CONFIDENTIAL / DITRAHSIA KAN.

Sociological and Legal Implications of the Implementation of Islamic Family Law in Malaysia

ed. Wazir J. Karim

The KANITA Project
School of Social Sciences
Universiti Sains Malaysia

and remained free for abetting in prostitution. On June 1st, 1987, the editor of this report wrote a letter of protest against the passing of the sentence by the *kadi* of the Syariah Court in Kota Bahru;

The Case of Kamariah Deraman Vs the State

"Kamariah Deraman, a 37 year old divorcee, was the first person to be sentenced for illicit sexual offenses under the amended State Syariah Criminal Law which was enforced in Kelantan this year. The case was one which involved prostitution rather than adultery, hence the offender was a woman. The sentence was passed on March 19, 1987.

According to a newspaper report, she asked for payment for sex, to support her three children and an aged mother. The court sentenced her to 31 months' jail or a $3,000 fine. Syariah Court *kadi* Haji Ahmad Nadzirin Haji Abdullah said this was a reduced sentence - from $4,000 or two years' imprisonment - in view of Kamariah's plea for leniency. The man who was charged with her, Mahmud Abdullah, 43, was married with seven children. He was only sentenced to seven months' jail or a fine of $1,000. This implied that in the *kadi*'s view the seriousness of his offence in abetting in prostitution and illicit sex was (following the original sentence) a quarter of that of Kamariah's. She was four

times more guilty for selling her body to support her family than the married man of seven children, who cheated on his wife and family to have sex with her.

Although they were found by enforcement officers bearing witness to the sexual offence, it is not known if a case of *zina* was even attempted or made against her robust partner. This is despite the fact that in Islam, it is adultery rather than prostitution that is indexed in the legislation (Surah XXIV:2). As it stands, his much lighter offence enabled him to pay his fine and to get off scot-free while poor Kamariah, who could not pay her fine, went to jail. Islam is concerned with preparing people for a responsible married family life. When or how was this done for this man? Is he aware of his duties and tasks as a responsible father under Islamic Family Law? Did these concerns ever transpire when the sentence was passed under Syariah Criminal Law? How are these two components of the law co-ordinated and integrated in the Syariah Court?

It seems as if Kamariah was more responsible than he was under Islamic Family Law but less responsible than him under Islamic Criminal Law. Since Islam only knows one law and that is the law of God - to implement justice for all without prejudice and rancour - was a proper case made for Kamariah in the eyes of God? In i' harshest or most lenient

form (subject to interpretations by States), the law is equal for both men and women. For adultery, both parties bear the same consequences. By differentiating prostitution from adultery, the State automatically transfers the burden of the offence and the guilt to women. Reading about Kamariah's `crime', I am sure many Muslims and non Muslims were concerned and saddened by the way in which sentence was passed. Her case merited a plea of mercy that she would repent (*taubat*) and would not commit the offence again (Surah XXIV: 5, *Save those who afterwards repent and make amends for Allah is forgiving and merciful* and Surah XVI: 119, *For those who do evil in ignorance and afterward repent and amend, for them Allah is afterwards indeed forgiving and merciful*).

Charity and welfare being another important principle of community support in Islam, it should also have been a case for the welfare authorities to review, either to support her children in school or help her to obtain an `honest' job to support her family. The principles against which the fines were passed are also unclear. What makes one kind of prostitution worth $4,000 as an offence and another $3,000 or $2,000 etc.? Why are married men who pay to sleep with women found to be much less guilty and why is it that even in the presence of witnesses, married men who pay to sleep with women are free from being tried for sexual offenses

under *zina*?

It is hoped that in this case, there were fewer than four enforcement officers, and so it did not merit an accusation (Surah XXIV: 13). For sexual offenses, is this method in passing judgement then no different to what it was when *khalwat* was an offence? Where have the corrections been made? What then makes these new judgments more Islamic? The public has to be enlightened on these issues before it can be made to feel confident that the principles of humanity and justice in Islam for all - women and men - are properly followed.

Significantly, it also appears that the way Islamic law is being implemented, at least in Kelantan, follows the same class principles in English law that offenders can have the alternative of paying off their fines to avoid jail. This creates a situation where the economically more advantaged seldom feel the inconvenience of remorse or guilt as the poor do. If this system persists, under the present State Syariah Criminal Law System, the jail would be full of poor Muslim prostitutes, sexual offenders and alcoholics while their well-heeled counterparts quietly carry on with the same style of living - ready to apply the practical logic of Western philosophy of `being free to pay to stay free'.

