Intimacy Under Surveillance: Illicit Sexuality, Moral Policing, and the State in Contemporary Malaysia

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Abstract

Malaysia’s Malay-Muslim majority adheres to heteronormative forms of sexuality that recognise marriage as the only means of securing access to lawful sexual intimacy. Islam, Malay customs (adat), and the Malaysian state impose strict sanctions on pre- and extramarital intimacy in its Syariah criminal laws. A Vice Prevention Unit responsible for moral policing is legally authorised to arrest couples who violate Islamic rules of behaviour, including sexual offences such as khalwat (illicit proximity)—a crime of passion punishable by a fine and/or imprisonment. This article compares two khalwat trials in Kota Bharu and Kuala Lumpur’s Syariah court to illustrate what Peletz (2002) calls the judges’ “cultural logic of judicial reasoning”. In these trials, Syariah judges extend beyond a narrowed focus on gender to also consider cultural understandings of age, profession, family circumstances, and marital status, thus reproducing Malay adat understandings of intimacy, marriage, and personhood. In an effort to steer young couples away from forbidden sexual temptations, the Malaysian state liberalises access to marriage by recognising cross-border marriages contracted in Southern Thailand, offering financial incentives to young couples intending to marry and defending existing legal provisions allowing the marriage of minors. The Malaysian state’s mix of punitive, preventative, and pro-marriage policies, I suggest, are various ways of surveilling sexuality by bringing uncontrolled desires under the purview of matrimony, where it may find its lawful expression.
Keywords

intimacy – marriage – polygamy – Syariah – khalwat – Islamic law – Malaysia – Southeast Asia

Introduction: Marriage Is the Answer

Sitting at the back of one of the courtrooms of Kuala Lumpur’s Syariah court, I watched curiously as a young Malay woman in her 20s entered the hall and walked towards the defendant’s stand with her head bowed low. She was dressed in the traditional Malay baju kurung (a knee-length tunic with a long skirt), paired with a plain tudung (headscarf) modestly covering her hair. The judge’s assistant (pembantu Syariah) read out the charges against her: Religious Enforcement Officers (Pegawai Penguatkuasa Agama) conducting a late-night raid had found her in a locked budget hotel room with a man who was neither her lawful husband nor her relative (lelaki bukan muhrim).1 The state of undress and disarray the couple were found in during the raid constituted sufficient evidence for the crime of khalwat—defined in the Syariah Criminal Offences (Federal Territories) Act 1997 as being in illicit proximity with a member of the opposite sex, in “any secluded place,” in a manner that “may give rise to suspicion.” Under section 27 of this Act, khalwat is an offence punishable by a fine of up to RM 3,000, imprisonment not exceeding two years, or both. The couple were arrested by the officers and soon summoned to the Syariah court to face the charges of khalwat from the prosecutor. Although both of them received the court summons, the male accused (yang kena tuduh) could not be tracked down by the police, even with an arrest warrant, leaving only the woman to face the charges in court.2

The defendant pleaded guilty to the charge of khalwat. During the course of the trial, the judge inquired regarding her family circumstances: her parents were divorced, and her single mother received monthly financial support from the Ministry of Social Welfare (Jabatan Kebajikan Masyarakat). The defendant herself, who, at the time of arrest, was a bank employee earning RM 1,800 (£300) per month, now worked at McDonald’s. It was unclear whether this career change was a direct consequence of her recent khalwat arrest.

1 This raid was part of “Ops Bajet” (“Operation Budget”), in which religious enforcement officers raid budget hotels to arrest prostitutes or unmarried couples.
2 If an accused refuses to appear for a trial in court after three summons, the court can issue an arrest warrant (waran tangkap).
Nevertheless, the judge certainly interpreted this career regression as a form of moral retribution from God for her crime, stating, “If you are ungrateful [to God], He will retract his blessings” (Kalau tak bersyukur, Tuhan akan tarik balik nikmat). Then he asked her about her age and marital status. She replied that she was 28 years old and had never married. “Still unmarried?” (Belum nikah lagi?), the judge inquired, with a surprise that barely disguised his disapproval. He admonished her for delaying marriage, saying:

You should be married already, that’s why we tell young people to marry early. A man and a woman together in a hotel room, doing what only married couples should be doing … [speaks in a tone of disapproval]. You’re lucky you’re only charged with khalwat, nothing more. At 28, you are an adult; people nowadays are married already by 20 or 21. Why would you delay [marriage]? Just get married. If you’re married, you can even sleep [together] on the hotel roof, we would not care. […] Whatever you want to do, think a thousand times first.

Now in tears, the defendant acquiesced, and pledged to steer clear from the path of sin in the future.

This article explores the state surveillance and judicial apparatuses responsible for moral policing in contemporary Malaysia. Drawing on two khalwat trials I observed in two different Syariah courts—one in the capital city of Kuala Lumpur; the other in Kota Bharu, the capital of the northeastern state of Kelantan—I illustrate the severe legal and social consequences for Muslims who transgress cultural, religious, and legal boundaries on heteronormative sexual intimacy. This systematic surveillance of intimacy by the state leaves couples with little room for sexual experimentation outside the confines of matrimony, thus reinforcing marriage as the only means for accessing physical and sexual intimacy that is “halal” (permissible) in the eyes of the Islam, Malay adat (generally translated as “culture and traditions”), and the Malaysian state.

This paper has two major aims. First, I unpack the khalwat trials to understand the cooperative and collaborative relationship between different federal and state-level bureaucracies administering Islam in enforcing the Qur’anic injunction of amar makruf, nahi mungkar (to enjoin the good, and to forbid evil) on the ground. I focus in particular on the Syariah judges’ “cultural logic of judicial reasoning,” to borrow Michael Peletz’s (2002, 4) expression, in meting out punishments for khalwat, which is tried in Malaysian Syariah courts as ta’zir offences—moral crimes whose punishments have not been set in the key texts of Islamic law. Judges therefore exercise a wide discretionary power for deciding the appropriate penalties for khalwat. But, more important than the
penalties themselves are the admonishments given by the judge, who draw on multiple sources of knowledge and traditions that are not exclusively “Islamic” but may also derive from Malay cultural traditions and sensibilities referred to as adat.

*Adat* here is understood to mean Malays’ customary laws and traditions encompassing a wide range of prescribed codes of ethics and behaviour deemed legitimate or appropriate in particular circumstances. *Adat* carries a significant degree of moral force in Malay society, such that to act or to think in a “correct” or “proper” way is to conduct oneself in accordance with the demands of *adat* (Peletz 2002, 6; Karim 1992, 15). *Adat* is, in and of itself, a “way of life,” or “cara hidup” (Nagata 1974, 94). It is understood by Malays to comprise the banalities of everyday life, ranging from their style of dress to the proper etiquette of speech and conduct (*budi bahasa, tata tertib*)—in other words, everything that they “think, believe, and practice” (ibid.).

Marriage is one of the key institutions in *adat* that are central to Malays’ access to intimacy and social reproduction. Marriage in Malay society is a crucial rite of passage that accords one ritual power and the accompanying elevated status to adulthood (Karim 1992, 131). For this reason, men and women’s “central” or “peripheral” status in Malay society is defined by their “matrimonial rank,” and both young men and women are typically marginalised by virtue of their age and premarital status rather than because of their gender. With marriage and, subsequently, parenthood, one acquires prestige and seniority (Peletz 1996, 304). This highlights the importance of marriage in the construction of personhood, social adulthood, and, more specifically, adult womanhood for Malays: to be considered as a “full-fledged adult,” the individual is expected to engage in a conjugal contract and to bear or father children; for women, they must also be defined as “a particular man’s wife (or ex-wife or widow)” and “the mother of a particular man’s children” (Peletz 1996, 304).

