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POLICING AND PROTECTING WOMEN: SOME ASPECTS OF MALAY-ISLAMIC LAW-MAKING UNDER BRITISH COLONIALISM

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ABSTRACT

Some aspects of Malay-Islamic law-making, specifically on marriage, sexual offences and land succession and ownership rights during colonial times are discussed here. The study uncovers the gender-based dynamics of negotiation, accommodation and conflict between British administrators and Malay rulers, which drew several themes and questions in relation to women's place in society then. British colonial officials seemed benevolently supportive of Malay women's integral economic role in the social and cultural cohesion of their community. On the other hand, Malay male rulers seemed intent at reclaiming their emasculated authority from colonial powers by focusing on aspects of male-female relationships. To do so would be to attain assertion and control over their designated private sphere of religion, family and sexual relations. On land matters, the British took a more primeval view of customs and acted in such a way that customary matrilineal land could be preserved in entirety through law. But in land matters Malay rulers did not treat customs as necessarily unchangeable as they were aware that a material resource such as land could be valorised monetarily. Some other developments took place, with colonial officers not wanting anything personal to be regulated, while local rulers wanted the personal, particularly relationships between the sexes to be even more widely regulated. Ultimately it was the power to use modern law as an instrument of control, which decided the differing positions of the two parties. By centralising gender in the study of socio-legal history of law-making we see the confluence of imperial agenda and Malay ruling interests in affecting and entrenching masculinity through the motions of policing and protecting women.

Keywords: Malay women, sexual relations, colonial Malaya, Islamic law, customary land

INTRODUCTION

Some aspects of Malay-Islamic law-making during colonial times are discussed here by uncovering the gender-based dynamics of negotiation, accommodation and conflictual tension between British administrators and Malay rulers. As law-making requires subjects to be addressed with exactness, legal "subjectivities" of the self are constructed. This becomes the iron-cage within which the unitary logic of being one gender over the other can be delineated, rationalised and practised.

Colonial power-play between male (coloniser) imperialists and Malay (colonised) males instituted a dichotomous separation between the domain of the external/material world (of the former) and the internal/spiritual sanctum (of the latter).[1] It can be said that the latter being the domain or the home of the non-wordly self, is where "women is its representation" (Chatterjee, 1989: 624–625). Since law-making was a powerful device for the authentication of authority, local rulers, designated as the protectors of Malay customs and Islam, under British indirect rule, focused on this "inner sanctum" to be affected by colonial regulation. Some interesting paradoxical developments took place, when British colonial rulers preferred that the personal remained less regulated, while Malay local rulers wanted the personal to be even more explicitly regulated. It was really the power to use modern law as an instrument of control that decided which positions were being taken by either of the two parties. The narrative of policing and protecting women under male charge constituted the colonised female subjectivity, or a frequent subject in the negotiation and accommodation between opposing male agents, representing the coloniser on the one hand and the colonised on the other.

In illustrating the above argument four case studies are discussed. The first involves a debate about what constitutes a "wife", the second is on a late 19th century proposal for a law on offences between man and woman from a member of the Malay royalty, the third on the contents of a Muslim "offences" law and the fourth on the implications of a law to protect female customary land inheritance. I intend to show that the early making of these Malay-Islamic laws under colonialism can be seen as a form of "entexting" or fixing and coding non-textual knowledges into bounded texts (Hallaq, 2009). This then leads to the hegemonisation of a particular gendered subjectivity (Connell, 1995). Both of these dynamics served the purpose of entrenching colonial rule while placating the authority of local Malay rulers. In all of these the subject "woman" is at the centre of the deliberation between English ruler and Malay ruler.

ENTEXTING AND MASCULINE HEGEMONY

In outlining the above postulations two conceptual notions of social transformation are applied – one within the field of gender studies and the other in the field of Islamic legal studies. The first is on the *entrenchment of hegemonic masculinity*, and second, on the *entexting* of everyday practices into textual tools for governance. The two ideas are respectively propounded by Connell (1995) and Hallaq (2009), who saw both of these processes as presaging the establishment of the modern nation-state. Connell defines hegemonic masculinity as the "configuration of gender practice which embodies […] the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women" (Connell, 1995: 77). But not all men were in the position to dominate, for example English colonial officials were more superior than the Malay rulers, but still, the latter were complicit in entrenching a hegemonic masculinity. All would gain from the overall demotion of women by extracting the patriarchal dividends out of this system (Connell, 1995: 79). Hallaq's (2009: 547–550) notion of the entexting of Syariah is instructive for our analysis here as the argument goes that it is through the pre-colonial ruling system's confrontation with the modern colonial state with its system of centralisation and bureaucratisation that the epistemic and structural changes to transform Islam had occurred. If Islam, within a pre-colonial milieu was integrally linked with family and communal welfare, it later became a source of political legitimacy for the nation-state (Hallaq, 2009: 547–550). Entexting, or fixing and coding non-textual knowledges into textual sources, by modern state structures serves the project of social engineering, especially in severing ties of indigenous systems to their "anthropological and sociological" past (Hallaq, 2009: 548). In applying these notions to the study of Malay-Islamic laws under colonialism we see an array of indigenous systems and way of life being entexted and reduced to laws, while simultaneously, masculinity is being hegemonised.