Yet, Islamic criminal law knows no barriers of race, class or gender. A thought that comes to mind is a statement from a Malaysian Syariah lawyer, Puan Kamar Ainiah Kamaruzaman, who feels that Syariah Courts needed more qualified manpower and training resources to ensure a smooth, effective implementation of the new Islamic Family Law (The New Straits Times, Feb 23). It is supposed that this would apply to Islamic Criminal Law as well. Ironically, while one half of the law attempts to elevate the welfare and status of Muslim women, the other half rejects this by pushing prostitutes into jail.

I would like to recall the case which this lawyer pointed out, of destitute prostitute who managed to get a hawker stall permit to run her own small business. Her request for a loan from the Baitulmal was rejected. Yet, the Baitulmal carries out business activity - it chose to reject a destitute woman who wants to make an honest living to support her family. This could be Kamariah, after she serves her jail sentence of two years. That is, if her spirit and will to support her destitute family has not yet been broken, by the grace of God."

Following this case, KANITA, a research programme on Women and Children in Development, now the Unit of Women and Human Resource Studies, organized a research project on 'The Legal

and Sociological Implication of the Implementation of Syariah Law in Peninsular Malaysia'. An earlier suggested focus on Syariah Criminal law was widened to include Syariah Family law, to ascertain how family matters and crimes were coordinated by the Islamic Affairs Department and the Syariah Court in Malaysia. A second purpose of the study was to determine the extent to which these new laws advanced the position of Muslim women in Malaysian society. A third purpose was to alert Muslim women and the public on possible injustices which might arise in the implementation of the law under an all male *kadi* (Syariah judge) system.

On 23rd September, 1989, KANITA, the Women's Association of Universiti Sains Malaysia and the Joint Action Committee of Penang organised a Workshop on `Syariah and Civil Laws: Developments, Implementation and the Position of Muslim Women'. More than 150 participants from public and private organizations attended the workshop. Researchers of the KANITA project, Mehrun Siraj, Zaleha Muhammat, Norlia Zakaria and Jamilah Karim Khan presented papers on different aspects of Islamic Family Law relating to marriage, divorce and polygyny, while two civil law experts, Lim Kah Cheng and Lalitha Menon presented a joint-paper on the comparative position of women under Civil and Syariah law. The following were the main recommendations of the workshop;

1) To formally institute a position of a woman councillor in the Syariah Court, to ensure that women are give

adequate and just hearings throughout the proceedings.

2) To implement constant retraining programmes for *kadi*, to ensure that they are acquainted with new rules and procedures of Syariah law within the State and are able to interpret them fairly without prejudice of gender and class.

3) To urge the Syariah authorities to speed up procedures of standardization or interpretation and implementation, through a formal judiciary process where the law of evidence can be constituted and instituted in systematic and equitable manner throughout the different Malay States in the Peninsular, Sabah and Sarawak.

4) To immediately develop a systematic system of compiling statistics on marriage, polygyny, divorce and the division of property throughout the States and to ensure that the system of compilation and upgrading is systematic and standardized.

5) To urge the government to look into grey areas of the law concerning the rights of Muslim women under Civil law. Some problematic areas highlighted were in Guardianship, Citizenship, Immigration, Income Tax, domestic violence and rape. Many of these problematic areas referred to the way in which Civil law intervenes in the rights of Muslim women in areas like Guardianship and Immigration and the way in which Islamic law is silent on the rights of Muslim women in crimes relating to rape and domestic violence.

6) To look into the possibility of training women *kadi* since there is nothing in the Qur'an or Hadith. Which says or suggests that a woman cannot be a *kadi*. This will formally advance the status of women under Islamic law a well as ensure more equitable judgements to be passed at

least in terms of increasing women's representations in Court.

This study draws upon these problems in a more fundamental way by looking into the status of Muslim women under the current trend of practices of Syariah law in Malaysia. A major obstacle to the study was in the compilation of

statistics relating to marriage, polygyny, divorce and the division of the property. Researchers had to count the cases manually from file to file. In many cases, entries were made with no follow ups. Hence, the outcome of the cases were not known. In other cases, a discrepancy existed between the statistics available in the chief *kadi's* office, in the capital and those available at the district level. In some states like Johore and Penang, districts did not send back their statistics to the capital for compilation and this made the procedure of counting very tedious indeed. Some states were also better in updating cases than others and this seemed to be dependent on the efficiency of the staff of the Islamic Affairs Department.

To facilitate the research, KANITA printed standard monthly forms of marriage, divorce, reasons for divorce and polygyny. Researchers entered the cases within each district, for every month, for a four year period between 1985 to 1988. When 1988 figures were not yet available (ie not yet filed and not released to the researcher) the four year period of study extended from 1984 to 1987. The resulting data analysed in this study is the most accurate statistical counting possibly made for Muslim marriages, divorce, polygyny and division of property in the states of Johore, Selangor, Federal Territory, Penang, Kedah and Kelantan. A margin of error of 5% probably exists for

problems relating to double counting or dummy entries, ie when for example a person files for divorce, changes his or her mind and nothing more is heard of it. Such cases should have been struck off the files. For example, in polygyny, a person could apply for another marriage in one state, then realizes that he would have a better chance in another state, subsequently drop his application and resubmits it in another.