Women are under greater social and cultural expectation to marry, which, in a sexually conservative society such as Malaysia, is also the only way they may access motherhood. Malays have been described by Maila Stivens (1996, 200) to be “pronatalist”—it is unnatural, indeed frowned upon, for women to reject their reproductive and nurturing duties as mothers. Many risk subliminal and, at times, overt censure from their elders for prioritising their education or careers over building a hearth. These social expectations to marry—heavier for women than for men—explain why *khalwat* presents a serious religious and cultural transgression for Malays: should marriage cease to be as central an institution to Malays, the very nature and process of social reproduction itself is at stake. *Khalwat* trials illustrate well this cultural emphasis on marriage (and, by contrast, the moral anxieties of delayed marriage), as judges’ interpretations of the defendants’ age, gender, profession, family circumstances, and
marital status are all intertwined with, and essentially reproduce, Malay adat understandings of intimacy, marriage, and personhood.

Second, I explore how this legal, cultural, and religious intolerance of pre- or extramarital sexual intimacy creates pressures for Muslims to marry before they may be intimate. In the trial above, the judge above emphasised that “khalwat can destroy [one’s] lineage (nasab or keturunan). It is an immoral act (perbuatan tidak bermoral).” Khalwat thus poses a serious moral, social, and religious threat, for it “leads [one] towards zina [adultery or illicit sexual intercourse]” (sudah mendekati zina), and can jeopardise the purity and perpetuation of the ummah (Muslim community). To protect the moral well-being of society, the state thus strongly proposes marriage as a preventative step to falling into sexual temptation, thus reinforcing the centrality of marriage as a cultural and religious mechanism for “halalising” (that is, to render permissible) desires that are otherwise haram (forbidden).

The state’s attempts to prevent zina (unlawful sexual intercourse)—and all that precedes it—led to the enforcement of various pro-marriage policies, some of which directly challenge and circumvent existing provisions for marriage in the Malaysian Islamic Family Law. This liberalisation of access to marriage demonstrates the state’s apprehension towards unsupervised intimacy and ungovernable desires, which must be “domesticated” through matrimony. I argue that this sanctity of marriage as the only gateway for accessing “halal” intimacy is another form of surveilling sexuality by ensuring that young couples—especially women—are drawn into matrimony, where they may be protected from unlawful temptations that may compromise the moral and social reproduction of the ummah.

This article is based on long-term, multi-sited ethnographic fieldwork conducted between 2014 and 2015 in Southern Thailand (primarily, Hat Yai and Songkhla) and Malaysia (in the cities of Kota Bharu, Shah Alam, and Kuala Lumpur). During my fieldwork, I conducted interviews with women I met in Malaysian Syariah courts, who were appealing to the law for various reasons: to register their marriage contracted in Thailand; to apply for a divorce; to secure a court order for maintenance from the husband; or to negotiate for child custody. I supplemented these interviews with archival research into the records of the Kota Bharu and Kuala Lumpur Syariah courts on marriage registration, polygyny applications, and divorce cases, as well as with observations in court on marriage registration, divorce, inheritance, and khalwat proceedings in the same court.³ Beyond the court, I also conducted fieldwork with other branches

³ Polygyny is a type of polygamy (multiple marriage) in which one man is married to multiple wives. As polygyny is the only form of polygamy allowed in the Malaysian Syariah system, I may use the two terms interchangeably.
of the Islamic bureaucracy, such as Kelantan’s Department of Religious Affairs (Jabatan Hal Ehwal Agama Islam Kelantan, JAHEAIK), under which the Vice Prevention Unit (Unit Pencegah Maksiat) discussed in this article operates.

The first part of this paper offers a political and historical context to explain the emergence of a highly unique and complex Islamic bureaucracy governing an all-encompassing Syariah system in Malaysia. Next, I discuss the state apparatuses and constitutional enactments that govern moral policing of Muslims. This is followed by an examination of court trials on khalwat cases I observed and a reflection on moral judgment and juridical reasoning by the judges presiding over these cases. I then illustrate how a punitive approach to illicit sexuality by the state leads to the pursuit of marriage through various avenues such as eloping to Thailand, which is legally recognised by the Malaysian state. This phenomenon is but one way the state seeks to bring potentially sinful sexual desires under the purview of matrimony through many more pro-marriage policies and initiatives.

The Birth of Bureaucracy

Malaysia has a multi-ethnic and multireligious population of 32.5 million, with the Malay-Muslim majority constituting nearly 60 percent of its people (Current Population Estimates, Malaysia, 2018). Islam is recognised in Article 3 (1) of the Federal Constitution of Malaysia, first issued in 1957 upon independence from the British, as “the official religion of the Federation.” Besides this, several articles in the constitution, which was drafted in close consultation with the British in the period immediately prior to independence, explicitly allow the state to fully undertake the responsibility of promulgating and administering Islam. Article 12 (2) of the Constitution, for example, states that:

Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

Article 12 (2) supports the freedom of other religions in Malaysia. More importantly, it asserts that it is fully in line with the constitution for the state to
financially invest in various Islamisation initiatives to incorporate Islam at every level of society, from government policies to, as we see in the case of moral policing, its Muslim citizens’ intimate engagements behind closed doors. Critical to the state’s Islamisation mission is the gradual establishment of a powerful Islamic bureaucracy, comprising of ministries, government departments, and a department of religious affairs, each specialising in the interpretation of textual sources, the formulation and enforcement of Syariah legislation, and the inculcation of Islamic ideals, values, and beliefs on the ground (Müller and Steiner 2018).

The origins of the Malaysian Islamic bureaucracy today are traceable to British colonial rule in what was then Malaya. The signing of the Treaty of Pangkor in 1874 was often identified as the turning point in Malayan history: it allowed the British to firmly entrench their political authority on Malayan soil—a victory gained by forming a bargain guaranteeing the Malay sultans the role of “guardians and arbiters of religion and custom” (Hussin 2007, 765; Abdul Hamid 2009, 158). The British facilitated this new role by introducing significant reforms in Islamic religious administration and judicial matters through the establishment of the Council of Islamic Affairs (Majlis Agama Islam) and Malay Customs (Majlis Hal Ehwal Islam dan ‘Adat Melayu). This was a strategic effort to restrict the implementation of Islamic law to matters pertaining to family law, and to then usher in their own secular legal system, thus beginning the process of separating the “church” (that is, Islam) from the “State” (Shamsul 2005, 459).

The dominant legal system in nineteenth-century colonial Malaya was English common law. Nevertheless, the British did allow for “Islamic” law to be applied to Muslims in the domain of personal law, particularly in matters concerning marriage, divorce, inheritance, and maintenance (Syed Ahmad 2012, 188). In 1880, the British issued the Muhammadan Marriage Ordinance to regulate Muslim family law, and by 1900, Muslim courts were established for the enforcement of this law (Moustafa 2014, 157). Though these Ecclesiastical Courts—as the Muslim Courts were then known by the British—formed part of the Islamic judiciary, the rulings they produced were still subject to appeal in the High Courts, which practised English common law (ibid.). They also followed Western-style judicial procedures that were adopted directly from the British legal tradition, creating a hybrid legal system that was neither entirely Islamic nor fully English (Roff 2009, 189). These courts not only administered personal law cases pertaining to marriage, divorce, and property inheritance; they were also concerned with “breaches of the moral law and ritual observance,” overseen by a Hakim who “acted as judge in what seems to have been primarily a criminal court, in which a mixture of Islamic and Malay customary (adat) law was administered” (ibid., 183).
In the postcolonial period, these Councils of Islamic Affairs and Islamic courts have since evolved into a multinodal network of state and federal-level institutions, whose form, function, political influence, and infrastructure far surpass their modest origins. Between 1981 and 2002, under the rule of the then prime minister, Mahathir Mohamad, the state launched various Islamisation policies that were partly a political strategy to “out-Islamise” the opposition Islamic party, PAS (Liow 2007, 167), and also to “legitimate itself as Islamic” (Othman 2003, 124) to the Malay-Muslim majority. Under Mahathir, this structural expansion was undertaken in strategic ways, transforming this entity into what is recognised by Steiner (2018, 47) to be the most elaborate Islamic bureaucracy in South East Asia today.

