



The evolution of Syariah and postcolonial modernity:

embedding Malay authority through statutory law ¹

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Introduction

One of the pillars of State Islamization is the development of exclusive laws for Muslims. However, this project of authenticating Islam through the enactment and implementation of the Syariah is contentious. Laws meant for Muslims are not unequivocally “Syariah” in essence since many of the rules may not directly emanate from divine sources such as the Quran or Hadith. Regulations and norms for Muslims are also set forth through edicts known as the *fatwa*, the authorial voice and juridical source have traditionally been unstructured, shifting and decentralized (Messick, 1986; Burhanudin, 2005). In truth, many local particularities and cultural considerations have found their way into the making of the Syariah. In the modern context Islamic laws are determined by legislature and in many countries, drafted and validated through a procedural, parliamentary process. This latter system of Syariah law-making has supplanted the earlier traditions. The origin of this modern Syariah law-making exercise could likely be traced to European colonial rule, which had fashioned Islamic law as a hybrid system, incorporating elements of “sacred law” with customary and British laws replicated almost consistently in all of the colonies, from Malaya (Yegar, 1979:119; Husin 2007: 4) to Nigeria (Oba, 2002). But while the origin of the Syariah’s formalized and hybridized legislation can be traced to colonialism, even postcolonial state and religious authority have continued to legitimize,

as well as expand Syariah through the enactment of statutes. Thus, I argue that for at least a century or more, the evolution of Syariah has been a temporal, if not a secular exercise frequently mistaken for a movement towards de-secularization in society. In this article I focus on the development of the Syariah in Malaysia, a former British colony, today ruled by a majority Malay/Muslim-dominated government. If a pattern were to be discerned, the “Syariah-tization” process feeds into the political agenda of entrenching the authority of ethnic “Malayness” within the system rather than that of building an eventual Islamic state in line with an ostensible global trend of Islamization. More importantly this is achieved through faith in a secular order of law-making rather than through the dismantling of these structures.

The intensification of Islamization is dependent on the increased codification of the Syariah and by being so, manifests secular law-making, which is then employed to govern (or rather homogenize and ringfence) Muslims within a plural nation-state. Through fixed stipulations, the Syariah is able to reflect and convey the immutable message of the religion, while simultaneously imbibing the shifting political contexts and authority-structure of nation-states as they invent and reinvent themselves. While all Muslim laws try to approximate precepts derived from the Quran, Hadith and Sunnah, the formal statutes which contain these derived precepts

ultimately vary from one social context to another, from one historical period to the next, and from one national state to the other.

In Malaysia, the Syariah's evolution into statutory law began with its first brush with colonial agents. As part of the political plan to cultivate and co-opt indigenous ruling elites into accepting governance by the rule of law, a plural legal system was in set in place and a space of autonomy was created for local rulers to confine their powers of regulation to that of religious and customary matters. This appeared to have reified the first legal notion of what being a "Malay" meant, with Islam inextricably forming one of its non-negotiable constituents (Husin, 2007). A post-colonial period of nationalization followed, when laws for Muslims were rationalized to characteristically fit in with the ethos of progress and modern notions of civil liberty. This soon proved to be merely a shaky, transitional period, which was gradually overtaken by a new phase of forceful state Islamization. The latter has featured the latest phase of Malaysia's Syariah law-making exercise, where there is now a distinctive trend towards the multiplication, differentiation and extension of the Syariah to encompass and delineate as much as possible an emerging sphere of "Muslim citizenry". In this, Syariah statutes cover a gamut of regulations for Muslims, ranging from family to property to associational to morality to criminal laws. But in all of these, laws for Muslims and on the Muslim family had crucially evolved to embed a particular ethno-centric authority: that of the masculinist, Malay state, though taken to be the essentialist and authentic Islamic identity, reclaimed in modern times. I attempt to show this by tracing how the Syariah has evolved as sets of statutory laws that were expedient in the eventual creation of this masculinist Malay-Muslim state within a plural modern nation-state.

Malaysia is a country of 14 million Muslims, who constitute 60% of the total population. While all Malays are constitutionally defined as Muslims, not all Muslims in the country are ethnically Malay. It is Malay, rather than Islamic authority that is embedded through the Syariah's evolution; and its legal character should correctly be seen as statutory rather than divine. The turning-point-moments through which this

historical evolution took place roughly covers the three periods I have briefly sketched above. To reiterate and abbreviate some of their distinguishing features:

1. The colonial period (1900s-1950s), when plural statutes were formalized, while Islamic law was fused with other living laws such as *Adat*. This was the period when Malayness was first reified as a legal, discrete category.
2. The postcolonial period (mid-1980 – early 2000s), when exclusive statutes for Muslims were rationalized to accommodate modernization. As a by-product of this, a progressive Islamic Family Law was enacted. However this was also a period of a fledgling civic Malayness which could not take off completely. Although dominated by a progressive Syariah Family statute this was eventually supplanted by another legislation in the following period.
3. The current period (post-2000s) is characterized by the centralization of Islamic governance accompanied by the multiplication and differentiation of Syariah statutes. Here Islam is elevated as the *primus inter pares* of all other religions and various new statutes, including a New Family Syariah was enacted to contain the ethos of this period. A ringfenced legal Muslim-ness eases the way for the entrenchment of a masculinist Malay authority within the system.

The above phases were marked by the passage of different statutes, sets of multiple codes that enabled the varying definition of the Malay-Muslim and subsequently the stipulations, limitations and offences applied to their subjectivity. The discussion below analyzes each period by highlighting the essential features of the varying and evolving laws for Muslims in the country. I also analyze some of the societal disjuncture consequent upon the application of these laws as these statutes try to serve their purpose of constructing the essential and authentic Muslim society in modern times.

Colonial Period (1900s-1950s)

Extensive scholarship had already established that ‘Malay’ and ‘Islamic’ laws were in existence even before the coming of European colonization, (Wilkinson, 1929; Taylor, 1937; Buss-Tjen, 1958; Ahmad Ibrahim, 1965; Hooker, 1970; Hooker, 1976). But although many local laws were found to have existed in written forms there is scant evidence of their breadth and depth of influence and implementation. Some appeared to be reproduction and copies of laws from as far as Persia, such as the 99 Laws of Perak (Buss-Tjen, 1958). The Minangkabau laws on the other hand were not written as formal dictates or a set of explicit rules but in the form of the *Perbilangan* or poetical stanzas.² By tradition they were transmitted orally but codified by colonial scholars at the turn of the twentieth century (Caldecott, 1912). Other compilation of Malay laws were later distinguished by their collective names such as the Undang-Undang Kerajaan (Laws of the Monarch), Kedah Digest and the Malacca Digest. Various versions of these law collections could be found from Aceh to Macassar to Mangindanao. The dates of origins are not known but they were either scribed or discovered from about the 17th century onwards. All of these laws appeared to be an admixture of local customs, Hindu elements and Quranic precepts (Buss-Tjen, 1958: 252 -260). There were contradictions in rules and many ambiguities in regulations and punishment. Hence, Muslim law could not be taken to be a fixed, written code but rather, as other scholars had observed of Hindu law, an interpretation of “prolix and ever changing living law” (Cohn, 1961: 614).

Through Colonial Eyes

Out of the mass of knowledge above, colonial scholars classified the plethora of Malay or indigenous laws to be falling between the laws of *adat perpateh* and the *adat temenggong*. Many of these scholars admit that the *adat perpateh/adat temenggong* divide is not an absolute binary but such dualisms had enduringly affected the popular perception of *adat perpateh* being matrilineal and *adat temenggong* being patrilineal. The *adat temenggong* also originated from the matriarchate

Minangkabau tradition, but was modified and altered under Hindu influence. Thus in *adat temenggong*, we find that land tenure and inheritance is similarly based on a bilateral system, as in *adat perpateh*, although lineage (among the nobility) is traced to the paternal line. Yet another form of law, which came under colonial knowledge classification was law derived from Islamic sources. The body of laws derived from divine or Quranic sources was known by the local term as *Hukum Syarak (Shara’)*. Subsequently, when these laws were translated into statutes by the British, the appellation “Muhammadan laws” was attached to it. Interestingly enough, locals did not refer to these laws as *Undang-Undang Islam* (lit. Islamic Law) but preferred the epithet *Hukum Syarak* to distinguish religious from customary dictates.