Despite the methodological problems encountered in this study, it is hoped that this study would make a worthy contribution to the increasingly important field of knowledge on the advancement of the status of Muslim women under Islamic law.

Acknowledgements

I would like to thank my co-authors Mehrun Siraj and Razha Rashid for agreeing to collaborate in this study, also former KANITA researchers, Norlia Zakaria, Jamilah Karim Khan, Sarina Abdul Rani and Suzanna Mohd @ Aziz for conducting painstaking file research in the district Islamic Affairs Departments of the states of Johore, Selangor, Penang, Kedah, Kelantan and the Federal Territory.

I would also like to thank all the personnel of the State Islamic Affairs Departments and the Syariah Court who collaborated in this study. A list of personnel who collaborated with us is mentioned in the next page. Their insights, and opinions proved to be extremely useful for the authors, seeking clarification of rules of law and procedures.

Finally, this study would not have been possibly without funding support from the Ford Foundation. I am deeply indebted to the Ford Foundation, particularly to the staff of the Jakarta office who have been rendering continuous support to KANITA from its development as a research project to its present status now as a research unit within the School of Social Sciences.

Wazir Jahan Karim
30 June 1991

KANITA wishes to express its appreciation to the following who collaborated in the study;

Abdullah bin Mohammad, Pegawai Penyelesai Pesaka Kecil, Kedah Tengah

Hasiah bt Kasah, Pegawai Penyelesai Pesaka, Wilayah Persekutuan

Haji Kamaruzaman bin Hj Habib, Pengarah Pembahagian Pesaka

Haji Mansor bin Mohammad 'Isa, Kakitangan Pejabat Penyelesai Pesaka Kecil, Kedah Tengah

Ustaz Mohammad Ibrahim, Pendaftar Mahkamah Syariah, Wilayah Persekutuan

Radiudin bin Hj. Said, Kakitangan Pejabat Penyelesai Pesaka Kecil, Kedah Tengah

Syeikh Azmi bin Ahmad, Timbalan Kadi Besar, Negeri Kedah

Ustaz Tawadz bin Abas, Penolong Pengarah Unit Perunding dan Pembangunan Keluarga

Interviews of Applicants for Divorce and Claimants to the Sub-Division of Property

---

Abdul Hamid bin Darus, Penang

Abdullah bin Hj. Abdul Hamid, Penang

Aisha bt. Jusoh, Penang

Bahrul Anuar bin Hj. Md. Zain, Penang

Bakar bin Abdullah, Penang

Che Wan bt. Arshad, Penang

Mohd. Yusof b. Ishak, Penang

Rohani bt. Chat, Penang

Sabarina bt. Yahya, Kuala Muda

Siah bt. Jasin, Kota Setar

Tamah bt. Abdul Hamid, Penang

Zainab bt. Jusoh, Penang

CONTENTS

	Page
Chapter: One	1
The Syariah In Malaysia	
Mehrun Siraj	
Chapter: Two	28
Administration of Muslim Law In Penang: A Case Study of Constraints and Problems In Standardization of Muslim Law In Malaysia	
Razha Rashid	
Chapter: Three	51
The Status of Muslim Marriages, Polygyny and Divorce in Peninsular Malaysia	
Wazir Jahan Karim	
Chapter: Four	84
Sociological Observations on the Division of Property, at Divorce and Death	
Wazir Jahan Karim	
Chapter: Five	116
Recent Developments In Islamic Family Law	
Mehrun Siraj	
Chapter: Six	167
Conclusion	
Wazir Jahan Karim	

Chapter One

The Syariah In Malaysia

by

Mehrun Siraj

Made up as it is of several different states, Malaysia has a complex legal history but the one fact that emerges clear and undeniable is that the Syariah has been a part of the law of the Malays since they became Muslims in the fourteenth century.[1] The Syariah was introduced into the existing law and was therefore not applied solely but in conjunction with the Malay customary law or Adat. The Undang-Undang Melaka or Hukum Kanun Melaka is the earliest known code to contain provisions based on Islamic Law. The code is believed to have been started by Sultan Muhammad Shah, sometime between 1424 and 1444. This first part of the code is predominantly Adat but the influence of Islamic Law is seen in the many sections that refer to the law of God after stating the position according to the Adat. The code was completed during the reign of Sultan Muzaffar Shah (1445-1458) and by then had two major parts that were

exclusively Islamic Law - the law of sale and procedure and the family law.[2] The Dutch and Portuguese occupation of Melaka did not affect the legal system which was allowed to continue without change. The Undang-Undang Melaka was therefore in force in Melaka when the English Law was introduced to the then Straits Settlements by the Charters of Justice. Sir Stamford Raffles, while in Penang between 1805 and 1810, had collected the manuscripts of the laws in force in the Malay states and his translation of the Undang-Undang Melaka was published in 1818. Despite such clear evidence, the British view was that the Malays had no laws and they were therefore justified in establishing a legal system based on English law.[3]