The most important branch of the Malaysian Islamic bureaucracy is the Department of Islamic Development (Jabatan Kemajuan Islam Malaysia, or JAKIM), operating at the federal level directly under the prime minister’s office. JAKIM’s role is to standardise and synchronise the administration of Islam across the country; to ensure that the development of Islam and the country take place along parallel and complementary trajectories; and to strengthen transnational alliances with Islamic bureaucracies in neighbouring countries such as Thailand and Singapore, in the spirit of “[upholding] the tenets of Islam” (mempertabatkan syiar Islam) (JAKIM Berpelembagaan 2019). In addition to this, Islam is also administered independently in each state through the Council of Islamic Affairs and Department of Religious Affairs. Every state deploys its own Vice Prevention Unit responsible for moral policing, but all are united under a common mission: to prevent the evil and enjoin the good (amar makruf, nahi mungkar). As part of the state’s Islamisation initiatives, Islamic universities (International Islamic University of Malaysia), banks (Bank Islam), and research institutes (Institute for Islamic Understanding) were established to promote Islam in educational, financial, and public institutions.

The Islamic legal system (Syariah) was also upgraded to a position of authority comparable to its civil counterpart, which, since colonial times, had always been the privileged and superior law of the land (Buang 2007, 321). Prior to this, any decisions made by the Syariah courts could be overruled by the civil court through the Rule of High Courts 1980 and the Court of Adjudicature Act 1964 (Abdul Hamid 2009, 163). In 1988, Article 121 (1) of the Federal Constitution, which held that the High Court “shall have such jurisdiction and powers as may be conferred by or under federal law,” was amended to include clause 1A. This amendment stipulates that the High Courts of Malaya and of Sabah

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4 PAS stands for Parti se-Islam Malaysia, or the Pan-Malaysian Islamic Party.
and Sarawak “shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts,” meaning that the civil court could no longer overrule any rulings by the Syariah courts. This effectively brings Syariah courts and judges—at least, in theory—on par with their civil counterparts, effectively creating “jurisdictional dualism” in Malaysia’s legal system (Abdul Hamid 2009, 163).

With the Syariah courts occupying a more autonomous and fortified position, the state could finally work on standardising various laws, statutes, and procedures within the Syariah legal system. Prior to these legal reforms, Islamic family, personal, and criminal laws differed state by state. This created inconsistencies in critical areas of Islamic family law, such as polygyny applications, as some states implemented more lenient conditions than others for men to marry additional wives. The fragmented nature of Syariah law across the country allowed men to “shop around,” as Jones (1994, 282) puts it, for the state with the most lenient conditions for polygyny. In the 1980s and 1990s, the Islamic Family Law and Syariah Criminal Codes were redrafted; all states would eventually come to adopt a standardised template of these laws, with minor modifications here and there (Mohamad 2010a, 513–15). The standardisation of Syariah statutes and ordinances across the country was therefore considered quite progressive, as it led to a more uniformed regulation and execution of laws for Muslims.

Beyond the legal statutes and amendments, the Syariah courts themselves were important beneficiaries of the state’s Islamisation initiatives, which groomed them to be important institutions for the production of modern, but Muslim, citizens (Peletz 2002). Michael Peletz’s historical study of a Malaysian court in Rembau demonstrates the drastic transformation the court has undergone within a period of almost three decades. On a return visit to Rembau’s Syariah court after 25 years, Peletz not only found an entirely new and modernised court, with all the computers and software needed for an online system of Syariah “e-governance”; he also discerned in the judge a rather different set of “sentiments, dispositions [and] habitus informing his practice” (2015, 148). This upgraded court operated based on a Vision, Mission, and Objective (Visi, Misi, dan Objektif), promised to deliver “friendly, fair, timely and satisfactory service” to its clients, and held to protocols of the International Organisation for Standardisation (ISO). These dispositions towards “corporate-capitalist” and “administrative-managerial” values all suggest a heavy “corporatisation” of state Islamic institutions, which seeks to instil Islamic values in its Muslims citizens through rather “secularised” avenues (Peletz 2015, 148). As Syariah courts become more modernised and corporatised, legal procedures and rulings also become more formalised, drawing heavily on the civil-secular system but also
injecting a more explicitly Islamic form of logic and juridical reasoning. Having established all the bases for the proper governance of Islam through improving, expanding, and upgrading state-run Islamic institutions in society—in other words, doing all that enjoin the good (amar makruf)—Peletz (ibid., 155) argues that the focus of this Islamised state has now shifted to the forbidding of evil (nahi mungkar). In what follows, I examine how pre- and extramarital sexuality and illicit intimacy are treated in Syariah court as part of its “nahi mungkar” initiative, and the lessons they teach.

**Punishing the Passionate: Moral Policing in Malaysia**

In the early 1900s, Kelantan’s Council of Islamic Affairs was already deploying a moral police unit responsible for policing and penalising Muslims who failed to observe Friday prayers and fasting during Ramadhan, and those who committed khalwat offences (Roff 2009, 185). The policing of illicit intimacy and other moral transgressions considered sinful (berdosa) is a duty the Malaysian state undertakes even more seriously today. The purpose of moral policing is not only to uphold the values and tenets of Islam as faithfully as possible, but also to enforce appropriate measures for the “rationalisation, discipline, surveillance, and control” of its Muslim citizens (Peletz 2015, 147). The state’s authority to conduct moral policing derives from Article 12 of the Malaysian Constitution mentioned earlier, which makes it incumbent on the state “to provide or assist in providing instruction in the religion of Islam.” More specifically, Item 1 of the State List bestows the state with the power to deal with “Islamic law and personal and family law of persons professing the religion of Islam.” This also includes the power of the state in “the creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List” (Shamrahayu Aziz 2007, 112).

Moral policing in Malaysia is enforced by a state-funded “Syariah police” known as the Vice Prevention Unit. This Vice Prevention Unit (henceforth, VPU) is run by a team of about four to five (usually male) religious enforcement officers (pegawai penguatkuasa agama), who are bestowed with the legal and moral authority to arrest Muslims who transgress Islamic codes of behaviour listed in the Syariah Criminal Offences Act of each state. The Syariah Criminal Offences Act encompasses a wide range of transgressions that might tarnish the sanctity of Islam and jeopardise Muslims’ social, spiritual, and physical well-being. This includes:
(a) offences that harm a Muslim’s *aqidah* or faith (e.g., wrongful worship; making false claims to prophethood; propagating false doctrines);

(b) offences relating to the sanctity of the religion of Islam and its institution (e.g., insulting the religion of Islam; showing contempt for Qur’anic verses; disrespecting the fasting month of Ramadhan by selling food to Muslims or eating in public; alcohol consumption; gambling); and

(c) “miscellaneous offences” (e.g., giving false evidence, information, or statement; enticing a married woman; instigating a husband or a wife to neglect [marital] duties).

Relevant to our discussion here is the provision related to “offences relating to decency” in the Syariah Criminal Code Act 1997 (Federal Territories), comprising:

- Section 20: incest
- Section 21: prostitution
- Section 22: pimping (*muncikari*)
- Section 23: sexual intercourse out of wedlock
- Section 24: an act preparatory to sexual intercourse out of wedlock
- Section 25: anal intercourse (*liwat*)
- Section 26: sexual relations between women (*musahaqah*)
- Section 27: illicit proximity (*khalwat*)
- Section 28: male person impersonating as woman
- Section 29: indecent acts in public place

These prohibitions on any form of homosexual and pre-/extramarital heterosexual intimacy make “haram” offences in Islam also a serious legal offence punishable by the state. Although all states throughout Malaysia generally include similar offences in their Syariah Criminal Offences list, the punishment for the same crime can differ between states. For example, in the Federal Territories (including Kuala Lumpur), the maximum penalty for *khalwat* is a fine of RM 3,000, up to two years in prison, or both. In Kelantan, the penalties for the same crime are much lower, set at RM 2,000 in fines, a year of imprisonment, or both.

Under section 27 listed above, two people can be legally arrested for *khalwat* if they are found “in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts.” Note that this definition refers to “immoral,” not “sexual,” acts. Yet in court, this is taken to mean that the couple were, at the time of arrest, engaged in illicit sexual intimacy that may or may not have included unlawful sexual
intercourse (~zina~). Furthermore, what counts as “immoral” acts heavily depends on the subjective interpretations of the religious enforcement officers conducting the arrest. The rather loose and ambiguous definition of what constitutes ~khalwat~ thus makes it easier to prosecute couples on this charge, as opposed to other crimes such as ~zina~ (s. 23), for example, which would require the testimony of four male witnesses who actually observed the act of sexual penetration taking place.

