonial tool, often deployed to implement both the Washington Consensus and US neoliberalism by favoring an ethical model that maximizes individual (and enterprise) well-being (Marangos et al. 2013). Market-oriented laws (e.g. anti-trust and patent laws) have been remarkably successful in supporting competition and deregulation (Christophers 2016). In general, however, neoliberal scholars privilege economic incentives over legal sanctions to deal with the complexity of market exchanges. This is not to ignore the proliferation of regulatory policies that have been

erected following recent waves of financial crises, but neoliberal commentators argue that regulatory policies tend to generate more regulations and hence should be minimized (Styhre, 2014).

While the 2000 Enron collapse mandated the reporting of managerial misconduct, little legislation in the United Kingdom (UK) requires lawyers to act as gatekeepers of moral and ethical values or to monitor investment activities.⁴ English common law does not mandate the disclosure of client wrong-doing. In the US, the 2002 Sarbanes-Oxley Act was enacted that requires the Securities and Exchange Commission to police lawyers' reporting of corporate misconduct. But as Fisch and Rosen (2003) note, the dominant view of client primacy continues to influence state ethics rules. Neoliberal authors see common law as emerging from interactions of free distanced relations, making explicit what is already implicit in the habits and practices of market agents (Njis 2016). Law is constituted from norms of thousands of reciprocal activities developed over time. To assume universality, common law has privileged outcomes of accountability which Riles (2016) describes to be a discursive process of collateralization. Localization of swap agreements, for instance, entails a technocratic labor of collateral documentation in her study of Japan's derivative market. Such documentation from legal and extra-legal experts realizes and legitimizes capital through a material pledge to reduce risk. The collateral can take the form of a legal text (e.g. contract, letter of credit), legal person or institution that helps to secure certainty from unpredictable and irrational market behaviour. Financial institutions in particular favor private law, such as collateral contracts, over public law (legislation) and government regulations because it represents a form of property rights that assures credit. Much of the materiality surrounding contractual norms are transcribed according

⁴ An exception is the 2007 Money Laundering Regulation (Loughrey 2011).

to English common law or New York State law (Flood 2007), reflecting the financial reach and power of London and New York City.

Collateral lawmaking is embedded in two processes: (i) the production of “things” that protect exchange freedoms through products of legislature (statutes and their requirements), courts (rulings, documented precedents), and executive agencies (regulation); and the operation of (ii) law-in-practice which describes how law is interpreted and acted upon by communities of experts. Both processes are inherently relational involving legal agents and their intermediaries who act as translators of meaning between two systems arising from divergence in local and extra-local norms. Halliday and Carruthers (2009) argue that law internalizes contradictions since it attempts to balance the interests and meaning systems of various groups at local and global scales, although such translations are often contested and conflict-ridden. If successful, they can result in the transformation of problems to substantive and procedural institutional reforms. Normative standards develop through scripts of legitimacy. These scripts may comprise softer law such as the International Monetary Fund’s published procedures and World Bank’s assessment templates of insolvency, or, they may draw on legislative guides such as the UN Commission of International Trade Law. More importantly, Halliday and Carruthers maintain that validation of global law and acceptance of legal scripts requires the work of legitimizing translators - specialists and legal professionals who represent technical epistemic communities, gate-keep the adoption and dissemination of rules, and are engaged in everyday compliance procedures. Deploying translators with specialized expertise ensures that procedural fairness is perceived in the rules of deliberation because they help to customize a global or standardized script for local implementation. Alternatively, translators intermediate by ensuring better harmonization between two systems of meaning, and in the context of this article, between secular and religious legal knowledge systems.

Legal script-building is facilitated by the material expression of legal theory and knowledge into legal-rational rules, and the latter's effectiveness depends on the enforcement power of professionalized bureaucrats. Authority of the legal-rational bureaucracy is associated with functions that are discharged according to "calculable rules" and "without regard for persons" (Weber 2009: 215). Such a de-personalized social structure stems from capital's need for predictability through objectivization of legal standards and norms in the bureaucracy. For Weber, the modern juridical bureaucracy is organized as a hierarchy, and authority is unevenly distributed between higher and lower offices. Market relations are transformed into collaterals as social relations in professional bureaucracies are impersonalized and professionalized. Weber's focus on the character of professionalized bureaucracy is also implicit in the VoC scholarship that notes the role of formal (and informal) institutions such as legal institutions in regularizing firm interactions (Hall and Thelen 2008).

Across a wide range of literatures then, values and their legal expressions are bound up – however implicitly - with the formation of markets. Production and translation of these scripts capture norm coalescence and practices that may be legitimized through communities of professionals, and in the context of this article, the rationalization of religious authority.

