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**Islam and Family Legal Contests in Malaysia:
Hegemonizing Ethnic over Gender and Civil Rights**

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INTRODUCTION

*“Women’s relegation to the private sphere has been more of “dream” or a “statement of desire” about women’s actual social condition, the family’s status is both a private and public institution”*¹

*“Whether or not marriage is natural as is often claimed, entry to the institution is bound up with civil rights ...No modern nation-state can ignore marriage forms, because of their direct impact on reproducing and composing the population. The laws of marriage must play a large part in forming “the people”. They sculpt the body politic.”*²

*“The history of private life is more than anecdotal, it is the political history of everyday life.”*³

As the above words imply, the private realm of the family is never sacrosanct. The process of composing and reproducing the nation depicts just how thinly public anxiety is differentiated from private unease whenever rules of nationhood and belonging are being drawn and re-drawn. In Malaysia, recent events involving family cases and judgments have indeed taken on a momentous significance not just for the private lives of the litigants but for the body politic of the nation. A spate of high profile cases involving Muslim-non-Muslim rights in areas of marriage, divorce, custody and religious conversions appearing from 2004 onwards has elicited immense government actions, civil society responses, scholarly research and public debates on issues of governance and the sustainability of modern institutions such as the secular state, common law statutes and democratic rules as they face the challenges of a politicized Islam. The episodes also drive home the point that the image of an idealized family, as cohesive, “basic units of consumption, living together and of reproduction” (Goody, 1996; 8), can be easily unsettled whenever strident forms of power struggles are being pursued.

In this paper I intend to analyze why was there such as an over-regulation of private concerns in family matters as well as an over-definition of identity, to an extent that this had led to a worsened state of multiethnic and inter-religious relations in the country. I argue that this has come about from a process of legal reforms which were intended to legitimize and secure the dominant rule of the Malay-Muslim government under UMNO (United Malays National Organization).⁴ The consequence of this was the strengthening of a dualistic legal system⁵ allowing much leeway for Islam to dominate the public spaces of governance and hence to

¹ Lynch (1994; 665-684)

² Cott (2000)

³ Hareven (1971; 120)

⁴ The UMNO is the main component party of the National Front coalition of parties which ruled the country undefeated since 1957. The pressure to stay on top of the ruling coalition has forced the party to make numerous concessions to strident Islamic demands.

⁵ Civil courts cover a wide range of jurisdiction, while the jurisdiction of the *Syariah* is limited to family, inheritance and Islamic offences. It was not until 1988 when the Federal Constitution was amended through Article 121 (1A) that the *Syariah* was elevated in the sense that decisions made within the *Syariah* jurisdiction could not be reversed by the civil courts. This effectively equalized the status of the *Syariah* to be on par with that of the civil courts.

the impending marginalization of other systems of rule. In a more far-reaching way this also led to the homogenization of Islam, its diverse features and traditions subsumed under an inflexible stream of doctrine and practice, and its laws extensively used in marking the boundaries of the imagined Islamic identity. Islam in this state has been “de-syncretized” from the infusion of local norms and customs that are considered to be deviating from the *Syariah*.⁶ Nonetheless *Syariah* proponents may not necessarily be averse to the law’s syncretization or absorption of modernity by way of its administration and procedural systems (Hamayotsu, 2003; 57). Finally we will see how the immutable face of Islam and the *Syariah* today has also alarmingly influenced how the civil court system responds to issues of Muslim-non-Muslim litigations.

FAMILY AS THE BATTLEFIELD OF CONTESTING PUBLIC INTERESTS

In advancing the above arguments I would like to focus on the significance of the family as a variable in the interplay of group and state politics above. Why so? The family narrative is a rich site where feminist, ethnic and nationalist politics can be projected and advocated. In the Malaysian case, the discourses of feminism, cultural relativism and liberalism, *vis-à-vis* the issues of family litigation have all been used to assert and bargain for specific political causes and interests. There are three interest groups that have prominently played their parts in this contestation. They are the women’s rights advocates, the liberal-democratic lobby and the *Syariah* Islamists. In terms of the women’s rights advocacy, the fact that almost all of the appellants or aggrieved parties in the litigation are women, had lent credence to their role and relevance in this issue. Court judgments which have almost all been unfavourable towards women appellants have further opened up the opportunity for a feminist reform agenda to be pushed further within national politics.⁷ The second important pressure group that had prominently thrown itself into the centre of the controversy is the liberal-democratic lobby. The group’s agenda is the defense of human rights and civil liberty, and their referent point is the Constitution, which they see as the supreme legal foundation of the nation-state.⁸ Finally the most crucial interest group, or the prime movers of this contestation are the defenders of cultural relativism. They may not necessarily see themselves as “multiculturalists”, but argue that the right to practice their beliefs and faith, such as the right to be fully governed under the *Syariah* is also a right to defend culture relativism. I would specifically term these actors

⁶ Here I have benefited from the insights of similar experiences with law contestation involving Personal Laws and Uniform Laws in India as elaborated by Kumkum Sangari (1999). Her argument was that the formalization of Personal Laws is sustained to homogenize diverse religious traditions and enclose the boundaries of affiliation. The desyncretisation movement began with colonialism during which diverse customs were homogenized in order for customary laws to be codified (see pp. 28-29).

I would also like to note that the spelling of *Syariah* follows the Malaysian version of the term. Elsewhere the spelling can range from *Sharia* to *Shariah* to denote the system and body of Islamic laws.

⁷ The coalition of women’s groups calling itself the Joint-Action Group Against Violence Against Women (JAG-VAW) had been most vocal and prominent in this issue. The Women’s Aid Organization (WAO) had also acted as the Secretariat for human rights groups monitoring the high profile cases mentioned in this article.

⁸ In the early phase of the eruption of these controversial cases the group had constituted itself as an interim body, known as the Inter-Faith Council (IFC). Later, in order to not narrowly focus on inter-faith issues a bigger coalition of human rights organizations and advocates started the Article 11 movement, to defend the provisions of the Federal Constitution, particularly Article 11 which refers to the freedom of belief.

the *Syariah* Islamists. They do not represent the whole spectrum of the Islamic lobby.⁹ *Syariah* Islamists view the competition between one court system against another (civil versus *Syariah*), as a ground for the assertion of more autonomy, if not complete separation of the two systems, hence paving the way for a more forceful and comprehensive reform of the *Syariah* itself.