At the point of early colonization the jurisdictions of the variety of laws were all acknowledged, recognized and applied to particular communities by colonial administrators. *Hukum Syarak* was just one of the three streams of laws practiced by locals. The concept of a universal Islam or *orang Islam* or Syariah was not prevalently used then – or at least not from evidence culled from colonial records. What this meant was that there were many rules for conduct and ways of doing things – Islamic precepts being an important source of these rules, though not necessarily the only ones or even the dominant ones which indigenous society followed. *Adat perpateh* had many rules which were different from ones prescribed by Islamic jurisprudence. Rules applied to land tenure and inheritance differed considerably from the Islamic dictate. The *adat perpateh* was a tradition that ensured the preservation and well-being of a tribal community tied to immovable property such as land, while many Quranic rules were not entirely specific about landed and immovable form of property holding. The preservation of tribes, particularly the Minangkabau people was dependent on land control and ownership, with the latter strictly passed on through the female line. Only the descendants of one female womb or *perut* mattered, in that ancestral landholdings can only be passed on by mothers to their daughters and then granddaughters (see Hooker, 1976: 13-33). Married sons belonged to the tribes of their spouses.

In-marrying within the same tribe was prohibited and monogamy was a rule (Parr and Mackray, 1910). The Minangkabau social unit was hinged upon the *perut*, traced through a maternal line rather than based on a parental unit headed by a patriarch. This was what provided the defining basis of the *suku* or tribe, with the 'male-female' parental unit being less significant than the community.

In all of this, the British actually showed a marked preference for the *Adat* over Islamic laws, and within *Adat* they preferred *adat perpatih* over *adat temenggong*.³ The number of studies done on Minangkabau customs and on Negri Sembilan political structures during the early 1900s was disproportionately high as compared to studies of other Malay states (See for example, Parr and Mackray, 1910; Nathan and Winstedt, 1920). British administrator-scholar such as R. J. Wilkinson was particularly partial towards *adat perpatih*, opining that,

...the men of the *Menangkabau* succeeded in creating a jurisprudence so simple that the humblest villager could understand it, so well known that no judge could excuse or defend an unjust decision, so little vindictive that it sought the interest of the injured party rather than the punishment of the wrong-doer, so humane that it could dispense with mutilation, scourging, torture, slavery and imprisonment (Wilkinson, 1970: 10).

Wilkinson also placed the stature *Hukum Syarak* as above that of the *adat temenggong* in terms of the former's 'sophistication', "Moslem plane stands on a much higher plan of intelligence (than *adat temenggong*) but it was rather inhuman in its penalties and unpractical in its ability to distinguish between crimes and sins" (Wilkinson, 1970:10).

As to the origin of formal codification of this plethora of Malay, customary and religious laws, we can attribute this to the strategy and motive behind British annexation of the Malay lands. Colonial "civilizing missions" not only involved a great deal of law-making, but also the demarcation of autonomous spheres to enable a system of differentiated authority. Ensuring the separate spheres of governance between them (as modernizers) and the local rulers (as protectors) was a strategic move in the ultimate possession

of the colony. Through major treaties such as the Raffles Memorandum to the Sultan of Johore, 1873 and the Pangkor Treaty of 1874, local rulers were given autonomy to only rule over the sphere of Malay customs and Islamic religion (see Braddell, 1931 for contents of the treaties).⁴ In return for this, English laws were to be applied to the "non-privatized" areas of life (religion being relegated to the area of personal law). It is thus to be expected that one of the first laws to emanate from the authority of Malay Sultans were laws punishing those who had transgressed the *Hukum Syarak*. In Perak for example, the *Order in Council of 1885* (presided by the Sultan), required "Muhammadans to Pray in Mosques on Fridays". In the same state, there was also *Order in Council No. 1, 1894* to punish "Adultery by Muhammadans". In Selangor, another Malay state, there was a *Regulation XI of 1894*, or the *Prevention of Adultery Regulation, 1894*. In Negri Sembilan (Sungei Ujong) there was the *Order of 9th August 1887* for "Mosque Attendance".⁵ As these regulations imply, law-making for Muslims remained to be the only critical site through which local elites could carve out their "autonomous Malay space", perhaps even resistance against colonial power and encroachment (Iza Husin, 2007: 3).

In contrast to the above laws, there were the positive English laws. The first instance at which these laws were first introduced to Malaya was through the granting of a Royal Charter of Justice, to the Straits Settlements (Penang, Malacca and Singapore) in 1807 (Napier, 1898: 8). With this, positive laws were enacted and disputes settled in a formal court setting. While many laws were copied from England, early colonial administrators were also flexible in accommodating and incorporating diverse legal traditions into the system. The principle used to adjudicate was simply based on "natural justice". Colonial administrators tried to recognize local customs and laws, as applied to the plural communities of Muslims, Hindus and Chinese. With regard to this, a set of laws for the registration of marriages and divorces was promulgated, the formalization of which was in accordance with the customary specificities of each group. Thus there were separate matrimonial laws for Chinese, Hindus and Muslims. The first statutory law for

Muslims was the *Mohammedan Marriage Ordinance of 1888 (Ordinance No. 5, 1888)*. Later, the first law for the punishment of what was classified as “Muhammadan offences” was the *Muhammadan Laws Enactment of 1904, for the FMS (Federated Malay States)*. Offences under this legislation included not attending Friday prayers, enticing an unmarried girl, adultery, incest, cohabitation after divorce, breaking of betrothal contract, religious teachings without the permission of the Sultan, sale of food during the Fasting month and the printing of religious books without the written permission of the Sultan.

Early colonial governance also enacted specific laws for Malays *per se*, as opposed to laws imposed upon them as Muslims. The first law to specifically address the identity of Malayness was the *Customary Tenure Enactment of 1909*. The first legislation to define what being Malay means, is found in the *Malay Reservations Enactment 1913*, in which it is defined that being Malay “means a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion” – a highly ambiguous and open meaning. Oddly enough these legislations actually fell outside of the authority of the Malay rulers. The promulgation of such laws, and the inevitable definition of the legal Malay, suggests that the first concern of the British was to preserve some aspects of adat *per-pateh* rather than to protect Malay-Muslim interests as a whole.⁶ The 1909 law was enacted to ensure that the customary land laws of the Minangkabau community would be legitimized and protected under a legal clout. The legislation officially recognized 12 “tribes” or *suku* of the Minangkabau community.⁷ In this instance “custom”, gets codified, leading to *adat*, being associated with landholding, or, defined according to the law as encompassing the, “customary land law of Malays resident in the districts of Kuala Pilah, Tampin and Jelebu who are members of the tribes mentioned in Schedule B”. The rules for female-ownership are spelled out in Section 7 (i), of the legislation which states that, “No customary land or any interest therein shall be transferred or leased to any person *other than a female member* or any one of the tribes included in Schedule B” (emphasis my own). This law

enables the land collector to classify which landholdings can be legally-claimed as *harta pesaka* or ancestral land. Once that is registered, the land cannot then be transferred to or inherited by anyone other than the female members of the tribe. Even if the land were to be sold it had to be sold to another female member of the tribe, failing which it had to be offered to another female member of another tribe, with the permission of the *Lembaga* or ruling council of the tribe. This enactment subsequently led to many disputes involving land inheritance, transfer and sale, as the temptation to transact land based on market rather customary principles became more and keener, with the boom in rubber price and rise in land demand for cash crops and housing.