At the time of British intervention around the late 19th century, Muslim laws among Malays were applied directly only in matters of marriage and divorce but not on property and succession laws, or even on morality norms, which were only partially based on Islamic doctrines. Among Malays, succession to ruling titles followed the male line while succession to and division of land would follow either the bilateral or matriarchal custom (Buss-Tjen, 1958: 257). But as Islam became affixed to the authority and power of male rulers in exchange for British indirect rule, religious rules gradually supplanted that of *adat* or customary practices to re-assert male authority over privatised spheres of family, inheritance and sexuality. What was distinctive under entextisation was that it allowed some of women's traditional entitlements to be secured, entrenched and protected by colonial statutes, something which traditional norms were not able to guarantee, given their fluidity and at times, ambiguity about execution. As this article will show there was also an irony to this. While British

colonial officials were benevolently supportive of what they perceived as Malay women's integral economic role in the social and cultural cohesion of their community, Malay rulers were veering towards the opposite pole as the latter was concerned about reclaiming their emasculated authority from the British colonisers.

BACKGROUND OF COLONIAL LEGISLATION-MAKING IN MALAYA

As to the origin of formal codification of the 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 modernisers) and the local rulers (as legitimators of colonial presence) was one of the more strategic moves in the ultimate possession of the colony. Through major treaties such as the Raffles Memorandum to the Sultan of Johor, 1973 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 major treaties signed towards the establishment of British colonialism in the Malay states and the Straits Settlements). 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* or Islamic precepts. 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 Negeri Sembilan (Sungai Ujong) there was the *Order of 9th August 1887* for "Mosque attendance".[2] As these regulations imply, law-making for Muslims remained to be the only critical site through which local elites could carve out their "autonomous space for Malay rulers", perhaps even resistance against colonial power and encroachment (Hussin, 2007: 764).

Under British indirect rule which incorporated the Residential system (for the federated Malay states of Perak, Selangor, Pahang and Negeri Sembilan) and Advisory system (for the unfederated Malay states of Kelantan, Terengganu, Kedah, Perlis and Johor) treaties were also entered with respective Malay rulers to enable the general administration and collection of revenues to be under the charge of the British. However, avenues were created to allow Malay participation in governance through their membership in the State Council and to be appointed into the position of Malay magistrates, or Islamic court judge, the

kadi or as village or sub-district headmen, the *penghulu* (Triantafillou, 2004: 28).

It was through the State Councils that most of the discursive exchanges over laws between British and native rulers had occurred. The State Councils acted as the governing body of British indirect rule, where legislations could be passed or consultations sought from local leaders over policy matters. The first State Council was formed in 1877 in the state of Selangor (Chew, 1966: 182). Through the State Council, the British supposedly gained, "a satisfactory political accommodation with the Malay elite" (Chew, 1974: 176), or rather, it was considered a forum for "manufacturing consensus" from local elites (Hussainmiya, 2000). Less kindly, it was also known as one of the instrumentalities of governance which created "the fiction of native self-rule by Malay sultans", while the real rulers were the "oligarchy of colonial officials sent from the mother country" (Kennedy, 1945: 225).

A State Council would consist of the British Resident, and, or other British members of the colonial administrative class, together with the Sultan and, or Malay rulers and district chiefs and non-Malay representatives such as heads of Chinese clans or labour groups. The first State Council of Selangor had seven members, one of whom was the well-known Captain Yap Ah Loy, who represented the Chinese. The Perak State Council had eight members, two of whom were Chinese headmen (Chew, 1966: 183). Available writings on the State Councils did not note the appointment of any woman member, as ethnic, rather than gender representativeness was more of a requirement for membership (see composition of members in Roff, 1969: 217).

The accounts discussed in this article are not directly sourced from minutes of the State Council meetings, but are pieced-together from archived colonial administrative papers which drew upon decisions made by the State Council.

In formal administrative structures women did not participate in the debates involving questions of law and policy. However, by furthering this point is not to deny that Malay women had participated actively and intensely on the question of their subjectivity at the household and community levels. It was just that the proxies for their interests largely oscillated between that of the male coloniser on the one hand, and the colonised male on the other. In formal administrative structures it is undeniable that only male voices were heard. But "woman" was a site of much contestation among male ruling elites, whether British or Malay. As "woman" became constituted as a legal subject the main concerns involved either policing or protecting them, as the following discussion will illustrate.

AN IDENTITY CONUNDRUM: A DIVORCED WOMAN UNDER *IDDAH* IS STILL A "MARRIED" WOMAN

The preciseness of definition was an important consideration for law-making in the colonies. This was where entexting creates new dynamics within people's everyday lives. British officers had no jurisdiction in the area of Islam and Malay customs, having relegated that sphere to the Malay rulers. But this was only on paper. In fact colonial officials were highly instrumental in seeing through the passage of one "Islamic" and "customary" law or the other, as the following discussion will show.