The research project

The research draws from a project exploring the development of Islamic finance in Malaysia and, specifically, how Malaysia is positioning itself as an international center for Islamic finance. In-depth interviews with eighteen Shariah advisors and scholars and twelve Islamic financial professionals including Bank CEOs, vice-presidents, heads of product development, and directors of risk management. Seventeen of the Shariah advisors hold a doctorate in Islamic

Jurisprudence, law, or Islamic Studies. Two of them are women in what is a profoundly male-dominated profession. All of the Shariah advisors are members of Islamic financial institutions' Shariah committees (IFIs), and the majority have held academic or research positions at Malaysia's Islamic universities or the International Shariah Research Academy (ISRA). One Shariah jurist is a member of the Shariah Advisory Council at the Central Bank of Negara (BNM).

The interviews were conducted between 2012 and 2015. Six interviews with Shariah scholars and five with financial heads or vice-presidents occurred more than once as the authors returned to Malaysia for follow-up interviews. The interviewees were assured of confidentiality, hence their names remain anonymous in this article. In addition, the authors were invited to observe Shariah meetings; this included sitting in on meetings with management, site visits to the Central Bank and ISRA, and immersion in Shariah advisors' lives such as observing their interactions with one another, observing conversations among Shariah jurists at the Central Bank Negara, and at times participating in Friday prayers. Access to this elite group was facilitated by several months of emailing, *whatsapping* (the preferred mode of communication in Malaysia), and *LinkedIn* conversations educating potential interviewees about the research project. We employed a "multivoicing" approach enrolling a Bumiputra doctoral student assistant who traveled with Shariah jurists to meetings (see footnote 5). While the authors are non-Bumiputras, this has the advantage of "bracketing", that is, minimizing the influence of previous knowledge on understanding the present phenomenon (Vagie, 2014).

In addition to the qualitative interviews, we also examined a number of legal disputes. Due to the lack of precedence in decision-making and the pioneering status of Malaysia's Shariah lawmaking, some half a dozen cases may be considered as 'landmark' as they are setting

the pace and direction for future decisions. To comment on these, we use case law reports from LexisNexis and the Court of Appeal as well as the *Malayan Law Journal* (MLJ), *Current Law Journal* (CLJ) and ISRA's publications as part of the effort to document judicial precedents.

Lawmaking in Malaysia's Islamic financial capitalism

Modern Malaysia's markets have been co-constituted by global neoliberal forces and indigenous Chinese entrepreneurialism. The country has long been integrated into global production networks across the Pacific having functioned as an important electronics export platform in the 1970s and 1980s. Extra-territorial entanglements have been accompanied by a relatively strong indigenous Chinese but weak Bumiputra capitalist class. As part of the strategy to nurture the Bumiputra capitalist class, the 1991 National Economic Policy (NEP), Dr. Mahathir's Vision 2020 and Prime Minister Najib Razak's 2010 New Economic Policy (NEP) promised to improve the socio-economic standing of the Malays and to increase Bumiputra's participation in the economy (Islam 2010)⁵. While these efforts did help expand Malay citizens' role in economic development, modernization has taken on a spiritual tone with Dr. Mahathir promoting Islamic morality and ethics as part of the modern "New Malay" (Goh 2002). Islam is an ethnic marker; the Malaysian Constitution (Article 160) defines Malay to be a Malaysian citizen who "professes the religion of Islam". Cultivating ethics in the Islamic financial industry involves professionalizing Shariah knowledge and institutionalizing legal scripts at the federal level.

A/The Geography of Shariah Professionalization

⁵ Under Article 153, the Malay as well as non-Malay indigenous populations of Sabah and Sarawak, also known as Bumiputra, are constitutionally protected by special privileges that safeguard their interests in education, federal employment, firm ownership and agriculture.

Validation of English common law relies on the scripting of institutional processes such as codified rules (statutes), the written act (regulation), and contract. Islam deals with human relations with *Allah* and human relations with one another; it is a “living law” that is ritualistic providing guidance for the everyday life of Muslims. All human action may be classified, for example, zakat or alms-giving is an obligatory action while the sale of alcohol is forbidden (*haram*). As Shariah law assumes a divine character, it is not rationalized through a set of generalizable rules like common law (Lane and Redissi 2016). Shariah law is juristic drawing from four major schools of thought. “Law” arises from jurists’ *ijtihad* (i.e. cognitive process of individual reasoning to derive law from Shariah). Religious rulings or verdicts are issued through “fatwas”, and judgment varies from case to case. In this section, we argue that Shariah is being rationalized in Malaysia through geographical centralization as well as professionalization of Shariah scholars and jurists.

