

EQUALITY IN FAMILY AND MARRIAGE – COMPARATIVE TRENDS IN FAMILY LAW REFORM BETWEEN CIVIL AND ISLAMIC FAMILY LAWS

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Presented at Soroptimist Biennial Conference
Penang, 28 March 2009**

The Islamic Family Law, like the personal status laws and traditions of all religions, has always been problematic as it discriminates against women. Since the late 19th century, Muslim countries exercised *ijtihad*, reinterpretation of the Qur'an, in order to redress some of the injustices Muslim women suffer in marriage, polygamy, divorce and issues of custody and guardianship of children.

In the post-colonial era, when Muslim countries moved towards the codification of Muslim personal laws through statutory enactments, they adopted a process of selecting and combining differing juristic opinions of different schools of Islamic law (*mazhab*) in order to partially redress the discrimination against women. In Malaysia, the first major effort at law reform took place in the early 1980s when the Attorney-General's chambers was appointed to prepare a model enactment to be the basis of a uniform Islamic Family Law to replace the diverse and conflicting legislations of the different states which predated independence.

Trends in Muslim Family Law Reform

In 1984 the Islamic Family Law was codified and passed by Parliament. This law was seen as a progressive law, regarded as one of the best Muslim Family Laws in the world. The positive, gender-sensitive reforms included:

- Grounds for divorce for women were expanded:
 - 12 grounds for *fasakh*, (most of them from the Maliki school, because the Shafie school provides limited grounds) including cruelty on 6 different grounds:
 - habitually assaults her or makes her life miserable, or
 - associates with women of evil repute or leads an infamous life;
 - attempts to force her to lead an immoral life,

- disposes of her property or prevents her from exercising her legal rights over it; or
- obstruct her in observance of her religious obligations or practice
- if he has more than one wife and does not treat her equitably;
- Divorce outside the court was made illegal;
- Polygamy without the permission of the court was made illegal;
- Five strict conditions to be fulfilled before court can give a man permission to take another wife:
 - just and necessary. Grounds included sterility, physically unfit for conjugal relations, insanity;
 - financial ability to support all wives and dependents, including would be dependents;
 - ability to treat all wives equally;
 - no harm caused to existing wife in respect of religion, life, body, mind, or property;
 - no drop in standard of living, directly or indirectly, of existing wife and dependents;
- Wife has a right to claim her share of matrimonial assets from her husband even though she has not financially contributed to its acquisition. Her role as wife and mother are considered as contribution that enabled her husband to acquire his assets. This was considered revolutionary, not just in the Muslim world, but also in civil jurisdiction. Other Muslim countries looked at Malaysia's law as a model and adopted in particular the division of matrimonial assets provision.

HOWEVER....

Discriminatory Trends

Discriminatory trends began in the 1990s - as a result of the growing conservatism that engulfed the country because of the global Islamic revivalism movement and the rise of political Islam. This led to a holier than thou battle between UMNO and PAS to prove which party is more Islamic and pious in their contest to capture the Malay votes. The Islamisation policy introduced by the Mahathir administration which was meant to inculcate universal Islamic values for good governance, in effect, led to the expansion of the Islamic

bureaucracy and the phenomenal expansion of Islamic institutions, laws, regulations and standards of social interaction and behaviour.

One major consequence of this was a regression in the rights of Muslim women under the Islamic Family Law, which many among those in religious authority and Islamic groups and conservative men, found too liberal for their comfort. Even in 1984, the law was pushed through Parliament with a 3-line party whip (which means all MPs had to attend and all had to vote for it) because of the opposition from many male MPs, especially over the restrictions on polygamy.

The series of amendments, passed in the FT in 1994 saw the first regression in law reform in the name of Islam in Malaysia:

- Divorce pronounced outside the courts is allowed. (This led to recognition of divorce by SMS)
- Polygamy committed without the court's permission is allowed.
- 5th Condition for polygamy, - no drop in standard of living of existing family - was removed to make polygamy easier.
- Punishment for breaking the law is minimal, a fine of \$1,000 or less and does not act as a deterrent to the offenders.
- Only the biological mother is held responsible for the maintenance of the illegitimate child. The biological father has no responsibility.

Impact – the amendments which allow for divorce and polygamy outside the courts created a loophole in the law which defeated the whole purpose of the 1984 law reform. The 1994 amendments has led to a proliferation of men who divorce their wives and who take second, third and fourth wives without the permission of the court. In almost all states, the number of illegal polygamous marriages is three to four times that of legal ones. In some states the numbers of divorce pronounced outside the court is also double or triple those pronounced inside the court.

Then the last round of law reform, starting from 2003, culminated in the amendments submitted to Parliament in 2005. The offensive amendments included:

- The right of the husband to claim a share of his existing wife's property upon his polygamous marriage;

- Making polygamy easier for Men. “just AND necessary” was amended to “just OR necessary”;
- Forcing a wife to choose maintenance OR division of *harta sepencarian* upon a husband’s polygamous marriage;
- Extending the wife’s right to *fasakh* divorce to the husband while he maintains his right to divorce his wife at will;
- A husband can now get a court order to stop his wife from disposing her property.