Early Tensions Between Adat and Hukum Syarak

The many disputes involving land held by females of Negri Sembilan and Malacca were based on how colonial officers interpreted the terms of the customary laws, which, as stressed before, did not come under the purview of Malay or Islamic authority, since what was rightfully the jurisdiction of the latter were personal or family laws, while land was not.⁸ This discrepancy had often been missed by scholars on Minangkabau social change. It was largely assumed that women had lost out on their rights to land due to colonial land registration policies, which favoured male ownership (Stivens, Ng and Jomo, 1994: 10-36).⁹ Nothing could be further from the truth, because a scrutiny of case laws shows that there was intense competition between *Adat* and *Hukum Syarak* proponents, with British colonial officers being partial to the former. Ever since the passage of the *Customary Tenure Enactment*, colonial land authorities were quite diligent in registering land titles under women’s names. Many judgements were found to be generous in awarding women land rights and were inclined to declare all kinds of land whether inherited or purchased to come under the “customary” category. Just to give an example of this, I cite a particular case involving a dispute between a female member of a tribe versus another female member of a different tribe.

A case for Appeal, *Munah binti Haji Badar vs Isam*

Binti Mohamed Syed & Anor (Malacca Originating Motion No. 17, 1935) was deliberated in Malacca in 1935.¹⁰ The case involved dispute over a piece of ancestral land (*Pesaka*) belonging to the Suku Tiga Nenek tribe. One Sudah Binti Midin (Isam's late grandmother; Isam being the defendant in this Appeal) had charged the land to a Chettiar (money lender). She defaulted on the payment and the land was auctioned in July 1924 and sold to a man, Haji Ahmad bin Haji Puteh from another *suku* or tribe. By law, no transfer can be effected to a member of an outside tribe. Haji Ahmad subsequently arranged for the land to be purchased from a male member of Sudah's own tribe, the Suku Tiga Nenek. The latter, Haji Salleh bin Tahar, then registered the land under his wife's name, Munah Binti Haji Badar. This was because by law, only a female member of any *suku* shall have the right to own any ancestral land. An added complication was that Munah did not belong to the Suku Tiga Nenek tribe but was from another tribe, the Suku Anak Melaka Kampong Bukit. The court heard evidence from several witnesses which testified that going by *Naning* custom, any member of a tribe who acquires ancestral land belonging to another *suku* is duty bound to surrender it to a female member of the original *suku* if the latter could pay the money to redeem the land. In this case, Munah (the registered owner of the land) agreed to give back the land to Isam provided that the current market price of \$400 be paid for it. The original price of the land, when Isam's grandmother charged it to the money lender was \$60.00. The Collector of Land Revenue in the district of Jasin ruled that Munah had to sell back the land to Isam at a price agreed by her *suku*, the Suku Tiga Nenek. The redemption price offered by the latter was \$65.50 (\$5.50 being the rent for the land for the eleven years). Munah appealed against this decision to the High Court. The Chief Justice upheld the decision of the Collector and ordered Munah to sell back the land to Isam at the requested price of \$65.50, since the land was registered as 'Pesaka Tiga Nenek', or ancestral land of the Tiga Nenek tribe. As such the tribe had the right to reclaim the land as its own. The judge accepted the argument of Isam's lawyer that the value of the land should not be based

on prevailing market rates as interest is forbidden by Islamic law. The judge concurred on this point by noting "the reluctance of Naning Malays to stipulate for interest as being forbidden by Mohammedan law".

In the above case, profits could have been made from land transaction – it was the time of the rubber boom and the area around Jasin was being increasingly urbanized. The Customary Tenure Enactment was an example of a legislation which put a protective caveat on the commercial transaction of customary lands, revealing some form of disjuncture here. On the one hand, colonial policies paved the way for capitalist development, but on the other hand, colonial authorities seemed keen to protect and preserve customary life which would eschew market rules. The idea of preserving customary tribal practices was good but the reality around which such practices had to endure was harsh. Over the years, female members of the Minangkabau and Naning customs were to be increasingly challenged over their land rights. By about the 1930s, male litigants were invoking the *Hukum Syarak* to establish their right to land inheritance, while colonial officers tried to mitigate this by defending the *adat*. In Negri Sembilan, palace authority (based in Sri Menanti) or those aligned to the Yam Tuan were most keen to promote *Hukum Syarak*, as opposed to *adat* leaders who guarded the matrilineal system. In Negri Sembilan, unlike the other Malay states, power of the ruler (Yam Tuan) was checked by the *Undangs* (district chiefs), as they were responsible for electing him to his position as central ruler. For the Yam Tuan, having *Hukum Syarak* under his authority would enable some blunting, if not a balancing of the district chiefs' power:

Negri Sembilan Malays have retained their tribal organization which is essentially democratic, whereas the other states are autocratic. Sri Menanti therefore must always see in the *adat* something which reduces the power and glory of the ruler. (E.N. Taylor, 1970a: 234).

Adat and Harta Sepencarian

In this section I focus on the notion of *harta sepencarian* as a distinctly Malay *Adat*, rather than it being property inheritance and division in accordance with

Islam. As argued earlier, Malay and Islamic law was already evolving as a syncretic, plural tradition, as soon as colonial rule was instituted. Malay law was considered a living law, and, “being a living law at certain time in a certain place, adat is elastic and adaptable to social needs” (Buss-Tjen, 1958: 258). It was an amalgamation of several elements of ‘living laws’, namely the *Adat Perpatih*, *Adat Temenggong*, Indian (Hindu) laws as well as *Hukum Syarak (Shara’)* (Taylor, 1937: 260).

On an everyday basis, the above sets of laws were applied selectively but was also rationally-dependent on many factors. Minangkabau social structure was based on a tribal identity related to land control, bilateral family units and the fusion of territorial with maternal genealogical ties. At the centre of this arrangement was the ownership of tribal land vested in the matrilineal rather than the patrilineal line. Closely connected with the norms of female trusteeship over tribal lands, was also the notion of the *harta sepencarian*, loosely translated as marital property jointly-owned. According to this idea, if it can be ascertained that there were property, particularly land which was acquired or opened-up through the joint-effort of the married couple then it is considered as *harta sepencarian* and can be claimed by one party upon divorce or widowhood. Under colonial governance, the decision to recognize *harta sepencarian* was first made by the Kathi of Larut at the Perak State Council Meeting in 1907 and then later by the Committee of Kathis in Pahang, 1930 (Ridzuan Awang, 1994: 113).