The politicization of litigation involving Muslim-non-Muslim family cases has proved to be an effective means of drawing attention to the transformational potential of law in society. On the surface the unfolding of these events, especially when posed as a human rights concern can be reduced to a struggle between the Islamists and the secularists. However, there is also a more complex process at work involving multiple contestations around middle-class competition, leadership struggles, and legitimacy of rule, rather than just an assertion of ideologies (particularly religious ideologies). What I will show in this paper is that the family as economic and social unit, and even as metaphor, has become a terrain where acute and multiple level power struggles can take place. By looking at the background and outcomes of several landmark inter-religious court cases the paper analyzes the wider socio-political implication of these contestations, especially how the representation of the family and its fragmentation has situated it within a critical interstitial domain lodged between the struggle for group affinity on the one hand and nation-state membership on the other. In the Malaysian case the struggle is about grandstanding the authority of Islam over all other forms of governing systems. But it is also about how significant the terrain of ‘law and law-making’ has become in defining the limits of inter-ethnic relations and challenges against the hegemony of Malay-Muslim rule. For a country like Malaysia, this would mean sustaining its brand of an “ethnic democracy” --- a system which ensures the hegemony of Malay-Muslim rule within the context of a procedural democracy. The fact that keen public debates had erupted and political advocacy and negotiations had taken place meant that this ethnic democracy was being challenged. I see the litigations cited in this paper as “test cases” which forge the “battle of wills” among the above-mentioned interest groups, specifically between those riding on the Islamization wave on the one end, against those who attempt to mitigate its rise on the other. That this battle of wills is fought at the expense of families largely escapes the attention of those who were in this competition. It would seem that one of the costs of asserting or re-defining the rules of nation and belonging had been the undermining of the sacredness of family and the autonomy of private choice.

FAMILY LAWS AND THE EVOLUTION OF ISLAMIC LAW MALAYSIA

In most societies with a Muslim presence, the project to “Islamize” government and society usually begins within the realm of family. Through the recourse of Family Laws cultural-political groups are able to demarcate a definition for themselves. Rules, especially ones that are considered to be derived from a divine source are invoked, becoming “a political expression of the group’s power to determine its (non-territorial) membership boundaries, i.e. a self-defined legal procedure for autonomously demarcating who falls inside and outside the

⁹ What is most surprising about this is that the group may not necessarily be led by the main Islamic political opposition force in society namely PAS (Islamic Party of Malaysia). An organization called the Muslim Lawyers Association was especially prominent in the midst of the controversies involving the Lina Joy. Among the members of this group were the defence lawyers representing the government in the Lina Joy case. They were especially vocal in pushing for the agenda of the *Sharia*. Another group, which is modernist in outlook and strategy is the Muslim Professionals Forum. The spokespersons for this group had contributed actively to public debates on the issue.

collective.” (Shachar, 2001; 54). Family laws are personal status laws that allow cultural groups, either in the majority or minority to privilege their claims for exclusivity and through which they could also eventually argue for the entitlement of jurisdictional autonomy. Control over law, starting with Family law, has become so important as a “means of securing community identity”, that it is assuming new significance (Sunder Rajan, 2000; 55). Family laws are very much connected to the making of Islamic laws in Malaysia. With the replacement of customary rules and norms by Colonial common law statutes the realm of family regulations was relegated to the field of religious or personal laws, a pattern common to all once-colonized societies.

In a country of 23 million people Muslims comprise 60% of the total population in Malaysia. Before the period of formal colonization or Indirect Rule by the British from the late nineteenth century the Malay States under their local rulers were governed under a set of indigenous laws, which were derived from both customary (*adat*) and Islamic sources. In this early period, laws recognized as being Islamic in nature were actually the syncretic blend of Islamic edicts and Malay customs. They were compiled under such canons as the Laws of Malacca and were enforced in the Malay Sultanates since the 15th century (Badriyah, 2001). Later on during the apogee of British colonial rule, Islamic, customary and various forms of native laws were circumvented by the English common law. What was later constituted as *Syariah* was actually a British legacy which infused this body of laws with elements of Islam, native customs and the sovereign Malay kingship (Hooker, 1993). Nevertheless, Islamic laws went through a systematization process, the jurisdiction was limited to family, personal status codes and matters of inheritance. The first piece of legislation which established the manifest place of Islamic law within the emerging post-colonial nation-state was the 1952 Enactment of the Administration of Islamic Laws in Selangor. This was followed by the passing of other state enactments, 13 altogether. As the Federation of Malaysia has 13 states, and Islam is under the purview of state rulers, 13 separate enactments were passed by each state legislature.¹⁰ This early post-colonial process of entrenching Islamic laws into the body politic of nation-state projects took place between 1952 till 1974. However, the formalization of the Islamic or *Syariah* court was affected through an intermittent way, from *Syariah* being totally cut off from the Civil Court system (with the passing of the 1948 Courts Ordinance) to the *Syariah court* being recognized as a lower court within the court system hierarchy (as in the 1965 *Syariah* Court Act) (Ahmad Ibrahim, 1999). But the result of this systematization still confined the reach of Islamic laws in society to only Muslims, and to encompass only three areas of regulation, namely family laws, inheritance laws and matrimonial and Islamic offences.

It was only from 1984, when the Federal Territory Administration of Islamic Laws Enactment was passed, that the re-centralization and augmentation of the *Syariah* system began to take on a swifter pace. The 1984 Enactment was crucial as it paved the way for the establishment of a more uniform set of Islamic laws on a national level. Up till then Islamic laws in Malaysia were administered distinctly and separately by the various State legislatures. But more importantly this new 1984 legislation also laid the groundwork for the establishment of a much more empowered and enlarged Islamic court system. Under this provision the office of the Mufti and the Islamic Religious Council would be separated from the *Syariah* Court administration itself. The *Syariah* court system would then be expanded into three levels of courts – The *Syariah* Lower Court, the *Syariah* High Court and the

¹⁰ Malaysia has three territories which come under federal purview, the Wilayah Persekutuan, Labuan and Putrajaya. The Islamic enactments for these territories are passed by Parliament. Islamic laws for these territories are contained in the 1984 Federal Territory Enactment on the Administration of Islamic Law.

Syariah Appeals Court. With this single new legislation the Islamic state bureaucracy experienced a multifold expansion almost overnight. All other 13 states under the federation gradually adopted the provisions of the Federal Territory enactment within their own state laws. By 1991, all 13 states within the Federation had established the three-tier *Syariah* court system. The Islamization agenda was equally bolstered by the separation of the offices of the Islamic Religious Councils from the court system, as a much bigger bureaucracy was created out of the divisions of these two institutions. The office of the Mufti, as head of the Religious Council was particularly powerful as it slowly overwhelms the function of the traditional rulers (as heads of Islam in each state) in acting as the voice of authority in Islam.

The consequences arising out of such an extensive reform process above are highly significant.¹¹ An expanded Islamic bureaucracy opens up the way for a rise in the number of Islamic legal scholars, practitioners and administrative personnel within the system. Hence, after two decades of institutional expansion it is to be expected that various vested interests would have been built around the dynamics of this structure.

Added to the strengthened Islamic bureaucracy is the rise of the Malay-Muslim middle class of which many were aligning themselves as members of the new Islamic civil society rather than as advocates of secular social movements. The rise of the Islamic civil society had only started from around the late 1970s with the establishment of the Islamic Youth Movement (ABIM). By the 2000s there have since emerged numerous Islamic groups outside the aegis of political parties such as the ruling Malay-Muslim party UMNO or the opposition Islamic Party (PAS). The fact that not all of the Islamic civil societies are aligned to either government or opposition also indicates that their interests around the issue of Islam are more diverse and plural in nature. Nevertheless, sporadic in terms of affiliation as they are, they constitute a ready-made reservoir of idealists and pragmatists that could be tapped for political mobilization. In this atmosphere of a strong Islamic civil society and a swelling Muslim middle class, the Islamic politico-legal elites are keen to test the strength of the *Syariah*, particularly the extent of its jurisdiction. I shall term this pressure group the *Syariah* Islamists, who can be said to be at the forefront of trying to establish a re-Islamized judicial system. Donald Horowitz (1994) describes this undertaking as “a quest for authenticity –an effort to recapture or choose a new set of institutions deemed morally appropriate” (ibid.; 254). However, this reformation must be seen as far from just “going back into the past” --- in fact what these proponents imagine to be changes in the direction of Islam are actually legal modifications to laws and institutions a form of *Sharia* that is actually “suffused with melding, absorption, and sheer syncretism.” (Horowitz, 1994; 254).