While the authorities are determined to keep Muslim women chained and shackled by chiselling away at rights they already enjoyed and by increasing the grounds for discrimination, women of all faiths except for Islam continue to enjoy increasing spheres of personal rights.

Trends in Law Reform for Citizens of other Faiths

1. Law Reform (Marriage and Divorce) Act, 1976

Since 1976, when the **Law Reform (Marriage and Divorce) Act** was passed by Parliament (enforced in 1982), the trend in civil law reform for non-Muslim women has been progressive.

The major reform of the LRA was the banning of polygamy among non-Muslims. Prior to that, non-Muslim men could choose to be polygamous under their respective customary laws e.g. the Chinese customary law allowed unlimited polygamy. It also allowed Chinese men to unilaterally pronounce divorce on their wives, on any one of seven grounds:

- Adultery,
- disrespect to husbands' parents,
- barrenness (i.e. failure to bear a son),
- talkativeness (nagging),
- jealousy
- suffering an infectious disease, e.g. leprosy,
- committing theft.

The LRA abolished all that and provides for divorce by mutual consent or upon petition by either spouse in an equal divorce process where the grounds for both men and women are:

- intolerable adultery
- unreasonable behaviour
- desertion for not less than 2 years
- living separately for not less than 2 years.

Process – This law reform was done in a democratic and consultative manner. A Parliamentary select committee was established and it travelled all over the country to listen to diverse views from the ground before this law was drafted.

But not for the IFL. A group of five men and one woman drafted it in consultation only with like minded people at the state level – the muftis, the state exco members for religion, the legal advisers. We, the stakeholders, were not heard at all.

Other progressive reforms in civil law governing family matters took place in the late 1990s - amendments to the **Guardianship Act and the Distribution Act**.

2. Guardianship of Infants Act, 1961

The **Guardianship of Infants Act** was amended in 1999 to provide for the father and mother to have equal rights to guardianship of their children. In the past, only the father was the primary guardian of his children. Alas, this amendment only benefited non-Muslims as guardianship of children for Muslims comes under the jurisdiction of shariah law.

The constitutional amendment of Article 121(A) made in 1988 which provided that civil court cannot exercise jurisdiction on matters under shariah jurisdiction meant that Muslim women could not benefit from this law reform process as guardianship for Muslims comes under the jurisdiction of the Islamic Family Law.

Are Muslim women then supposed to roll over and play dead while their sisters of other faiths advance forward in the pursuit of the Constitutional guarantee for equality before

the law? Certainly nobody in government saw it fit to deal with the issue of the guardianship rights of Muslim mothers.

Sisters in Islam of course objected to this gross discrimination against Muslim mothers. Since amending the IFL provision which provides for the father as the sole primary guardian of his children would be an uphill task, we decided as a strategy to push for an administrative reform.

We wrote to the Cabinet and lobbied the then Deputy Prime Minister, Datuk Seri Abdullah Badawi, who was scheduled to launch a Hari Wanita celebration in August 2000. We decided to pick on three areas where women's groups have received the most complaints from mothers in their inability to exercise guardianship – the right to sign their children's application forms for passports, registration and transfer of schools and permission for surgery. These are immigration, education and health matters which all come under federal jurisdiction. Therefore the power to make decisions on these issues lie with the federal government, not with the state shariah authorities. Also there was no specific law that required the guardian's signature for these consent forms, therefore no legal amendments were needed. It was merely an administrative policy that could be changed easily by the government. And we successfully negotiated over the issue of jurisdiction and constitutional guarantee of equal rights and got the Cabinet to get the forms for these three matters changed from signature of guardian, to signature of father, mother or guardian.

This policy decision thus enables Muslim women to enjoy the benefit of law reform that applied only to their non-Muslim sisters.

3. The Distribution Act 1958

The Distribution Act was amended in 1999 to provide for equal inheritance for widows and widowers. Previously, the husband of a deceased woman inherited the whole estate (even her children were excluded from inheritance if she died intestate and was survived by her husband), while the wife of the deceased man inherited only **ONE THIRD** of his estate if he had children (the other two-thirds were given to his children), or one-half of his estate if he had no children (the other half was given to his other relatives). The amendment provides equal right to inheritance for the husband and wife and also

granted children the right to inherit from their mother's as well as from their father's estate.

What was happening to Muslim women at about the same time? When laws for non-Muslim women were being amended to grant them equal rights to inheritance and guardianship, even more laws and policies were amended to discriminate against Muslim women.

The Insurance Act was amended in 1996 to provide that the Muslim beneficiary named in an insurance policy acts only as the administrator of the estate, as the deceased insurance monies is to be distributed according to faraid. This means if your husband buys a policy and names you, his wife as the beneficiary in order to protect your well-being upon his death, you actually will not be the sole beneficiary of that policy. The monies will be divided according to faraid, the Islamic inheritance rules.