The other Malay states had laws that were similar to the Malacca laws. In Pahang the Legal Digest was issued during the reign of Sultan Abdul Ghafar (1592-1614 SA.D.). Many of the provisions in this Digest were based on Islamic Law. The state of Perak had several codes, the Law of the Monarchy, the Undang-Undang Dua Belas and the Ninety-nine Laws of Perak. The Kedah Digest is based on the Undang-Undang Melaka as were the Johore Laws. The latter was added to in the early twentieth century by the inclusion of Malay translations of the Turkish and Egyptian Codes on Islamic Law - The Majallah Ahkam Johore and the Ahkam Syariah Johore.

The Charters of Justice introduced English law to the Straits Settlements ignoring the existence of Muslim Law in Melaka. The following portion of the judgment of Sir Benson Maxwell in Regina v. Willans[4] suggests a reason for this:

> "... a system of law which according to its own principles, can only be administered by Mohammedan judges and Mohammedan arbitrators, upon the testimony of Mohammedan witnesses is not a system which can devolve ipso facto and without express acceptance upon a Government and people of different faith."[5]

This reason can also account for the allegations of the British that Muslim Criminal Law was barbaric and cruel when in fact, English law was no different.

The English law ousted the Muslim Law as the basic law of the land, relegating it to the field of Family Law and a few offences against the religion. This occurred in the Malay states as well when they came under the protection of the British through Treaties with the Sultans. Although English Law was not introduced to the Malay states in the way that it was in the Straits Settlements, it was nevertheless received and absorbed into the Malay states. The legislation was either based on English statutes or on other models that had been based on English law. The Syariah was applied only to Family Law and certain offences against the religion. A series of legislation was passed for this purpose.[6]

In the Straits Settlements, the Muhammedan Marriage Ordinance, 1880 provided for the registration of Muslim marriages and divorces. In Perak the Registration of Muhammedan Marriages and Divorces Order in Council 1885 and the Muhammedan Divorce Rules, 1889 regulated marriages and divorces. The corresponding law in Selangor was the Registration of Muhammedan Marriages and Divorces Order in Council 1885, and in Negri Sembilan, the Mas Kahwin Order in Council 1886 and the Muhammedan Inheritance Order in Council 1893.

These early laws were replaced by the Muhammedan Marriage and Divorce Registration Enactment, 1900 in each of the four States of Perak, Selangor, Pahang and Negeri Sembilan. The Enactments of 1900 were replaced by the Muhammedan Marriage and Divorce Registration Enactment, 1930. This was included in the Revised Edition laws of the Federated Malay States 1935.

In regard to offences against religion there were some early Orders in Council like the Perak Adultery by Muhammedans Order in Council 1894, the Perak Muhammedan to Pray in Mosques on Fridays Order in Council 1885, the Selangor Prevention of adultery among Muhammedans Regulations, 1894 and the Negeri Sembilan Mosque Attendance Order in Council, 1887. These early laws were replaced by

the Muhammedan Laws Enactment, 1905 in all the four States. These enactments were amended from time to time and in Pahang it was replaced by the Muhammedan Laws Enactment, 1933. In 1937 all the earlier laws were replaced by the Muhammedan Offences Enactment, 1937.

The Malay States also enacted legislation to constitute Councils of Muslim Religion and Malay Custom. The enactments were first enacted in Perak, Selangor, Negeri Sembilan and Pahang in 1949. In Perak this enactment was replaced in 1951 by the Council of Muslim Religion and Malay Custom Enactment 1951 and this was further amended in 1959 and 1962. Perak also had a Baitulmal, Zakat and Fitrah Enactment enacted in 1951.

In Kedah a Muhammedan Marriages (Separation) Enactment was passed in 1913/1332 which set out the detailed provisions for divorce especially in regard to the process of Syiqaq. This was amended a number of times and as amended was included in the Revised Laws of Kedah. Kedah also had a Syariah Courts Enactment, first enacted in 1918 and the Religious Observance Enactment, first enacted in 1911 and a Council of the Religion of Islam and Malay Custom, first enacted in 1948. Perlis had legislation based on the Kedah laws.