In what way then did the imaginings of the Malay "woman" permeate the consciousness and worldview of colonial officers? Native women were entirely absent as representatives of the local ruling class in any formal meetings, particularly in State Councils, or the highest body in colonial governance which deliberated on laws and policies. One can only surmise that the window to the construction of the subjecthood of the Malay-Islamic "woman" was that of the Malay males. About the only occasion that women would be visible was when they were litigants in a dispute, although their voices may only actually be heard through their representatives. Who then decides on what they are or should be? The following case is particularly interesting in this respect. In 1925, an extensive exchange occurred between British law drafters and Malay ruling authorities on the subject of the legality of a Muslim wife – or, how should such a status be defined given the peculiar rules of divorce, involving *talak* and *iddah* (or spelled "edah" in archival papers; three months or three consecutive periods of menstruation, before the confirmation of divorce) under Islam?[3]

During the said year, a couple was charged in the state of Negeri Sembilan and found guilty of committing adultery. The man, Buyong was convicted to two months, while the woman, Bainah to two weeks of imprisonment. The judge however reserved a point of law for decision by the Court of Appeal.[4] There were some uncertainties as to the status of Bainah, as she had been recently divorced by her husband and was still in the period of *iddah*. In this case, before the termination of the *iddah* period she was alleged to have had sexual relations with Buyong, the other man.

The question of law, that the judge posed, to be decided by the Appeal Court was whether a woman under *iddah* could still be considered married. Under Section 6 of the *Muhammadan Laws Enactment, 1904*, adultery was an offence, although fornication was not included in this provision, hence if interpreted that the woman was already divorced, the act would not be an offence as it did not tantamount to adultery. The Appeal Court did in fact adopt this interpretation – which Bainah was no longer married, and even if she had sexual relations with Buyong, she would be committing sex outside marriage but not adultery. The period of *iddah* was incomprehensible to British colonial judges, and they depended on a case tried in an Indian court, *Abdul Gani vs Azizul Huq*

39 Calcutta 409 and on the statement of the *kadi* of Ampangan that the parties during the woman's period of *iddah* were "*seperti laki bini* (like husband and wife)" only and not really "*laki bini* (husband and wife)". After the conviction was quashed there was dissatisfaction among the Muhammadan assessors. The latter is the group of Malay notables and religious officials appointed as advisers, which would be called upon by the court on matters related to the Islamic religion and law. The Legal Adviser W. S. Gibson subsequently suggested that this issue be brought up for the attention of the State Council of the Federated Malay States. There then followed extensive correspondences and exchanges among various British officials on this subject, which included the British Residents of the Federated Malay States, the Legal adviser and the Sultan of Perak, Raja Chulan.

W. S. Gibson, Legal Adviser of Selangor tried to clarify on the finer points of sexual intercourse outside marriage, according to Islam. His suggestion was that if lawmakers were to take fornication as sinful under Islam, and wished for the offence to be included under the then existing laws for Muslims, then the latter should be amended accordingly. Similarly if the period of *iddah* is to be considered a "married" state then this provision should be included under the law. His explanation is reproduced as follows:

> Adultery in the Penal Code means sexual intercourse with the wife of a person whom the adulterer knows or has reason to believe to be the wife of another. "Zinah" in Mohamedan law is sexual intercourse without either the reality or the semblance of a right to have it…It is wider than adultery since it may include intercourse between unmarried persons […] If the enactment is intended to punish "zinah" it is immaterial whether the woman during her "edah" is regarded as still the wife of her divorcing husband or not, but the Enactment should be amended to make this clear. If on the other hand, the section is only intended to apply to adultery, words should be added to declare that a woman during her "edah" remains the wife of the divorcing husband.[5]

Having clarified the difference between adultery and fornication, with "zinah" to mean both, there then ensued a debate as to what was construed "wife" in this case. The Muslim assessors were of the opinion that a divorced wife during the period of *iddah* should still be considered married while the Appeal Court overruled their decision.

Even among the Malay members of the State Councils there was no consensus. At the Negeri Sembilan State Council meeting held on 8th February 1926, some members of the Council such as the Dato Klana, Dato Rembau and Dato Bandar expressed the view that the word should include a woman who had

been divorced (irrevocably or otherwise) up to the date of the expiry of her period of *iddah.* Another group of Malay nobility, the Dato Jelebu and Tungku Muda Chik had the opinion that a divorced woman should not be considered as a wife for the purpose of the law, even if the divorce was revocable. Another member, Dato Johol agreed with the latter, though he would view a woman in such a position to still be bound to some extent to her divorced husband by the conjugal tie (*ada bertali sedikit).* The Sultan agreed with the interpretation of the Dato Johol and Tungku Muda, since, "as soon as a woman has received the first *talak*, she cannot be deemed to be a 'wife' during her period of 'edah' unless she is recalled (*rojok*)."[6]

The matter was not easily resolved. There emerged differences in the positions of the other members of the State Councils. In the State Council of Perak, it was minuted that "…the word 'wife' includes a divorced woman up to the expiration of 'edah' whether the divorce is revocable or irrevocable." In Pahang, it was minuted that "After even a revocable divorce a woman can no longer be considered a 'wife', unless recalled (*rojok*), but during the period of 'edah' the husband usually allows maintenance (*nafkah*), and therefore the woman should be considered 'dalam milik'[7] of her husband, but no longer his wife." The State Council of Negeri Sembilan decided that "it would be best that a woman should cease to be considered a 'wife' (for the purpose of the section in question) on divorce unless and until she is recalled (*rojok*) after a revocable divorce."[8] Ultimately, the Conference of Residents held at Carcosa on 7th September 1926 agreed that the interpretation of the word "wife" in Section 6 of the *Muhmmadan Law Enactment 1904*, be allowed "to rest for the present", in other words there were to be no final closure to the debate, as there was no immediate move to amend the law, in order to please one section of the Malay elites over the other.[9]