REGULATORY PROVISIONS AND PROHIBITIVE LAWS

In Malaysia, many of the laws and statutes enacted during the period of intensive and extensive Islamic law reformation of the 1990s have reinforced the strength of the Islamic lobby to define specific marital norms. Several *Syariah* and civil laws function to delineate the boundaries of group identity by imputing a gatekeeping role within them, defining who shall be taken in as legitimate members of the group (in this case as Muslims) and who to preclude. These laws and statutes affect family life and personal liberty by affecting one of the following:

¹¹ The modernization and expansion of the *Syariah* is excellently traced by Kikue Hamayotsu (2003).

1. Prohibition of Muslim-non-Muslim intermarriage,
2. Provision of a civil definition of Malay-Muslim identity
3. Criminalization of conversions among Muslims
4. Facilitation of Muslim polygamous marriage
5. Establishment of the jurisdictional autonomy of *Syariah* to be separate from the civil system.

The existence of the above provisions has thus lent much scope for interest groups to seize upon the legal arena in the battle to either grandstand or suppress the authority of Islam in public life. Private norms on family and marriage have become convenient grounds for the articulation of society's competing moral visions. Legal decisions and outcomes within the Malaysian judicial process thus mirror these contestations, reducing family litigation as a site for testing the limits of the dual legal system as well as the strength of competing state and non-state authorities. In the sections that follow I would like to document how this would have happened.

Prohibition of Inter-Marriage

The most definitive law which lays the norms for marriage is the one which prohibits Muslim-non-Muslim marriage. Both the Islamic Family Law under the *Syariah* and the civil marriage law contain this provision. In the Islamic Family Law Act (Federal Territory) 1984, it is stated in section 10 of the legislation that no Muslim men shall marry anyone other than someone who is a *kitabiyah*, while no Muslim woman shall marry a non-Muslim. While there is an exception given to Muslim men, this exception is almost impossible to fulfill because the definition of who constitute the *kitabiyah* is much too stringent.¹² Consistent with the *Syariah* law, the civil law in the form of *The Law Reform (Marriage and Divorce) Act, 1976*, for non-Muslims, also makes the conversion to Islam by one party a matrimonial offence to the extent that the non-Muslim spouse will have the right to a divorce. In tandem with these prohibitions, there is also no recourse for Muslims to convert out of Islam if they wish to intermarry, as the conversion itself is unlawful under the apostasy provision of the *Syariah*.

Even within the civil jurisdiction there is no provision to allow for a Muslim to declare himself a non-Muslim as the renouncement of the Islamic faith must be done through the *Syariah* system. In the case of *Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors*¹³ the plaintiff's application to declare herself a Christian in order to validate her marriage was struck off as the High Court did not consider it within its jurisdiction to hear the case for conversion. Similarly, in the case of *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Jal Ehwat Agama Islam Perak & Ors*¹⁴ the plaintiff applied to be declared a Hindu as she had renounced the religion of Islam some five years back. In her application it was stated that her continued treatment as a Muslim had subjected her to arrest, and charges for deriding the religion of Islam on account of cohabiting with her husband, and having two infant children by him. This application was also dismissed by the civil court on grounds that it has no jurisdiction to hear cases involving conversions out of Islam.

¹² For example the definition of *kitabiyah*, follows the Shafi'i School of Law. The woman must be descended from one of these ---- from the Bani Ya'qub lineage, or of Nasrani ancestors who lived at the time before Mohammad became the prophet, or is a Jew by descent from the line of Jews who live at the time before Isa became a prophet. See Ahmad Ibrahim (1999; 156)..

¹³ [2004] 5 MLJ 40.

¹⁴ [2003] 2 MLJ 302.

Prohibition of Conversion

When it comes to conversions, it becomes a “catch-22” situation for Muslims who seek to opt themselves out of Islam even if applied through the *Syariah* court. This is because their renouncement of the religion of Islam is an admittance of apostasy, which is a criminal offence under *Syariah* laws. For example section 13 of the *Enakmen Jenayah (Syariah) Perak 1992* (Perak *Syariah* Criminal Enactments of 1992) states that, “Any Muslim who willfully either by his action or words or in any manner claims to denounce the religion of Islam or declares himself to be a non-Muslim is guilty of an offence of deriding the religion of Islam and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or both”.

Fixity of Definition and the No-Exit Clause

Over the recent period several new laws have also been enacted to fix the civil definition for the Malay-Muslim identity. One impediment to interfaith marital union is the National Registration Regulations (2001) which makes it mandatory for Malays to declare their religion as Islam in their National Registration Identity Card (NRIC - identity card). As all official applications, from marriage to birth to death registrations are validated in accordance with national registration particulars, this instrument of governance has acted as a control over membership movements within groups, such as the Islamic constituency. The Lina Joy case specifically illustrates how this national regulation, outside of the *Syariah* system has also acted in tandem to control and prevent the exit by members from the Islamic community, or *ummah*, even to the extent of denying them their civil rights as national citizens.

Jurisdictional Separation

As for jurisdictional separation, the amendment that was made to the Federal Constitution in 1988 through Article 121 (1A) was one of the most significant law reforms ever made in post-independence Malaysia. The purpose of this amendment was to delineate the judicial jurisdiction of the *Syariah* and the Civil Court, so as to subject Muslims and non-Muslims to different jurisdictions when it comes to personal status laws. Of late, this clause has been persistently invoked in court judgments involving inter-religious applications. Effectively, the rights of citizens (both Muslims and non-Muslims) to have access to one common, equitable and universal court system has been denied with the affirmation of this jurisdictional distinction. With Article 121 (1A) of the Federal Constitution, there is essentially no basis to overturn the decision of the *Syariah* court based on any syncretic precedent, as “Islamic law will now mean *Shari'a* rather than precedent or practice (whether judicial precedent or customary practice)” (Hooker, 1993; 44).

The assertion of cultural relative rights, through the invocation of Islamic laws has led to some distinctive outcomes in inter-religious litigations, the more significant ones being, (i) the emergence of an explicit, exact and irreversible civil definition of the Islamic identity -- “the Malay is forever a Muslim and Islam, by virtue of its sacralization cannot be repudiated by any court system. (ii) the closure of the “Constitutional” avenue for Muslims who seek to exercise their civil liberty in their choice of faith and (iii) the affirmation of the Islamic sovereignty by the invocation of jurisdictional separation between Civil and *Syariah* courts, hence extending the authoritative field of Islamic laws even beyond family and personal matters.