While the Sultan of each state of Malaysia is officially charged with the role of controlling Islamic affairs, religious observance among rural Muslims operates largely through their relationships with village religious elites, that is, *muftis* and *ulamas*. Rural religious elites derive their power from their ability to read the Koran and *hadiths*. The emergence of an urban elite, however, has seen the modernization of *ulamas* in cities. Increasingly armed with educational credentials from local and foreign universities, they are promoting a more rational scientific approach to Islam and treating rural Islam as mystical and ritualistic (Nagata 1982, Hamayotsu 2002). Indeed the rise of an urban class of Shariah professionals and bureaucrats has paralleled the growth of Islamic finance. Dr. Mahathir, who became Prime Minister in 1981, embarked on a strategy of Islamization that became increasingly pronounced through the 1990s.

His *Vision 2020* sought to transform Malaysia into a developed country and to create modern Malay subjects.

Determined to find a place for Malaysia in the global economy (Khoo 2003), Dr. Mahathir began a process of state-led strategic alliances. Deeply suspicious of the policies of neoliberal international institutions, Dr. Mahathir attributed the 1997 financial crisis to currency speculation and excessive risk-taking (Mahathir 2000). His criticism of Western capitalism, beginning with his “Buy British Last” in the early 1980s and capital controls in the late 1990s, was paralleled by a “Look Westward” orientation towards the Middle East (Ooi 2006). In effect, Dr. Mahathir’s spiritual economy involved populating the government bureaucracy with Malay and Muslim technocrats, and in the context of Islamic finance, banking analysts, Shariah professionals, jurists and advisers.

Shariah professionals and bureaucrats tend to concentrate in cities, particularly Kuala Lumpur, that are home to the top Islamic universities and research centers. Many of the professionals possess university degrees, frequently with a post-graduate degree including a doctoral degree. The establishment of International Islamic University (IIUM) and INCEIF (International Center for Education in Islamic Finance) has produced a skilled pool of graduates available for expanding the Shariah bureaucracy particularly at the federal level. It is noteworthy that INCEIF was established by the Central Bank to raise bureaucratic competence. All of the thirty interviewees possess at least a bachelor degree and virtually all of the Shariah advisors graduated with a doctorate in Shariah or Shariah jurisprudence from IIUM, INCEIF, a British, American or Australian university. One informant pointed out that there are now more than 150 Shariah advisors in Malaysia sitting on IFIs’ Shariah committees. As for financial professionals,

the majority graduated with a bachelor in finance, economics, accounting, Islamic finance and even engineering, with half of them holding an MBA.

Perhaps the most significant professionalization process is associated with the conferring of institutional authority on a group of experts as Shariah arbiters in the Islamic financial industry. Shariah professionals are entrusted with the responsibility for ensuring that transactions are Shariah compliant through two-tier governance. For the first tier, IFIs are required to put in place a Shariah committee that is appointed by the board of directors. For the second tier, Parliament has enacted legislation that concentrates final Shariah rulings on the Shariah Advisory Council (SAC) housed in the Central Bank Negara (BNM). Should there be any dispute at the first tier, the SAC has the final say. While the first tier is found in many Gulf countries, Malaysia is the only country to offer a centralized SAC whose rulings are legally binding nationally.

The first-tier Shariah committee, approved by BNM, is tasked with monitoring various aspects of the bank's activities including risk management, review, audit and research. While it is not unusual to find product development specialists or non-Shariah professionals on the committee, approval of the activity and contract must be endorsed by at least three Shariah credentialed advisors (Interview, 2 February 2015). The committee reports directly to the board and alerts the board to any non-compliant activities. While such a committee or advisory board is also mandated in many Gulf countries, particularly countries that follow AAOIFI (Accounting and Auditing Organization for Islamic Financial Institutions) guidelines, governance surrounding the composition of the Shariah committee in Malaysia has taken pains to minimize conflicts of interest associated with multiple boards. Specifically, a Shariah advisor is able to serve on the committee of only one Islamic bank and one Takaful (Islamic insurance) or investment company.

Shariah advisors are concentrated among a small elite group and it is not uncommon for them to sit on several Shariah boards or committees (Bassens et al. 2011, and Pollard and Samers, 2013). A 2013 report by *Bloomberg* found that one Syrian Scholar was advising up to 101 IFIs⁶. One reason for multiple boards lies in the small number of professionals who are experts of the field (Islamic Finance 2015) although Malaysia's human capital supply has been rising with the establishment of IIUM and INCEIF. Limiting the number of committees on which Malaysian Shariah advisors can be members is also designed to diminish "Shariah risks". But while contracts minimize transaction costs in neoliberal markets, they are also a moral collateral that minimizes "gharar" (uncertainty and deception) in Islamic markets.

"We need to ensure that there is transparency – meaning that whenever you sign an agreement with a client, you must ensure that the client understand the terms of the contract. This is also the same with the bank. The bank cannot hide things from the customer. It must be transparent ... in conventional they have the same thing."