How should one analyse the above exchanges and "resolution" to the issue? The definition of what constitutes a Muslim wife would not have been an issue if the focus was solely on the offence of fornication or *zina*. As I see it, British officials were not prepared to include *zina* into the statutes, as this would involve not just adultery but also other relationships outside marriage. In any case, it was found that *zina* was very difficult to prove under Muhammadan Law, so much so that in states like Terengganu most cases were dealt with under the heading of "*Berkluat*" (sic), or *berkhalwat* in today's lexicon, and interpreted as "suspicious proximity" not amounting to sexual intercourse.[10] The debates demonstrated how British officials had not always tried to cede to local rulers' conception of Islamic law, and the intervention was done guardedly so as to avoid "over-regulating" matters which involved the bounds of the "private", notably relations between the sexes, and offences involving cruel and inhumane punishment.[11] But within these dynamics, the idea and construction of the gendered Islamic subject began to take shape in more definitive ways. As the limited jurisdiction of indigenous ruling authority was pitted against the superior

legal authority of the colonialists, "woman" was a site for intensive and continuous contestation.

AN AMBIVALENT GENDER CONTRACT: THE CODIFICATION AND REGULATION OF MALAY SEXUAL MORES

We now look at another case which touches on the nature of sexual mores between Malay men and women at the turn of the 20th century. It appears that English sensibility was unable to accept some of the social and marital norms prevailing among Malays at that time.[12] In 1894, Raja Suleiman, the *Raja Muda*, or crown prince of the State of Selangor submitted a proposal on the "Draft Regulations relating to the offences between men and women according to Muhammadan Law" (Yegar, 1979: 189; Gullick 1987: 293). The contents of the Draft Regulations may have been considered too eccentric by the British as the colonial government was "rather dumfounded" by it, resulting in an official reaction which was "tepid and non-committal" (Gullick, 2008: 11). Raja Suleiman was said to have been tutored by British teachers, apparently, including a British clergymen (Tan, 2012: 115), as well as Islamic scholars. But Gullick noted that it was not possible to establish who the latter might be (Gullick, 2008: 11). Although Tan (2012: 114–115) made an argument that Raja Suleiman could have also been influenced by his tutor, an English clergymen, thus also by Christian moral ideals, this point cannot be ascertained. I followed up on the original item of the 1894 Draft Regulations by looking it up in the record at the Malaysian National Archives.[13]

My reading of the archival papers showed that British authority at that time, tried to diplomatically avoid having to adopt the crown prince's suggestions into a formal statute. It would appear that by not giving in to the ruler's recommendation, they were going against the grain of the contract set out between British indirect rulers and the Malay rulers, which gave the latter sole purview over the area of "Islam and Malay customs". The correspondence on this matter opened up with the Chief Magistrate of Selangor to the Acting Government Secretary, Selangor.[14] On the request of the British Resident of Selangor, the Chief Magistrate of Selangor was told to examine the translated document on the draft legislation. The Chief Magistrate, after having gone through the drafts, found that the compilation, as it stood, "though of interest", could not be much use to magistrates being "not suitable or complete enough for a Regulation which the State Council could be asked to pass."[15] The colonial regime was apparently "embarrassed" by this draft regulation (Gullick, 1987: 293).

Why were British officials reluctant to adopt the contents of the memorandum into law? The contents of the draft included the following six chapters; (1) betrothal; (2) offences against girls, married women and others; (3)

disputes between husbands and wives; (4) divorce; (5) privileges of married women; and (6) imprisonment in default of payment of fines. In total there were 52 sections. Although termed, "Muhammadan Law", some of the provisions were clearly not based on Islamic principles, but on prevailing Malay norms on marital and sexual mores. The proposal was interesting as it seemed to be a window as to how sexual relations and acts related to sex were viewed those days. Raja Suleiman's proposal reads like an ambivalent sexual contract between men and women. Although sexual relations between unmarried couple are considered an offence, these are not considered *zina* (a grave sin under Islam) in the memorandum. Furthermore sexual relation without the consent of the woman, though considered a grave offence, is not severe enough to be treated in the same vein as rape and sexual violation would be in present time. Consider the following proposal in the Draft Regulations:

> Any man having sexual intercourse with an unmarried girl, or taking away from the house of her parents or other lawful guardian, or detaining in any place an unmarried girl, or taking any improper measures with a view to having sexual intercourse with an unmarried girl should be punished with a fine of $22, and if her parents or guardian desire that the girl should be married he must provide a dowry of an amount suited to her condition. *If the girl is unwilling to marry him he is free from liability towards her as she is willing to bear the disgrace. If the man is unwilling to marry the girl with whom he has committed the offence he incurs the penalty of paying to her the whole amount of her dowry* (emphasis my own).[16]

Another provision in the proposal does not even consider sex outside marriage to be *zina*:

> Any man taking away from the house where she resides, or enticing away a unmarried woman who is willing to leave her husband, or concealing a married woman, or detaining a married woman in any place with the intention that she may have illicit intercourse with him, or with any other person, *whether with or without her consent, should (shall) be punishable with imprisonment of either description for a term not exceeding two years; but if there is no consent on the part of the woman she incurs no penalty* (emphasis my own).[17]