The idea that property could be jointly-owned by married couples and at the point of divorce be divided was first brought up in formal litigation in 1884. The case of *Tijah v Mat Ali* was heard in the court of Province Wellesley (part of the Prince of Wales of Island or Penang). In this case, the colonial court ruled that Tijah, the applicant was not entitled to joint-earnings, since Province Wellesley was governed by English law, which did not have any provision for such a property division. However, by 1919, a divorced woman in Perak succeeded in getting a third of the landed property acquired jointly during her marriage. The court consulted the Raja Chulan of

Perak on this, and was advised that the eligibility of claim would not be based on other factors other than proof of work done on the land. Even though the divorce was brought on because of the wife’s alleged adultery, this did not affect her claims to the land, or the *harta sepencarian*. Similarly, in an earlier case of *Sohor of Suku Batu Hampar, Negri Sembilan 1907*, adultery of a wife was also not a reason for denying *harta sepencarian* at the point of divorce (Parr and Mackray, 1910: 91). In another 1925 case, even though it was the wife who had asked for the divorce by redemption or *tebus talak* she also won her case to have joint-property divided by half (*Wan Malaton v Hj. Abdul Samad*). Through this method of divorce she returned her dowry or *mas kahwin* but did not lose her claim to the *harta sepencarian* (Taylor, 1937: 25-28). In fact, *harta sepencarian* was not just confined to divorce settlement, but also extended to claims upon death of a spouse (Taylor, 1937: 56). In all of these cases, a widow or a divorcee was entitled from one-third to up to half of all joint-property acquired during marriage. The principle used was labour and its contribution to converting the land from a static to a livable, productive resource. Hence, more than anything else, being Malay at that time whether in the ethnic or gender-sense was an identity tied to land tenure, especially in the state of Negri Sembilan (Hooker, 1976: 55-56).¹¹

The customary law of inheritance as revealed by the above cases is unrecognizable by Islamic tenets, but accepted as a secondary source of Syariah in that it constitutes a customary practice or *urf* (in Arabic) (Abdullah, Martinez and Radzi, 2010). Description of inheritance norms among Malays of the past also showed a deviation from Islamic rules applied today – for example, in late nineteenth century Perak, it was noted that, “plantations, houses and padi fields go to his daughters...cattle, buffaloes, goats, elephants are divided into four shares, three to go to sons and one-fourth is devoted to the cost of the funeral feasts...if there is no land or house, the daughters share in the personal property equally with the sons” (Maxwell, 1884: 128). This was because the significant social unit was the tribe, rather than the nucleated family (Taylor, 1970: 109-158). Colonial officials relied on

authoritative Shafie texts such as the *Minhaj et Talibin*¹² as well as on precedents by Indian-Muslim judges such as Justice Amir Ali and Justice Tyabji to decide on local disputations, but occasionally finding that what was practiced locally such as distribution of *harta sepencarian* could not be found in these sources.¹³

Gradually though, two forces began to effect how land was to be inherited among Malays. The first was the entry of capitalism which treated land as saleable commodity, the value of which would be subject to market principles rather to customary or religious norms. The second was the Islamic law of inheritance itself, or the *hukum faraid* which contains rules quite different from the *adat* as far as female inheritance was concerned. Strictly speaking, *hukum faraid* does not recognize division of property based on the principle of *harta sepencarian*, or the equal division of estate between male and female heirs.

British officers, nevertheless took it upon themselves to protect all of “Malay” or customary lands from being transacted freely on the open market.¹⁴ As for Islamic law, as discussed in the earlier section of this paper, it was the Malay ruling class who preferred to employ them, especially in mitigating the authority of local tribal leaders who ruled by the more decentralized *adat* (Taylor, 1970a: 234). Inheritance by *faraid* was also more applicable to moveable property rather than immovable property such as land, which was the mainstay of Malay families. Due to these contestations, an enactment was even introduced to allow more leeway for people to choose between the *adat perpateh* or *adat temenggong* in their devolution of land. Before this new law, all land, whether ancestral land or new land belonging to any member of the 12 Minangkabau tribes (as specified in the legislation) must be inherited according to the *adat perpateh* and not the *adat temenggong* (Taylor, 1970: 188). As a result of this contestation, The *Customary Tenure Enactment of 1926* was amended to allow for a choice to be made between the two *adat* laws. Even so, there was pressure from the territorial chiefs that all property classified as property earned (*harta charian*), as distinguished from ancestral property (*harta pusaka*) must be devolved according to

Hukum Syarak (Taylor, 1970: 189-190). Over time, the rule of customary land inheritance was eventually supplanted by the *Hukum Syarak*, which also coincided with the decline of the Malay matrilineal family tradition.

Adat law on marital property was distinguished from *Hukum Syarak*, since there was no necessary conflation between Malay and Islam law then, and it was not considered a deviation either. There were other differences too, such as on male marital rights. The Minangkabau family was designed for tribal preservation and well-being, making monogamy a rule while in-marriage among members of the same tribe was punishable by death in places such as Rembau, Negri Sembilan (Parr and Mackray, 1910: 78-79). Divorced women were able to depend on claims from *harta sepencarian* to eke out their living outside of marriage, thus making the institution of the family less dependent upon the presence of males within the household. In the Minangkabau situation, the care of children was the responsibility of clan members as a whole rather than something which fell squarely on the shoulders of the father-mother parental unit. This can be evidenced by the nature of litigations involving marriage between the early 1900s and late 1930s, which were usually centered around property division rather than applications for maintenance or *nafkah* from men. Under these circumstances, the *harta sepencarian* was keenly contested in divorce settlements, as it was women’s insurance against failed marriages and widowhood.

Nevertheless, although family litigations during the colonial era recognized the validity of *harta sepencarian*, this notion of rights was not codified until after the colonial period. Perhaps this was due to the grey area which *harta sepencarian* occupied, as it was neither Islamic nor something that could be codified under the common law. Hence, the way around this issue was for the courts to seek the advice of Malay rulers or religious authority whenever disputes around this arose. It was only in the comprehensive enactment for the “administration of Muslim law” adopted in almost all states, starting from 1952 in the state of Selangor that a legal definition for *harta sepencarian* found its way into the statute books. It was considered

'Malay custom' rather than Islamic. But through the years, *harta sepencarian* had become so embedded with Malay-Islamic norms that it survived as a significant legacy of Malay legal tradition. In fact, what was left of Malay custom within Malaysian Islamic law was reduced to that of the *harta sepencarian*. For example the *Perak Administration of Muslim Law Enactment 1965* defines 'Malay custom' as being "part of the 'Adat' (usage) ...and at present in force in the State known as "Harta Sa-pencarian" and "Belanja H Angus".¹⁵ The definition of *harta sepencarian* is spelled out as "the earning of the property acquired as the result of joint labour of husband and wife and includes the income derived from capital which is itself the result of joint labour." To this day, *harta sepencarian* has remained as an important component of Syariah law, and even influencing civil cases (Abdullah, Martinez and Radzi, 2010)

Early and Middle Postcolonial Period (1950s to 1990s)

In the post-war colonial situation, the movement for nationalization was speeded-up. By this time the Malay Sultans were losing power to new national ruling elites, as the former were transformed into constitutional monarchs. The new elites were however modernist in perspective and although Islam was held to be important as a basis for Malay identity, Islam's place was still at the level of "personal laws" rather than be extended to overall matters in a Muslim's life. More importantly, this early postcolonial period was a period of statutory rationalization. This was before the onset of Islamic revival politics. Syariah courts were given more clout during this time, while Islamic administration continued to decentralize at the state level. The various enactments for Muslims also remained within the purview of state rulers rather than the national federal government. Islam was under the purview of each individual state and hence each of the 13 states in Malaysia enacted their own legislations to govern Muslims within their boundaries. Some laws could differ from one state to another. Rationalization exercises to lead towards the upgrading of the Syariah essentially involved the passage of one comprehensive

law for Muslims to replace all the various separate enactments that existed during colonial times. The passage of the first "single omnibus statute" was the *1952 Administration of Muslim Law (AML)*, in the state of Selangor (Horowitz, 1994a: 258). Instead of having the list of separate enactments, as in the *Muhammadian Law and Malay Custom (Determination) Enactment 1930*, the *Muhammadan Marriage and Divorce Registration Enactment 1931*, the *Muhammadan (Offences) Enactment 1938* and the *Council of Religion and Malay Customs Enactment 1949*, the post 1950's saw the integration of these laws into one major statute for Muslims, named *The Administration Of Muslim Law Enactment 1952 (State Of Selangor)*. Given that all laws for Muslims were still governed under the separate state governments, there was little power for the federal authority to intervene in Islamic matters. Malaysian Islam at this time was still decentralized in scope and feature.