"You know "gharar" right? That element must be put away to make sure that everything is transparent. There must not be any ambiguity and must have certainty." (Interview, 23 February 2015).

Mahathir (2010) notes that the authority and status of local and rural *muftis* and *ulamas* depend on relatively small areas of jurisdictions, that is "kariah", where their fatwas are revered reflecting the geographical influence of local mosques. The geographical boundaries of kariahs, more specifically kariah masjids, depend on the influence of the masjid (mosque) and their *muftis*. But modernizing a structure of disparate kariah authority involves building a more Weberian rational structure populated by professionals. The emergence of urban *ulamas* is, in part, precipitated by an alliance between state elites and Shariah bureaucrats in cities, particularly

⁶ "Malaysia exposes Shariah scholars to jail for breaches", *Bloomberg*, 24 August 2013.

Kuala Lumpur, as Shariah professionals have been placed on state as well as IFIs' payrolls. One informant, on the Shariah committee of HSBC bank, summarizes the geography of professionalization as follows:

“So we have fourteen states, and each state has its own *muftis*. So one *mufti* may advise five to six banks. After 2008, the government advised Bank Negara Malaysia to include Shariah professional experts to become more involved in Islamic finance. Since then, each bank has its own Shariah units, that is committees.” (Interview, 15 February 2015)

Shariah professionals in IFIs and government administration are rewarded with higher salaries, power, status and mobility especially those recruited to federal agencies in charge of administering Shariah compliance. They are more cosmopolitan than their rural counterparts actively codifying legal discourses and engaging in Islamic legal theorization at ISRA. Three of our Shariah informants are reputable scholars at ISRA whose publications are cited here. Two of them are involved in documenting Shariah judicial precedents including the cases examined in the next section. Part of the advisors' power lies not only in drafting Shariah contracts, but transforming Shariah theory and rulings into legal norms, and assessing or monitoring IFIs' financial affairs. Script production is a legal technique that reduces Shariah risks, and such scripts are expected to meet norms of accountability like financial reporting in the conventional sector.

It is, however, the establishment of Shariah Advisory Council (SAC) that edges the country towards Weber's notion of legal order. As the above quote suggests, relying on state *muftis* often produces 'fatwa-shopping' where IFIs can graze different states for a ruling that is favorable to their activity. Decoupling a decentered system of Shariah mediation at the state level, and, dominance of common law in Islamic commercial judgments creates a centralized Shariah authority that supercedes offices at the state level. Responsibility for mediation lies in

the SAC which serves as the ultimate Shariah body at the federal level with the power to educate and inform civil court deliberations. Nine of the ten members of SAC are Shariah jurists and *ulamas* holding at the minimum, a bachelor degree in Shariah. Six of them possess post-graduate degrees (two Masters and four doctorates) in Islamic law or Shariah, and two of them have published books on Shariah's relationship with the industry. The tenth member is not Shariah credentialed but a federal judge at the Court of Appeal. As we argue below, inclusion of a civil legal agent is not accidental; it is central to the translation of knowledge between secular and religious knowledge systems.

The two-tier governance level enables the federal reclaiming of Shariah values that historically have been debated at the state level. One informant describes such a centripetal process as offering "legal certainty", and expects countries in the Middle East to emulate the model:

"I think the Middle East is adapting many things that we are doing. We have a Central Shariah Board. They don't have but I think there are quite a number of regulators who are talking that they might have the same approach. But these people will never say they are taking it from Malaysia." (Interview, 17 April 2014)

The geographical consolidation of Shariah commits IFIs, state *muftis* and *ulamas* as well as civil adjudicators to the power of a bureaucratic super-agency that is supported by federal statutes. The government also set up a separate division, the Muamalat Court, in the commercial arm of the High Courts in Kuala Lumpur where most financial disputes are litigated. While the Muamalat Court is not a separate legal system, its cases are confined to Islamic commercial issues. More importantly, its decisions are sensitive to SAC's Shariah rulings, allowing the latter's scripts to become an important instrument of rationality.

Rescaling Shariah Legal Norms

Legal actors in the neoliberal environment are generally associated with the conceiving, drafting and enforcing of legal texts that protect property rights and certainty of exchange. Law here is presented as rational, universal, and part of the claim to modernity. Such an approach to law is, however, criticized by proponents of Islamic finance. Shariah law purports to govern an economy that cultivates human virtues of social justice and equality (e.g. poverty alleviation). Exchanges that involve interest (*riba*) and excessive gambling, or the commodification of cultural vices such as prostitution and alcohol are forbidden⁷. In this section, we show that Shariah professionals and jurists are asserting their role in secular lawmaking, backed by political support. Law-in-practice in Islamic finance has seen the gradual insertion of Shariah scripts and the norms of ethics they articulate in the secular judicial process.