In Kota Bharu, Kelantan, the VPU conducts moral policing through regular raids in budget hotels with a reputation for hosting couples on their sexual dalliances, and public “hot spots” where couples like to date, such as the beach and the local airport’s runway. The VPU also responds directly to complaints lodged by the general public. For example, if a neighbour happens to see a house being used as an illegal gambling den, or if a hotel receptionist checks in a couple who were not able to produce proof of marriage (such as a marriage card or ~kad nikah~), they may call the VPU’s hotline number or lodge a report at JAHEAIK’s office by filling in some forms. According to the religious enforcement officer I interviewed in Kota Bharu, these cooperative members of the public may also be rewarded with some financial remuneration for their “service to the community” with RM 20 (~£4~) to RM 30 (~£5.50~) for reporting incidences (or suspicions) of vice to the VPU. This makes moral policing not only a state-led effort from above but also a communal one operating at the grassroots level.

Moral policing in theory should follow a specific standard operating procedure (SOP) set out in the Syariah Criminal Procedures Act of each state, in order to ensure fair treatment of the couples under suspicion. When raiding hotels, religious enforcement officers should begin by asking management if there are any unmarried occupants in their establishment. Once the suspected rooms are identified, the VPU must first knock, give a courteous greeting (~beri salam~), and announce their presence and purpose. The couple should be given sufficient time to open the door of their own accord. If they refuse to cooperate, or attempt to escape from the premises, the VPU then may, with the help of the hotel management, use a master key to access the room or use more forceful means to this end. If, upon entry, the couple are found without proper clothing, with no other company in the room, and are unable to demonstrate proof of marriage, the VPU may take this as sufficient evidence that something

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5 ~Zina~ in the Malaysian context refers specifically to unlawful sexual intercourse between an unmarried couple.

6 If the tip was made anonymously, as was often the case, there would usually not be any financial reward, as the tipper would also refuse to be identified.
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suspiciously sinful and immoral has—or could have—taken place. The couple would be taken back to the VPU’s headquarters in JAHEAIK, where they remain under arrest until a bail is paid by a guarantor who promises to bring the couple to court on the day of their trial.

The VPU’s use of force to interject their presence in private spaces is seen as a violation of privacy by an outraged general public, who view this as a violation of the couples’ privacy. This right to forcefully enter these premises, however, is authorised by section 12 of the Syariah Criminal Procedures Act, which grants religious enforcement officers the legal authority to enter the premise without a warrant if there is sufficient reason to believe that any person to be arrested is located therein. Considering the wide dispensation of the law given to the VPU for the purposes of preventing, purging, and punishing vice through moral policing, it is unsurprising to see thousands of couples across the country succumbing to the state’s surveillance apparatus. The statistical prevalence of khalwat arrests varies state by state. For example, Kelantan’s Department of Religious Affairs recorded 345 khalwat arrests in 2012, followed by 455 arrests in 2013. The state of Selangor, which has almost four times the population of Kelantan reported even higher numbers of khalwat cases, with 1,783 arrests made in 2010 alone, and 1,734 in 2011 (Sinar Harian 2012).7 The bulk of these arrests reportedly involved the youth (belia) aged between 20 to 30. Suspicions of rampant sexuality among unmarried youth today are further exacerbated by increasing news of children born out of wedlock—between 2006 and 2010, 80,979 children of illegitimate status (anak tidak sah taraf) were born to (predominantly young) unmarried Malay mothers (Abdul Ghani et al. 2014, 617). The moral panic caused by this glaring evidence of uncontrolled and unsupervised sexuality adds a renewed vigor to the VPU’s mission to purge vice (membanteras maksiat) from Malaysian society.

Confronted with an increasing incidence of sexual criminal offences among Muslims, the state is compelled to take on the paternal task of disciplining errant citizens to ensure the production and protection of a secure and stable ummah. This is an endeavour the community is also equally invested in, as evident in the cooperation of concerned citizens who are quick to summon the Moral Police Unit on the suspicion of vice in their vicinity. Amar makruf, nahi mungkar is thus also a state project in community building through encouraging moral surveillance. Khalwat crimes are not only punished in a closed

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7 As of 2017, Kelantan had a population of 1.83 million; in the same year, Selangor had a population of 7.95 million. Department of Statistics Malaysia, “Kelantan,” 14 November 2019, available online at: https://www.dosm.gov.my/v1/index.php?r=column/cone&menu_id=RU84W GQxYkVPeVpodUZtTkpdnBmZz09, accessed on: 11 November 2019.
courtroom; the sensational stories surrounding their arrests are also classic tabloid material voraciously devoured by a public with an appetite for scandal. As these arrests often take the form of a public spectacle, anonymity is impossible for the couples, who suffer a great degree of shame (malu)—even if they were wrongly accused of khalwat. For many couples and their families, the psychological trauma and loss of face from being subjected to this public shaming is a great price to pay for temptation. But legal penalties, as I demonstrate next, constitute an even more important punitive measure enforced by the state for those who transgress the limits of intimacy.

Judgment Day

Malaysian Syariah courts are not exclusively preoccupied with family matters such as marriage, divorce, child custody (hadhanah), and inheritance for Muslims. They are also key disciplinary agents of the state responsible for meting out punishment for sinful and serious moral transgressions in Islam, collectively categorised under "Syariah crimes" (jenayah Syariah). In this section, I return to the khalwat trials to investigate what Michael Peletz calls “the cultural logic of judicial discretion” that is at play when Malaysian Syariah judges mete out punishments for ta’zir offences (2002, 4). By this, Peletz refers to what he observes to be “pronounced procedural regularities and consistencies in Malaysia’s Islamic courts,” which are:

keyed to broadly shared cultural understandings bearing on the contractual responsibilities (though not so much the rights) entailed in marriage, the importance of reconciliation and compromise, and, more generally, the nature of social relatedness, personhood, human nature, gender similarities and differences, and the like. (Peletz 2002, 118)

This observation emerged from Peletz’s observations in Malaysian Syariah courts in the town of Rembau, in Negeri Sembilan, in the 1980s. This was a significant transformative period in which the Malaysian Syariah system was going through a gradual overhaul as part of the state’s nationwide Islamisation initiatives to widen the Syariah jurisdiction, make Islamic courts more “modernised,” and train court officials and Islamic legal scholars into efficient “bureaucrats” (Peletz 2002, 124; Mohamad 2010b, 365; Moustafa 2014, 161). Yet from the khalwat trials I illustrate below, Malaysian Syariah judges decide the appropriate penance commensurate to the weight of the crime of khalwat by
returning to the cultural resources found within Malay adat rather than classical Islamic legal exegeses. This emphasises the role of Syariah courts in reproducing Malay adat ideas about marriage, intimacy, status, sexuality, gender, and personhood, which raises questions of how “Islamic” these Syariah courts are and what the implications are of this legal approach on Muslim women’s encounters with the law.

Scholars have noted the ways in which the scope of Muslim women’s rights seems to narrow with the expansion of the Syariah jurisdiction over the years (Shuib 2005; Nik Badli Shah 2004; Mohamad 2010b). This is exacerbated by the Malaysian ulama’s tendency to codify “the most conservative opinion into law,” particularly where women’s rights are concerned (Anwar 2005, 124–30). The Islamic Family Law (Federal Territories) Act 1984 made it increasingly difficult for women to secure maintenance, divorce, child custody, and their share of matrimonial assets (Moustafa 2013, 178). By contrast, men were given great liberty to exercise their right to divorce and polygyny, the latter of which now entails fewer conditions to marry subsequent wives. For example, in 2006, the state removed the condition that “the proposed marriage would not directly or indirectly lower the existing wife or wives’ standard of living,” thus no longer holding men legally accountable for providing for their families reasonably. This facilitated access to polygyny and divorce under the new Syariah shows a new form of “Malay-Muslim masculinity” emerging, based on conferred male entitlements rather than a responsibilities-based authority (Mohamad 2010b, 374).