In this decentralized phase the characteristics of Islamic laws was one of diversity and plurality and the central government had little authority over Islam, within the different states. Matters of marriage, divorce, custody and maintenance were inserted under only a few sections within the general law meant for Muslims. Legislation such as the *Administration of Muslim Family Law (Penang) Enactment 1959*, only had 25 sections for marriage and divorce matters, out of a total of 172 sections in it. In these early years each state in Malaysia had its own set of Islamic Family laws (contents of which could often differ from one state to the other) while their Syariah courts were administered independently of federal intervention.¹⁶ The Syariah court which heard marriage cases was known as the *Kadi* Court, and had the status of a lower court. Lawyers were not usually appointed to represent the plaintiff and the defendant. The settlement of marital disputes could often be reduced to a slanging match between husbands and wives in the presence of the *kadi* (Peletz, 2002). Most of the judgments would be made by the *kadi*, or the Islamic court judge. The laws were probably less-developed and therefore less rigid in terms of interpretation and enforcement. The *kadi* were at liberty to express their views judiciously without being necessarily bound by

precedence, dogma and text. In 1965, for example, one could find judgments which were extremely sympathetic to women, while women's character or acts of disobedience (*nusyuz*) were seldom used to deny them of their rights. For example, a case involving a woman who wanted to redeem her divorce by *tebus talak*,¹⁷ because of a sexually unsatisfying marriage was even granted to her, even though in current times, it would be more difficult to be granted a judicial divorce based on such grounds.¹⁸

Hence, we could surmise that in this period Syariah was constructed within the ambit of English statute law. Thus the features of laws for Muslims were plural in scope and jurisdiction and hybridized in almost all aspects (Yegar, 1979: 119). What was meant by Islamic law was a combination of laws which included customs as well as modern ideas of progress. In effect, an "early family Syariah" was being instituted and a form of masculinist protective ideology was informing the character of this early Syariah. Nevertheless, the evolution of Syariah in Malaysia took a different path from other nation-states of sizeable Muslim populations. In Pakistan, there were no specific statutes which would be distinguishable as Syariah, but instead, Islamic doctrine was installed as higher laws, by which other ordinary laws were to be measured by using judicial review (Jahangir, 1988). In Indonesia there is no supremacy of Islamic law, but instead laws which hinted of Islamic elements would be integrated into national laws or as local-level regulations (Horowitz, 1994: 236). In Asia, it was only in Malaysia that, "the Islamization of law proceeded more methodically" and that "in the span of a decade, dozens of new statutes and judicial decisions have clarified, expanded, and reformulated the law applicable to Muslims." (Horowitz, 1994a: 236).

The background of the 1980s development of laws for Malaysian Muslims would be too extensive to cover in this one article – but in a nutshell we could correlate this period with the rise of Islamic consciousness and politicization. In the colonial period we saw the admixture and amalgamation of various *adat* with Quranic dictates, fluidly interchanging and juxtaposing the two or three traditions in the Malay world. *Harta Sepencarian*, for example was consistently

proclaimed by *kadi* and *ulamas* to be in consonant with *Hukum Syarak*, even though this tradition was not present in other Muslim societies outside of the Malay world. By the 1980s, after laws for Muslims (a bulk of which dealt with family matters) were rationalized and unified to constitute a single body of "personal laws", the focus of attention naturally revolved around the "Muslim family". This was to be associated with the project of build appropriate behavioural norms for the new Muslim community. Given that the Islamization movement could not have succeeded without the initial transformation "from within", regulating the family through more authentic Islamic laws became a popular concern, of government as well as civil society. However, the many social factions and movements were actually lobbying for a Muslim family law for different reasons, and from differing perspectives.

For the new Islamic movements, such as ABIM (*Angkatan Belia Islam Malaysia* – Malaysian Youth Movement) law was seen as a strategic entry point for more Islamization in society. Since personal law had always been associated with family laws, and also because Muslims' encounter with law had always involved family – at least at the point of marriage, Family Law became the most natural vehicle in the deliverance of the new Muslim Family. However, there was also another group, with a special interest in Family Law for Muslims and these were women's groups. The social and economic progress that middle-class women achieved during this time raised their concerns about their cultural status. Influential group like the women's wing of the ruling party UMNO (United Malays National Organization) were concerned with issues such as polygamy, divorce rights and maintenance. Yet another group was Muslim lawyers themselves, who were trained in Western law. With the growing appeal of Islam, they also looked towards law reform as a way of showing their commitment to Islamization.¹⁹ The result of all these multi-pronged pressures was the passage of a new enactment called the *Islamic Family Law Enactment*, promulgated in 1984 in the Federal Territory, denoting that Islamic matters from that instance onwards were set to be gradually charted by the central

administration. The Federal Territory, a new administrative unit created by the federal authority, was like the “13th” state of Malaysia – and would serve as the central government’s “model state” for Islamic law-making. The Islamic Family Law of the Federal Territory was expected to serve as the model template for Islamic law reforms in the other states. But this was not a project without contenders. Kelantan was also another state which had already seen a passage of its own Islamic Family Law a year before the Federal Territory template came into being (Horowitz, 1994a: 273).

Even though there were differences between the two models, they still tried to incorporate the ethos of a modernizing nation, and conformed to some prevailing standards of gender rights and justice. This new Islamic Family Law statute took out all the sections on Family from the ‘omnibus’ legislation, the AML and crafted a new legislation which expanded the scope of family regulation by increasing the number of provisions from 25 sections to 135 sections. A new phase of Islamic law-making, from consolidation to differentiation was taking off. The clear trend was towards the greater codification, reification and essentialization of the Islamic family. In the 1984 legislation, modernists and progressive women seemed to have had an upper hand, ahead of the other groups in this project. The Islamic Family Law at that time was generous towards granting women some reasonable rights, in matters of marriage and divorce, and was even considered to be one of the most progressive in the Muslim world (Zainah Anwar, 2008).

One progressive clause to restrict polygamy was found in Section 23 of the Selangor Islamic Family Law, 1984 – “that the proposed marriage will not directly or otherwise lower the standard of living that his ... wives and dependants have enjoyed ... if the proposed marriage is not performed”. This means that if a man were to take on additional wives, the living standards of existing wives and families must not be lowered, after the new marriage takes place. This is a very interesting caveat because it is impossible for any man to establish a new family without lowering the standard of living of his 1existing families. Only extremely wealthy men would be able to pass this test.

But even so, some wealthy men were not given permission because they could not fulfill other conditions contained in the legislation. Even a well-to-do man must prove that his polygamous marriage is not only *necessary*, but *just* as well. That being so, the court would be legally-bound to reject any application (for polygamy) if it was not “satisfied that the proposed marriage was necessary as well as fair at the same time [Section 17 (3) (i) of the *Kedah Islamic Family Law, 1984*]. The other condition to be fulfilled was that a man had to prove that he could accord equal treatment to all wives [Section 17 (3) (ii) (b) *Kedah Islamic Family Law, 1984*]. These stipulations were contained in the Islamic Family Laws of almost all states in the 1980s and made it impossible for polygamy application to be granted freely by the courts.