THE LITIGATIONS AND THEIR IMPLICATIONS

In this part of the paper I discuss the series of litigations and their implications. They have become the focus of much attention to observers of Malaysian politics and society. Do these cases imply that the definition of domination and belonging in the Malaysian nation-state has been sealed or do these cases actually provide much grounds for further contestation over state authority and legitimacy? Have the outcomes of these cases succeeded in setting the rules for ethnic-distance? I have grouped the ensuing discussions into the various implications brought about by the outcomes of the litigations, namely the impact of the prohibitions and the consent. What is most significant in all these is that, it is the Muslims themselves who have had to bear the brunt of an evolving legal system, both *Syariah* and the civil law, unable to defy a pervading Islamic orthodoxy which has crept into almost all levels of the judiciary. Besides the human rights implications, there is a question of fear, especially the fear of an imagined heresy against Islam, especially among the Muslim bench in the civil courts. Needless to say this does not bode well for the future of the judiciary in Malaysia when the concept of fairness and justice is allowed to be dictated by inflexible Islamic doctrines that are in themselves historically contestable and never immutable.

Implication #1: Not just the Syariah, Even Civil Courts Do not Recognize Muslim-non-Muslim Marriages

In this section I describe the ordeal of three women, all born as Muslims but in their lives have chosen to marry outside of their religion. In the legal proceedings which they initiated they sought for a formal recognition of their conversion out of Islam and also for the Civil court to validate their inter-marriage to non-Muslim husbands. All of their applications were dismissed by the Courts.

In the case file of *Priyathaseny & Ors v Pegawai Penguatkuas Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*,¹⁵ the plaintiff was an ethnic Malay and born a Muslim. She renounced the religion of Islam 5 years before the trial and adopted Hinduism as her religion. She changed her original name of Zuraidah bte Hassan to Priyathaseny and married the second plaintiff, an ethnic Indian and a lifelong Hindu. They subsequently had two children. During her second pregnancy, she was arrested by the Perak Islamic religious authorities on charges of deriding the religion of Islam (by leaving the faith) and also for cohabitating outside of lawful Muslim wedlock (as her spouse is not a Muslim). At the time of the arrest she pleaded guilty to the charges and was convicted and fined RM5000. She also spent a total of 3 nights in detention, before being released on bail and the payment of her fine. While she was detained her Hindu husband was told to convert to Islam by the Perak Islamic religious authorities. It was claimed in the court document that this was done under duress in order to prevent his wife from being imprisoned. Counsel for Priyathaseni and her husband argued at the High Court that they do not profess the Islamic faith and that their continued treatment as Muslims by the Islamic religious authorities should be deemed unconstitutional because as non-Muslims they are not within the jurisdiction of the *Syariah* system. Their application was dismissed on grounds that the High Court did not have the jurisdiction to determine if Priyathaseni's renunciation of Islam is valid and whether the husband remains a Muslim despite the allegation that he was coerced into converting. The verdict of the judge was that all matters involving conversion out or in of Islam must be decided by the *Syariah* court and therefore the civil court was not the right avenue to seek relief of the above kind.

¹⁵ [2003] 2 MLJ 302.

A similar predicament was faced by Tongiah Jumali who sought the High Court to declare that she was a Christian, and not subject to the Islamic Laws of Johor and that her marriage to a non-Muslim be considered valid under Malaysian law. Tongiah's application was also struck off and the objection raised by the defendant, which is the government of Johor was upheld. The judgment handed down by Justice Jeffrey Tan asserted that, "the jurisdiction to adjudicate on any purported renunciation of the Islamic faith lies with the *Syariah* Court even if express provisions are not provided in the State Enactment ...the *Syariah* Court is the only forum qualified to answer whether a Muslim had renounced Islam".¹⁶ The judgment further elaborated on the fact that the issue was not whether the litigant can seek recourse through the court but it was to do with the issue of whether they were doing it within the correct court (jurisdiction).

But the "catch-22" situation was proffered by the counsel for Priyathaseni who argued that, "To send this case to the *Syariah* court would be to give the *Syariah* Court powers over persons who do not profess Islam in Malaysia – a country comprising people professing and practicing so many different religions. This cannot be right, particularly as the Federal Constitution expressly provides that the *Syariah* Courts shall have jurisdiction 'only' over person 'professing the religion of Islam.'"¹⁷

Yet another case of the above nature where application for a Muslim's conversion and that Muslim-non-Muslim intermarriage be validated by the civil court was in the case of *Zubeydah bte Shaik Mohd Lwn Kalaichelvan A/L Alagapan dan Lain-Lain*¹⁸. In this case the plaintiff Zubeydah bte Shaik Mohd, had applied to the High Court to declare that her 22-year old daughter was still a Muslim despite the latter's conversion to Hinduism via statutory declaration, and to sought that the marriage of her daughter to an Indian who professes Hinduism to be null and void. The plaintiff's daughter, Siti Mariam bte Mohamad Ismail was 22 years when she first left her family home without any word. Three years later in 2000 her whereabouts were discovered by the family. By then she had made a statutory declaration to embrace Hinduism and to change her name to M Tarini. On the same day that this declaration was made the marriage between her and Kalaichelvan was registered by the Hindu Sangam Registrar of Marriages under the Law Reform (Marriage and Divorce) Act 1976. Both her conversion and her marriage were declared invalid by the High Court. On her conversion the High Court also used the same argument that it would only be the *Syariah* court which would have the authority to decide on whether Siti Mariam was no longer a Muslim and as long as that was in question she was considered to be still a Muslim. For that matter her marriage to a non-Muslim contravened section 3 (3) of the Law Reform (Marriage and Divorce) Act, 1976 as such a provision can only apply to non-Muslim and non-Muslim marriages. The judge further ruled that even if the defendant (Siti Mariam) was of adult age, the plaintiff (her mother) still had the *locus standi* to make her application on the grounds to deny both the conversion and the marriage since the mother was considered the rightful inheritor of her daughter's estate.

¹⁶ *Tongiah Jumali & Anor V Kerajaan Negeri Johor & ORS*, [2004] 5 MLJ 40.

¹⁷ *Priyathaseny & Ors V Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors*, [2003] 2 MLJ 302.

¹⁸ [2003] 2 MLJ 471.

Implication #2: Conversion during Marriage Leads to the Irreconcilable State of Inter-Religious Divorces

If cases of inter-religious marriage can be a highly risky contract, inter-religious divorce can be even more thorny. Here the power of the state to regulate along the rules of the re-constituted nation is felt in major ways. The repercussion of judgments made in two cases of non-Muslim women in the throes of their divorce and child custody battle had a far-reaching impact on the nation's state of ethnic balance, as it led to the realization that two decades of Islamic law reforms in the country had in actual fact culminated in a Constitutional crisis.

These cases involve divorce and custody cases of children. Shamala and Subashini were two women of ethnic Indian origin and Hindu by professed religion. They were both married to Hindu-Indian spouses. At the point when their marriages were breaking down or had broken down, both of their spouses converted to Islam. As such, they were legally subjected to *Syariah* jurisdiction.