On the other hand, scholars such as Peletz (2018) are more optimistic about the state of this revamped Syariah today, particularly in responding to women’s appeals for divorce and in delivering justice in a timely manner. In his study of fasakh (judicial rescission) divorce—the only way women may get their marriage annulled should their husband refuse to divorce—he finds that: (1) women are getting quicker responses from the state; (2) men are punished more heavily should they fail to fulfill their responsibilities in the family law; (3) women now have more access to resources to help them negotiate their legal rights in marriage; and (4) Syariah law may still cater to men’s rights, but there are nonetheless various avenues for women to attain their rights—if they honour sociocultural expectations of obedience and heteronormativity (Peletz 2018, 654–55). This suggests that women’s access to justice in the Syariah is nevertheless still conditional on whether they are able to conform to their social roles as women, wives, and mothers. Similarly, in what follows, I show that although gender is not the sole consideration of the judge in khalwat trials, women nevertheless face condemnation in court should they delay or defy social pressures to be domesticated in matrimony.
The principal sources of Malaysian Syariah law are the Qurʾan, the hadith (narrations of the Prophet Muhammad), and the sunna (Prophetic traditions), all considered to be of “divine” origin. For over a millennium, scholars of Islamic law (fuqaha’) have produced a diverse and pluralistic body of interpretive works based on these divine sources known as fiqh (Islamic jurisprudence), which Muslim jurists and scholars still refer to today. The Malaysian ulama (religious scholars) today draw in particular on legal exegeses produced within the Shafi‘e tradition—one of the four major madhāhib (schools of thought) in Sunni Islam—in formulating Syariah laws. The state also retains a monopoly on the production of new religious interpretations for Syariah law, which is the exclusive domain of the Council of Islamic Affairs—specifically, the Office of the Mufti and the Islamic Legal Consultative Council. These bodies operating at the state level, and the National Fatwa Council at the federal level, are authorised to produce fatwas (learned opinions) that are legally binding on Muslims (Abdul Hamid 2009, 162). This is contrary to the spirit of usul al-fiqh (Islamic jurisprudence), which has always flourished as a “bottom-up, not a top-down process” (Moustafa 2014, 154).

Islamic jurisprudence recognises three major types of criminal offences: hudud (predetermined crimes and punishments listed in the principal texts); qisas (laws of retaliation and compensation for homicide and personal injury, also dictated in the texts); and taʿzir (“discretionary penalties” for crimes that are not specified in the texts) (Rabb 2015, 31). It is important to note that Malaysian Syariah courts do not mete out hudud punishments, even though in 1995 (and again in 2015), there have been significant attempts by the Malaysian Islamist opposition party PAS to enforce the Syariah Criminal Code (i.e.) Bill 1993 in Kelantan to include hudud and qisas punishments. However, this has been rebuked by the federal government, who rejected the bill on various legal and constitutional grounds.

Given that hudud is still withheld at the level of parliamentary debate, Syariah criminal cases in Malaysia today are tried as taʿzir offences (misdemeanours that fall beyond the scope of hudud or qisas). Taʿzir offences historically encompass a wide range of offences considered to be “moral wrongs”—transgressions Muslims “knew or should have known to be prohibited”—and Muslim
jurists have struggled to agree on a standard punishment under *ta’zir* (Rabb 2015, 36). The loose and indeterminate nature of what comes under the category of *ta’zir* in the key texts, as well as its resultant punishments, leaves the state “with a wide discretionary power to create offences and punishments relevant, expedient and necessary for the country” (Shamrahayu Aziz 2015, 82). The Malaysian Syariah system has dealt with the undefined boundaries of *ta’zir* offences by enlisting the relevant punishable crimes in the Syariah Criminal Offences Act of each state. Under the Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised in 1988), Act 355, which authorises Syariah courts to enact punishments on Syariah crimes, *ta’zir* penalties cannot exceed RM 5,000 in fines, three years of imprisonment, or six strokes of the cane (Jamal and Hashim 2017, 54). Act 355 is modelled on the civil system, which entitles judges to enact much higher sentences than merely fines, lashes, or imprisonment, and also a wider range of punishments, including death penalties (Shamrahayu Aziz 2015). It also, Jamal and Hashim (2017, 57) argue, retains remnants of English colonial law. As will be evident from the *khalwat* trials below, Syariah judges produce rulings on *ta’zir* offences based on multiple sources of knowledge and traditions, including Malay *adat*.

One *khalwat* appeal trial I observed in Kelantan’s Syariah court in Kota Bharu involved a couple who, when arrested a few months before, were married to different spouses: the man was already married to two wives, and the woman had a husband and four children of her own. In this case, the judge had imposed a punishment of about RM 1,800 (£350) to the male defendant, and a fine of a lesser amount (RM 1,600 or £300) to the female defendant in the first trial. The couple had reappeared in a High Court that day to appeal to the judge for lighter fines, which was rejected for several reasons.

First, the judge considered the male defendant’s profession as a teacher—a profession much respected in Malaysian society. A teacher and a civil servant should teach and lead through example, and thus held to a greater moral standard, which the defendant had failed to do. The judge then considered the male defendant’s polygamous status. The fact that he already had two wives (who were uninformed of the *khalwat* charge brought against him) made his extramarital pursuits all the more immoral and inexcusable, as he had also failed to act in a responsible and exemplary manner for his wives and children as a father and a husband.

The male defendant attempted to give another justification in his appeal for lighter fines: since their initial arrest, the female defendant and her husband had divorced. Within four months, he claimed to have “taken responsibility” for their misfortune by marrying her in Thailand as his third wife. The judge did not find that this marriage helped ease the severity of the case at all, as...
he said, “Marriage is not meant to absolve you of your crime” (*Nikah bukan-nya untuk melepaskan diri*). His refusal to recognise the marriage here is worth noting: the timing of the defendant’s third marriage (after the arrest) led the judge to suspect this to be merely a strategy for vindicating himself of a crime already committed.

Polygyny has long been promoted by the Malaysian ulama as a means of curbing men’s temptations to engage in extramarital (sexual) relationships and therefore to prevent *zina* (*mengelakukan zina*). This rhetoric is enthusiastically embraced by Malay men who claim that they are “adulterous by nature”; Islam has thus offered a divine solution to the problem of men’s “excess” sexual drive by allowing polygyny (Ong 2006, 40). However, here, the male defendant’s polygyny was rebuked by the judge, who reminded him that he was already married to two wives (and should, presumably, already have adequate access to *halal* sexual outlets). The judge’s disapproval shows that marriage is only an honourable, “halalising” solution if it takes place before the illicit desires are acted upon. As such, its timing too must crucially precede any indulgence in sexual temptation.

The female defendant, too, had a lot to answer for, having engaged in extramarital sexual liaisons with a married man herself despite being a wife and a mother of four. Her transgression complemented *adat* tropes of the indomitable passions of the female sex and “women’s irrationality and immorality” (Ong 2006, 40), but it also contradicted the image of the ideal Malay woman and wife, who is modest, submissive, demure, obedient, and, most of all, faithful and domesticated. Her crime was sinful in the eyes of Islam, but acting out of line with *adat* further added to the severity of her offence. Nevertheless, the judge decided on a slightly lower fine for her compared to the male defendant, as he recognised her unemployed status as a housewife with no income of her own. He reasoned that a heavy fine would be too much for her to bear as a recently-divorced woman with four children to support.

The judge’s interpretation of age and maturity according to Malay *adat* also significantly determined the course of *khalwat* trials, which, as befitting *ta’zir* offences, must be considered from every angle possible. This was made clear when he hypothetically considered how age might influence his ruling:

Not all [guilty parties] merit the same punishment. For example, a 15-year-old girl and a 30-year-old man [caught in *khalwat*] would not receive the same punishment, as it is very unlikely that a child of 15 would plan something like this. If [the woman were] a prostitute, however, the punishment would be heavier, because she ‘entraps’ people.
Age here plays a significant role in determining the weight of the punishment, as it denotes an individual's level of physical, mental, and emotional maturity, which might also suggest their likelihood to conspire and engage in such crimes. His use of the term “child” (budak) to refer to a 15-year-old, for example, points to her minor status not only by law but also by her level of maturity, which, at this age, has not yet reached that of a full, responsible adult. As such, her failure to act in a more rational and mature manner was more easily pardoned by the judge than had she been an adult who might have been capable of scheming such intrigues.