In 2001 an application for polygamy by one Ruzaini bin Hassan was rejected by the Negri Sembilan Syariah High Court.²⁰ This case was heard in the mid-1980s. It was a detailed written judgment and there was much emphasis on the financial affordability of the applicant, in order for him to be granted permission to take on another wife. The proceedings revolved around the calculation of the applicants’ income and expenditure, inviting the ire of the judge when it was tallied that even with the addition of his current wife’s monthly savings, the balance of what was left was merely pittance; “Do you think that with only RM391.90 (*USD118*) left you can afford to maintain another wife?”, asked the judge. Ruzaini did not answer the judge’s question, and his application was subsequently rejected. It was on the basis of Sections 23 (3) and 23 (4)(a), (b), (c), (d), (e), of the Muslim Family Law (Negri Sembilan) Enactment, 1985, that the above application was rejected. Section 23 (4)(e) was the most crucial condition which could not be fulfilled by Ruzaini as the judge had opined that with polygamy, Ruzaini would especially be breaching a clause which stipulates that polygamy cannot be approved if the proposed marriage would directly or indirectly lower the living standard of existing wife or wives and dependants. Various other cases demonstrated that this was an era which embodied a norm of ‘female progressivism’ with many high-profile applications by men to contract polygamy

rejected by the court, such as in the 1990 case of *Aishah bte. Abdul Rauf v. Wan Mohd. Yusof bin Wan Othman* (Horowitz, 1994b: 546), and in the 1991 case of *Rajamah bt Mohamad v Abdul Wahab bin Long* (Nik Noriani, 1998: 36). In *Zainab binti Mahmood and Abd. Latif bin Jusoh*, the husband's pronouncement of *talak* outside of court was rejected by the state of Selangor Syariah Appeals Committee (Horowitz, 1994b: 545-546). In the case of *Fakhariah bte. Lokman v. Johari bin Zakaria*, the court allowed for the application of a wife to seek divorce by stipulation (*cerai taklik*) on grounds that the husband had failed to provide maintenance. The husband's defense that his wife had committed *nusyuz* (act of disobedience) was rejected by the court, as it was not considered material to the divorce application initiated by the wife (Horowitz, 1994b: 553-554).

During this period of a fledgling movement for a rights-based, civic Malay statutory laws for Muslims were being upgraded within the legal system by accommodating the ethos of modernization and progress. The reforms gave much concession to women's right lobbyists. At the same time the Islamization project, directed by the central government, was one which tried to fit in with the image of a progressive and moderate Islamic nation. But as we shall see later, this process was far from stable. The Family Syariah of this period was only transitional in nature, and was eventually repealed and subsumed by a new statute in the early 2000s. Gains which women had made in the 1980s began to slip away as the new statute took effect.

Current Period (Post-2000s)

One significant development to have contributed to the rising saliency of the Syariah was an amendment made to the national Constitution in 1988. The purpose of the amendment to Article 121 (1A) of the Federal Constitution,²¹ was to delineate the separate jurisdictions of the Syariah Court and the Civil Court, so as to subject Muslims and non-Muslims to different jurisdictions when it comes to various Syariah laws involving laws, both family and criminal matters. Building a parallel judicial system also meant

that recourse to an appeal out of Syariah court judgments at the higher (civil) court levels could no longer be an option. In tandem with this new constitutional provision, an Appeals court was set up within the Syariah system. This new structure and clause of allowing only the Syariah court to have jurisdiction over certain exclusive cases has been persistently invoked in court judgments involving inter-religious applications, such that the civil court is limited in its power to decide on issues that have anything to do with Islam, or even the civil rights of Muslims, such as in the issue of freedom of religion. On the latter, the case of *Lina Joy* is instructive as it leaves no recourse for the application of Muslims to embrace another faith other than Islam. Even in a case where relief from domestic violence was sought, a Muslim woman was prevented from relying on the civil court to seek her redress. The case of *Mohamed Habibullah bin Mahmood v Faridah Bte Dato Talib [Supreme Court (Kuala Lumpur), Civil Appeal 02-441-89]* is an example of a Supreme Court ruling where the defendant (Faridah), as a Muslim woman was not allowed to bring her complaints up with the civil court. On the basis of Article 121 (1A), Supreme Court judges interpreted this to mean that Faridah's application to stop her husband from abusing her did not come within the jurisdiction of the civil court, as they were Muslims and all their marital matters could only be resolved within the Syariah court system. This was the beginning of the 'ringfenced' Muslim in which the choice for justice would be bound by their legal identity as a religious subject rather than a national citizen. In the words of Mohamed Azmi, SCJ, the Muslim appears not to have any civil rights:

"The root of the plaintiff's complaint relates to the conduct of the defendant during the course of a Muslim marriage. It is not really a civil or criminal matter as suggested by the trial judge. In fact and in law, the alleged assault and battery constitute matrimonial offence or misconduct and the matter should be dealt with by the court in its matrimonial and not in its general civil jurisdiction" (*Mohamed Habibullah bin Mahmood v Faridah Bte Dato Talib* 2 MLJ 793, 1992).

The above case is a prelude to many other cases which followed. Muslim applicants were not able to

use the law and courts on the basis of their status as citizens with civil rights. They were instead treated as religious subjects, over whom the civil court would refuse to claim jurisdiction.²²

By the late 1980s the exercise in Syariah statute-making had taken off with great vigour. New laws on Syariah criminal offences were enacted for all states. There were also laws for court procedures to be used in Syariah civil and criminal trials which were modeled wholly on English law. The outcome of all of these was the homogenization as well as the ringfencing of Muslims, as occupying the parallel status of the religious subject and therefore possessing only a quasi-national citizenship. Some of the many new laws applied to Muslims are so comprehensive as to leave little room for civil laws to exert their regulatory hold on them. These include the following:

- Syariah Criminal Offence Enactment (Kedah) 1988.
- Syariah Courts Civil Procedure Enactment (Selangor) 1991.
- Syariah Court Criminal Procedure Enactment (Perlis) 1993
- Administration of Islamic Religion Enactment (Selangor) 2003.
- Islamic Family Law (State of Selangor) 2003
- *Tarekat Tasawuf* (Negri Sembilan) Enactment 2005

During this period, after the year 2000, the Family Law statutes of the 1980s were all repealed and replaced by a new Family Law legislation, enhancing men's entitlements and curtailing women's rights (Zainah, 2008: 277 – 278). For example, polygamous marriages would still be registered and recognized even if the marriage was done without court permission, the punishment being only a fine or jail sentence. Even divorces pronounced out of court are valid under the New Enactment so long as a fine or a jail sentence is served. This was a serious setback as divorce could now be granted to men without them having to settle all claims related to the divorce. Another amendment which roused the anger of women publicly was the clause which allowed for polygamy to be practiced without the man having to prove that

the marriage was both necessary *and* just, as was the case under the old law. One onerous qualification for polygamy was dropped under the New Enactment, so that it was no longer required of a polygamous man to maintain the same material standard of living for all his wives. Equally irksome for women was the insertion of a new clause allowing men to apply for a no-fault or *fasakh* divorce, which was previously the exclusive right of women. Having a no-fault divorce on the man's part could exempt him from paying the wife *mut'ah* and other post-divorce maintenance claims.

Constructing the appropriate Muslim family became an even more intense aspect of "Syariah-tization" during the post 2000s. Instead of just amending the 1984 Islamic Family Law the legislature completely replaced the old law with a new one. There were major changes as to how the regulation of the new Muslim family was exercised. In this new legislation, such as, the Islamic *Family Law (State of Selangor) 2003* contains more lenient conditions for polygamy. There were marked changes in the provisions for polygamy, divorce and maintenance rights in the new law which was promulgated in the early 2000s. As discussed in the previous section, the 1984 Islamic Family Law will only allow courts to approve polygamy if it fulfills the conditions of necessity and fairness, equal treatment and the maintenance of similar living standards of existing wives and families. Through the New Family Syariah, polygamy could even be granted to men with very little financial means. Polygamous marriage can now be approved as long as the marriage can fulfill the condition of either being "necessary" or "just", and not necessarily the two conditions being simultaneously fulfilled. Thus, a man can apply for polygamy due to the infertility of current wife (hence considered a necessity, if the intention is to have a progeny), but not necessarily be obliged to prove that it would be just (to the current wife). Another amendment was to lower the need for "equal treatment" to "fair treatment" of all wives. But the most significant change was in dropping altogether the clause on not lowering the living standards of existing households were a new marriage to take place in the new enactment.