Historically, Malaysia inherited a colonial system based on English common law; the Shariah legal system runs parallel to the common law system. Until recently, decisions made at the Shariah courts could be overridden by the civil courts which are responsible for implementing federal law. British colonial officers delegated Islamic rulings to the Sultans of each state but retained authority over the civil courts; this spatial hierarchy of legal authority persists today. Thus, punishments meted out by the Shariah court cannot exceed fines or imprisonment sentences of the civil courts. Subordination of the Shariah legal system is not unique to Malaysia. In many Gulf (GCC) countries, Shariah courts are well-equipped to handle personal and family law but commercial transactions, particularly financial transactions, continue

⁷ Kuran (2012) argues that eighteenth century European financiers were also concerned with the ethics of interest but these concerns dissipated with the dominance of market reasoning provided by Adam Smith and David Hume. He suggests that Islam's failure to transform Shariah principles around the banning of interest contributed to the lack of financial growth in the Middle East and subsequent economic divergence from the West.

to draw on English or New York State law. In Saudi Arabia, for example, the legal system is Islamic, conferring ultimate judicial authority on its Shariah Court, yet its Shariah legal system provides little guidance on *riba*. This has encouraged IFIs to conduct their activities like conventional banks (Hasan 2012). One reason for the popularity of English common law is its flexibility. Referring to common law, a former governor of Saudi Arabia's monetary agency declared most financial transactions to be "permissible" and "Someone has to tell me if and how it contravenes [Islam] explicitly" (cited from Colon 2012: 416). This "someone", will be a Shariah translator who mediates between two systems of meaning and knowledge.

To give an example, we can consider the financing of property and real estate, which is relatively popular in Islamic banking. Many transactions are offered through an *Al-Bai Bithman Ajil* (BBA) facility. Under BBA, the bank purchases an asset, say property, for a client and sells the property back to the client with a pre-determined profit. The client then pays the borrowed sum and the profit to the bank in a series of installments. What happens in the event of a default of repayment by the client? Is the bank to recover the outstanding borrowed sum on the full term of the contract that includes the pre-determined profit? From the client's point of view, such an interpretation is onerous as the payment would be greater than under a conventional loan; in the latter, no interest is applied on the unexpired tenure of the loan.

In *Affin Bank Berhad v Zulkifli bin Abdullah* [2006, 1 CLJ 438]; [2006, 3 MLJ 67]⁸, the High Court judge Abdul Wahab Patail applied the principle of equity, reasoning that the defendant would have been better off with a conventional loan bearing *riba*. Here, English

⁸ Judicial decisions are well-recorded. The report of this case for example is hosted in the Chief Registrar's office of the Court of Appeal under No. W-02-918-2008 [2009] MYCA 47. Other sources include the *Malayan Law Journal* (MLJ) and *Current Law Journal* (CLJ). Following Cornell Law School's case citations, the parties' names are italicized and listed first followed by date and volume of publication, title of journal and the first page number.

common law was applied with the Justice treating the contract as a loan rather than a sale. A sale is permissible in Shariah; on the other hand, *riba* is implicated in a loan. The ruling created consternation among Shariah lawyers and jurists who worried that issues of Shariah ethics and morality associated with *riba* were disregarded in the judicial decision-making process (Hasan and Asutay 2011; Markom et al 2013). It raises questions about the ability of the civil court to accommodate Shariah (Buang 2007).

The ruling also unsettled IFIs as 70% of Malaysian home financing is made using BBA contracts. Bank Islam Malaysia Berhad (BIMB) filed twelve separate appeals to the Court of Appeal because the ruling adversely affected its ability to recover pre-determined profits from its defaulters under BBA contracts. In one of the appeals, *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals* [2009, 6 CLJ 22]; [2009, 6 MLJ 839], the Court of Appeal overturned Justice Abdul Wahab Patail's ruling concluding that BBA was a sale contract that should not be compared with a conventional loan. Notably, the Appeal Court disagreed with the High Court's interpretation of the "religion of Islam". Earlier, Justice Abdul Wahab Patail had questioned the validity of the BBA facility because its jurisprudence principles were based largely on the *Shafi'i* school, even though there are four Sunni schools of jurisprudence. One prominent Shariah interviewee, the president of an Islamic University, observed that Malaysian Shariah scholars' proclivity towards *Shafi'i* fiqh compared to the more conservative *Hanbali* of Saudi Arabia reflects the country's history of Islamic law and the latter's validation among the local population. But as financial transactions' complexity increases and more disputes are being litigated, juristic deliberations are also maturing and drawing from other schools. In this case, the Court of Appeal upheld the validity of BBA and decided that the secular court was in no

position to define Islam or to determine the validity of Shariah jurisprudence given the existence of SAC.