In the case of *Shamala A/P Sathiyaseelan V Dr Jeyaganesh A/L C Mogarajah*¹⁹, Shamala as the plaintiff had sought to protect herself and her young sons, aged 3 and 8 by seeking custody, care and control over her children as well as maintenance from her husband who had since embraced Islam. The two sons were also converted to Islam by the husband. The issue deliberated at the courts were whether the defendant (Shamala's husband) as a Muslim could be subjected to the jurisdiction of the civil court. In this early application in 2003, the court passed the judgment that it has the power to hear the application as the plaintiff and the defendant were both married under the Law Reform (Marriage and Divorce) Act 1976, and that under that legislation the dissolution of their marriage could only be affected by Section 8 of the Act.²⁰ In the meantime, the husband had applied to the Selangor *Syariah* High Court for custody or *hadanah* of the two children.²¹ The *hadanah* application was subsequently served on Shamala by the *Syariah* High Court. When she failed to turn up at the hearing a warrant of arrest was issued against her on 27 March 2003. This order was eventually held in abeyance, when the case was applied at the civil court. The remarks of the High Court judge on the issue of the *Syariah* court's order on Shamala who is a non-Muslim, expressed the potential conflicting tendencies of the two jurisdictions; "I must at this juncture briefly state that the *ex parte hadanah* application dated 28 January 2003 is not binding on the plaintiff wife and if served on the plaintiff wiew it has no effect because the plaintiff wife is a non-Muslim ...the same *Syariah* Court issued a warrant of arrest against the plaintiff wife for failure to attend the said *Syariah* Court. I cannot understand why the said *Syariah* Court whose jurisdiction is territorial and over matrimonial disputes involving Muslim marriages only can issue such a warrant. The plaintiff wife is not a Muslim. She is Hindu. I am of the opinion that it is unconstitutional for the said *Syariah* Court to issue the warrant of arrest..."²² Although Shamala was granted joint-custody over her children she was however ordered by

¹⁹ [2003] 6 MLJ 515.

²⁰ Section 8 of the Act states that, "Every marriage solemnized in Malaysia, after the appointed date, other than a marriage which is void under the Act, shall continue until dissolved by –(a) by death of one of the parties (b) by the order of a court of competent jurisdiction, or (c) by a decree made by a court of competent jurisdiction that the marriage is null and void."

²¹ In Islamic law there is a distinction between child care (*hadanah*) and rights to guardianship. The right to guardianship resides with the father but the rights to *hadanah* can be contested by either parent. However, the mother loses this right as soon as she re-marries or when both children reach the age of adulthood.

²² *Shamala A/P Sathiyaseeelan v Dr Jeyaganesh A/L Mogarajah*, [2004] 2 MLJ 241.

the judge that she should bring up her children as Muslims, even though as a parent she never consented to their conversion.

Just two years after the proceedings of the Shamala case, another similar case emerged to occupy public attention. Subashini, the woman in this case, was married to Saravanan, both Hindus at the time of their marriage. In May 2006 Saravanan, converted himself and his 3 year-old son to Islam. Subsequently he applied through the *Syariah* to dissolve his marriage to Subashini and to obtain custody over their two sons. As a counter-suit, Subashini, as a non-Muslim filed a petition in the High Court to annul her marriage, and to seek custody on both sons and to prevent Saravanan from converting both of the children into Islam without her permission. Two separate applications were made, one by the Muslim husband at the *Syariah* Court and the other by the non-Muslim wife at the civil court. However, in a majority decision at the Court of Appeal of two judges against one, Subashini lost her application to prevent her husband from dissolving their marriage in the *Syariah* court and from converting their second son into Islam. The most controversial part of the judgment was a reference which stated that Subashini should try to seek recourse through the *Syariah* court in order to prevent her husband from resuming his action at the *Syariah* court. There is a constitutional lacuna here as Subashini would not be able to appear before the *Syariah* court anyway as she was a non-Muslim and not subjected to Islamic system.

Subashini's case spurred a flurry of protests, as it was a case which had cut deep into the fundamental question of whether the highest law of the land, the Constitution had any use at all in protecting citizens rights. For example, an inter-faith religious coalition, the Malaysian Consultative Council Of Buddhism, Christianity, Hinduism, Sikhism And Taoism, expressed its concern over the erosion of rights of non-Muslims, "It is our duty to inform the authorities that there is growing discomfort amongst the non Muslim citizens of Malaysia, who form 45% of the population, many of whom feel that the judiciary are failing in their constitutional duty to ensure the equal protection of the law for all Malaysians."²³ Other prominent persons such as the Crown Prince of the state of Perak also called for the emphatic defence of the Federal Constitution in the interests of nation-building.²⁴ A newspaper columnist Azmi Sharom (2007) commented that, "what has been happening over the past few years in this country is an insidious move towards a theocratic state. When the religious freedoms of individuals are not respected (no matter how repulsive one might feel it is), when normal governmental decision dealing with matters such as health have to be referred to religious authorities, when the doors of the civil court, the only court open to non-Muslims, are slammed in their faces in total disregard of the Constitution, we are losing sight of the secular principles upon which this country is meant to be run on."

The two cases of Shamala and Subashini drove home the realization that the amendment to Article 121 of the Constitution to separate the jurisdiction of the Civil and *Syariah* courts had spelled a grave consequence for human rights, not forgetting upon the notions of belonging within a modern nation-state. It could all too easily usurp the rights of not just Muslims but

²³ Dato' Chee Peck Kiat, President,, Malaysian Consultative Council Of Buddhism, Christianity, Hinduism, Sikhism And Taoism, *Press Statement On Court Of Appeal Decision On Saravanan V. Subashini*, 23 March, 2007

²⁴ See text of a keynote speech by Raja Nazrin Shah Ibni Sultan Azlan Shah at the "Young Malaysians Roundtable Discussion on National Unity and Development in Malaysia: Prospects and Challenges for Nation-Building", 4 April, 2007.
See <<http://thestar.com.my/news/story.asp?file=/2007/4/4/nation/20070404211&sec=nation>>.

also non-Muslims who before this were under the impression that they would be immune to the jurisdiction of the *Syariah*. Islamization was no longer the exclusive experience of Muslims but thorough laws and the specific nature of law reforms, non-Muslims too could be subjected to the norms of Islamism. The dualism of the legal system looked alright on paper, applied to real life, it was more messy. As Cott puts it, “Marital behavior always varies more than the law predicts. Men and women inhabit their marital roles in their own ways, not always bending fully inside the circle of civil definitions, but bringing new understandings into the categories of “husband” and “wife” (Cott, 2000; 8).