Changes within the New Family Law have now exposed the dissonance between male (lack of) economic power with his actual ability to maintain a family, let alone several families and households. This has been papered over by the emphasis on his entitlement and his success at disciplining women under his charge. Many applications for payment of maintenance by women in polygamous marriages have found their way into the Syariah courts today. Male negligence seems to be a recurring theme in marriage contestation. While indulging in the privilege of polygamy, for example, the case of a wife, Nik Rasita suing her polygamous husband for failing to pay for children's support is instructive of the current period of dominative masculinity. In a case like this, there were four court sessions, including an order for arrest, before the court could hand down a judgment for an extremely minimal payment to the man's own family. In the end the order was proved to be unenforceable.²³

The non-enforcement of courts' orders for maintenance payment of women and children, such as the above, has now become a mounting national issue so much so that the state is coming into the picture to cover-up for Muslim male negligence. The Malaysian Syariah Judicial Department recently revealed that since 2000, a total of 12,300 husbands had failed to pay their maintenance obligations despite court orders to do so.²⁴ Earlier, in January 2010 the Islamic Department under the Prime Minister's office announced that it was setting up a special fund to the amount of RM15 million (USD4.5 million) to advance up to six-months payment to Muslim women who fail to get maintenance from their husbands.²⁵ Oddly enough there was no proposal to deal with male criminal breaches, even though the law specifies imprisonment as punishment for the contempt of court orders.²⁶

The new Family law is a reflection of an intense competition for authority within the internal circles of the Islamic bureaucracy. Changes inserted in the new statutes were brought about by several factors. Many powerful and influential men had been denied their application for polygamy, under the old law, so there was pressure to remedy the situation in their

favour. The Islamic bureaucracy had also become increasingly independent of political control and civil society pressures, becoming a powerful force in the adjudication of right against wrong Islam. This bureaucracy was firmly in the hands of salaried officials who had either come back from more conservative centers of learning in the Arab world or locally-trained in newly established tertiary institutions in the country. They basically had little or no training in English law, as was the case with some their predecessors. . Their sense of autonomy was further reinforced by the hands-off attitude of law-makers in parliament towards anything to do with Islam. Elected legislators were fearful of questioning any Islamic authority so much so that no debates would transpire whenever any bill for Muslims were tabled in the legislative houses. Non-Muslim law-makers also shied away completely from wanting to have any say on a matter perceived to be outside of their legal sphere. In sum this had led to many flawed and unjust legislations for Muslims passing off as 'sacred law', even though more thorough philosophical debates involving jurists, theologians and scholars may take a longer and circuitous process in the pronouncement of what should construe as authentic or just Syariah.

The current period (post-2000s) of Islamic law-making is featured by the enormous multiplication of statutes that are now meant to be applied to the entire Muslim citizenry within the nation-state. Instead of accommodating law from the customary or even western sources, there seemed to be an activism which is attempting to reclaim an authentic tradition of the Syariah based on some new notions of family and masculinity. Nevertheless, in the Malaysian case, those who control the religious bureaucracy have had the greatest advantage in defining what is to be construed as correct and legitimate Syariah. Furthermore, this bureaucracy and the civil society behind it consider Islam to be the first-among-equals of all religions in the country. The construction of the Muslim Family thus takes on a new dimension, with the new family Syariah embodying the traits of the dominative masculinity, which is more coercive rather than protective in nature. The disjuncture brought about by a legal system which is more focused on Islam's performative

aspect (rather than family security) has brought hardships in the everyday lives of economically and socially disadvantaged women and children.

Conclusion: Syariah as Emblematic of Postcolonial Modernity

The ideal, if not ideological basis behind Syariah law-making is not always in consonance with practical reality in Muslim countries today. In nation states with a sizeable Muslim majority there is more often than not, confusion, contradiction and gaps in advancing the notion of the ideal Muslim family and in the enforcement of sanctions and punishment against its negation. Since most Muslim societies have a multi-level and multi-pronged parallel judicial systems (as in civil versus religious or customary legal jurisdictions), these have also added to the complications and the disjuncture within the system. In theory, laws enacted in the name of Islam adhere to the ideal tenets of the masculinist protection logic. In reality this ideal is not always upheld, when men are not able to fulfill their end of the bargain in the family security arrangement, and manifest this slippage through acts of neglect or violence – in both the bodily and the structural senses.

The most compelling idea about the power of modernity brought about by Western colonization was its exercise in classification and the fixing of definite identities upon its constituents. This theme has been sufficiently explored in studies on postcoloniality. Bernard Cohn (1961) who did his studies on Colonial India argued that tools of governance such as surveys, censuses and laws were all part of the classification exercises for categorization. Here, I have focussed on statutes as yet another significant device that was used for such a purpose.

Talal Asad (2003), and before him William Cantrell Smith (1962) propounded the thesis about the new saliency of religion as a reified institution, which is applicable to this brief study of the Syariah's evolution. In reviewing Smith's classic work, Asad reminds us how Smith basically makes a distinction between faith and religion (Asad, 2001). While faith is fluid and indefinite, religion is fixed, codified and

essentialized. Asad follows from this to underscore that modern religion in its textualized, codified and formalized form is a product of secularization – "... no thing corresponds, properly speaking, to the noun 'religion'. The use of that term to refer to what does exist – namely, the personal quality of faith-therefore inevitably reifies it" (Asad, 2001: 206). Along the same lines, Aharon Layish (2004) concludes that the conceptual premise in the understanding of Islamic law today should be based on the foundational transformation of the Syariah from being a jurist law to becoming a statutory law.

The upgrading and elevation of the Syariah as modern statutes in Malaysia today is in fact an adaptation, if not an imitation of secular legal reforms, even though it is meant to reclaim and re-establish a stolen cultural identity from the clutches of colonialism and westernism. Partha Chatterjee's term, derivative nationalism, may be usefully applied in the understanding of Islamic law reform in the modern nation-state context. That, while the Syariah purports to be a project in the reclamation of an indigenously, religious-centric identity it is also dependent on western legal language, procedures and substance for the activation of its authenticity:

"Nationalism denied the alleged inferiority of the colonized people; it also asserted that a backward nation could modernize itself while retaining its cultural identity. It thus produced a discourse in which, even as it challenged the colonial claim to political domination, it also accepted the very intellectual premises of 'modernity' on which colonial domination was based." (Chatterjee, 1993: 30)

My own attempt at classifying Malaysia's Islam is to situate it as a bureaucratized religion, that the outcome of derivative nationalism is the recreation and reproduction of a similar, though not-so-familiar new system of control and authority, which functions to embed Malay authority in governance. Control through law, as exemplified in the discourse of colonial domination and westernization seems to be replicated through the elevation of the Syariah. That what is construed as authentic religion or Islam in contemporary Malaysian society is in fact an invented tradition facilitated by the upgrading of Syariah through

its transmutation into statutory laws drawn along Western principles but subsequently incorporated as the postcolonial identity of the modernizing state. Here, it can be seen that the role of Islamic law reform is crucial in the project for postcolonial state building – as a means for simultaneously resisting imperialism as well as claiming political autonomy (Brown, 1995: 55-60; Asad, 2003: 222). I have shown the trajectory of Malaysian Syariah to be following a secular path – all along through statute-making, which fixes and reifies the notions of identity (be it racial or gender) in a more coercive and dominative way. However, the most compelling outcome of the fashioning of Syariah through statutory law was the embedment of a masculinist- Malay authority within the system rather than a heightened state of Islamism or a de-secularized public space for social and political engagements.

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Endnotes

1 This is a revised version of a Plenary paper presented at the conference, "Spirited Voices from the Muslim World: Islam, Democracy and Gender Rights", University of Sydney, Australia, 28-30 April, 2011. The paper was originally titled, "The Masculinist Protection Logic:

Disjunctures of Contemporary Syariah".