Although the young unmarried woman convicted for khalwat introduced earlier was 28 years old—far beyond the legal age of 18 under a Malaysian federal legislation act known as the Age of Majority Act 1971—the judge nevertheless considered her “immature” due to her unmarried status, which prevented her from being socially recognised as a full, responsible adult in Malay society. The judge perceived her as a double victim of her circumstances: when he discovered that her parents were divorced and that her mother received financial support from the Department of Social Welfare, he surmised that the lack of proper parental guidance and supervision could have led to her wayward behaviour and allowed for sexual ventures with strange men to occur. Moreover, the sudden and unexplained disappearance of her “boyfriend” or partner in crime after their arrest suggested that she had been lured into his sexual ploys. She had confessed that he had made promises for marriage—promises that, with his disappearance, would never be realised. Her youth, vulnerability, and gullibility—and, perhaps, the tearful demonstration of her repentance for this first offence, which she promised never to repeat—won her some mercy from the judge, hence rendering his ruling more advisory than punitive.

Peletz (2015, 152) suggests that Malaysian Syariah courts today are “actively involved in the reconfiguration of kinship, personhood, and subjectivity” through attempts to decontextualise the individual from its wider kin network, instead favouring an “emphasis on individuation.” What we see here, by contrast, is that the judges’ serious consideration of their litigants’ family background and marital circumstances positions them right at the heart of their kin network. The gravity of their crime was determined in part based on an individual’s social position and their responsibility. Thus, we see a child who should still be under parental guidance and protection (albeit, already a fully rational adult) given more leniency by the judge than a husband to two wives and several children, and a wife and mother.

This explicit attention to age, marital status, level of maturity, and family circumstance is why we see the judge showing a more paternal castigation
to the young, unmarried woman compared to the wife and mother who had committed the same crime. It also explains why a polygamous teacher considered “lascivious” (*gatal*) enough to seek sexual satisfaction outside of marriage, more so with a married woman, was given harsher sanctions than these two women for failing to act as an exemplary leader (to society; to his family) through honourable behaviour. Marital status here is significant not only because of its implications for the (perceived) level of maturity, but also because it determines whether the individual has access to a “reasonable” amount of lawful sexual satisfaction or not. As such, the judge saw this polygamous man’s desire to engage in extramarital (sexual) affairs as morally questionable, having already married two wives. The unmarried woman’s error, by contrast, was rather understandable, given that she lacked a safe space for the permissible exploration of her sexual desires through (or rather, within) marriage.

The judge in the *khalwat* appeal trial furthermore took into serious consideration various motivational and circumstantial factors that might have facilitated the transgression, in order to identify who between the couple had incited the other down the path of *zina*. For example, he asked the prosecutor who, according to the case facts gathered during the time of the couple’s arrest, had booked the hotel room. The answer to this question was unclear, as the information was not noted in the prosecutor’s records. The judge then proceeded to stress the importance of investigating under whose name the hotel reservation had been made, for the guilty party may deserve a heavier punishment for “inviting” the other person towards *zina* (*mengajak kepada zina*), and can also be charged with interfering in someone’s marriage (*kacau rumah tangga orang*), if their partner were married (as was indeed the case). This suggests that the harsher punishment between the couple will usually fall on whichever of the two would be more capable of initiating the other to commit the crime, as in the case of a prostitute who seduces a client, or an adult who entices a child, or a man who tempts a married woman.

These *khalwat* trials reveal a striking paradox—a judiciary claiming to uphold divinely inspired “Syariah” laws not only relies on legal mechanisms replicated from a civil system, but also ultimately reproduces cultural understandings of marriage, gender, and personhood in attempting to discipline its citizens. In other words, the Syariah judiciary system, from its structure to its substance, is suspiciously more secular than “Islamic” in nature. This is reminiscent of Tamir Moustafa’s argument that, “The religious councils, the shariah courts, and the entire administrative apparatus [in Malaysia] are Islamic in name, but in function they bear little resemblance to the Islamic legal tradition” (2014, 167).
Moreover, the judges’ approach to these crimes of passion also illustrates how unmarried women—and married women engaging in extramarital sexual dalliances—are becoming a source of apprehension for the state. These women are “no longer supervised by their fathers and brothers”—as the young, unmarried female defendant was, coming from a broken home—and have therefore become “uncontrolled and uncontrollable under Islamic family law” (Ong 2006, 40). The possibility of premarital pregnancies, and media reports about a possible increase in baby dumping, makes it all the more urgent for the state to control women’s intimate desires and access to intimacy, as there is no place for unmarried mothers and children born out of wedlock (anak tidak sah taraf) in a society intolerant of pre- and extramarital sexuality.10 Recall, for example, the rather offhanded way in which the judge ordered the defendant to “just get married” as a solution to her temptation to indulge in illicit sexuality. I suggest this can be read as an attempt to enforce what Aihwa Ong (2006, 40) calls “a regime of localisation” in which “free single women are brought into matrimony, and men’s domestic supervision.” The state’s pro-marriage policies not only grant couples the licence to be intimate through marriage but, more importantly, put women back under the surveillance and responsibility of a male—that is, their husband.

Elopements at the Malaysian-Thai Border

As we have seen from the khalwat trials above, delayed or untimely marriage creates not only moral chaos in the Muslim community but also legal inconveniences that compel the state to discipline its citizens. This pressures Muslims into seeking access to marriage in creative and convenient ways, with the goal of “halalising” their union—and all the passions and temptations incited therein—as soon as possible, and with minimal involvement with bureaucracy. One of these is by contracting cross-border marriages—both monogamous and polygynous—in Southern Thailand.

Southern Thailand is a predominantly Muslim region, with more than 4 million (5.8% of its population) practising Islam as of 2010 (Pew Research Center 2011). Although Muslims form a religious minority in the country, the

10 According to the Ministry of Women, Family, and Community Development, the number of newborn babies dumped throughout the country has been rising. Police statistics reported a total of 697 cases of baby dumping throughout Malaysia from 2010 to 2016. I. Lim, “Ministry: Over 690 babies dumped in last six years,” MalayMail, 25 July 2017, available online at: https://www.malaymail.com/news/malaysia/2017/07/25/ministry-over-690-babies-dumped-in-last-six-years/1428729, accessed on: 27 February 2019.
Act on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala, and Satun Provinces (1946) allows the Islamic Law on Family and Succession to be applied to Muslim family matters such as marriage, divorce, and inheritance. As this also enables other non-Thai Muslims to marry according to Islamic rites, Malaysian Muslim couples may thus contract a cross-border marriage (perkahwinan rentasan sempadan) that fulfills the procedural requirements of a nikah (marriage) in Islam, as well as in Malaysian Syariah law. This is facilitated by the fact that Muslims in Thailand predominantly follow the Shafi’i branch of Islam, as Muslims in Malaysia do. This, and the increasing cross-border cooperation occurring between jakim and its Thai counterparts, have led to the opening of more bureaucratised channels to marry in Thailand.

All Malaysian Muslims must, in theory, acquire the permission of their local religious authorities before contracting a marriage. However, Section 31 of Act 303 of the Islamic Family Law (Federal Territory) Act 1984 (henceforth, IFL) allows for the registration of marriages contracted outside of Malaysia, including those contracted in Thailand. To register a marriage contracted without the permission of a registrar in the applicant’s native state constitutes a violation of the IFL. This matrimonial offence carries a punishment of no more than RM 1,000 in fines or a year of imprisonment, or both. Cross-border marriages contracted in Thailand can only be recognised as a legal union if they have been validated and registered in a Malaysian Syariah court.