Implication #3: Not just the Syariah, Even Civil Courts Do Not Provide the Exit-Clause Out of Islam

The above cases of inter-religious marriage and divorce have sparked intense consciousness about the fragility of multicultural existence. The application by Muslims themselves to disavow their religion was even more catalytic in sharpening inter-ethnic animosities. One of the earliest cases of Muslims applying through the court to convert out of was that of *Soon Singh A/L Bikar Singh V Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*.²⁵ The appellant, Soon Singh had appealed to the highest court of Malaysia, the Federal Court to recognize that he was no longer a Muslim. At the age of 17, Soon Singh who was born to Sikh parents had converted to Islam without the consent of his widowed mother. At that time he was still considered a minor. By the time he reached the age of 21, Soon Singh went through a Baptism ceremony into the Sikh faith, thereby renouncing the religion of Islam. This was followed by a deed poll and an application to the High Court to declare that he was no longer a Muslim. At this hearing, the Religious Department of Kedah objected on the grounds that the High Court did not have jurisdiction to hear of such cases as it involved a Muslim conversion and therefore would fall under the purview of the *Syariah* Court. The High Court upheld the objection of the Religious Department, while the Federal Court rejected Soon Singh’s appeal against this. In arguing for the plaintiff, counsel for Soon Singh referred to Article 12 (4) of the Constitution which states that the religion of a person under 18 years of age shall be decided by his parent or guardian. They also referred to Article 11 (1) of the Federal Constitution which states that every person has the right to profess and practice his religion. However, these lines of defense did not succeed in convincing the judges of Soon Singh’s grounds for wishing to revert back to his original faith. What was evoked was still the issue of jurisdiction which was again differentiated between the Civil High Court and the *Syariah* Court whenever it came to a Muslim’s rights to apostasy. This particular judgment set the precedence for later cases involving individuals who had wished to cross the faith lines between Islam and the rest.

Soon after this the Lina Joy case came to public eye. By then a storm of controversy had emerged and ethnic dissension began to take on a rising and renewed height. The events surrounding the issue of Lina Joy’s application to renounce Islam sometime around the early 2000s had started to evoke intense political reaction from the Muslim civil society. Seeing themselves as custodians of the Muslim collective they had whipped up Muslim sentiments so as to thwart the intention of anyone wanting to leave Islam. The movement lobbied for the enactment of anti-apostasy laws within the *Syariah* system, so as to mitigate cases of the Lina

²⁵ [1999] MLJ 489.

Joy type.²⁶ This movement also attempted to derail a proposal for the setting up of an Inter-Faith body, as well acted to censure any public discussions and debates on constitutional rights to freedom of religion. The more focused objective of this movement was to preempt any court judgment that would grant any civil rights to Muslims who are intending to repudiate Islam. The threat of public disorder arising out of Muslim anger was invoked in order to pressure the intervention of government in the judicial proceedings. The result of which was that all public discussions on constitutional rights to freedom of religion were banned and the final verdict of the Federal Court was to reject Lina Joy's final stage of appeal. Lina Joy's case demonstrated how entrapped the legal system and its judiciary had become in not being able to negotiate, let alone challenge the new Islamic legal-bureaucratic orthodoxy.

The background of the Lina Joy case involves the application of Azlina Binti Jailani (the birth name of Lina Joy) who was born to Malay-Muslim parents. At the age of 26 she began to embrace the Catholic faith, by attending Mass regularly and going through the process of baptism. Azlina adopted a new name, Lina Joy to reflect her change of faith. By the time she was 36 she had also planned to marry a non-Muslim and was therefore in need of registering her conversion formally as under Malaysian rules, only intermarriages among non-Muslims can be validly registered. To go through this process, the name change of Lina Joy had to be registered with the National Registration Department. At a High Court order was sought in order to declare her new status as a non-Muslim. The first "gate of exit" which was closed to Lina Joy was when she attempted to use an administrative means to register her name change.

Under the National Registration Regulations 1990, there were several new amendments and conditions which were being put in place between 1999 and 2001 in order to formally prevent Muslims from using this "administrative" route to enable their name and religion change. Previously the application for a name and religion change was relatively simple. A statutory declaration was all that was needed to affect these changes. Among the new requirements which had upset this arrangement was for every applicant for a National Registration Identity Card (which is mandatory for all Malaysian citizens above the age of 12) to state his religion on the application form.²⁷ The exception is that for non-Muslims, their religion will not be stated on the identity cards. However, for all Muslims, the religion of Islam will be imprinted on the card. In 2001, a new clause was also added to specifically disallow "conversion of religion" as being one of the reasons stated in any application for a name change. These new administrative "twists" seemed to have almost been designed to thwart Lina Joy's attempt at legalizing her new status as a Christian as it was argued in court that some of these new regulations were enforced retroactively in order to deny Lina Joy's application. Her application to the National Registration Department (NRD) was first made in 1997 while the new regulations were put in place between 1999 and 2001.. At the Court of Appeal, her application was dismissed, on grounds that the NRD was acting within their powers to demand that her renunciation of Islam be confirmed by the *Syariah* Court. Other reasons given was that the constitutional provision as contained in Article 11 of the Constitution on

²⁶ This movement comprises several Islamic groups, from the Malaysian Islamic Youth Movement (ABIM) to Muslim Professionals Association which got together to form a national coalition such as ACCIN (Allied Coordinating Committee of Islamic Networks).

²⁷ There were two amendments to the 1990 National Registration Regulations which came into force retrospectively in October 1999. One amendment was in regard to the particulars to be given to the registration officer --- a person's religion had to be stated in the application for identity cards. The second amendment made it compulsory that the religion of Islam be stated on the identity cards for Muslims. Published on March 1, 2000, under P.U. (A) 70/2000. See *Lina Joy (No. K.P. 640108-10-5038) V Majlis Agama Islam Wilayah Persekutuan and Others*, [2005] MLJU 335.

freedom of religion could not be applied to Muslims as their right “to profess and practice his religion” did not include their right to change out of the religion of Islam.²⁸ Clause (2) of Article 160 of the Federal Constitution was also cited to mean that the appellant being originally a Malay, would be defined as someone professing the religion of Islam, and since the appellant would remain a Malay to her dying day, she could not then renounce Islam, according to the judge.²⁹

In 2006, the case was brought up for appeal at the Federal Court level. The case had taken on a very high profile, not just nationally but internationally. At this litigation, the arguments proffered by both appellant and defendants were raised to touch on fundamental and historical issues of nation-state foundation. Counsel for Lina Joy argued for the supremacy of the Federal Constitution which intended that the country adopts secular laws rather religious laws, while the other side argued for the pre-Constitution position of Islam which they argued was historically more relevant in the context of Muslims. While the court hearing was going on Muslim groups were busy mobilizing the ground sentiment over the issue, and presented a scenario to the masses that were the judgment by the Federal Court to go in the favour of Lina Joy, this would strike a blow to Muslims, spelling the end of Islam’s hold on the Muslim population resulting in an uncontrolled exodus of Muslims out of their faith.³⁰ This heightened environment of ethnic tension which surrounded the case and the threat of Muslim uprising against the state resulted in the banning of public debates on the issue as well as the various stages of deferment of court decisions on the appeal.

Not much is known as to the whereabouts and where-hows of both Soon Singh and Lina Joy. It is unlikely that both would have tried to seek their demands of renouncing Islam through the approval of the *Syariah* Courts. To do so would be almost futile. For example, the case of Kamariah Ali and another appellant at having the High Court declare that they are no longer Muslims illustrates the “no exit” rule for Muslims.³¹ Kamariah Ali and her associates continued and sustained application to renounce Islam at the *Syariah* Court and up to the Federal Court persisted from 1992 till 2005. At the *Syariah* Court their application to renounce Islam was rejected on grounds that the question of verifying whether a Muslim has become an apostate or not, is a question that cannot be resolved as it was an ecclesiastical

²⁸ See Thio Li-ann (2006) in analyzing the judgement of Justice Faiza in Lina Joy’s litigation at the High Court.