2 For example to emphasize the symbiotic relationship of *adat* and Islam:

*Adat bersendi hukum
Hukum bersendi kitabu'llah
Kuat adat, ta' gadoh hukum
Kuat hukum ta' gadoh adat
Ibu hukum muafakat
Ibu adat muafakat*

[Customary law hinges on religious law
Religious law on the word of God
If custom is strong, religion is not upset
If religion is strong, custom is not upset
Mother of Religious law is consensus
Mother of religious law is consensus]

On the meaning of justice:

*Chupak yang tepat
Gantang yang piauwi
Bongkal yang betul
Teraju yang baik
Tiada boleh dialeh lagi*

[The quart measure that is full
The gallon measure that is precise
The weight that is correct
The scales that are good
These cannot be upset]

On the meaning of property:

*Chari bahagi
Dapatan tinggal
Pembawa kembali
Kutu dibelah
Suarang di ageh
Rugi laba pulang ke tempat semanda
Nyawa darah pulang kepada waris*

[Earnings by husband and wife goes to whoever earns it
What is from the tribe remains with the tribe
What the husband brought goes with him
Property acquired in partnership is split
Common property acquired together is divided equally
Any loss or profit on the wife's estate is a matter for her tribe
The man's person is restored to his own tribe]

The above is extracted from Hooker (1973: 35-37), but original version is from Caldecott (1918 :3-41). I have paraphrased the original English translation.

3 For a critique of colonial interpretation of Malay Adat laws see Noor Aisha (2006)

4 In the treaties, Islam and Malay custom was to be the only purview of the Malay rulers: "In all cases regarding the ceremonies of religion, and marriages, and the rules of inheritance, the laws and customs of the Malays will be respected, where they shall not be contrary to reason, justice or humanity. In all other cases the laws of the British authority will be enforced with due consideration to the usages and habits of the people" (Memorandum by Stamford Raffles, Johore, 1823) and "That the Sultan receive and provide a suitable residence for a British Officer to be called a Resident, who shall be accredited to this Court, and whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom" (Pangkor Treaty, 1874).

5 All these were formalized in 1904 in the Muhammadan Laws Enactment of the FMS, stated as, "an enactment to provide for the punishment of certain offences by Muhammadans", namely, not attending Friday prayers, enticing an unmarried girl to run away, adultery, incest, cohabitation after divorce, breach of betrothal contract, religious teaching without the permission of the Sultan, selling food during Ramadhan and printing of religious books without permission.

6 A statement by Winstedt (in Hooker, 1970) seems to imply that the law was enacted to protect adat, hence the need to specify what being Malay means, "In my time I did all I could to preserve adat, tiresome as it was, because with no Malay Reservations Enactment, it was the only way to keep the Malay from selling his land to foreigners, Indians and Chinese."

7 The list of recognized tribes in the enactment (Schedule B) includes:

1. Biduanda (waris and/or Dagang)
2. Batu Hampar
3. Sri Melenggeng
4. Tanah Datar
5. Sri Lemak
6. Mungkal
7. Tiga Batu
8. Tiga Nenek
9. Paiah Kumbah
10. Anak Melaka
11. Anak Achih
12. Batu Belang

8 The matrilineal custom in Malacca was also known as the *Naning* custom. The latter was specified under the law, *Ordinance No. 39 (Malacca Lands Customary Rights) – Naning Custom*.

9 Maila Stivens, Cecilia Ng, Jomo K.S with Jahara Bee (1994) *Malay peasant women and the land*, London and New Jersey; Zed Books Ltd: 10 – 36;

10 From *The Malayan Law Journal* (1936), Vol. V, no. 2., February

11 There was a rule connected to this form of land tenure. Property under Adat could be classified as the following (Hooker, 1976: 58):

Harta Carian (acquired property, which is further distinguished between that which is acquired during singlehood, before marriage (*carian bujang*) or together, during marriage (*carian laki-bini*).

Harta Dapatan, or ancestral property brought by the wife to a marriage and reverts to her upon divorce. *Harta Pembawa*, or non-inherited property brought into the marriage by the husband and reverts to him upon divorce.

Harta Pesaka, or ancestral property.

12 This seventh century text had been translated into English for use by English jurists in India. The 1914 edition is translated by E. C. Howard. See Mahiudin Abu Zakaria Yahya Ibn Sharif en NAWAWI, *Minhaj et Tali-bin: A Manual of Mohammadan Law According to the School of Shafii*, translated into English from the French edition of L.W.C. Van Den Berg by E.C. Howard, late district judge, Singapore, London: W. Thacker & Co.

13 See deliberations in *Laton vs Ramah (Selangor Civil Sui No. 323 of 26)* reproduced and discussed in E.N. Taylor (1937: 35-47).

14 In a memo by R.O. Winstedt, when asked about his view about adjudications involving *adat* and Islamic law, "In my time I did all I could to preserve *adat*, tiresome as it was, because, with no Malay Reservations Enactment, it was the only way to keep the Malay from selling his land to foreigners, Indians and Chinese." (Taylor, 1970: 184).

15 See Part 1, Section 2 of the Enactment. "Belanja H Angus" is also distinctly Malay as this is gift or payment in cash given to the bride's family upon betrothal or before the marriage contract is solemnized. This is to be distinguished from *mas kahwin* which is the mandatory *mahr* paid at the time the contract is being sealed, in accordance with rules of Islamic marriage.

16 Due to the nature of the federal system, and constitutional provisions, Islamic laws are still under the legal purview of each individual state within the country. While there was more variation in the Islamic laws of each state before, especially during colonial times, the current policy of the central government is to compel all states to adopt a uniform set of Islamic laws.

17 Under Islamic law, a woman is allowed to ‘purchase’ her divorce for an amount agreeable by the husband and/or the court. The term *tebus talak* in Malay literally means redeeming the *talak* (a man’s prerogative) for use by the woman herself.

18 All translations from Malay into English are my own. See *Nerat bt Musa vs Ahmad B. Kanchil; Kadi Court, Perlis, 1965*. Reported in *Jurnal Hukum*, September 1983, Vol 1, Section 1, pg. 102.

19 A person like Professor Ahmad Ibrahim, a former Singaporean was once such person who was responsible among others in enacting and reforming many of the postcolonial laws for Muslims in Malaysia.

20 *Ruzaini bin Hassan’s application for polygamy (Syariah High Court of Negeri Sembilan, 2001)*, as in “Dalam Perkara Permohonan Poligami Ruzaini bin Hassan” (In the Matter of Ruzaini bin Hassan’s Application for Polygamy), reported in *Jurnal Hukum*, vol. 15, pt. 1, June 2002; p. 95.

21 Article 121 (1A) of the Constitution states that the High Courts of Malaya, Sabah and Sarawak “shall have no jurisdiction in respect of any matter within jurisdiction of the Syariah courts”.

22 I have discussed several of these cases in Mohamad (2010:367-373).

23 Kes Mal: 03010-024-0142-2007, Seksyen 74 Eki Neg Kel 2002 (Civil Case: 03010-024-0142-2007). This case was heard in the District of Jeli (Kelantan) Syariah Lower Court in 2007.

24 “Jamil: Bekas Suami Boleh di Penjara Jika Gagal Bayar Nafkah ” (Jamil: Ex-Husbands to be Imprisoned for Failure to Pay Maintenance), *Malaysian Insider*, 20 March 2010; from <http://www.themalaysianinsider.com/index.php/bahasa/56937-jamil-bekas-suami-boleh-dipenjara-jika-gagal-bayar-nafkah>, Accessed 20 March 2010.

25 “More Allocation for Divorces”, *The Star*, 30 January 2010.

26 Section 133 (2) of the Islamic Family Law (State of Penang) Enactment 2004 states that the penalty for not complying with court orders is one month’s imprisonment for each month of unpaid payment or one year for any payment remaining unpaid.

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