Cross-border marriages have gained traction in recent years because they are quick, cheap, and discreet—all that a legal marriage in Malaysia is not. Marrying in Malaysia is a long bureaucratic process that requires approval from local Islamic authorities and, most importantly, consent from the bride’s male guardian (wali), usually her father. An elopement to Thailand allows the bride to marry without her wali present during the nikah—if she can convince the Thai jurunikah (marriage officiant) that her wali is located more than 92 km from where the marriage takes place. Furthermore, according to Malay adat, it is incumbent on the groom to provide the bride with an exorbitant dower (hantaran), currently estimated at about RM 10,000 (£2,000)—a sum many young men are unable to afford. A quick marriage in Thailand relieves many young grooms from the cultural obligation to pay the hantaran, and enables many young brides to marry without the permission or knowledge of their wali.

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11 Section 19 of the IFL 1984 states that “No marriage shall be solemnised unless permission to marry has been given by the Registrar […] or by the Syariah judge.”
For slightly older couples, usually above the age of 30, an elopement to Thailand is a means of halalising a relationship that, for the man’s part, is polygynous. Under the Malaysian Islamic Family Law Act enforced in every state, every man intending to practice polygyny is required to fulfill certain requirements before being granted legal permission by the Syariah judge to marry another wife. Section 23 of the Islamic Family Law (Federal Territory) Act (1984), for example, the male applicant must prove, among other things, that:

1. the subsequent marriage is “just or necessary”;
2. he owns or earns enough to support any existing and future dependents;
3. he would be able to accord equal treatment to all his wives as required by 
   Hukum Syarak (Syariah law);
4. his intended marriage would not cause darar syar’ie (harm to mind, body, property, and religion) to his existing wives.

However, many men aiming to practice polygyny cannot prove if they are able to afford taking on an additional wife without driving their existing family into economic destitution. More importantly, judges will invite existing wives to testify in response to their husband’s polygyny application in court before approving or rejecting his application. This would risk revealing the husband’s polygynous intentions to his wife or wives, who might then demand a divorce or attempt to sabotage the impending union. Men who cannot afford the time or money to engage with bureaucracy, and who prefer to marry their subsequent wives secretly, find a covert cross-border marriage in Southern Thailand to be a desirable and expedient solution.

|                      | Kes Mal 010 (Monogamous CBM) | Kes Mal 012 (Polygamous CBM) | Kes Mal 011 (Polygamy applications) | Marriages Registered | Divorces Registered |
|----------------------|------------------------------|-----------------------------|-----------------------------------|----------------------|---------------------|
| Registered           | Approved                     | Registered                  | Approved                          | Registered           | Approved            |
| 2009                 | 2,956                        | 1,605                       | –                                 | 139                  | 90                  | 15,322              | 2,478               |
| 2010                 | 2,972                        | 1,393                       | –                                 | 124                  | 93                  | 16,106              | 2,572               |
| 2011                 | 3,081                        | 1,471                       | –                                 | 128                  | 98                  | 17,124              | 2,734               |
| 2012                 | 1,872                        | 1,342                       | 874                               | 438                  | 141                 | 14,493              | 2,223               |
| 2013                 | 1,605                        | 975                         | 740                               | 378                  | 129                 | 18,093              | –                   |
| 2014                 | –                            | –                           | –                                 | –                    | –                   | 18,514              | –                   |

**Figure 1** Marriage, Divorce, Cross-Border Monogamy & Polygyny, and Polygyny Applications Registered in Kelantan (2009–2014). Statistics obtained from Kota Bharu’s Syariah Court & JAHEAIK.
The statistical prevalence of cross-border marriages varies throughout Malaysia, but in most states, monogamous marriages involving young couples below the age of 30 outnumber polygamous ones between much older couples. This is certainly the case in Kelantan, where, in 2011 and 2012, monogamous cross-border marriages were more than double polygamous ones. Given that an average of 16,600 marriages were contracted per year in Kelantan between 2009 to 2014, it can be surmised that cross-border marriages constitute roughly 10% of marriages contracted in Kelantan. In 2009, the rate of monogamous cross-border marriages is even more striking when compared to the number of in-state marriages registered that year, which is five times higher. This is statistically significant, as it means that one out of five couples in Kelantan had married in Thailand in 2009 alone, possibly by way of an elopement, without prior permission from the Malaysian Islamic authorities.

These statistics on cross-border marriages indicate how the state’s bureaucratic requirements for marriage have produced a serious unintended consequence: a rising demand among Malaysian couples to appeal to a more lenient Islamic authority in Thailand to contract their marriages, both monogamous and polygynous. The fact that these cross-border marriages, contracted in contravention of the existing legal provisions on marriage in the Islamic Family Law, could nevertheless still be legalised in Malaysia shows that the state is willing to overlook this legal transgression, if it is committed in the name of avoiding zina. Next, I illustrate other pro-marriage policies enforced in the state of Kelantan designed to steer young couples away from the path of zina, towards halal matrimony.

More Pro-marriage Policies

In contrast to other Muslim-majority societies such as Morocco that perceive young couples’ developing sexuality as a threat to be denied and suppressed, the Malaysian state of Kelantan recognises sexuality among young couples as an inevitable part of “human nature” (fitrah manusia) that must be harnessed and channelled towards matrimony—as soon as possible. For example, Morocco’s reformed Family Code, implemented in 2004, known as the Mudawwana, attempts to delay marriages for young couples by increasing the minimum marital age for women from 15 to 18 (Sabbe et al. 2015, 136; see also Sonneveld, this volume). My Kelantanese interlocutors, by contrast, held that marriage among the youth should not be delayed; rather, it must occur as soon as signs of nafsu (sexual or carnal desire) become visible, to ensure that unmarried couples do not fall into the temptation of committing zina. Marriage
also offers a woman a security net of sorts: “At least,” my regular taxi driver in Kelantan’s capital, Kota Bharu—himself an unmarried 28-year-old man—said, “If the girl becomes pregnant, the husband will naturally have to take responsibility for it. If they were not married, there is no guarantee that her fate (nasib) would be protected.” The moral and social implications of this sexual transgression are clear: premarital sexual intercourse leads to unplanned pregnancies that may derail a young woman’s life, and possibly leave her socially and economically vulnerable.

The threat and temptation of sexual desire was one of the reasons why Nik Aziz—the political and spiritual leader of Kelantan and the Islamist opposition party PAS—encouraged young couples to “marry early” (kahwin awal) rather than engage in a prolonged period of premarital courtship. This is manifested in state policies aimed at helping young, economically unstable couples on their path towards matrimony, so that they would not engage in premarital sexual activities. In 2011, Kelantan’s PAS-led government launched a scheme called Gerbang Az-Ziwaaj (Gateway to Marriage), which offers financial assistance of RM 1,000 (£180) to couples intending to marry for the first time. This scheme, intended to partially cover the burgeoning costs of the wedding, must be applied for by the prospective groom (as the “head of the household”); only those with a monthly income of less than RM 700 (£120), and therefore in the “poor and needy” (miskin dan perlu dibantu) category, are eligible for this financial aid.

Between 2011 to 2018, the Kelantanese state invested RM 18,179 million (£3.5 million) in this scheme, which has assisted 18,179 couples in marrying lawfully (Hanif 2018). Nik Aziz specifically targeted the youth as the main beneficiaries of this scheme, which was conceived as part of a family development program called “You Are Smart for Getting Married” (Anda Bijak Kerana Berkahwin). During the program’s launch, Kelantan’s State Human Development, Youth and Sports and Non-Governmental Organisation Committee Chairman Datuk Abdul Fatah Mahmood justified this scheme as part of state efforts to police morality and sexuality, saying, “The state government is trying to discourage illicit sex and immoral activities.” Considering the alarming rate of khalwat arrests and baby dumping in Kelantan, it was critical for the state to launch initiatives aimed at preventing the youth from engaging in zina, and also to prevent premarital pregnancies that might result in baby dumping (Syed Azhar 2011).

The Gerbang Az-Ziwaaj scheme demonstrates a different approach to moral

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12 Nik Aziz Nik Mat, fondly known as “Tok Guru” by his dedicated followers, was PAS’s mursyidul am (leader). He wielded great political and spiritual influence on his people, who often looked to him for moral directive advice.
policing by the Kelantanese state, one that is centred not on punishing errant sexuality but on productively helping young couples channel these desires towards the institution of marriage—the only proper and rightful place for the exploration of sexual intimacy.