Even cohabitation between unmarried couples is tolerated with nothing more than an order to marry, and if not, imprisonment:

> If an unmarried man cohabits with an unmarried woman not related to him whom he can marry, and does not marry her, this becomes an offence according to Muhammadan Law or custom. *When any such case comes to the knowledge of a magistrate he must call all the parties before him and order them to marry, and if they do not comply they must be kept separate*, and should be punished with imprisonment until they agree to obey the order made by the magistrate (emphasis my own).[18]

The chapter on "Disputes between husband and wife" is particularly interesting. It is drafted that,

> A woman cannot prosecute her husband for undue intimacy with other women, but she may ask for assistance from a magistrate, and the magistrate may call the husband before him and advise him to desist, and if the husband continues in the same course of conduct he should be punished by the magistrate with imprisonment until he humbly declares that he will desist.

Another chapter titled, "The privileges of married women", noted in one of the sections that,

> When a man desires to take his wife to any place away from where her home is fixed, whether by sea or land, he can do so except in the three cases, namely, (1) if he is changing his place of residence for a considerable time; (2) if his wife has no relations and would be strangers at the place to which he is going; (3) if his wife is not living comfortably.

In these cases the wife may choose not to accompany the husband and by making such a decision due to the stated conditions, she cannot be declared to be a rebellious wife.

The chapter on "Bethrothal" is also particularly intriguing as one cannot find any semblance of the conditions in contemporary Islamic family law. As Islamic marriage is considered a social (if not monetary) contract, such intended regulation would ensure the protection of the would-be marrieds if there is a breach by one party in the promise to marry. It begins by stating that,

> It is forbidden to make an offer of marriage to a woman who has previously accepted the offer of another suitor; though if she neither gives permission nor object, the offer may be made. If any person either on the part of the suitor or of the woman to whom this offer is made calls for a consultation, the friends of

> both parties should meet together, and if there is vice on the part of the suitor it must be truly set forth in order that there may be no union with him.

There was indeed a contestation between colonial preference for minimal laws on private matters and Malay-male feudal preference for extensive laws on private relations. Here was when "woman" was akin to private property, but at the same time with a free will, and thereby with a sexuality to be contained. The elements of both policing and protecting the women seem to run through the proposal, though one thing is clear – it certainly does not resemble the Islamic law of today.

A large bulk of the contents of the above draft did not find their way into any enactment, with the British Resident ambiguously declaring that, "this subject has been dealt with by Regulation No. XI of 1894", which was a minimalist law to regulate offences considered to be in violation of Islamic precepts.[19] Much later though, some watered-down aspects of Raja Suleiman's memorandum found their way into the Federated Malay States (FMS) *Muhammadan Laws Enactment of 1904* (Gullick, 2008: 11). The next section discusses this enactment.

SEXUAL CRIMES: "ISLAMIC" OFFENCES LAWS AS REFLECTIVE OF MALAY-BRITISH MORALITY

It was the statute known as the *Muhammadan Law Enactments*, which saw the expressions of Raja Suleiman's recommendations (Gullick, 2008: 11). This legislation is to be distinguished from the enactment on marriage and divorce, or the earlier "*Muhammadan Marriage and Divorce Registration Enactment 1900*". The *Muhammadan Law Enactments* was an early version of its contemporary counterpart, The Islamic Offences Enactment, as in *the Syariah Criminal Offences (Federal Territories) Act 1997*. The sphere of "criminality" and moral wrong-doings was the last vestige of power left to the Malay sultans. As had been noted before, rulers were able to exert some powers over marital matters, as this had been privatised to belong to the domain of "Islam and Malay customs". More "religious" offences began to include acts such as enticing an unmarried girl to run away, adultery, incest, cohabitation after divorce and the breaching of betrothal contract. Ultimately, what had been presented by Raja Suleiman in 1894, did find their way into the statutes though of a much diluted and attuned version of his original proposal, a version which was more reflective of a "British-Malay" notion of morality, rather than one which was Islamic in nature.

In the Negeri Sembilan enactment (*Enactment No. 6 of 1904: An Enactment to provide for the punishment of certain offences by Muhammadans*)

12 provisions were included, five of which referred to as marital or sexual offences, and their punishments.

The provision, "Enticing an unmarried girl to sexual intercourse or marriage without parental permission" would result in imprisonment of not more than six months, and a fine "which may extend to twice the amount of *mas kahwin* usually paid on the marriage of a girl of her class."[20] The other provision on "Unmarried girls leaving their lawful guardian, 'in order to lead an immoral life'" would subject the offender to an imprisonment of up to one month. The offence on "Adultery" came with the punishment of imprisonment not exceeding one year and fine not exceeding 250 dollars for a man, and for a woman, imprisonment not exceeding six months. The offence of "Incest" could lead to an imprisonment not exceeding five years for a man and not exceeding one year for a woman. Finally, "Breaching a betrothal contract" would subject the withdrawing party having to pay the value of *mas kahwin* (had marriage not taken place) as well as returning all gifts received from the other aggrieved party.