Perhaps the best example of the court's turn to Shariah jurist translators for substantive interpretations is the case of *Tan Sri Abdul Khalid bin Ibrahim v Bank of Islam Malaysia Bhd* [2009, 6 MLJ 416]; [2012, 7 MLJ 597]; [2013, 4 CLJ 794]. This case is both long-drawn and complex; below we summarize the main highlights. The bank BIMB had provided two *Murabaha*⁹ facilities to Tan Sri Khalid to acquire and redeem a company's shares that were subsequently restructured into a BBA agreement. Having defaulted on the *Murabaha* agreements previously, Tan Sri Khalid defaulted once again on the first installment of the BBA leading BIMB to apply for a summary judgment. In May of 2007, Tan Sri Khalid sued BIMB alleging that the BBA facility was a *riba*-bearing loan and inconsistent with Islam. As both the purchase and sale of the shares had occurred at the same time - raising the possibility that a sale transaction may not have occurred - the bank was alleged to be non-Shariah compliant. Two weeks later, BIMB filed a separate suit to recover its payment. Both suits were consolidated in 2008 (thereafter "Khalid case").

At this point, it is important to highlight the chronology of events. The 1958 Central Bank Act and its amendment in 2003, offered the civil court considerable discretionary power to consult with Shariah lawyers and jurists concerning Shariah matters. This changed with the enactment of the Central Bank Act (CBA) 2009 which stated that the court or arbitrator shall

⁹ Strictly speaking, *Murabaha* is a concept than a mode of financing. It conceptualizes a form of sale with a mark up price. But *murabaha* may be realized as a financing mode if the sale involves a commodity or trade. BBA uses the *murabaha* concept for a sale contract but BBA may also draw from other concepts. Specifically, BBA is popularly used to finance house purchases but it may also be used for the purchase of shares or for educational purpose.

“refer such question [i.e. Shariah matters] to the Shariah Advisory Council for its ruling” (section 56 1b), and the ruling “shall be binding” on the court or arbitrator (section 57). The High Court judge was Datuk Rohana Yusuf. Deciding the Khalid case at a time before CBA 2009 came into effect, she became the first judge to make an enquiry to the SAC for a ruling of BBA stating that: “there will always be differences in views and opinions in Shariah, particularly in the area of *muamalah*...” [2010, 4 CLJ 388] (see also Markom and Yaacob, 2012). In rendering the statement, the judge understood the juristic nature of Shariah law and the relevance of SAC rulings even though it was within her discretion not to do so. SAC’s secretariat confirmed that the BBA Agreement was permissible. Justice Rohana Yusuf’s role warrants some attention: credentialed in Shariah in addition to common law, she opened the court’s jurisdictional space to SAC resolution.

Unhappy with the judgment, Tan Sri Khalid appealed to the Court of Appeal which agreed to a High Court trial under judge Mohd Zawawi bin Salleh in 2011. At the same time, given Tan Sri Khalid’s charge that the BBA was not Shariah compliant, BIMB requested that the court refer to SAC for its ruling on BBA, noting that its own in-house Shariah committee had approved the facility. Tan Sri Khalid objected to the SAC consultation on grounds that sections 56 and 57 of the newly enacted CBA 2009 could not be applied retrospectively. More importantly, he contended that both sections contravened the Federal Constitution; hence SAC rulings were unconstitutional and would usurp the functions of the civil courts. Justice Mohd Zawawi bin Salleh ruled otherwise, concluding that sections 56 and 57 are “valid federal law” and may be invoked retrospectively as a matter of procedure. Further, he reinforced the constitutional role of SAC noting the limits of secular legal expertise:

“Even if expert evidence is allowed to be given in court to explain or clarify any point of law relating to Islamic banking, civil judges would be in a difficult

situation to decide because the divergence of opinions among Islamic jurists and scholars to which the opposing experts might have and which they will urge the court to adopt may be so complex to enable civil judges to make an independent determination of Shariah principles.” (*Malayan Law Journal* (2015): lii).

Tan Sri Khalid appealed against the decision but the Court of Appeal upheld Justice Mohd Zawawi bin Salleh’s rulings including the constitutionality of SAC. Both Justices Rohana Yusuf and Mohd Zawawi bin Salleh saw the SAC as an important arbiter of Shariah (Markom and Yaakub 2012). Justice Rohana Yusuf, for instance, had been a Muamalat Court judge while Justice Mohd Zawawi bin Salleh had served as deputy head of the Shariah Advisory Division at the Attorney General’s Chamber. Their rulings, particularly those of Justice Mohd Zawawi bin Salleh’s, have been described to be “perhaps the best judgment of a Malaysian [civil] court on Islamic banking to date” by a former Chief Justice (Mohamad and Trakic 2013: 38).