In Terengganu, a number of proclamations and notices were issued relating to the Islamic Law including the Courts Enactment, 1930, the Prohibition of improper intercourse Enactment, 1342, PUnishment for Non-observance of Friday Prayers, 1341, Baitul-Mal Enactment, 1356, Suspended Marriage Notice 1345, Return of Conjugal Marriage Notice, 1346, Rules for Kathis Courts 1348, Rules during Puasa, 1351, and Rates of Maskahwin, 1353. These were replaced in 1937 by the Muhammedan Marriage and Divorce Enactment, 1937.

In Kelantan there were a number of early laws including the Syariah Courts Enactment, 1327, the Majlis Ugama Islam dan Adat Istiadat Melayu Enactment 1915, and the Muhammedan Marriage and Divorce Enactment, 1911. The Muhammedan Marriage and Divorce Enactment was amended a number of times and replaced by the Muhammedan Marriage and Divorce Enactment, 1938. A Muhammedan Offences Enactment was also enacted in 1938 replacing earlier legislation on compulsory attendance at Friday prayers, consumption of alcohol and breach of the fasting in Ramadan. The Majlis Agama Islam and Istiadat Melayu Enactment, 1938 replaced the Majlis Enactment of 1915. There was also a Mosques Enactment of 1938.

In Johore there was the Wakaf Enactment, 1914 and the Registration of Marriage and Divorce Enactment, 1914. In

1919 were enacted the Offences by Muhammedans Enactment and the Determination of Muslim Law Enactment. There was also a Baitulmal Enactment, 1934 and a Zakat and Fitrah Enactment 1957. The Registration of Muslim Marriage and Divorce Enactment was amended several times and included in the Revised Laws of Johore. So was the Muhammedan Offences Enactment.

The first Council of Muslim Religion and Malay Custom was constituted in Kelantan on 24th December 1915 and this was followed by Kedah and the other States in 1949. Thus Perak had the Council of Religion Enactment 1949, Negeri Sembilan the Council of Religion and Malay Custom Enactment, 1949, Selangor the Council of Religion and Malay Custom Enactment, 1949 and Pahang the Council of Religion and Malay Custom Enactment, 1949. Some States like Johore had a religious department, first constituted in the 1880s. Other states had religious departments attached as administrative authorities to the Majlis. The Majlis was the body which gave advice to the Ruler on matters relating to Muslim affairs.

In Sabah and Sarawak the basic law was Native Customary Law and in the early days Islamic Law was administered as part of the native customary law. In Sarawak the law was codified to some extent in the Undang-undang Mahkamah

Melayu, which was first drafted in 1915. The bulk of the law is concerned with betrothal, marriage, divorce and sexual misconduct. In Sabah there is a law text purporting to be a model or guide for the native courts. The Undang-undang Mahkamah Adat Orang Islam was drafted in 1936. The bulk of the rules deal with sexual offences.

The states of Negri Sembilan, Pahang, Perak and Selangor were federated under the name "Federated Malay States". Article 4 of the 1895 Agreement excluded Islam from the matters on which the Resident was empowered to give advice. The Johore Constitution of 1895[7] and the Trengganu Constitution of 1911[8] both provided that Islam is the religion of the state. This recognition of the importance of Islam however did not mean that the Syariah was implemented in its totality. In reality it was applied only in matters relating to the family and the religion.

After the Second World War, reorganization of the territories in the peninsula resulted in the formation of the Malayan Union and later, in 1948 the Federation of Malaya. With Independence, the Federation of Malaya Agreement was replaced by the 1957 Constitution. The position of Islam in these constitutions is as reflected in the present Constitution of Malaysia. Article 3 provides:

3. (1) Islam is the religion of the Federation;

but other religions may be practised in peace and harmony in any part of the Federation.

(2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorise the Yang di-Pertuan Agong to represent him.

(3) The Constitution of the States of Melaka, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.

(4) Nothing in this Article derogates from any other provision of this Constitution.

Again it must be pointed out that this Constitutional provision does not mean that the Syariah will apply in all matters. The legislative powers of the Federal and State governments are delineated in the Constitution. Article 74 provides:

74. (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

Islamic Law and the matters which it governs are set out in List II, the State List:

1. Except with respect to the Federal Territory, Muslim Law and personal and family law of persons professing the Muslim religion, including the Muslim Law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions, and non-charitable trusts; Muslim wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Muslim religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat Fitrah and Bait-ul-Mal or similar Muslim revenue; mosques or any Muslim public place of worship; creation and punishment of offences by persons professing the Muslim religion against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Muslim courts, which shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in

respect of offences except in so far as conferred by federal law; the control of propagation of doctrines and beliefs among persons professing the Muslim religion; the determination of matters of Muslim Law and doctrine and Malay custom.