In Johor there were seven provisions in a similar enactment to the above (*Enactment No. 25 of 1919: An Enactment to Provide for the Punishment of Certain Offences by Muhammadans*), four of which dealt with marital and sexual offences, as in adultery, incest, re-marrying after pronouncement of the "three talak", as well as co-habitating as an unmarried couple or living as a prostitute. Apparently, in the late 19th century incidences of adultery, as well as incest were commonly brought up to the courts of Perak so much so that the ruler's concern to have a written law on this was supported by the British. With the statute, punishment of public flogging was replaced by imprisonment and, or fine (Yegar, 1979: 188–189).

I would argue that the colonial consequence of limiting Malay rulers' sphere of authority to matters on "Islam and the Malay custom" led to this disproportionate focus, among Malay rulers, on the privatised sphere of morality and sexuality, something which they considered as their "inner sanctum" in need of even more regulations to protect the domain, of which woman was the main subject. Nevertheless due to the moderating and accommodating maneuvers exercised by British rulers, in order to circumscribe the powers of the Malay rulers, much of what made their way into formal statutes were more reflective of a Malay-British notion of morality rather than a pristinely Islamic one.

ECONOMIC AUTONOMY: LAND, LINEAGE AND CHALLENGES TO FEMALE AGENCY

One of the most distinctive features of Malay marital entitlements (as opposed to Islamic societies outside Southeast Asia) is the notion of joint-matrimonial property or *harta sepencarian.* The significance of this entitlement is that at least a half-share of the matrimonial property can be claimed by one party upon

divorce or widowhood. Under colonial governance, the decision to recognise *harta sepencarian* was actually initiated by local authority. This was first made by the Kathi [sic] of Larut at the Perak State Council Meeting in 1907 and then later by the Committee of Kathis [sic] in Pahang, 1930 (Ridzuan, 1994: 113).

When the issue of joint-matrimonial property was first brought to the attention of the colonial judiciary in 1884, the English judge rejected a woman's application for her share of this entitlement. 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 which the court ruled that Tijah, the applicant was not entitled to joint-earnings, since Province Wellesley was governed by English law. This territory did not have any provision for such a property division (Taylor, 1937: 15–17). However, in 1919, a divorced woman in Perak succeeded in getting a third of the landed property acquired jointly during her marriage, but only after the court consulted the Sultan, Raja Chulan of Perak on this matter. The ruler advised that the eligibility of claim would not be based on other factors other than proof of work done on the land.

Perhaps we could hazard a claim that Malay woman during the colonial time, whether in the ethnic or gender-sense was an identity tied more to land tenure, rather than Islam, especially in the state of Negeri Sembilan (Hooker, 1976: 55–56). But as land was becoming a valuable commodity subject to market demands, the colonial government was aware that if certain parcels of land regulated by customs were not protected, owners would eventually succumb to pressures of market capitalism.[21] In this regard, one of the earliest legislations to be enacted to regulate the registration and transfer of customary lands was the Customary Tenure Enactment (CTE), described as, "An Enactment to provide for the preservation of Customary Rights over certain lands (Enactment No. 17 of 1909)" (Federated Malay States, Negeri Sembilan, 1910). One of the most distinctive of its terms was the rule for female-ownership, which is spelled out in Sect 7 (i), of the enactment. It 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).

The CTE was also strictly interpreted and applied by colonial officials to such an extent that women's economic autonomy was preserved at the expense of family justice. As is the distinctive feature in Minangkabau matriliny the importance of cognates, or relatives is higher than that of members of a conjugal unit (Fischer, 1964). Following this, the CTE had established that women who did not have daughters nor close enough female relations could not leave their ancestral property to sons. Lands had to be auctioned off to other female members within the clan group whenever this occurred. In the case of Ibrahim bin Kebong he had to apply to the British Resident in 1927 to get some proceeds of the auction to support his sons, which was fortunately granted to him, but not before extensive investigations by the colonial authority.[22] This case had established that the basis of *Adat Perpatih* was less on conjugality (marriage and

the nuclear family) but more on the cognatic ties between kin groups. It was in the latter that female economic autonomy resided, though a slippery source of agency as other developments entered the scene.

Disputes around land under the customary provision visibly brought women into the public domain of the courts and administrative offices of the colonial state. However, land law did not involve the jurisdiction of Malay rulers. Colonial officers were able to administer the law without undue interjection by Malay male authorities. Nevertheless there were tensions around the practice of exclusive land ownership by females. Palace authority (based in Sri Menanti, the royal capital) or those aligned to the Yam Tuan were the ones keenest to promote Islamic law on inheritance, as opposed to territorial *adat* leaders who were in support of the customary system. The Yam Tuan would occasionally use Islamic law to blunt the power of other chiefs who were in support of the CTE (Taylor, 1937: 234). Lands belonging to the Yam Tuan and his associated clans (namely, the Lengkongan clan group) were not covered by the enactment and hence not restricted to female ownership and other restraining conditions for sale and transfer.[23] But at times there were grey areas as to which lands would come under the customary land provisions, or not, especially when gains could be made by transacting unencumbered lands to the "highest bidder". Whenever a situation like this arose, disputes around the interpretation of which land came under "customary" restrictions and which were not, also ensued. This inevitably challenged women's economic autonomy through matrilineal ancestry.[24] While the British were reluctant to regulate the private sphere of marriage, they were more forceful in wanting to protect *adat* based on matrilineal land inheritance. But in the end, the land law itself was considered an encumbrance by male members of the community, and even female landowners as they could not transact their land freely, and nor was there leeway for sons to inherit the land holdings (Azwan, Nordin and Ishak, 2015).