Lawmaking need not be confined to Shariah credentialed legal agents. Moustafa (2013) asserts that Muslim civil lawyers with no knowledge of Shariah are able to operate in Malaysia’s “Anglo-Muslim law” because the application of English common law to Malaysian Muslims has historically carried some element of Islamic jurisprudence. Former Chief Justice Tun Abdul Hamid Mohamad, for example, holds a bachelor degree in English common law, served on the High Court, Court of Appeal and Federal Court before becoming Chief Justice. He was also judge of the Shariah Court of Appeal in Penang and a former member of the SAC. In assessing Malaysia’s legal framework for global Islamic finance, he argues,

“...lawyers play a very important role in finance, conventional or Islamic ...we have an advantage. Most of our lawyers who specialize in Islamic finance are Muslims. The faith factor is there.” (Bank Negara 2013, p. 94).

The above quote is consistent with Moustafa’s point that Muslim civil lawyers carry some authority in mediating Islamic financial disputes through their familiarity with religious norms.

The Chief Justice's translation between the two systems of knowledge has earned him an honorary degree in Shariah. Translation may be exemplified in his chairing of the Islamic Finance Law Harmonization Committee. The committee was formed to "position Malaysia as the reference law for International Islamic financial transactions" (Bank Negara Malaysia 2013). To better harmonize civil and Shariah legal spaces, the committee endorsed four amendments to the 1980 Rules of the High Court (RHC) and Subordinate Court Rules (SCR). One amendment on the judgment of debts¹⁰ (Order 42 Rule 12) took *riba* into consideration (Order 42 Rule 12A and Rule 12B). Tun Abdul Hamid Mohamad's membership at the SAC soon after completing his term as Chief Justice enhanced his translational role here: the SAC issued a favorable resolution regarding judgment debts that allows creditors (i.e. IFIs) to recover debt and expenses between judgment execution to settlement. This resolution, in turn, helped to legitimize the committee's amendments by inserting Shariah principles of *tawidh* (compensation) and *gharamah* (penalty) to civil legal scripts. Nonetheless, rescaling Shariah norms could not have happened without the parallel institutional building that elevated and modernized Shariah.

Re-centering Shariah Authority

If law represents a legal space of power-conferring norms, then Shariah norms are gaining a place in Malaysia's juridical constitution of market norms. Shariah law acquires a material character through an identifiable set of scripts that encode its values. Those responsible for making Shariah jurisprudence, such as the ten members of SAC, are charged with powers of extraordinary juristic deliberations. The SAC's power lies in its role as the ultimate arbiter.

¹⁰ Under the court rules, a judge can determine up to 8% of interest to be paid to a conventional bank from the day-of-judgment to settlement of debt. The amendments allow IFIs to obtain compensation based on *tawidh*.

Juristic outcomes are documented in *Shariah Resolutions in Islamic Finance* (Bank Negara Malaysia 2010) and they are a “fatwa-based compilation”. This publication captures legal labor of formal text assembly by recording *ijtihad* consensus among the ten members. It is available online. In effect *Shariah Resolutions* codifies the permissibility of Shariah transactions through rationalization of various Shariah collaterals or contracts for the market. Rationalization is supported by reasoning from relevant fiqh schools; at times *hadiths* are quoted directly. It is noteworthy that the second edition of *Shariah Resolutions* includes Islamic jurisprudence from non-*Shafi'i* schools. The publication resonates with Halliday and Carruthers’ (2009) account of international bankruptcy lawmaking wherein published guidelines and templates of international organizations contribute to legal norm production and circulation. *Shariah Resolutions* frames the content of what is ethically permissible. The resolutions do not carry the power of a statute, but they are supported by statutes that help insert Shariah consensus into judicial deliberation. *Shariah Resolutions* demonstrates the influence of softer scripts in mapping the material terrain of Shariah legal norms.

Two federal statutes have significantly empowered SACs. As described previously, the 2009 Central Banking Act renders SAC resolutions binding in the civil court. The second statute, the 2013 Islamic Financial Services Act (IFSA), empowers the Central Bank Negara to oversee regulatory requirements that ensure Shariah compliance of IFIs, and to specify the functions of the board of directors and the Shariah committee. More importantly, the statute creates a penal space that criminalizes non-compliance with Shariah; non-compliance can result in imprisonment of up to eight years, a fine not exceeding M\$25 million, or, both (Section 28 (5)). In associating non-Shariah compliance with criminal behavior, IFSA 2013 objectivizes Shariah

professional jurists' exercise of power that strengthens Malaysia's ambition to be a global Islamic financial center. This was noted by the Shariah advisor of an export-import bank:

“This is the strongest act in the world. Even the Middle Eastern scholars, whenever they come to Malaysia for a meeting, like Dr. Hamid Hassan, they say that Malaysia's law on Islamic finance is the best in the world.” (Interview, 9 February 2015)

Ratification of both Acts enables rescaled Shariah scripts to become the solutions for regulating Islamic transactions. As textual commands backed by statutory power, *Shariah Resolutions* encourages legal interpretations that capture the aspirations of SAC creators that adjudicate on how Shariah values should guide the financial community. More importantly, Malaysian Shariah jurists see themselves at the forefront of mediating and resolving conflicting fatwas from around the world. As two prominent Shariah informants said:

“I consult with people in Southeast Asia and Middle East since I am attached to Bank Negara and ISRA ... I do resolutions of fatwas from all around the world. Only Malaysia does this.” (Interview, 30 May 2013)

“You can actually buy from BNM a book called the Resolutions of the SAC, and so they would say, ‘where was the issue, what was the issue with the decision and why it was decided that way?’ So everything is laid out clear for everybody to see. The students of Islamic finance can look at that and understand the logic behind those things. But that only happens in Malaysia. I know of Shariah scholars elsewhere - companies approach them for a decision and they give a yes-no answer, and they don't explain. And when asked to explain, they say the decision was arrived and things like that.” (Interview, 6 June 2012)

To the extent that Shariah is now relevant in shaping IFIs' relational exchanges, Malaysia is advancing a model that renders Shariah relevant for shaping market relations. Indeed the country is contemplating going one step further, that is, transforming the Islamic economy from one that is Shariah-compliant to one that is Shariah-based (Interview, 4 July 2012).

Conclusion

This article has highlighted, first, the role of Shariah jurists in financial market formation through an analysis of lawmaking in Malaysia's Islamic finance. Part of Malaysia's development as an international center of Islamic finances rests on its critique of neoliberal practices thought to be devoid of moral, altruistic and ethical quality and obligation. Shariah capitalism by contrast, whether viewed as potentially progressive or not, advocates a moral space where personhood formation includes the promise of meaningful human relations and altruistic obligations. For this reason, the Malaysian government sees its citizens, particularly the Malay, as being entangled in economic activity that produces pious subjects. A common view among Shariah scholars is that financial scandals are aided by neoliberal lawyers who help design highly speculative financial instruments. Yet the labor of Shariah involves transformation of both moral and market risks into legal pledges. Social exchanges that define personhood become the negotiation of material pledges that are treated as properties as the BBA contracts have shown. In turn, a process of "dereligionization" appears to be occurring (Mohamad and Saravanamuttu, 2015).

Second, drawing on Islamic financial litigation and interviews with Shariah scholars, we have demonstrated that market governance institutions are intrinsically geographical. Legal spaces and professionalized juridical processes have been rescaled to enhance the mobility of Shariah expertise transnationally. There is something of a paradox here in that the Malaysian model is being advanced through a centralizing spatial framing that favors the distancing of social relations in two ways: (i) a science of economic management and governance, and (ii) the entanglement of market rationalities and Islamic morality through appeals to forms of neoliberal accountability that in effect collateralize Shariah values (see also Rudnyckyj 2014). Lawmaking privileges the agency of urban Shariah professionals and translators. Shariah translators

intermediate between knowledge systems and transform them into portable institutional routines and norms that facilitate their insertion to secular legal space. Production of legal scripts replaces spatially varied human agency with institutional agency that reinforces market logics. Indeed one advantage of expressing Shariah norms through the civil court rather than a separate religious legal system is that common law institutions generate a sense of market certainty and transparency through their legal scripts. Common law promotes the recording of judicial precedents because the activity of text assembly captures rules, doctrines or legislative intent that may be regarded as evidence of the law (Hamburger 2008). Such an activity is also observed among Shariah scholars and jurists whose codification of juristic deliberations and judgments including the publication of *Shariah Resolutions* contributes to the development of authoritative templates from which rules and guidelines may be produced. They demonstrate the intimacy of Shariah labor to the process of Islamic financial lawmaking.

In sum, the Malaysian model represents a juridical project that facilitates the global projection of its Shariah law. Lawmaking in Islamic finance does not so much represent a retreat from neoliberal influence but a re-ordering of market values and norms. Indeed the Malaysian model relies on the development of rational legal techniques to support market orderliness. Such re-ordering is expected to reinforce Malaysia's international stature in Islamic finance by transforming moral values into insurable properties. Malaysia's juridical project is associated with the construction of Shariah collateralization that may be seen to be a form of stabilizing presence against the destabilizing effect of neoliberal financial forces.

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