²⁹ Stated in judgement of Abdul Aziz Mohamad JCA in *Lina Joy (No. K.P. 640108-10-5038) V Majlis Agama Islam Wilayah Persekutuan and Others*, [2005] MLJU 335.

³⁰ One vocal and unrelenting exponent of this type of “doom-tactic” was the Mufti of the state of Perak, who would make statements such as, “Jika dalam kes ini Lina Joy menang, maka agama Islam akan hancur. Ia membawa implikasi: (i) Kuasa Raja mengenai agama Islam akan hilang (ii) Kuasa Mahkamah Syariah tidak boleh dipakai (iii) Orang Islam tidak boleh memaksa anaknya asembahyang, tidak berhak lagi kutip zakat dan tiap-tiap orang boleh mentafsir Islam ikut kehendaknya. Itulah akibatnya.” (translation: *If Lina Joy wins in this case, Islam will be destroyed. It will bring about these implications, (i) The powers of Malay rulers over Islam will be usurped (ii) The powers of the Syariah Court will be made redundant (iii) Muslims cannot force their children to perform prayers, will have no right to collect tithes and everyone will be able to interpret Islam according to their whims and fancies. That will be the result.*). Message relayed through the internet at the height of demonstrations over the Lina Joy case, titled, “Peringatan Mufti Perak Perlu DiRenungi”, 10 August 2006.

³¹ See *Kamariah Binti Ali and anor v Majlis Agama Islam dan Adat Melayu Terengganu and Anor*, High Court (Kuala Lumpur), [2005] MLJU 595.

problem beyond the paradigm of secular or worldly legal rules.³² In short, there seems to be a legal opinion that the custodians of Islam could not even accept the will to apostasy by Muslims as this in itself would construe complicity on their part if they did not prevent someone from committing a grave sin in Islam. Whether it is Soon Singh, or Lina Joy or Kamariah Ali all would have to seek licence which is “conditioned on permission from the group representatives”, to leave --- a right which the representatives were not willing to give anyway (Thio, 2006; 6).

Ayelet Shachar (2001) calls this response to multiculturalism a syndrome of “reactive culturalism” where group identity is demarcated by “walling it off from the outside world”, and the group’s assertion of its difference from others becomes significantly heightened. Schahar writes of how their representatives will seek to “govern substantial aspects of their members’ everyday lives” to the extent of abusing conditions that would make for a workable multiculturalism. The discourse of “insider-outsider” and “non-interventionism” by states or others permeate so deeply, that systemic abuse of certain member’s citizenship rights are likely to persist, if not inevitable as an outcome (Schahar, 2001; 36).

Implication #4: One of the Patriachal Privileges in Islam: Polygamy Made- Easy.

In this section we move on to look at family contention at the intra-religious level. That the unmitigated project of group identity control can also lead to systemic in-group violation is often overlooked by members themselves. One example of how this has occurred is through rules regarding polygamous marriage. It has now been made easier. *Syariah* reforms did not just mean instituting a slew of new prohibitions, in fact newer forms of consent and permissiveness have also been put in place. Laws on polygamy have now made it easier for Muslim males to so-called fulfill this part of their obligation.

Ever since Muslim family laws were promulgated in the country, the right of a Muslim man to marry more than one wife up to a maximum of four has always been recognized. However, certain conditions were applied to this right. During the early years, the Muslim enactments in certain states required that the man acquire the written permission of the Kadi in order to do so. This is still in contradiction of certain adat laws in which the rule was monogamy. In the state of Negri Sembilan for example where the matrilineal system pervades, a Malay could not marry a second wife without obtaining the permission of the ruler and the consent of the first wife (Ahmad Ibrahim, 1965; 187).

Over the years, amendments to Muslim Family laws have inserted more specific requirements such as for a formal application to be made to the court. During such hearings all the existing wives will be called to appear before the court after which a judgment will be made as to whether the marriage is “appropriate and necessary”. In some states a written permission from the kadi must be obtained by the man before he can enter into a polygamous marriage. Failure to comply with these conditions is an offence, liable to a fine or imprisonment. There were landmark judgments that favoured women. The conditions to be fulfilled for polygamy were stringent. In the case of *Aishah bte Abdul Rauf v Wan Mohd Yusof bin Wan Othman*, the wife’s appeal to overturn the Kadi’s decision to allow for the husband to take on a second wife was granted by the Selangor State Appeal Committee, even

³² See Judgement by Justice Raus Sharif, *Kamariah Binti Ali and anor V majlis Agama Islam dan Adat Melayu Terengganu and Anor*, High Court (Kuala Lumpur), [2005]MLJU 595.

though the husband was someone of material means. The rules were so strict at that time so as to favour women.

However, starting from the mid-1990s, these rules have been gradually relaxed. In the state of Selangor, a clause requiring the written permission of existing wives to consent to the polygamy was removed in 1996. Women's groups protested but this did not succeed in reversing the situation.

In 2005, there were further new rules which made tried to lessen the economic burdens of husbands in their quest to propagate and maintain multiple families. In that year, amidst vociferous opposition from women's groups Parliament passed the Islamic Family Law (Federal Territories) (Amendment) Bill. These amendments have discriminatory effects upon women. Among the amendments made were those which included the rights of husbands to claim part of their existing wives's assets or joint property upon his new marriage. Under this amendment, wives of polygamous husbands are forced to choose either to apply for order of maintenance or to apply for order of division on joint property. They could only choose one or the other and not both as sources for maintenance. This has no basis in Islamic law as the conventional version had always made it mandatory for a husband alone to maintain his wife/s. Another amendment gives an additional right to a husband to apply for a dissolution of marriage under judicial order or *fasakh*, which before this was solely the right of women. There are 12 grounds of divorce under this clause, which includes desertion, violence and non-maintenance. However, the granting of divorce by judicial decree to a husband is superfluous as he already has the unilateral right to divorce without reason. The only reason why a man would apply for divorce under *fasakh* would be to avoid paying compensation to the divorced wife. The other discriminatory amendment under the new regulation was to allow for husbands to obtain a court injunction to prevent the disposition of property by a wife or former wife in order to protect the husband or former husband's financial claims on the woman's property in the even of a legal contest.³³ Women's groups called these moves blatant and unabashed as they seemed designed to make it easy for Muslim males to practice polygamy while freeing him from some of the stringent conditions of bearing an economic responsibility towards his co-wives and multiple families.

The ideological basis behind the law-making process itself is of interest. Since the emphasis was so much on property and material rights, it was biased towards the interests of wealthier men. It was also to remove the economic conditionality which was one of the bases for assessing the viability of any application for polygamy. The context of this "gendered" law was specific to the times. It is being made at a time when more women are now economically independent. It seems that law-makers exploited this situation in order to revise if not relax the obligatory duty of a husband to solely provide for family maintenance. The customary concept of *harta sepencarian* was given a new twist by entitling men an equal right to the matrimonial property not just at the point of divorce but also at the point of a new marriage.