In the 1950s, *adat* forces "fought" against an Islamic lobby in Negeri Sembilan.[25] Pressured by a new political order, *adat* land laws were progressively replaced by Islamic inheritance laws.[26] The decline of colonialism, which benevolently validated economic autonomy upon the Malay-Islamic "woman", simultaneously saw the rise of a decolonised male-led nationalist state reinforced by a new Islamic identity.

By the 1950s' women had to become fierce defenders of their customary assets, as more lands were being used either as collateral for monetary loans or to fund pilgrimages to Mecca.[27] For example a case in 1953, involved an application from Nomeh binti Mat Daban to sell her land to Piah binti Haji Dahalan from another *suku*, or clan group which by provisions of the CTE was not allowable unless permission was granted by the Collector of Land Revenue. Nomeh's application was in order to pay for the expenses of her intended pilgrimage to Mecca. However, this was objected by one of her *waris*, or lawful beneficiary, Bedah binti Maaris on grounds that sale of the customary land

should be the avenue of last resort for the source of funds. Bedah made an appeal to the Rembau Land Office to object to the sale of the land by her aunt, Nomeh. Bedah's argument was that Nomeh should be advised to sell her goats, buffaloes and other non-ancestral land holdings first before permission was to be granted for the sale of the customary land in question. In the end, Bedah's appeal in stopping the sale of the ancestral land by Nomeh was not successful. Instead, the Land Office granted Nomeh the permission to proceed with the sale of her land, which was customarily only held by her in trust on behalf of her clan.[28] This showed how land had become the source of much disputes within family and clan circles as it had monetary value that even customary prerogatives could not surpass. In a way, women's agency tied to their guardianship of ancestral land gradually declined with both market capitalism and their need to fulfill religious obligations.

CONCLUSION

I have analysed how several examples of Malay-Islamic laws covering marriage, sexual offences between men and women, and land ownership have defined and subsequently constructed gendered Islamic subjects through statute-making. The consequences of limiting Malay rulers' sphere of authority to Islam and Malay customs had led to their disproportionate focus on the privatised sphere of morality and sexuality. Themes and questions involving women's subjectivity as wife, unmarried daughter, land owner and land beneficiary were some of the more pervasive narratives which went into the construction of colonial laws affecting women. Colonial Islamic laws, which were more an amalgamation of British-Malay notions of morality were restrictive in scope but were nevertheless the precursors of present-day Syariah (Islamic) legislations. Under colonialism, marriage laws were largely confined to procedural matters, as British rulers were less concerned about regulating the family, seeing it as a privatised domain. But Malay male rulers were keen to fashion Islamic laws in accordance to their oftentimes eccentric preferences, particularly ones that dealt with the relations between the sexes. The trope of Malay-Islamic "woman" conjured in their image was a subject in need of both policing and protecting especially against the sexual temptations of men. This was contrasted to the trope of "woman" as economically autonomous, which Malay rulers initially supported but later receded from unequivocally doing so. Male colonial officials on the other hand supported *adat* law on matrilineal landownership and felt that this was key to the preservation of identity and continuation of traditional clan groups. But as new transformations took hold, especially when land could be easily monetised due to the imperative of either capitalism or Islam, there ensued a keen contestation among men to establish a system which could eventually secure their advantage in a postcolonial state. At the end of the day it was about the power of law-

making which steered and decided the direction of the evolving masculine hegemony. There were continuous tussles, negotiations, accommodations and compromises between colonial rulers and Malay authorities, whenever it came to defining the subjecthood of the Malay female. The events documented from the male viewpoint, is "systemic and hegemonic" (MacKinnon, 1983: 636). The making of Malay-Islamic laws under colonialism can be seen as embodying two dynamics. The first is on the *entrenchment of hegemonic masculinity*, and second, on the *entexting* of everyday practices into textual tools for governance. This practice continues into the making of present-day "Syariah", with its vast array of Islamic statutes covering not just Family Law, but also the spheres of morality, criminality and punishment; all distinguished by their Islamic "exceptionalism" from regulations and offences covered under civil laws. In modern Malaysia, the process of entexting, or fixing and coding non-textual knowledges into textual sources, by modern state structures continues to serve the project of social engineering, undoing ties of indigenous systems to their past while entrenching a hegemonic masculinity *sans* the white male coloniser.

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NOTES

1. The Pangkor Engagement Treaty of 1874, which paved the way for British indirect rule in Malaya specified among other conditions that Malay rulers must appoint British Residents, "whose advice must be asked and acted upon on all questions other than those touching Malay Religion and Custom". For a description of this see for example Hussin (2007).
2. All these were formalised in 1904 in the Muhammadan Law 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.
3. Under Islamic divorce, men are given the unilateral right to pronounce the *talak* as a way of renouncing the marriage. After this is done, the couple has to observe a period of *iddah* equivalent to three menstrual cycles or three calendar months, during which the woman is prohibited from remarrying and the man is obliged to maintain her.
4. See file *Sel. Sec. 4653/1925*; correspondence from Legal Adviser, Federated Malay States. (W. S. Gibson), Kuala Lumpur to The Under Secretary, Federated

Malay States, 14th October 1925, subject of letter: "Decision of the Court of appeal in Negeri Sembilan Misc – Criminal Application No. 3 of 1925 (Public Prosecutor vs. 1. Buyong 2. Bainah) – Interpretation of the word 'wife' in Section 6 of the Muhammadan Law Enactments suggest reference to State Councils".