These are the matters in relation to which the State legislatures can enact laws. One matter requiring comment is "the creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List". The portion that is emphasised is significant in that it prevents duplication of offences. Where the offence is prescribed by Federal law, the state has no authority to legislate on it even if it is an offence against the precepts of the religion. Hence offences like rape and sodomy are not included in the state enactments as they are already in the Penal Code. Extra-marital relations with consent is not an offence under the Penal Code even if it amounts to Incest. The State enactments have therefore provided for this in varying degrees of seriousness: *khalwat* or close proximity, *zina* or fornication and *sumbang* or incest. Some states also have *perbuatan tidak sopan* which is less serious than *khalwat*.

After the formation of the Federation of Malaya, most states had only one enactment dealing with all matters governed by Islamic Law. They were:

Selangor Administration of Muslim Law Enactment, 1952

Trengganu Administration of Islamic Law Enactment, 1955

Pahang Administration of the Law of the Religion of Islam Enactment, 1956

Penang Administration of Muslim Law Enactment, 1959

Melaka Administration of Muslim Law Enactment, 1959

Negeri Sembilan Administration of Muslim Law Enactment, 1960

Kedah Administration of Muslim Law Enactment, 1962

Perlis Administration of Muslim Law Enactment, 1964

Kelantan Syariah Courts and Muslim Matrimonial Courts Enactment, 1966

Kelantan Council of Religious and Malay Custom Enactment, 1966

Johore Administration of Muslim Law Enactment, 1978

Sabah Administration of Muslim Law Enactment, 1978

Pahang Administration of the Religion of Islam and Malay Custom Enactment, 1982.

Since the eighties however, many states have attempted to improve the administration of Islamic Law by enacting legislation to deal with specific issues. For example the Family Law Enactments[8] were aimed at codifying the principles governing family relationships. Some changes were introduced to improve the position of women. There was some controversy as to whether this was "reform" and whether the Syariah could be "reformed". The first and fundamental source of the Syariah is the Qur'an, believed by Muslims to be of divine revelation.

"The revelation of the Book of which there is no doubt is from the Lord of the worlds."

Qur'an 32:2

If the laws were promulgated by God through His Prophet, Muhammad (s.a.w.), how can man make changes to the laws? Professor Tahir Mahmood has explained that even in the context of Islam, reforms are possible provided the following techniques are used:

1. Takhayyur which can take three different forms:

(a) an eclectic choice between the corresponding legal principles of the various schools of Islamic Law;

(b) enforcement of one of the conflicting solutions provided by various jurists in relation to controversial cases;

(c) preference for an obsolete or lesser-known legal opinion over a generally accepted principle.

2. Talfiq which means the evolution of a new legal rule by combining two conflicting juristic views on the same problem or by blending certain parts of two or more such views.

3. Siyasa syariah under this principle the state can abandon a principle of the traditional law not by express supersession but by directing its courts that it shall not entertain any case based on such a principle. In the course of time such principles become obsolete.

4. Ijtihad: under the doctrine of Ijtihad the settled legal principles may be interpreted by the jurists in accordance with the changed social conditions in any country at any point of time.[10]

The techniques mentioned above enable the Syariah to be "reformed". Muslim law is not and need not be static and with slight modification within the set parameters of the Syariah it becomes suitable for all times and all circumstances.

After the codification of the Family Law, the next move was towards the Criminal Law and the laws of evidence and criminal procedure. Again Kelantan was the first state to enact the Syariah Criminal Code in 1985.

Other enactments relating to the Syariah are:

Evidence Enactment of the Syariah Court

Kedah Enactment No. 8 of 1990

Kelantan Enactment No. 2 of 1991

Pahang Enactment No. 1 of 1990

Syariah Criminal Procedure Enactment

Kedah Enactment of 1988

Melaka Enactment No. 2 of 1986

The state of Sarawak is reported to have enacted six laws dealing with various aspects of the Administration of Muslim Law.[11]

The Selangor Administration of Islamic Law Enactment of 1989 will replace the 1952 Enactment when it comes into force. Its provisions regulating Conversion to Islam are being challenged in court as being ultra vires. Section 67 provides that any person who has attained the age of majority according to the Syariah - *baligh* - may convert to Islam. The age of *baligh* is set at around fifteen years and therefore less than the age of majority of eighteen years under the Age of Majority Act 1971. The question of whether a person below the age of eighteen can convert without his or her parent's consent was raised in that celebrated case of In re Susie Teoh[12] The Supreme Court was of the view that "a non-Muslim parent or guardian has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. ... the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes major."