The same applies to **EPF funds** as well. In 2000, the National Fatwa Council issued a Fatwa to extend the faraid rule to EPF funds. So if you are named the beneficiary, you actually only act as an administrator.

This means, if you have children, you get only $1/8^{\text{th}}$ of the monies; if you have no children, you get $1/4$, the rest goes to your husband's surviving heirs, which could be his parents and siblings or his nephews. If he has no surviving heirs, the rest goes to Baitulmal.

If your husband is a convert and you have no children, as in the case of a friend of mine, his non-Muslim family or his non-Muslim children from an earlier marriage cannot benefit from his insurance policy as non-Muslims are not considered heirs. So he was horrified to find out that an insurance policy which was meant to benefit his wife would actually go to Baitulmal, while his wife gets only $1/4$ and nothing would go to his Christian mother who was his dependent nor to his Christian children from his first marriage.

Why should insurance and EPF monies be considered as part of the deceased estate (harta pusaka) and distributed under faraid? As far as we know no Muslim country has done this. We believe that provident funds and insurance policies shd not be regarded

as actual property to be divided according to faraid upon death, but as a safety net of funds for one's well being in old age or for one's immediate dependents, should one die.

Under faraid inheritance rules, male heirs inherit double what the female heirs get. The historical rationale for this was that men have the responsibility to maintain their families, and provide for women as fathers, brothers, husbands and sons. Islam's introduction of faraid inheritance in the 7th century was actually revolutionary in a world where women were not allowed any inheritance or to own property or sign a contract.

The socio-economic context of men and women's lives today has drastically changed since Islam's early days and our understanding of these principles needs to accordingly evolve to reflect the justice of Islam, the realities of today and what justice means today. Today, many women earn a living and maintain their families together with their husbands. Divorced or widowed mothers often provide for their children without assistance from ex-husbands or male relatives. One would expect that women's right to inheritance would expand with their responsibilities but unfortunately this has not been the case. Should the daughter who takes care of her ageing parents financially, physically, emotionally and spiritually until their death, get half what her brother inherits, even when he did not lift a finger to help? Should men continue to enjoy privileges when they fail to perform their responsibilities? In Islam, privilege is linked to responsibility. But in reality, while men's privileges are recognised and codified into law, their responsibilities are somehow regarded as between them and God, and not for the state to enforce nor to punish them and deny them the privileges should they fail in performing their responsibilities.

SIS Advocacy

So what can we do? Basically, SIS is tired of tiptoeing and submitting one memo after another, holding one round of negotiation after another with the government because it has gotten us nowhere when it comes to law reform.

Since 1996, SIS has submitted seven law reform memorandums, including on the IFL, polygamy, court procedure, Shariah Criminal Offences Act, guardianship, - all to little avail in terms of substantive law reform. In fact, they made it worse. The last round of

offensive amendments introduced to Parliament at the end of 2005 were actually drafted in 1998 by the Syariah Technical Committee. When SIS received a copy of these amendments in 2001, we submitted a 42-page memorandum listing a long list of objections to all the discriminatory and regressive interpretations in the law. We started a process of negotiation with the Ministry for Women, Family and Community Development who acted as a mediator between us and JAKIM. In the end we were told that everyone acknowledged there were flaws in the law, but they should be passed by Parliament first and amend later. What was the logic?

We found this unacceptable as there was no guarantee that these laws would ever be amended for the better, as the record showed that each subsequent amendments made it worse. So we decided to target our last hope, the legislative arm of government. We lobbied the women senators that resulted in an unprecedented cross party revolt in Parliament when the women Senators demanded that the government withdrew the offensive bill. The three line whip was called and all BN senators were forced to vote for the bill, against their conscience. Many women spoke out against the bill, some apologised publicly to their daughters for failing to defend their interest, but said because of party loyalty and party discipline they had to vote for it against their will.

But the positive outcome to all this was the fact that the cabinet recognised an injustice was done, decided that the law should be reviewed, taking into consideration the concerns of women. What was also significant was that the Cabinet instructed the Attorney-General, not JAKIM where the law originated, to take charge of the consultative review process. We were happy to be a part of that process; although the SIS and JAG (Joint Action Group for Gender Equality) voices were the sole voice advocating for reform, with the AG himself playing the constructive role of the mediator. This was how it should have begun in formulating the amendments to the Islamic Family Law, just as it was for the Law Reform Marriage and Divorce Act. This showed that public outrage, public engagement and public demands for change can indeed bring about the desired impact.

An agreeable new draft was reached in March 2007. But two years later, the new bill which addressed many of the concerns we had, is yet to be submitted to Parliament. We

have been promised that it will be submitted in the next session of Parliament. Let's see if the new leadership has the political will to match the rhetoric of change.

For further information on issues of equality and justice in Muslim Family Law, please visit these websites:

www.sistersinislam.org.my

www.musawah.org

or contact Sisters in Islam at:

03-7785-6121

03-7784-3733 (Telenisa legal helpline)