5. Ibid.
6. Eric Hazelton, Clerk of Council, "Copy of an extract from the minutes of the Meeting of the State Council held at Seremban on 8th February 1926." In *Sel. Sec. 4653/1925*.
7. Translated as "still in possession".
8. Various notes in *Sel. Sec. 4653/1925.*
9. W. E. Pepys, Under Secretary to Government to Secretary to Resident, Selangor, 24.9.26, in *Sel. Sec. 4653/1925.*
10. W. E. Pepys, 2.11.25 in *Sel. Sec. 4653/1925*.
11. Under Islam, the punishment for *zina* would usually involve lashing.
12. In one of the circulars sent by the High Commissioner to the British Residents of the Malay States in 1904, it was noted that many of the provisions proposed by local rulers to be included in the Muhammadan Law Enactment were found to be "extremely repugnant to European ideas", hence much "circumspection" was suggested in dealing with the matter (Quoted in Yegar, 1979: 125).
13. A record of the translation is found in *Courts 2056/94*, titled, "On translation of certain draft regulations relating to 'offences between men and women according to Muhammadan Law'" (henceforth referred to as Draft Regulations).
14. *Courts 2056/94.*
15. Chief Magistrate of Selangor to British Resident of Selangor, in *Courts 2056/94.*
16. Chapter II: Offences against Girls, Married Women and Others. Provision 8 from Draft Regulations.
17. Ibid., Provision 12 from Draft Regulations.
18. Ibid., Provision 17 from Draft Regulations.
19. Notes on minute paper by British Resident Selangor, 10 October 1894, in *Courts 2056/94*.
20. *Mas kahwin* is the bride price mandatory for sealing a Muslim marriage contract.
21. Enactments on Malay Reservations Land had a similar purpose of "protecting" the interests of indigenous peasants. See Kratoska (1983: 149–168).
22. *N.S. SEC 2418/1927: "Division of the proceeds of sale of E.M.R 469, 470, 471 and 472. Asks that the children of Tarok binti Pandar be given a share.*" Letter from Ibrahim bin Kebong, Seremban, to Secretary to Resident, Negeri Sembilan, 15th September 1927.
23. By 1960 the Customary Tenure Enactment was amended by the Negeri Sembilan State Legislative Assembly to provide for Lengkongan Land tenure. See Hooker, *supra* Note 1: 222.
24. In 1937, a woman by the name of Eyut binti Ma'asin, wanted to declare that she belonged to the Lengkongan tribe and thereby exempted from the conditions of the customary land law. She seemed to have been persuaded to sell her land to a third party. However, her claim was disputed by another territorial leader who claimed otherwise, and that her land still belonged to the matrilineal clan. The case is reported in *N.S. Secretariat 555/1937*, encl. 3.

25. *Adat* territorial leaders and women had to battle with politicians from the Malay party, United Malays National Organization (UMNO) to mitigate the party's push for more Islamisation in land as well as other matters affecting family. See De Josselin De Jong (1960: 379–385).
26. The new political order in the form of the Malay nationalist party, UMNO was fashioning a new nationalism which tried to reinvent itself by eschewing "old" structures, which included feudal organisations and traditions cultivated by colonialists. Islam was a potent tool in this project.
27. See for example, *Rembau Customary Land Case (Sec 7) No. 1/53* (Application under section 7(IV) of the Customary Tenure Enactment (Cap. 215) for permission to charge her land to Menteri Besar, Negeri Sembilan on behalf of the Government of Negeri Sembilan. Comprised in respect of loan $4,000/– vide LOR 808/52); Tijah binti Mat Isa, suku Biduanda, Kg Perah, Kota Rembau to CLR, Rembau, 10 January 1953 and *Rembau Customary Land Case (Sec. 7) No. 13/53* (Application under section 7(IV) of the Customary Tenure Enactment (Cap. 215) for permission to sell his customary land to Salbiah binti Bulat, suku T. Datar Tg. Kling, for $500/– comprised in: Abdul Rani bin Abu Bakar to CLR Rembau, 10th February 1953). This is an application by Abdul Rani bin Abu Bakar of suku Tanah Datar, Tanjung Kling, Rembau residing in Kampung Batu, Rembau, Mukim Selemak for permission to sell two pieces of land (Tanah Pesaka Kampong dan paddy field) to go on a pilgrimage to Mecca. He wishes to sell to Sabiah binti Bulat of suku Tanah Datar for the price of $500/–.
28. See *Rembau Customary Land Case (sec 7) No. 9/53* (Application under section 7(IV) of the Customary Tenure Enactment (Cap 215) for permission to sell her land to Piah binti Haji Dahalan, suku Mungkal for $3,300/). This is an application from Nomeh binti Mat Daban, suku Sri Melenggang Kg Batu Hampar, Rembau, 30th January 1953 to the Collector of Land Revenue (CLR), Rembau.

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