The other section that is being challenged is section 70 which provides that the minor children of a convert will be converted to Islam at the same time. This section has been questioned because it does not consider the wishes of the non-Muslim spouse of the convert or the children who may be mature enough to have their own views though still minors. It will be interesting to see how the Supreme Court

decides these issues.

Muslim Law is administered by the Syariah Courts "which have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law."[13] The federal law that is referred to is the Syariah Courts (Criminal Jurisidction) Act 1965, Act 355 (Revised 1988). The revised Act increased the sentencing powers of the Syariah Courts to imprisonment for a term not exceeding three years, fine not exceeding five thousand ringgit, whipping not exceeding six strokes or a combination of all of these.

The Administration of Muslim Law Enactments of the various states set out in some detail the jurisdiction and powers of the Syariah Courts. Some provisions in the enactments appeared to imply that the Syariah courts were subordinate or inferior to the civil courts. As an example, Section 4 of the 1952 Selangor enactment provides:

> "Save as expressly provided in this Enactment nothing contained herein shall derogate from or affect the rights and powers of the Civil Courts."[14]

Section 45(b) provides:

"Nothing in this Enactment contained shall affect the jurisdiction of any civil court and in the event of any differences or conflict arising between the decision of a court of the Kathi Besar or a Kathi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail."

The result of this subordination of the Syariah courts was that many decisions of the Kathi's court were avoided by fresh applications to the civil courts whose decisions were upheld though they were in conflict with the earlier decisions.[15] This less than satisfactory state of affairs led to the inclusion of Clause 1A to Article 121 of the Federal Constitution. Clause 1A reads:

"The courts referred to in clause 1[16] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

The effect of this constitutional amendment is that there will no longer be any overlapping in the jurisdiction of the Syariah courts and the civil courts and consequently there will no longer be conflicting decisions from the two courts.

It should be stressed that the proper question to ask is whether the Syariah court has jurisdiction in relation to a particular matter. If it has, the civil courts cannot entertain the application. If it does not have jurisdiction, than the civil courts must necessarily assume

jurisdiction regardless of the subject matter and the parties to the dispute. For example the parties may have been married to each other and the subject matter of the claim may be jointly-acquired matrimonial property. If however one party ceases to be a Muslim, the Syariah court will not have jurisdiction over the case and the application must be brought to the civil courts.

Another example is where both spouses are Muslim and the wife seeks an injunction to restrain her husband from molesting her. The Syariah court can issue this injucntion only if matrimonial proceedings are pending. If the wife does not wish to get a divorce, she must seek her injunction from the High Court. In the case of Faridah bt. Dato Talib v. Mohamed Habibullah bin Mahmood[17] the learned judge held that the High Court had jurisdction to grant the injunction because it was to restrain the defendant from committing an actionable wrong which does not fall within the jurisdiction of the Syariah court.

One final point to note is that the Syariah courts are undergoing reorganization in most states to provide for a three-tier system - the Kadi's court, the Chief Kadi's Court, the Court of Appeal. The Court of Appeal will replace the present Syariah Appeal Committees and will have permanent members (unlike the present ad-hoc system) as well

as definite rules and procedures. The Kadis themselves will have training "to improve their competence and professional status and to make them more confident."[18]

The offences in the Administration of Muslim Law Enactments are by and large the same in all the states though some differences may exist with regard to the punishment imposed. For this study, the Perak Enactment of 1965 is used. In this enactment, offences fall under Part IX which begins by providing that the Enactment will apply only to persons of the Muslim religion. So a non-Muslim who commits an offence with a Muslim will not be prosecuted although the latter may be.

Some of the offences relate to failure to perform religious duties, for example, section 148 which provides that any male Muslim above the age of fifteen who fails to attend prayer on Friday at a mosque shall be punishable with a fine not exceeding fifty dollars unless his absence is excusable under Muslim law. The more commonly prosecuted offences are the buying and selling of food for immediate consumption during the fasting month of Ramadan (section 149(1)) and eating, drinking and smoking during daylight hours in Ramadan (section 149(2)), both of which carry a prison sentence, of seven days for the former, and, fifteen days for the latter, in addition to a fine.

The "sexual" offences are set out in detail in sections 154 to 157. Section 154 deals with *khalwat*. Sub-section 1 provides that a male Muslim "who is found in retirement with and in suspicious proximity to any woman, other than a woman who by reason of consanguinity, affinity or fosterage he is forbidden to marry" shall be punishable for *khalwat* with imprisonment not exceeding three months or with a fine not exceeding three hundred dollars. Sub-section (2) refers to a female Muslim who abets an offence punishable under sub-section (1). This difference in terminology suggests that the principal offender is the man while the woman is merely an abettor. The punishment however is the same for both.