The importance of marrying to prevent unwed couples in engaging in illicit intimacy may also manifest in another notable (and, to some, worrying) marriage trend—child marriage. Under section 8 of Kelantan’s Islamic Family Law Enactment 2002, the minimum age for marriage is set at 16 for girls and 18 for boys. However, the same act allows an exception to this law, if the child is able to secure written permission from the Syariah judge to allow the marriage to proceed.13 Kelantan in fact reports the second highest incidence of child marriage in all of Malaysia, surpassed only by Sarawak (Hui 2018). Between January 2013 and December 2017, the Malaysian Syariah Judiciary Department reported 793 cases of underaged marriage in Kelantan (Mohd. Pilus 2018).14 These numbers, however, only include underaged marriages contracted with the judge’s permission; if we were to include those contracted secretly in Thailand and remained unregistered, the number would very likely be higher.

In June 2018, news of a 41-year-old man from Gua Musang, Kelantan, marrying an 11-year-old girl as his third wife received extensive media coverage when his second wife posted pictures of their nikah ceremony in the border town of Sungai Golok, Thailand, and congratulated her husband on his marriage (Abdullah and Ibrahim 2018). This was followed by news of a 15-year-old girl marrying a 44-year-old divorcé, which received equal publicity from the media and netizens nationwide (Channel News Asia 2018). These two marriages were heavily condemned by the Malaysian public, who were scandalised by the age difference between the couples and by the brides’ unusually young ages. This prompted the federal government to take a critical stand against child marriage. The then deputy prime minister, Wan Azizah Wan Ismail, who was also the Minister of Women, Family, and Community Development (Kementerian Pembangunan Wanita, Keluarga dan Masyarakat, KPWKM), condemned child marriage.

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13 Section 8 of Kelantan’s Islamic Family Law Enactment 2002 states: “No marriage may be solemnised under this Enactment where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah Judge has granted his permission in writing in certain circumstances.”

14 Sarawak recorded the highest number of underaged marriages between 2013 and 2017 (918 cases), followed by Sabah (793), Johor (440), Terengganu (407), Kedah (389), Selangor (385), Pahang (354), Perak (266), Federal Territories (178), and Melaka (91). F. A. Mohd. Pilus, “5,362 Permohonan Nikah Bawah Umur,” Berita Harian, 19 July 2018, available online at: https://www.bharian.com.my/berita/nasional/2018/07/453272/5362-permohonan-nikah-bawah-umur-dalam-5-tahun, accessed on: 20 February 2019.
marriage in an official press release, stating that she “[is] against child marriage and [does] not condone it.” In response to these cases, she instigated JAKIM and KPWKM to prepare a paper proposing raising the age of marriage from 16 to 18 for both Muslim and non-Muslim girls.

However, the federal government may only recommend such a solution; each individual state ultimately is free to adopt and incorporate the proposed amendment to their own Islamic Family Law or not. Selangor has already raised the minimum age of marriage for girls to 18, but Kelantan, it seems, is not so easily persuaded. In a state meeting called “Roundtable on Underage Marriage: A Holistic Approach and Evaluation” organised by Kelantan’s Islamist pas-led government, its Department of Religious Affairs, and the Legal Freedom and Human Rights Organisation (Pertubuhan Lepasan Undang-Undang dan Hak Asasi Manusia, or LUHAM) that took place in November 2018, Kelantan was adamant that it would maintain the minimum age of marriage at 16. The roundtable rejected the Convention on the Rights of the Child (CRC) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), both of which call for the minimum marriageable age to be set at 18, because “these two conventions are not suitable for implementation, particularly for Muslims in Kelantan” (MalaysiaKini 2018). Another resolution further reasoned that any legal amendments to the minimum age of marriage was unnecessary, given that its Syariah courts already follow “strict” SOPs for underaged marriages by requiring prospective brides to secure written permission from the judge before marrying. The Kelantanese state concluded that underaged marriage is indeed “consistent with Syariah law,” and, in fact, a “necessity” in the state to preserve the morals of its people (MalaysiaKini 2018).

To steer unmarried couples away from the path of zina, the Kelantanese state not only casts early marriage as a noble effort and a personal triumph for “halalising” a relationship that is otherwise haram; it also engages in various initiatives to facilitate couples’ path towards matrimony. This proclivity to lean towards early marriage—both from Kelantanese citizens and the governing state itself—corresponds to Peng’s (2011, 141) observation that religious and cultural factors play a role in determining the age at first marriage; and this age, she furthermore argues, tends to be lower in less developed states such as Kelantan, Kedah, Terengganu, Perlis, and Pahang than in more developed states such as Selangor. Indeed, while the average age at marriage throughout the country was reported to be 29 for men and 26 for women (Marriage & Divorce Statistics, Malaysia, 2018), many of my Kelantanese informants—both male and female—had married much earlier than this age, usually not long after completing their secondary education between the ages of 17 to 19.
Driven by the passions and desires of nafsu, couples—both young and old—deep in the throes of romance are often spoken of as being uncontrolled and unstoppable, leading one registrar I interviewed in Kota Bharu’s Syariah court to claim in our interview, “We cannot deny people their right to marry” (Kita tak boleh sekat hak dia untuk berkahwin). Knowing they are helpless to prevent couples from marrying, the state is slowly widening the avenues to marriage, including, as we have seen, launching schemes to financially assist young couples towards matrimony, maintaining the minimum age for marriage to allow young couples to marry, and legalising cross-border marriages contracted in Southern Thailand, even if they contravene state restrictions on marriage. The means to marriage is rendered irrelevant here, as long as it is contracted with the hopes that it would steer couples away from the temptation to engage in anything haram that might compromise the socio-moral well-being of the ummah. In other words, the state’s punitive responses to sexual transgression (a manifestation of “forbidding evil,” or nahi mungkar) are balanced and complemented by preventative pro-marriage policies that facilitate young couples in “halalising” their desires (an act of “enjoining good,” or amar makruf).

Conclusion: Is Moral Policing the Question?

Malaysians have hoped that the election of the Hope Alliance (Pakatan Harapan) government, following the general election in May 2018—toppling the National Alliance (Barisan Nasional) government, which had been in power for 61 years—would usher in a new era of Islamic governance in the country. There were hopes, for example, that this moral policing and punishment would cease or, at the very least, decrease. Indeed, on 6 October 2018, the Malaysian Minister of Religious Affairs, Mujahid Yusuf Rawa, almost brought this hope to life, promising in an interview with the Malaysian newspaper The Star (Koya 2018) that there would no longer be any interference with what occurs behind closed doors: “I would advise all agencies under me, especially the enforcement officers, to not interfere with the personal sphere. This issue of enforcement of what you call khalwat has been misused—not all of it, but there have been times where it has been exploited and misused.”

Yet moral policing has continued, perhaps even more vigorously than before. This is perhaps evident in the increasing arrest of homosexual transgressions in particular, as in the case of the lesbian Malay couple who were whipped for romping in a car in a parking lot in Terengganu in 2018 (Harian Metro 2018). In 2019, five men in Selangor were fined RM 4,800 (£960) each and sentenced to six months in prison for “attempting to have gay sex” (Free Malaysia Today
The Malaysian state’s continued surveillance of sexuality by force and punishment leaves no ambiguity as to where the boundaries and limits to *halal* intimacy lie. This, as I have demonstrated, creates significant repercussions on Muslims’ approach to marriage. Moral policing has not necessarily reduced the appeal of forbidden sexual temptation; rather, it compels Muslim couples to navigate the path towards permissible intimacy more creatively by evading certain bureaucratic, financial, or cultural obstacles to marriage to secure a lawful union.

Whether the federal and state governments in Malaysia achieve their goal of purging vice and immoral activities (*membanteras maksiat*) remains to be seen. What we do know is that fear of a punishing state, and of the act of sinning, continues to push couples down inventive, unconventional avenues that allow them to legitimise their relationship in the eyes of Islam, *Malay adat*, and the state.

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