This was almost akin to a strategy of disciplining women by closing off any avenues for them to resist or undermine the institution of polygamy. By using the argument that maintaining multiple families is economically burdensome for a husband and therefore would make it impossible for him to be just and equal to all spouses and children, Islamic courts were able to decide in women's favour, to disapprove polygamy among me. However, the new

³³ See, Press Statement by SIS Forum Malaysia (Sisters in Islam), *Husbands May Misuse Amendments to Islamic Family Law Bill, Federal Territories, 2005*, 8 December 2005.

amendments to the law allowed economic leeway to the men as they are now able to tap on joint-wealth of the marriage. By permitting husbands to make claims as joint-owners over sources of marital wealth allows them control over women's earnings and assets ---which would be anathema to Islamic law which used to interpret that any wealth accumulated by a woman would belong solely to her. This was based on the premise that since males, whether as fathers, brothers or husbands get to inherit a larger share of inheritance they are also solely obliged to provide maintenance to their women and other charges. It is also in accordance with *Syariah* law that it is wholly men rather than women, or men and women in a joint-capacity, that are entrusted with providing maintenance for the family. Hence the appropriation of a customary practice, the *harta sepencarian* as an element of Islamic law can be said to be one of the more disingenuous ways of selectively invoking Islamic principles to propound more discrimination against women. Law provides yet another device to control the personal status of women, including their reproductive activity. The family well-being is unlikely to be enhanced by such new rules. What has been strengthened and bolstered is the ability of the group's authority to deploy more legalistic device to impute more distinctive markers upon group identity.

Polygamy is said to have more of a symbolic meaning at the national political level than it actually does at the practical level, where the practice is not widely prevalent (Abdo, 2006; 104). However, just as polygamy was used as a metaphor for tyranny and corruption by liberal western writers in the 18th century (Cott, 2001; 22) modern-day Islamists may be seeking to re-claim the discourse and practice of polygamy as a metaphor of an authentic and distinct movement of de-westernization. However, it is easier to see this development as a form of new patriarchal privilege which has been conveniently sanctioned by the divine cloak of the *Syariah*.

CONCLUSIONS: A PYRRHIC VICTORY FOR THE CULTURAL DEFENDERS

Marital norms as they are shaped within the context of Malaysia's dual legal jurisdictions have become the inevitable and unavoidable source of inter-religious conflict. Existing laws, either *Syariah* or common law statutes do not actually offer any solutions to resolving inter-religious family crisis when one of the parties is a Muslim. In fact family crisis is often exacerbated by court battles that test the relative strength of one legal system over the other. Families who seek recourse through the law can be caught in the web of competition between *Syariah* Islamists who wish to establish the dominance of a specific Islamic legal paradigm by building an exclusive set of rules for the community, against all others, whose vision of nationhood may just be the opposite of that. Translated into advocacy language, the battle over family laws in Malaysia today pits those who wish to maintain the secular foundation of nationhood versus those who want to impute religious and therefore immutable laws upon distinct sections of society.

The Malaysian case has shown that there has been an over-regulation as well as a mis-regulation of private concerns in relation to family matters. This has come about from a process of legal reforms which have been enacted to position the dominance of Islam in the state. Family formation and the nature of its contention reflect how group identity politics has been prioritized over concerns to retain the cohesiveness of family units. It can be said that Muslims in the revivalist context are caught in a project to create a *nomos*, or a "normative universe in which law and cultural narrative are inseparable". This term has been credited to Robert Cover which Shachar has used to expand a concept of the "*nomoi* communities",

meaning identity groups or religiously-defined groups of people who share a worldview that is circumscribed by a set of laws for the community (Shachar, 2001; 2). In either asserting or “leveling the playing field” between itself and the other communities, there may be the systematic abuse and maltreatment of individuals within the group; severe enough to deny them their citizenship rights.

In Malaysia, control over family laws has been most acute due to the distinct nature of how the legal system has been developed as a duality between civil and religious jurisdiction; with *Syariah* laws largely confined to personal status laws but increasingly being expanded to cover any aspect of public and private lives of the Muslim. In the case of deciding who can be a Muslim and who cannot, Family law, particularly Islamic Family Law is “licensed” to draw its own terms for membership. This may be dictated by divine precepts although in most cases it is more social and political in nature and contextualized within the particular national prerogatives of the powers-that-be. In Malaysia this was done in several ways, first, by prescribing rules of lineage or birth, or second, by defining who by way of marriage can be eligible to become a member of a group, and third, by setting up specific legal sanctions, or incentives to entice membership into the group. In the Malaysian examples, more attention is being paid to how laws can be effectively used as a no-exit clause or to prohibit any member from leaving the group. Islamic laws in Malaysia have made the act of conversion into Islam an easy but irreversible change of faith, but to leave the faith would be an impossibility. This group obsession to delimit the terms of membership, either through the prohibition of Muslim-non-Muslim marriage or through the prevention of exit has overridden concerns for family welfare and unity. The visit of personal tragedies upon families who are locked in acrimonious inter-religious divorce battles or are deprived of rights to conjugal intimacy because of invalidated Muslim-non-Muslim marriage suggests at this stage that the battle over Islamization had been won by its proponents, although most starkly this has resulted in Muslims themselves being most robbed of their liberties. In this contest the family is a vulnerable institution because it is the basis upon which jurisdictional autonomy can be established --- the legal domains of the family and rights to religious beliefs have become some of the areas upon which the contest for dominance has been forcefully waged.

The fundamental question of civil liberty and normative rights have been debated and defined, while court battles have been unable to offer any durable solution to the problem of multicultural injustice. The contours of family life as demarcated through family laws have assumed a contentious dimension because this is where the politics of group identity clash with the norms of a universalizing and inclusive democracy as had been originally envisioned at the point of formation of the modern nation-state. How can citizenship rights based on civil or secular notions of membership be defended when it is in competition with religious membership based on an often immutable set of doctrines and rules?

The persistence among *Syariah* Islamists to establish a dual and parallel systems of justice often overlooks the question as to whether they can coexist alongside other systems without dire consequences to private needs, interests and entitlements. Ten years ago Daniel Horowitz published his study on the success of an Islamic legal reform process in Malaysia which he claimed had accommodated modern structures with ease, suggesting that the compatibility of *Syariah* with norms such as democracy and civil rights may not be difficult to envisage. But he nevertheless concluded his observation with a caution:

The test of Islamic law will be its long-term coexistence with some version of the secular system, for the displacement of that system would disconcert non-Malays and religiously less observant Malays as well...A large if understandable, error of those who drive in two lanes is to project equivalent adaptability onto others and to assume that what has become, after a lengthy quest, authentic and familiar, however eclectically it was created, can find easy and unequivocal acceptance among people whose own search for authenticity may begin and end elsewhere (Horowitz, 1994; 293).

Indeed, testing if the *Syariah* system can function in tandem with the civil system *sans* the tension and the clash will be an on-going exercise, one which will see some collateral damage along the way – namely, the moderate Muslim, the family and women, being some of whom.

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