In the case Pendakwa Mahkamah Syariah Perak v. Abdul Mubin dan Zainab[19] the brother-in-law of Zainab had informed the *Ketua Kampung* and others that there was a man in Zainab's house. The witnesses alleged that they found Zainab and Abdul Mubin alone together in the house. Abdul Mubin's explanation was that he had helped Zainab's child who was involved in an accident and she had invited him home. Zainab, who was twice-divorced had two children from her first husband and two from the second. On the night in question, three of the children were watching T.V. at a neighbour's house while the fourth was asleep. The court decided that neither of the accused had a valid reason for

being together in the house at night and found them both guilty of *khalwat*. Both were fined $250/- each.

Although section 154(1) does not apply to a case where the man is with a woman he is prohibited from marrying, sub-section (4) applies in such cases and the punishment is the same as for sub-section (1).

The interesting provision is sub-section (6) which empowers the court to commit to a Home for a period of up to six months, any woman who is found guilty of an offence under section 154. This provision may be invoked for the protection and rehabilitation of young girls.

The marginal note to section 155 reads "Adultery" but a more appropriate translation for *zina* would be fornication because section 155 applies to single persons as well as married ones. Section 155(1) makes it an offence for a man to have sexual intercourse with a woman whom he knows is the wife of another while sub-section (2) applies where the woman is not married. Both carry the punishment of up to one year's imprisonment or fine not exceeding $1,000/-. In sub-section (3), a woman who abets an offence under sub-section (1) or (2) commits an offence punishable with imprisonment not exceeding six months and fine not exceeding $500/-. Again the woman is only the abettor but

for this offence her punishment is less severe than that for the man.

This offence is harder to prove as there must be evidence of sexual intercourse. Rarely are there eye-witnesses and usually a conviction is secured when the parties confess and plead guilty. Occasionally however a woman is convicted because she is unmarried but pregnent. The birth of her child is evidence of her adultery. In the case of Pendakwa Mahkamah Syariah Perak v. Fatimah,[20] the accused was found guilty of an offence under section 155(3) and fined $300/-. The evidence was that she had delivered a baby boy in the home of her parents. There was no evidence of any marriage. In this case, there were witnesses who testified that the accused had had a child.

In another case, Pendakwa Mahkamah Syariah Perak v. Ishak and Fatimah,[21] the allegation was that Fatimah had delivered a child fathered by Ishak, barely five months after her marriage to Desa. The child was registered as Desa's child. The prosecution tendered as evidence the confessions of both accused. Six witnesses testified that both accused had admitted committing *zina*. The accused however denied the offence. The learned judge held that there was insufficient evidence of *zina*. He explained that a confession relating to *zina* could be withdrawn at any time

by the accused. In this case, both parties denied committing the offence and as there was no other evidence apart from the confession, both accused were acquitted. The learned judge however did indicate that a fresh charge could be laid against Fatimah because delivering a child less than six months after her marriage raised the presumption that the child had been conceived before the marriage and therefore she was guilty of *zina*. When the case resumed however, the prosecution was unable to prove that a child had in fact been born as alleged. Fatimah was then acquitted.

Since a conviction depends on either a confession or evidence of the birth of an illegitimate child, it is possible that where two persons are charged with committing the offence with each other, one may be convicted while the other escapes punishment. In the Sabah case of Pegawai Pendakwa MUIS v. Haji Adib[22] the woman had confessed to the *zina* and had been convicted and sentenced. The man who withdrew his confession was acquitted on the ground that there was no evidence from four male eye-witnesses, the woman's confession bound only herself and could not be used against him, and finally that his confession could be withdrawn leaving no evidence against him. The unfortunate result from the mechanical application of the law in this case gave rise to some misconceptions about the justice that

was being meted out to both accused. It was believed that the woman was being discriminated against and that the man had escaped because he was a politician. Professor Ahmad Ibrahim has suggested that such a result could be avoided if the learned judge had regarded the offence as a *ta'azir* offence not requiring the same strict proof as the hadd offence of *zina*.[23] Indeed, since the punishment for the offence under the Enactment is not the hadd punishment, the offence could quite rightly have been considered a *ta'azir* offence.

One point regarding appeals from convictions. In the case of Azmi bin Ariffin and Maimon bt. Abdullah v. Pendakwa Mahkamah Syariah Melaka[24] the unfortunate appellants had their sentences increased from two months imprisonment to two and a half for the man and from six weeks to two months for the woman, a warning perhaps of the danger of appealing to higher authority regarding action that is condemned by the law. Those who do not understand the Islamic view of marriage and society tend to regard this condemnation as out-dated and an intrusion into the privacy of individuals. The justification for state intervention in this very personal area has been succintly expressed by Haji Sulaiman Abdullah in his paper, "The Administration of Islamic Law in Malaysia and the Syariah Courts."[25] Haji Sulaiman writes: