

GENDER JUSTICE AND ISLAMIC FAMILY LAW REFORM IN MALAYSIA

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The study discusses the changing perceptions toward gender justice in socio-legal context of Malay society. The transmission of Egyptian reformists' ideas regarding gender justice to Malay society through the Azharites, increasing education provided to women as well as the interaction between Malay intellectuals with Western civilization are among the factors which had contributed to these changes. To conform with the modern nation-state, the fiqh rules have been selectively codified and gradually drafted onto unified legal systems, inspired by a Western model. The transformation of fiqh rules to statutory law in the realm of family law were justified on the principle of judicious policy which enabled the rules to be changed, so as to conform with the changing modern Muslim society.

Keywords: gender justice, Malay women, Islamic family law, Azharites, Muslim reformists

INTRODUCTION

This study attempts to discuss some inter-related historical, legal and practical issues regarding gender and justice in Malaysia. The discussion will refer to the transmission of Egyptian reformists' thoughts towards Malay society regarding this issue. I will also discuss the continuing reforms of Islamic family law in Malaysia to accommodate the requirements of modern society concerning gender justice and equality which were carried out within the framework of *siyasah shar'iyah* (judicious policy) to achieve *maslahah* (public interest).

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The question of gender justice under Islamic family law has been under scrutiny since Muslims became aware of the difference of social position between women in Muslim and the Western societies. From then on, we have seen the emergence of a new gender consciousness and movement among Muslims. Women's liberation movements appeared everywhere in Muslim countries, advocating the needs for elevating women social and legal status, including in the realm of family law. The works of Qasim Amin, *Tahrir al-Mar'ah* 1899 (The Emancipation of Women), in which he received Muhammad Abduh's assistance, and *al-Mar'ah al-Jadidah* 1901 (The New Woman) became an impetus for women's movement in Muslim country. The thoughts of Egyptian reformists, such as Muhammad Abduh (1849–1905) and Qasim Amin (1863–1908) were transmitted to the Malay world as the result of contacts between Malay students and Abduh's circle in Egypt. The thoughts of Malay reformists such as Sayyid Sheikh al-Hadi (1867–1934), and Zainal Abidin Ahmad, known as Za'ba (1895–1973) as well as Abduh and Amin regarding gender issues, will be discussed interchangeably in this article.

Controversies regarding gender issues in Islam arise out of the different methodologies in the approaches and paradigms in viewing the issues. The different interpretations towards what constitute justice and equality between male and female on issues concerning family law arise from the fact that the primary sources on *shariah*, Quran and Hadith only provide basic foundation on how to implement and administer justice. How the *shariah* law particularly regarding the rights and duties of men and women are interpreted closely relate to the intellectual knowledge of the *ulama* (religious scholars) and the willingness of the *umara'* (authorities/legislators) to codify the accepted principles as a binding statute in one's country. Different intellectual knowledge and educational background lead to different statute regarding gender relations in the family system, thus, it is of no surprise when Islamic family law in the Muslim countries, which were drawn from the same source could be interpreted differently in certain aspects.

There are at least two main factors that determined how the Muslim society in Malaysia perceives gender justice. First, is the influence of Malay customs, and the second is the influence of Islamic teachings regarding marital relations as understood by religious scholars who had played a crucial role in disseminating Islamic teachings among the Muslims. This perception, however, evolves due to the contacts of

Muslim society with Western civilisation and the influence of reformist ideas of Muhammad Abduh as well as Qasim Amin in Egypt towards Malay intelligentsia, which in turn created the conflicting ideas between the conservatives and the reformists.

The awareness towards gender justice and the needs to conform with the declaration of human rights, and the increasing demands to conform with Islamic family law modern society, is said to be the impetus for the reformation of the Islamic family law in Malaysia. This development was, in fact a direct influence from other Muslim countries which had undergone the modernisation of Islamic law within the framework of the modern nation-state. This attempt was made possible, due to an active role played by academician-reformists, the lobbyist by Islamic movements within the government which supported modernisation within Islamic framework, and also the role played by women organisations in promoting gender justice.

ISLAM, MALAY AND GENDER JUSTICE

Islam has always played a significant role in the life of the Malays since the thirteenth or fourteenth centuries replacing Hinduism and paganism which were common beliefs before the coming of Islam to Malaysia.¹ The dominant school of thought (*madhhab*) of the Malays from the very beginning of their conversion to Islam was Shafi'ie. Thus, their interpretation and understanding of the jurisprudence were confined to the viewpoints of the Shafi'ie school of thought. The deep influences of the Shafi'ie school of thought among the Malay society consequently was further established when it was accepted as the only version of jurisprudence by the authorities through various codes implemented in Peninsular Malaysia.²

¹ SQ Fatimi, *Islam Comes to Malaysia*, Malaysia Sociological Research Institute Ltd, Singapore, 1963; al-Attas, *Preliminary Statement on the General Theory of Islamization of the Malay Indonesia*, Kuala Lumpur, [n.p], 1967 who opined that the Arabs were responsible for the conversion of the Malays.

² *Undang-undang Kanun Melaka* (Malacca Codes of Law) was drafted based on Islamic law according to the Shafi'ie school of thought with some elements of customary laws. Liaw Yock Fang, *Undang-undang Melaka*, The Hague, 1976; Other codified law in the Malay States such as in Pahang,

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The ideas of the Shafi'ie school of thought spread throughout the history of the Malay world until today due to the influences of the informal and formal education in which the jurisprudence from the Shafi'ie school of thought were taught.³ The Malays became the society that strictly adhered to the Shafi'ie school of thought to the extent that any other opinion (including opinions from Hanafi, Maliki or Hanbali schools of thought) which contradicted the Shafi'ie school of thought could create an uproar within the society.⁴

Islam has been a symbol of religious-cultural identity for the Malays,⁵ thus arguments based on Islamic principles on matters related to the Malays could be convincing points to attract support from the public, such as issues relating to gender justice. The reformists' approaches – using Islamic principles – had contributed greatly toward women's education (both religious and secular education in English schools) and their views regarding women's status and roles in society from Islamic point of view became an impetus for changing perceptions towards women.

The prevalent notion of the superiority of the male over the female in Malay society was regarded as the norm and had never been questioned until the early twentieth century by the reformist scholars. The primary role of men within the context of the family is that of providers, whereas

were also influenced by *Kanun Melaka* which based their law on the Shafi'ie school of thought. Ahmad Mohamad Ibrahim et al., "Islamisation of the Malay Archipelago and the Impact of al-Shafi'is Madhhab on Islamic Teachings and Legislation in Malaysia," *International Islamic University Law Journal*, Vol. 2(2), 1992, pp. 14–17.

³ Abdul Halim El-Muhammady, "Ikhtilaf and Its Development in Malaysia," *International Islamic University Law Journal*, Vol. 2(2), 1992, p. 53.

⁴ It was reported that there was a public debate regarding the question of dog's saliva whether it was impure (najas) or not between conservatives and reformists group who supported Maliki opinion on that matter. William R. Roff, "Whence Cometh the Law? Dog Saliva in Kelantan 1937," *Comparative Studies in Society and History*, Vol. 25(2), April 1983, pp. 323–338 ; Also had been discussed in *ibid.*, pp. 55–57.

⁵ The importance of Islam among the Malays is to the effect that Islam and Malays are synonymous. The definition of "the Malay" in the Federal Constitution of Malaysia is a person who professes the religion of Islam..." Article 160(2), *Federal Constitution of Malaysia*.

the role of women in normal circumstances is the management of domestic affairs and upbringing of the children.⁶ The unequal treatment towards women was perceived as normal, and had never been questioned culturally and religiously. Literal understanding of the religious teaching in the classical *fiqh* books which had been referred to throughout the centuries seemed to strengthen the notion of the inferiority of women. Regarding marital relations, it emphasized the domestic role of the women as wives and mothers. Women were reminded to obey their husbands and not to breach the latter's rights. At the same time, the husbands were reminded to protect the wives and fulfill her rights and were reminded of the consequences to those who were neglectful of their duties.⁷

Reciprocal rights and duties between spouses are important to maintain the harmony and well being of the homes as had been emphasized by religious scholars during those time, however what was lacking was the legal aspects. The applications of the stated rights depended on the moral and religious consciousness of the husbands, in other words there was no legal protection, or remedies for women should they face problems with errant husbands. Moral and religious consciousness alone is not sufficient to protect the women from errant husbands. There was also no discussion regarding women's rights toward education, and their public role in society. The activities of women in the history of Islamic civilisation were never highlighted in Malay traditional society until the

⁶ In spite of the notion of male superiority among the Malays, Malay women have been known to be an active partner in traditional economy by helping their spouses contribute to the expenditure of the household. The society regarded working women or full-time housewives as normal. It was common for women working in paddy fields, growing vegetables as well as doing business along side their male counterparts, and they even outnumbered the male businessmen, such as in the state of Kelantan. R. Firth, *Malay Fisherman: Their Peasant Economy*, Morton & Co, New York, p. 17, quoted in Raja Rohana Raja Mamat, *The Role and Status of Malay Women in Malaysia: Social and Legal Perspectives*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1991, pp. 14–15.

⁷ Abd al-Wahab al-Sha'arawi, *al-Yawaqit wa al-Jawahir fi 'Uqubah Ahl al-Kabair*, (Trans. Muhammad Ali bin Abd al-Rashid bin Abdullah al-Jawi, Matba'ah Halabi, Patani, 2nd ed, n.d, pp. 33–36; Daud bin Abdullah al-Fatani, *Jam'ul Fawaid wa Jawahir al-Qalaid*, Mustafa al-Babi al-Halabi, Egypt, 1346H, pp. 232–237.

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returns of the Azharites⁸ from Egypt, some of whom had advocated the elevation of the status of women within familial spheres as well as in the society.

The misconceptions of the status of women among Muslim society had been criticized by Muhammad Abduh. He believed that in order to bring forth a new vibrant *ummah*, it was crucial for the Muslim society to reform the prevailing customs regarding women. He insisted that there was gender equality in Islam: "*Men and women are equal in rights and duties; they are also equal in reason, feelings and sense of self*".⁹ He acknowledged that there was a mutuality of rights and duties between men and women, that they were equal in responsibility and accountability to God, that they have the same Islamic duties and beliefs, and that they were both enjoined to seek knowledge. He also affirmed that male and female have a covenantal relationship.¹⁰

He firmly believed that the Quran says that men are a degree above women¹¹ noting that distinction is necessary in order to avoid discord, for every social unit needs a leader. Men are more worthy of leadership because of their strength and the fact that they are responsible to provide for their families from their wealth. For him, the leadership and responsibility of the husband to protect and provide for the wife do not mean that women can be pushed around. The function of husbands and wives are complementary, as they are equally important in different ways. He said that, discord in the Muslim society was in fact due to the men's appetite for pleasure.¹²

His perspectives regarding the status of women and his wake up call for Muslim society to change their perspectives towards women were supported by his disciple, Qasim Amin. He advocated that Islamic legal system had secured equality for both men and women before any other

⁸ The word Azharites in this article refers to Malay students who had received education in al-Azhar University.

⁹ Yvonne Haddad, "Muhammad Abduh: Pioneer Of Islamic Reform," in Ali Rehmana (ed.), *Pioneers of Islamic Revival*, Zed Books, London/New York, 2005, p. 56.

¹⁰ Ibid.

¹¹ The Quran; al-Baqarah: 288.

¹² Ibid.

legal system. He said that Islam advocated women's freedom and emancipation, and granted women all the human rights during a time when women were at the lowest level in all societies.¹³ Amin strongly believed that Muslim society could not progress unless women were treated as true partners of men in everything, in familial life as well as in public affairs.¹⁴

The connection between the state of civilisation and progressiveness of a society is reflected in the social status accorded to women. According to Amin, the low status accorded to women indicates the backwardness of one's nation. On the other hand, the high status of a nation and its progressiveness will reflect towards women as well, where they will be highly respected.¹⁵ He stressed that, the backwardness of the Muslims was caused by the prevalent ignorance of both men and women who could not comprehend the reality of religion.¹⁶ He criticised the lack of respect for the rights of women, depriving their human rights and forbidding them from enjoying all the privileges accorded to them in Islam.¹⁷

To support his arguments, he emphasised that in the history of Islam, there was a significant number of women who were influential and had an impact on the general affairs of Muslims with their outstanding knowledge and leadership.¹⁸ Thus, for him to improve the condition of the nation, it was imperative to improve the condition of women.¹⁹

In Malaysia, this idea was supported by the Azharites who had been influenced by Abduh's thoughts during their academic years in Cairo.²⁰

¹³ Qasim Amin, *The Liberation Of Women And The New Women*, (Trans. Samiha Sidhom Peterson), The American University in Cairo, Cairo, 2000. p. 7.

¹⁴ "The underdevelopment of a country is a product of numerous factors, the most important of which is the inferior position of women." Ibid, p. 72, 199.

¹⁵ Ibid., p. 6.

¹⁶ Ibid., p. 66.

¹⁷ Ibid., pp. 127–128.

¹⁸ Ibid., p. 74.

¹⁹ Ibid., p. 75.

²⁰ The influence of Muhammad Abduh in the Malay world which includes Malaysia and Indonesia had been briefly discussed in Adams, *Islam and Modernism in Egypt*, Routledge, London & New York, 2000. pp. 102–103.

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They had advocated their cause through the publication of journals such as *al-Ikhwān* (1926–1931) and *Saudara* (1928–1941) to quote a few, which were published using the Malay language and were strongly influenced by *al-Manar* in Egypt,²¹ and in some cases through novels which carried underlying messages of women's emancipation.²² For the Arab descendants who resided in Malaysia their calls for the reformation of Muslim society including the aspect of women's rights were published in *al-Huda* (1931–1934), journal published in the Arabic language in Singapore. They attempted to bring the reform from other Muslim countries such as Egypt closer to Malay society. These journals contained news of modernist movements championed by the charismatic reformists and modernists in Egypt.²³

They criticized the backwardness and rigidity of Malay society and advocated the necessity of women's involvement in the progress of society, and stressed the importance of women in developing a strong nation.²⁴ Among the influential figures advocating the need for elevating the status of Malay women within the Malay societies were Sayyid Syekh al-Hadi and Za'ba.

The influence of Muhammad Abduh and Qasim Amin was evident in the writings of those Malay reformists, especially al-Hadi. He spread his ideas about Muslim women in Malaysia through his writings published

²¹ El-Muhammady, "Ikhtilaf and Its Development in Malaysia," p. 56.

²² The novels such as *Hikayat Setia Ashik kepada Ma'shoknya* (or widely known as *Hikayat Faridah Hanom*), *Hikayat Taman Cinta Berahi*, *Hikayat Anak Dara Ghassan*, *Hikayat Putri Nurul Ain* and *Cetra Rokambul* with the background of modern Egypt written by Sayyid Syekh al-Hadi had carried the messages of the emancipation of Muslim women. Ibrahim bin Abu Bakar, *Islamic Modernism in Malaya: The Life and Thought of Sayid Syekh al-Hadi 1867–1934*, University of Malaya Press, Kuala Lumpur, 1994, p. 136.

²³ The role played by Shaykh Mustafa al-Marafi, Muhammad Abduh, Qasim Amin and Huda Sha'arawi in the modernisation of Muslim society in Egypt was greatly admired, implying the needs of such movement in Malaysia as well. S .H. Tan, *The Life and Times of Sayyid Shaykh al-Hadi*, BA diss, University of Malaya in Singapore, 1961, p. 51.

²⁴ "the women form a foundation for whomever wants to develop his race and nation." *Al-Ikhwān*, 16 November 1926, p. 63; al-Sayyid Sheikh Ahmad al-Hadi, *Kitab Alam Perempuan*, Jelutong Press, Penang, 1937, p. 26.

in *al-Ikhwān* and his novels. His enthusiasm with the ideas of promoting women's status within Malay society made him write regularly in the women's column, "*Alam Perempuan*" (Women's World)²⁵ in *al-Ikhwān* which was strongly influenced by the ideas of Qasim Amin. In fact, almost half of his writings regarding women in this journal was a translation of Qasim Amin's book, *Tahrir al-Mar'ah* (Women Emancipation).²⁶

He believed that the concept of *qiwamah* or superiority derived from the verses of *al-Baqarah* 2: 228²⁷ and *al-Nisa'* 4: 34²⁸ was applicable only within the context of household, not in other context or situations. The superiority of men within familial context means that men had to bear the responsibilities related to the maintenance and comfort of their wives, and in return for his responsibilities, the wife has to be obedient on matters which do not contravene Islamic teachings. The obedience of the wife towards her husband was the reason which had made husband a degree higher than the wife.²⁹

Al-Hadi did not agree with the conservatives who believed that men were superior in everything, for him the superiority was only confined

²⁵ The series of articles in women's column called *Alam Perempuan* (*Women's World*), were then edited and published in a small book titled *Kitab Alam Perempuan* (*The Book of Women's World*).

²⁶ The influence of Qasim Amin on al-Hadi's works was mentioned in S.H. Tan, *The Life and Times of Sayyid Shaykh al-Hadi*, p. 19; Za'aba wrote: "*al-Ikhwān contained installments of the editor's commentary on the shorter chapters of the Quran, of translation from the Arabic on the emancipation of women and the feminist movement in Egypt, and of further sections in his history of Islam.*" Zainal Abidin Ahmad (Za'aba), "Modern Development", *Journal of Malayan Branch of Royal Asiatic*, Vol. 17(3), 1939, p. 155.

²⁷ "*And women shall have rights similar to the rights against them, according to what is equitable, but men have a degree over them.*" The Quran; *al-Baqarah* 2: 228.

²⁸ "*Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other, and because they support them from their mean.*" The Quran; *al-Nisa'* 4: 34.

²⁹ Ibrahim bin Abu Bakar, *Islamic Modernism in Malay*, p. 139 discussing this point which was derived from the ideas written in the novel *Faridah Hanom*, referring to al-Syed Sheikh al-Hadi bin Ahmad al-Hadi, *Faridah Hanom*, 2nd ed., Pustaka Antara, Kuala Lumpur, 1985, pp. 114–115.

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within familial life. He believed that women's mind was not lower than the men's nor was less rational than men for both had the same nature.³⁰ He stated that men and women had the same purpose in their lives, which was to know God and to obey His commandments as revealed in al-Quran.³¹

For him, a woman was a man's twin with regard to their physical and spiritual nature. A woman is a human being like a man. Al-Hadi cited the Prophet's saying: "*Indeed women and men are bodily twins*".³² Al-Hadi reminded the Muslim society that their misconduct and misconception towards women was wrong and contradicted with Islamic teachings.³³ His view regarding the concept of *qiwamah* was obviously the same with Abduh's ideas.

It was well understood by the Muslims generally, that Islam considers justice as an integral part of its teachings. The declaration of the principles of justice in the Quran has been a source of inspiration for those who seek the implementation of justice in the social and legal system. All of them believe justice as the main objective of the Islamic legal system. However, they differ on what constitutes justice and equality, and how to administer and achieve justice. The debates regarding gender justice and equality had taken a different level with the emergence of a new way of thinking in seeking justice and equality for women, that is a gender discourse which is "feminist" in its aspiration and demands, yet is "Islamic" in language and sources of legitimacy.³⁴ They believe that, there is dissonance between the ideals of Islam which

³⁰ Ibid., pp. 139–140.

³¹ "*O mankind! We have created you male and female, appointed you races and tribes, that you may know one another. Surely the noblest among you in the sight of God is the most god fearing of you.*" The Quran; al-Hujurat 49: 13.

³² al-Hadi, *Kitab Alam Perempuan*, p. 1.

³³ To argue his point he referred to the Islamic history which showed active participation of women in public affairs during early period of Islam. They were capable of doing bigger things such as their involvement in war and politics. *Al-Ikhwān*, 16 April 1928, p. 235; *Al-Ikhwān*, 11 October 1930, p. 46.

³⁴ Ziba Mir-Hosseini, "Islamic Law and Feminism: The Story of Relationship," *Yearbook of Islamic and Middle Eastern Law*, Vol. 9, 2002–2003, p. 34.

are premised on an ontology of human equality and the fact that in varying social context, Muslim women experience injustice in the name of religion.³⁵

In Malaysia, this trend was led by Muslim women organisations called Sisters in Islam (SIS) comprising a group of professional Muslim women, who have been influential on public policy, and frequently very controversial.³⁶ They took an egalitarian approach on the notion of the concept of gender justice, justifying their arguments with the reinterpretation of Quranic verses and rejecting the patriarchal gender notion in Islamic law which discriminates women. They believe that unequal interpretation of the gender role and functions in the society is contrary to the very essence of Islamic teaching which recognizes equality between the two sexes.³⁷ The existing notion of *qiwamah*, as understood by the jurists they said, is not a manifestation of divine will, instead it has been influenced by bias human construction.³⁸

On the other hand, there is a moderate trend in addressing gender justice issues within the Muslim society, emphasizing the need for simplification in maintaining a balance between established rules and

³⁵ Sa'adiyya Shaikh, "Transforming Feminism: Islam, Women And Gender Justice". In Omid Safi (ed), *Progressive Muslims on Justice, Gender and Pluralism*, Oneworld Publication, Oxford, 2003, p. 156.

³⁶ Maznah Mohamad, "At the centre and the periphery: The contribution of women movement to democratization," In Francis Loh Kok Wah & Khoo Boo Teik (eds.), *Democracy in Malaysia: Discourses and Practices*, Curzon, Richmond, Surrey, 2002, pp. 231–232.

³⁷ Guardianship Law and Muslim Women, SIS Working Paper Series, Sisters in Islam, Kuala Lumpur, August 2002; Zainah Anwar, "Law-making in the Name of Islam: Implications for Democratic Governance," In K.S. Nathan & Mohammad Hashim Kamali (eds.), *Islam in Southeast Asia*, Institute of Southeast Asian Studies, Singapore, 2005, pp. 121–134 ; Nasaruddin Umar, *Al-Quran untuk Kaum Wanita (Al-Quran for Women)*, (Trans. Nori Abdullah), Sisters in Islam, Petaling Jaya, 2004; Nik Noriani Nik Badli Shah (ed.), *Guardianship Law and Muslim Women*, SIS Working Paper Series, Sisters in Islam, Kuala Lumpur, 2002; K.H. Husein Muhammad, *Fiqh Wanita: Pandangan Ulama Terhadap Wacana Agama Dan Gender (Women's Fiqh: Jurist's Perception Towards Religion and Women Discourses)*, (Trans. Norhayati Haji Kaprawi dan Zaitun Mohamed Kasim), Sisters in Islam, Petaling Jaya, 2001.

³⁸ Refer to the series of publication by *Sisters in Islam* above.

social changes. The concept of *qiwamah* (superiority) of the men was regarded as a responsibility before it becomes an honor, and a sacrifice before it becomes a nobility, and it is not subduing. The position of man to woman and vice versa is rightly described in verse *al-Baqarah* 2: 87, “*They are your garments and you are their garments.*”³⁹ As an answer to the conservatives that men possessed absolute authority in the family, it stresses the point that Islam encourages neither male despotism-patriarchy nor female despotism-matriarchy. In fact, Islam strongly holds the concept of *shura* (consultation) both in family and other socio-political situations. The conservative interpretation towards women may be the result of the influence of local, national, and regional Muslim cultures which is based on certain customs, traditions and inventions which are not necessarily Islamic.⁴⁰

This moderate group disagrees with the trend of interpreting Islamic texts, from the view of either a Westerner or tries to relegate Islamic notions and concepts and promote Western notions in the name of modernisation as has been done by Muslim feminists.⁴¹ To achieve the mission of the Muslim *ummah* as vicegerence of Allah, Muslims need to ensure the de-traditionalisation and de-westernisation of Muslim thought so that it becomes pure, genuine and dynamic for the revitalisation of the Islamic *ummah*.⁴²

Their views seemed parallel with the early reformists such as Abduh and al-Hadi for all of them are believed to subscribe to the notions of the divisions of labour between male and female and both were complementary to each other. It was believed, problems that arose in the

³⁹ Ahmad Shehu Abdulsalam, “Gender and Sexuality: An Islamic Perspective,” *SARI*, Vol. 24, July 2006, pp. 36–39.

⁴⁰ Zeenath Kausar, *Politicization of Sex and Family Devaluation in Feminism: An Islamic Perspective*, Ilmiah Publisher, Petaling Jaya, 2003, pp. 152–153.

⁴¹ *Ibid.*, p. 155; Opposing western emancipation trend, women’s organisation were advised that if they really want to be the protector of women’s fate, they should open up the self, eyes and thoughts to accommodate all the problems and all the difficulties which go against the people not just the women. They must find the integrated solutions, which are suitable with the situation. Zaleha Kamaruddin and Raihanah Abdullah, “Women Emancipation in the 21st Century”, http://snni.org/events/ulama/rpp.shtml?pp/pe2002_7. Retrieved on 3 May 2007.

⁴² *Ibid.*,

society was due to the misconceptions of marital relationships. The relationship of a husband and a wife which was based on absolute domination of the husband, and the wife was considered as a helpless subject, were sources of problems, dissatisfaction and disharmony. For example, housework and child caring were perceived as derogatory. Both husband and wife should mutually regard housework as well as work outside as *ibadah* (good deeds) following Islamic injunctions. The purpose behind the co-operation of husband and wife is actually the realisation and actualisation of vicegerency – at the family level.⁴³

GENDER JUSTICE AND ISLAMIC FAMILY LAW REFORM

Considering the unjust treatment of women and the low status given to them during pre-Islamic Arab society, the introduction of rules pertaining to the rights and duties within the family institution contained in the Quran was regarded as revolutionary in enhancing the status of women in the eyes of the independent legal and spiritual identity. Islam, undoubtedly, improves women's position, establishes marital relationship on the basis of love and mercy, secure mutual rights and obligations. It had abolished the customs of pre-Islamic Arab of inheriting a dead man's widow (son's right to inherit his step mother after his father's death),⁴⁴ and the practice of selling the daughter for the purpose of marriage.⁴⁵ During that time, men enjoyed the right to divorce women at will without having to provide any maintenance to them as well as the right to unlimited polygamy.⁴⁶

The Arab customs which did not contradict with Islamic teachings were accepted with certain modifications so as to make them conform to Islamic law. The modifications were basically to improve the status of

⁴³ Ibid., pp. 160–164; Also refer to Zeenath Kausar, *Muslim Women at the Crossroads: The Right of Women in Islam and General Muslim Practices*, Thinkers Library, Selangor, 2006, p. 140; Lamya al-Faruqi, *Women, Muslim Society and Islam*, American Trust Publication, Indianapolis, 1991, p. 30.

⁴⁴ The Quran; al-Nisa' 4: 19, 22.

⁴⁵ The daughter was often purchased by the man from her father or guardian as an object of the sale, where the marriage contract was basically between the father and the groom. She has no say whatsoever regarding her marriage. Lamya al-Faruqi, *Women, Muslim Society and Islam*, p. 3.

⁴⁶ Ibid., p. 4.

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women. The practice of giving *mahr* (dowry) was modified, that it was not given to the father or her family, but instead it was considered as the bride's property.⁴⁷ The unlimited number of wives in a polygamous marriage was modified and limited to a maximum of four wives, allowable only if it was possible to treat them all equally,⁴⁸ and that separation by *talaq* (divorce) were made revocable to twice only.⁴⁹

The provisions of family law are primarily found in the Quran and Hadith. However, these two sources do not specify the details. They only contain some rulings and indications that lead to the cause of these rulings. On the basis of these rulings and indications, the jurists had developed the rules by employing the legal theory to discover the judgment of an unprecedented case.⁵⁰ The expansion of Muslim territories with multi-ethnic population from different cultures and backgrounds imposed countless new problems which need to be addressed accordingly. This was the scope where the role of *mujtahids*⁵¹ is necessary in matters of law and religion using their own methodology in *ijtihad*.⁵²

Early jurists who had formed independent opinions never claimed finality to their opinions and even admitted the possibility of errors. They encouraged other scholars who were qualified to practice *ijtihad* to form their own conclusions based on their own knowledge and abilities. However, this scholarly environment did not last long, for when the Muslim world went into decadence and the caliber of great scholars such as Abu Hanifah and Shafi'ie had ceased to exist, the independent *ijtihad* which had given life and vitality to Islamic jurisprudence had also ceased to exist. At the end of the third century it was commonly accepted by the

⁴⁷ The Quran; al-Nisa'4: 4.

⁴⁸ The Quran; al-Nisa'4: 3, 129.

⁴⁹ The Quran; al-Baqarah 2: 22.

⁵⁰ W.B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies*, Vol. 16(1), 1984, p. 4.

⁵¹ Those who carried out the task of discovering the new judgment by applying legal methodology. *Ibid.*, p. 1.

⁵² The maximum effort expended by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purpose of discovering God's law. *Ibid.*

majority of jurists that the gate of *ijtihad* had been closed.⁵³ The *ijtihad* activities then were carried out within the framework of the established schools of law, for none were deemed qualified for independent reasoning.

The closure of the so-called gate of *ijtihad* denounced the practice of fresh interpretation of divine laws to meet modern challenges successfully. Strict adherence to the doctrine of *taqlid*⁵⁴ caused stagnation in Islamic jurisprudence, including those that were related to family law. It became static and unable to achieve and maintain the desired objectives.⁵⁵ The rulings within this *taqlid* period were naturally influenced by their religious sects and their environmental and temporal circumstances. As a result, the rules regarding matrimonial law had been developed into a jurisprudence, systematically compiled in classical fiqh books according to different sects, in a special chapter known as “*munakahat*” (matters related to matrimonial rules).

It was contended that, the element of human reasoning during the process of *ijtihad*, had been the reason for the existence of gender biased interpretation of the rules relating to matrimonial laws, which had consequently jeopardized the status of women. Thus, it was argued that there were needs for the reinterpretation of the matrimonial laws which were based on religious sects, and to go beyond the opinions of the jurists. This effort was crucial in order to give back to women their former status as had been accorded to them during the Prophet’s period.⁵⁶

The reformist ideas emphasizing gender justice and equality with the new interpretation of matrimonial law had taken root amidst debates and controversies in West Asia, and had been followed later on by Muslim countries in South East Asia including Malaysia and Indonesia. The development of transforming jurist law to statutory law – a law promulgated by modern nation states legislature – gave an opportunity to

⁵³ Anderson, *Law Reform in Muslim Countries*, London, 1976, p. 7; Coulson, *A History of Islamic Law*, Edinburgh, 1964, p. 81.

⁵⁴ Accepting an opinion concerning legal rules without knowledge of its bases. Ali Muhammad al-Jurjani, *Kitab al-Ta’rifat*, al-Matba’ah al-Hamidiyah al-Misriyyah, 1903, p. 44.

⁵⁵ Khan Noor Ephroze, *Women and Law*, Rawat Publications, Jaipur, New Delhi, 2003, p. 11.

⁵⁶ *Ibid.*,

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include the issue of gender justice and equality, and give women's rights their legal protection, instead of leaving it to the moral and religious conscience of the individuals.

Basically, the implementation of Islamic family law reforms in Muslim countries was carried out within the framework of the principles of *siyasa shar'iyah* (judicious policy) which accorded the ruler the right to make administrative regulations in public interest. Bearing in mind the need to conform to the requirement of modern society, and the importance of gender justice and equality within the new legislation, the reformists had resorted to a few methods namely, *takhayyur* (selection)⁵⁷ and *talfiq* (patching)⁵⁸, *maslahah* (public interest), and the reinterpretation of the textual sources, the Quran and the Hadith.⁵⁹

The reformation of Islamic family law was carried out within the realm of the judicious policy, with the assumptions that all types of rules and laws are to be valued as Islamic law as long as they are consistent with the general spirit of the divine injunctions. Thus, based on these arguments, *takhayyur* and *talfiq*, as well as the new interpretation of certain verses related to matrimonial laws had been utilised for the purpose of achieving justice which accorded the rights for both men and women. The changes in the law are in accord with the changes in time, place, circumstances and customs were made possible in the interest of the public.

⁵⁷ Selection of the opinions from other school of thoughts other than the one on which a country's law were based (as opposed to the strict implementation of the strict adherence to a particular sect). Kecia Ali, "Teaching about women, gender and Islam: Resources and strategies." <http://www.brandeis.edu/projects>. Retrieved on 21 March 2006.

⁵⁸ Patching together refers to, the combination of elements from various schools, or from minority opinion within the schools, creating a new doctrine that was not held in that form by any classical school. Ibid.

⁵⁹ Coulson, *A History of Islamic Law*, pp. 182–217 ; Anderson, *Law Reform in the Muslim World*, pp. 42–48.

COMPULSORY GUARDIANSHIP AND WOMEN'S CONSENT TO MARRIAGE

The practice of forced marriages had been prevalent among the Malay and Arab societies residing in Malaysia due to the strong influence of Shafi'ie school of thought which had been transmitted through formal and informal religious education that was strongly protected by the religious authorities.⁶⁰ It was regarded as an accepted principle of Islamic law among the jurists and the public.⁶¹

This practice was further enhanced by the existing customs at that time which considered marriage of a daughter as some sort of business that generated income for the family. Among the poor Malay peasant families, the practice forcing their underaged daughter to marry meant they will have extra money from the *mahr* (dowry) paid by the grooms,⁶² which in fact contradicted the principles of marriage in Islam, whereby the *mahr* paid should be the property of the bride.

⁶⁰ The books from Shafi'ie school of thought were widely referred to and had been translated to Malay language by Muhammad bin Ismail Daud Patani, *Matla' al-Badrayn wa Majma' al-Bahrayn*, Dar al-Ma'arif, Pulau Pinang, n.d., written in Malay language based on Shafi'ie school of thought were widely referred to by the public, religious students as well as religious authorities.

⁶¹ *Syed Abdullah al-Shatiri vs Shariffa Salmah*, *Malayan Law Journal*, Vol. 25, 1959, p. 137. The daughter in this case refused to the forced marriage contracted by her father. The father applied court's order for his daughter to accept the marriage and forced her to live with the husband. The court decided that the marriage without the consent of the virgin daughter was valid. However, the husband was advised to divorce the wife since she did not agree to the marriage and already had the choice of her future husband. Refer also *Re Husseinah Bano*, *Malayan Law Review*, Vol. 5, 1963, p. 392. The father applied the declaration from the court that the marriage of his daughter was invalid since it was contracted without his consent due to the incompatibility between the husband and his daughter. The court granted the application and held that the husband was not equal to the woman and her father according to education, status in society and religion. Thus, the father had the right to apply for the dissolution of the marriage.

⁶² Niamah Hj Ismail Umar, *Fadhullah Suhaimi*, Progressive Publishing House Sdn Bhd, Selangor, 1998, p. 128.

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It is a well-known fact that forced marriage had been the focus of criticisms of the reformists in Egypt as well as in Malaysia. Qasim Amin was against the practice of arranged marriage among Egyptian society. He felt that the choice of a marriage partner is the right of every individual. Forced marriage was against the spirit of Islam. In Islam, the marriage contract cannot be legal unless both male and female consent thereto. One should be free to choose his/her own partner in marriage, for he/she is the one who will share the future happiness and difficulties in one's marital life.⁶³

Marriage at a young age was noted as among major factors for the lack of the girl's participation in education. For that reason, the Feminist's Union (*al-Ittihad al-Nisai al-Misri*) which was formed in 16 March 1923 led by Huda Sha'arawi,⁶⁴ demanded to the Egyptian National Assembly to set the minimum age for marriage at sixteen for girls and eighteen for boys.⁶⁵ The proposal was discussed by the Rector of al-Azhar, the Grand Kadi, The Grand Mufti and a group of religious scholars who were invited by the government. They unanimously agreed that there was nothing in Islam against fixing the age of marriage. The proposal subsequently was approved by the parliament and became the law in 1924.⁶⁶

The discussion regarding minimum age of marriage had only taken root in Malaysia in the 1950s. The discussion on fixing the age in Malaysia was discussed among women's organisation by referring to the development in Egypt. Religious scholars in Malaysia, such as Fadhlullah Suhaimi, considered changes that took place in Egypt as unsuitable to be implemented in Singapore (at that time, Singapore was part of Malaysia). He believed that valid marriage according to *shariah* principle could not be abolished by state law.⁶⁷

⁶³ Qasim Amin, *The Liberation of Women and The New Women*, pp. 77–82.

⁶⁴ Badran, *Huda Sha'arawi and the Liberation of the Egyptian Woman*, PhD Thesis University of Oxford, 1977, p. 155.

⁶⁵ Izadparast, *Position of women in Muslim Arab Societies*, PhD diss., University of Utah, 1974, p. 78.

⁶⁶ Ibid.,

⁶⁷ Niamah Hj Ismail Umar, *Fadhlullah Suhaimi*, p. 130.

He was reluctant to depart from the Shafie's opinion. As opposed to legal reform, Fadhlullah Suhaimi was inclined to social reform and creating awareness among parents and men to understand the importance of education for girls and to stress on the risk of early marriages. According to him, parents should send their children, both boys and girls for higher education and that they should not obstruct their rights by imposing unwanted marriages when they were young, and the males should not propose to the young girls as an indirect support for them in achieving higher education. He called upon others, including the doctors to explain to the public the negative impact of underaged marriages.⁶⁸ For him, the suitable age for marriage was 25 years old for males and 18 years old for females. His arguments were based on the possibility that uneducated underaged mothers would probably produce unhealthy children physically and mentally.⁶⁹

The other issue closely related to the forced marriage was equality in marriage (*kafa'ah*), which had been a controversial topic among the Muslims especially among the *sayyids* in Peninsular Malaysia. The *sayyids* claimed that they were from the descendents of Prophet Muhammad and as such they are considered to be much one honourable than other Muslims. Thus, men from *non-sayyid* descendents were considered not compatible based on the daughters of the *sayyids*, and the practice of forced marriage among the *sayyids'* daughters to other *sayyids* were quite rampant. They justified their action based on the empowerment given to the father and parental grandfather (*wali mujbir*)⁷⁰ according the to Shafi'ie school.⁷¹

⁶⁸ Ibid., pp. 131–132.

⁶⁹ Ibid., p. 129.

⁷⁰ *Wali mujbir* are confined to the father and parental grandfather who have the right to marry off his daughter or grand daughter without asking her consent, whatever her age may be, provided she is still a virgin. It is however commendable to consult her as to her future husband. They, however cannot force the marriage if she had already lost her virginity. Her formal consent is required in this case. Nawawi, *Minhaj al-Talibin* (Trans. Howard), London, 1914, p. 284.

⁷¹ The issue in *Syed Abdullah al-Shatiri vs Shariffa Salmah*, *Malayan Law Journal*, Vol. 25, 1959, p.137 is related to the girl's intention of marrying a man from a *non-sayyid* descendent that prompted the father to marry her off to a *sayyid*.

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This issue had attracted debates, and the *fatawas* (rulings) on that matter were frequently consulted in *al-Manar*.⁷² Muhammad Rashid Ridha in his judgment stated that there was no legal text in Quran and Hadith regarding *kafa'ah* in marriage, however it was accepted according to the customs. If the family felt disgraced with such marriages, then the couple was regarded as incompatible or of unequal qualities.⁷³ He further clarified that the issue was a matter of *ijtihadiyyah* which had been accepted by the custom. It is of importance to avoid *shiqaq* (quarrels) in the family. Thus, the custom which did not contradict with the Quran and Hadith should be accepted.⁷⁴

The increasing awareness of the importance of education towards women⁷⁵ was frequently highlighted in the journals⁷⁶ and alternative mediums such as novels,⁷⁷ criticizing the existing practices of forced marriages, and also in disregarding the basic rights of choosing husbands. The conflicts between the guardians and the girls regarding their choice of future husbands sometimes led them to resort to

⁷² There were questions from Singapore questioning the equality of marriage between the daughter of a *sayyid* with an Indian whose lineage was unknown in *al-Manar*, Vol. 7, 1904, 381–384; a question regarding *kafa'ah* (equality) between the daughter of *sayyid* with a *non-sayyid* in *al-Manar*, Vol. 8, 1905, pp. 215–217.

⁷³ *al-Manar*, Vol. 13, 1910, pp. 827–878

⁷⁴ *al-Manar*, Vol. 23, 1922, pp. 263–264

⁷⁵ Fadhlullah Suhaimi, a former al-Azhar student reminded Malay society the negative impact of such practice. His arguments are based on the possibility that uneducated and underaged mothers produce unhealthy children mentally and physically. He held the view that the girl of 13–14 years old was not suitable to get married. He suggested that the suitable age for marriage was 25 years old for male and the minimum age for female was 18 years old. Niamah Hj Ismail Umar, *Fadhlullah Suhaimi*, p. 129.

⁷⁶ *al-Huda*, 9 Nov 1931, p. 7.

⁷⁷ al-Hadi believed that Islam did not permit a father to force his virgin daughter to marry someone against her wishes. For him, the kadi should intervene and declare the marriage as invalid. His view was highlighted in the issues raised in his novel *Faridah Hanom*, Ibrahim Abu Bakar, *Islamic Modernism in Malaya*, pp. 144–145.

changing the *madhhab*, from Shafi'e to Hanafi to enable then to marry without the consent of the *walis* (legal guardians).⁷⁸

In promoting the rights of the women towards marriage, the codification of Islamic Law in Malaysia in 1980s was based on the method of *takhayyur* (selection of opinions from other school of thoughts), choosing the opinion of Hanafi school of thoughts which accorded women the right of marriage and did not recognise the power of *wali mujbir* to force the virgin daughter or grand daughter into an unwanted marriage. It was provided that a valid marriage needed the consent of both husband and wife and also the *wali* (in the case of absent *wali* [legal guardians], the *hakim* [judge] can act on his behalf).⁷⁹ However, not all Malay states adhered to these principles. Kelantan which holds a strong Shafi'ie school of thought and also Malacca and Kedah which followed the Islamic Family Law drafted by Kelantan, however, were reluctant to forfeit the right of *wali mujbir*. It was provided that the marriage of a virgin girl may be solemnised without her consent by *wali mujbir* if the *wali mujbir* and the prospective husband aren't hostile to her; the prospective husband of equal status to her; and able to pay a reasonable *maskawin* (*mahr*).⁸⁰ Although, it is not common for modern parents to

⁷⁸ In *Salmah vs Soolong*, (1878) 1 Ky. 411 the intention of a girl of an Arab father and Malay mother to marry a man of Indian descent was refused by the *wali*, her paternal uncle since her father had passed away. The court had accepted the paternal uncle's right as *wali* in refusing to allow the marriage. The girl changed to Hanafi *madhhab* and reapplied for permission to allow her marriage. The court allowed the marriage on the ground that a Hanafi woman who had attained *baligh* [puberty] may marry without the consent of a *wali*. A similar scenario was the case of *M.M. Nordin vs Shaikh Mohamed Meah Nordin Shah*, (1908) S.S.L.R., 72. the issue was the age of majority. The guardian submitted that the girl's age of majority should be 21 years old in accordance with English principles. The court however referred to Ameer Ali's "*Muhammadan Law*" which states that for both Shafi'ie and Hanafi the age of majority is attained at 15 years old. The court held that since the girl had already reached puberty according to Shafi'ie and Hanafi *madhhab* and had changed from Shafi'ie to Hanafi *madhhab* than she was entitled to contract her own marriage without the consent of the *wali*.

⁷⁹ Section 13, The Islamic Family Law Act (Federal Territories), 1984.

⁸⁰ Section 10, The Islamic Family Law Enactment of Kedah 1984; Section 13, The Islamic Family Law Enactment of Kelantan 1983; and Section 13, The

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force their daughters to marry, however such provision make it possible for them to do so.

The criticism towards this move has been raised by women organisations as well as academicians in their respective writings.⁸¹ This provision, however, was repealed during the revision of Islamic family law in Malaysia in 2000s.⁸² With the effect of that law, consent must be sought from the bride to make a marriage valid. However, it is balanced with the rights of a *wali* that she marries someone who is of her equal in status. The *wali* has the right to refuse the consent if the prospective husband is not equal in status to the daughter. If he withholds the consent unreasonably, the *shariah* court may act on his behalf as *wali hakim* to give the consent.⁸³

With regard to the minimum age of marriage, the Act provides that no marriage may be solemnized if the man is under 18 years old and the woman is under 16 years old except with the permission of the *hakim*

Islamic Family Law Enactment of Melaka 1983.

⁸¹ Refer to Sisters in Islam's series of publication such as Nasaruddin Umar, *al-Quran untuk Kaum Wanita (al-Quran for Women)*; Nik Noriani Nik Badli Shah *Guardianship Law and Muslim Women*; K.H. Husein Muhammad, *Fiqh wanita: pandangan ulama terhadap wacana agama dan gender Gender (Women's fiqh: Jurist's Perception Towards Religion and Women Discourses)*.; Refer also the writing of academicians who supported the cause of gender justice. Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments*, Ilmiah Publishers, Kuala Lumpur, 2000.

⁸² Section 13, The Islamic Family Law Enactment of Kelantan No 6/2002 follows the provisions enacted in Section 13, The Islamic Family Law Act (Federal Territories), 1984. The latest amendment in 2000s meant that all states in Malaysia are standardised regarding the right of the bride to consent her own marriage.

⁸³ Section 13(b), The Islamic Family Law Enactment of Kelantan No 6/2002; Section 13(b), The Islamic Family Law Act (Federal Territories), 1984 (Amended in 2006).

(judge).⁸⁴ The minimum age of marriage seemed to follow the Hanafi doctrine on the presumption of puberty. This provision which was introduced in the earlier statutes was maintained in the amendment of Islamic Family Law in 2000s.⁸⁵

Limiting Polygamy Practice

Traditionally, polygamy was considered as the male right, and there was no restriction to the practice among the Malays. The requirement of just treatment towards the wives was not legalized, for it was assumed as a personal moral conscience. Those who did not treat their wives justly and neglected their duties as husbands were considered as having committed sins and shall be punished on Judgment Day.⁸⁶

The discussions about polygamy in Islam usually emphasised that it was not encouraged nor prohibited. It is simply an alternative for those who need more than one wife, for example a man with a high sexual drive. Polygamy in this case is considered as necessary to settle his feeling so that he could concentrate on fulfilling his duties in *ibadah* (religious duties which will be rewarded).⁸⁷ The requirement of justice means equality in with regard to material and tangible matters, but not inner feelings, love and affection.⁸⁸ There were no regulations regarding polygamy. For this reason, polygamous marriages were easily contracted, with the perceptions that those who practiced polygamy actually followed the *Hadith* of Prophet Muhammad. The requirement for justice and equal treatment was not legalised, assuming that it was a matter of moral conscience of the husband.

⁸⁴ Section 8, The Islamic Family Law Enactment of Kelantan 1983; Section 8, The Islamic Family Law Act (Federal Territories), 1984.

⁸⁵ Section 8, The Islamic Family Law Enactment of Kelantan No 6/2002; Section 8, The Islamic Family Law Act (Federal Territories), 1984 (Amended in 2006).

⁸⁶ Abi Dawud, Sunan Abi Dawud, Dar Ibn Hazm, Beirut, 1998, p. 328; Daud al-Fatani, *Jam'ul Fawa'id wa Jawahir al-Qalaid*, pp. 235–236.

⁸⁷ Abd al-Wahab al-Sha'arawi, *al-Yawaqit wa al-Jawahir fi 'Uqubah Ahl al-Kabair*, pp. 37–38.

⁸⁸ *Muhimmat al-Nafais fi Bayan Asilah al-Haadith (Himpunan jawapan fatwa mufti shafii Sayyid Ahmad Dahlan dan lainnya dari ulama di Mekah)*. Mustafa al-Babi al-Halabi Wa Awladihi, Egypt, 1349H.

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The unrestricted practice of polygamous marriages by errant husbands create major sufferings among the women that led to the destruction of the family. The rampant practices among Muslim societies were criticized by Muhammad Abduh from Egypt who advocated that polygamy practices should be permitted within a limited context and not as a general rule as widely practiced among Muslim societies in Egypt. For him, polygamy is not encouraged, but discouraged. It and should only be allowed when really necessary that is if the wife is barren. Prohibited unless it is really necessary, such as the first wife is barren.⁸⁹

Abduh's disciple, Qasim Amin also held the same view. He stated that polygamy practices should be restricted and allowed for limited reasons, such as in the case when the wife is afflicted with a chronic disease that prevents her from fulfilling her marital obligations,⁹⁰ or could also be permitted if the first wife is barren.⁹¹ He called for serious consideration regarding justice before the husbands were permitted to practice polygamy. Thus, if there is injustice among wives; or polygamy brings moral corruption to families; if the limits of law which should be respected are broken; if enmity erupts among members of one family and threatens to become public – in these cases it is acceptable for a ruler concerned about public welfare to prohibit polygamy, with or without conditions, according to his perception of what is best for the good of the community.⁹²

Similar views were highlighted by Malay reformists in their journals which called for restricted practices of polygamy in Malaysia. *Al-Hikmah*, in its woman's column, stated that the restrictions of polygamous practices and prohibition on polygamy for those who could not give justice and equal treatment to the wives were considered as in line with the spirit of Islamic law, quoting *qawaid fiqhiyyah* (legal maxim), that “*preventions of harm takes priority over securing of benefits.*” The writer reminded the readers that Islam had given rights to the wives to stipulate during the wedding contract in prohibiting the

⁸⁹ *al-Manar*, Vol. 28, 1927, pp. 29–35.

⁹⁰ Although he agreed that this reason justified the need for polygamy, however personally he did not give him approved because women are not at fault for their condition.

⁹¹ Qasim Amin, *The Liberation of Women and The New Women*, p. 85, 201.

⁹² *Ibid.*, p. 86.

husbands from contracting polygamous marriage. He viewed that, if the *'urf* (custom) in the society prohibited polygamous marriage, then such *'urf* should be upheld and could not be breached.⁹³ The view highlighted in *al-Hikmah* apparently had been influenced by Abduh. It is not surprising since the publication of *al-Hikmah* had been motivated by the publication of *al-Manar* in Egypt.

Legalising justice and equal treatment in polygamy practice were evident in modern Islamic family law in Malaysia. The reforms had made polygamy conditional on obtaining a court order. The law has empowered the judicial authorities to refuse permission to the husband who fails to fulfill certain requirements. It is stipulated that an application for polygamy should fulfill at least five conditions; 1) the proposed marriage is "just and necessary", 2) the applicant has the financial means to support his existing and future wife, 3) the consent of the existing wife, 4) the applicant's ability to accord equal treatment to his wives "as required the Islamic law, and 5) that the proposed marriage does not cause "*darar syarie*" (harm under shariah law) to the existing wife or wives. The law also stipulated that the proposed marriage does not directly or indirectly lower the standard of living of the existing wife and dependants.⁹⁴ The application for polygamy which fails to meet the above conditions will be refused.

Before deciding that the proposed polygamous marriage could be considered as "just and necessary" it must regard the circumstances, such as sterility or physical infirmity of the existing wife, "physical unfitnes for conjugal relations," willful avoidance of an order for restitution of conjugal rights, or insanity.⁹⁵ The requirement for consulting the existing wife was also stipulated so that the husband's ability could be determined that is whether it fulfills the stipulated condition.⁹⁶ The requirement "just and necessary" meant that, the husband who intends to contract polygamous marriage need to show that such marriage is "necessary", and it is also "just" for him to do so. These two elements

⁹³ *al-Hikmah*, 26 March 1936, p. 476.

⁹⁴ Section 23, The Islamic Family Law Act (Federal Territories), 1984.

⁹⁵ Section 23 (4) (a), The Islamic Family Law Act (Federal Territories), 1984.

⁹⁶ The provisions in Islamic Family Law Act (Federal Territories), 1984 were followed by other states in Malaysia, except in Kelantan, Terengganu and Perak.

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should be proved simultaneously to enable the husband to be considered as qualified to contracte polygamous marriage.

The objective of rendering the power to the Court to decide one's polygamous marriage is in fact to ensure that the husband is in a position to carry out his responsibilities and has sufficient means to support the existing and future wife and the children. Polygamous marriage that is contracted without the court permission shall be liable to a fine or/and imprisonment.⁹⁷

The approach by the reformists regulating restricted polygamous marriage were sometimes challenged as being too radical or deemed to be a modern innovation and an act of veering away from the tradition of Islam. In effect, the fifth requirement namely that the proposed marriage should not, directly or indirectly, lower the standard of living enjoyed by the man's existing wife or wives and other dependents was removed in 1994.⁹⁸ This move had been criticised by women's groups namely, *Sisters in Islam* (SIS) which had been active in lobbying the government for an egalitarian Islamic family law in Malaysia. SIS had submitted a memorandum to the government, requesting a strict implementation of the law regarding polygamy and criticising that the existing law had not been handled properly, contradicting with the spirit of the reformation of Islam Family Law enacted in 1980s.⁹⁹

Religious departments in certain states were criticised for ignoring many of the restrictions and conditions contained in the existing enactments Which had made polygamy easily accessible to men. It was reported that, Shariah Court of the state of Perlis had allowed every application for polygamy since 1993.¹⁰⁰ There was also criticism towards the

⁹⁷ Section 123, The Islamic Family Law Act (Federal Territories), 1984.

⁹⁸ Nik Noriani Nik Badli Shah, *Marriage and Divorce: Law Reform Within Islamic Framework*, International Law Book Services, Kuala Lumpur, 2000, p. 74.

⁹⁹ Memorandum on reform of the Islamic Family Laws on Polygamy submitted to the Prime Minister, Datuk Seri Dr Mahathir Mohamad on 11 December 1996 by Sisters in Islam and Association of Women Lawyers. <http://www.sistersinislam.org.my/memo/111296.htm> as retrieved on 2 April 2008.

¹⁰⁰ Nik Noriani Nik Badli Shah, *Marriage and Divorce*, pp. 73–74.

amendment of Islamic Family Law which had removed the restriction on the registration of polygamous marriage without the court order, and allowed it to be registered even though it was contracted without the permission of the court, as long as it was in conformity with Islamic law.¹⁰¹ The moves were strongly opposed by *Sisters in Islam* who maintained that these amendments were retrogressive and contrary to the spirit of the original reforms, and demanded that they should be revised if the authorities believed that Islam stood for justice and fair treatment for all.¹⁰²

The amendment in 2000s, with the objective of protecting existing wife/wives in polygamous marriage and to standardise the statutes in all states in Malaysia is to insert a new provision. It is provided that the court shall have the power to order the division of matrimonial property (*harta sepencarian*) upon application either by a husband or a wife.¹⁰³ It means that, either a husband or a wife could apply for the division of any assets acquired by them during the marriage by their joint efforts or sale of such assets and the division of the proceeds of the sale.

This provision was strongly criticised by SIS as discriminatory to women. It was claimed that irresponsible husbands could abuse this provision for their advantage instead of securing women's welfare. This provision enables the husband to claim the property which was given to his existing wife as matrimonial property. This is unjust to the wife and the children.¹⁰⁴ SIS also criticized the changes of the word from "just and necessary" to "just or necessary" to make it easier for the husband to prove his ability to contract a polygamous marriage. The former requirement needs the husband to prove the two elements "just" and "necessary" simultaneously. However, the word "just or necessary" meant that the husband will only need to show to the Court that the proposed marriage is "necessary" for him, and need not bother as to

¹⁰¹ Mohammad Hashim Kamali, *Islamic Law in Malaysia*, p. 68.

¹⁰² Sisters in Islam, "Ideal State of Marriage in Islam", *The Star*, Kuala Lumpur, 22 October 1996, p. 19.

¹⁰³ Section 23 (10), The Islamic Family Law Enactment of Kelantan No 6/2002; Section 23 (9), The Islamic Family Law (Amendment) Bill 2005.

¹⁰⁴ Memorandum to Ahli Dewan Negara to Review the Islamic Family Law (Federal Territories) (Amendment) Bill 2005, <http://www.sistersinislam.org.my/memo/08122005.htm> as retrieved on 16 April 2008.

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whether it is “just” or not for him to practice polygamy.¹⁰⁵ In practice, the Court will refuse the husband’s application to contract a polygamous marriage if he is unable to prove to the Court that he could be just.¹⁰⁶

Women’s organisations had proved to be influential in their demands as the government had agreed to withdraw and review the Islamic Family Law (Federal Territories) Amendment Bill 2005. As a result, a committee was set up to review the Bill. The provisions which were considered as discriminating to women were finally removed when the Bill was passed in 2006.¹⁰⁷ However, such provisions are still an forced in other states which had already passed their respective Bills in early 2000s.

Access to Divorce for Husband and Wife

All the leading schools of Islamic law, including Shafi’e recognised the right of husband to *talaq* (repudiation). Divorce is permitted as a matter of necessity for the avoidance of greater evil which may result from the continuance of the marriage.¹⁰⁸ Although there is a Hadith which states, that “Talaq is the most detestable of all permissible things in the eye of God,”¹⁰⁹ and Quranic text which states that if divorce is unavoidable then “release the wife with kindness.”¹¹⁰ These directives were not properly honored by the husbands. Although, it was considered morally reprehensible for a husband to divorce his wife without just cause, the *talaq* uttered was considered legally valid.

Due to unrestricted rights of husbands to divorce the wives, it was a

¹⁰⁵ Ibid.

¹⁰⁶ *Aishah vs Wan Mohd Yusof*, Jurnal Hukum, Vol. 7, p. 152. It was held that, while the defendent fulfilled the condition “necessary,” but he failed to fulfill the condition for “just.” His application to practice polygamy was rejected.

¹⁰⁷ Section 23 (9), Section 23 (3) and 23 (4), The Islamic Family Law (Amendment) Bill 2005 were removed from The Islamic Family Law Act (Federal Territories), 1984 (Amendment) 2006.

¹⁰⁸ Ahmad, K.N., *Muslim Law of Divorce*, Islamabad, 1978, p. 4.

¹⁰⁹ Abi Dawud, *Sunan Abi Dawud*, Dar Ibn Hazm, Beirut, 1998, p. 334.

¹¹⁰ The Quran; al-Baqarah 2: 229.

normal practice among the Malays to divorce the wife without her consent and their knowledge.¹¹¹ Thus, it was not a surprise that the divorce rate in certain provinces in Peninsular Malaysia during 1950s was probably among the highest in the world, and that at least one-third of all Malay marriages were destined to end in divorce.¹¹²

In Egypt, the earliest modernist, highlighting the moral corruption of the husband who had taken divorce lightly was Qasim Amin, in his book *Tahrir al-Mar'ah* in 1899. He criticised their irresponsible manner, for making a joke with the *talaq*, and pronounced it nonchalantly, without much consideration just for the sake of threatening the wife during arguments.¹¹³ It came to the point that a man swears by his divorce while eating, drinking, laughing, and quarrelling and getting drunk while his wife at home was unaware of what he and his associates were doing.¹¹⁴

He believed that divorce should be regulated to correct the conditions of the corrupted practices among the society. Thus, it was proposed to the government that; 1) every husband who wishes to divorce his wife should come before an Islamic judge or an authorised official, and inform him of the split between him and his wife; 2) the judge or official must remind the husband of the consequences of divorce and its position as the most detestable of all permissible things, and instruct him to wait for a period of one week before going ahead with the decision to divorce his wife, 3) if after one week he insists to continue with the divorce, then an arbitrator from both sides should be appointed, 4) if the arbitrators fail to reconcile the couple, they should report the matter to the judge or official, who then could permit the husband to divorce the wife, and 5) divorce should only be considered legal if it occurs before a judge or

¹¹¹ Describing this phenomenon among the Malays, Gordon stated that "A woman waiting in her kampong (village) for the return of her husband may well receive her certificate of divorce through the mail, with no reasons stated, no evidence, no procedure, no appeal." Shirley Gordon, "Marriage / Divorce in The Eleven States of Malaya and Singapore," *Intisari*, Vol. 2, 1964, p. 25.

¹¹² It was stated that the divorce rates in 1950s in Kelantan and Terengganu were probably the highest in the world. Gavin W. Jones, "Malay Marriage and Divorce in Peninsular Malaysia: Three Decades of Changes", *Population and Development Review*, Vol. 7, No. 2, June 1981, p. 261.

¹¹³ Qasim Amin, *The Liberation of Women and The New Women*, pp. 95–96.

¹¹⁴ *Ibid.*, p. 98.

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authorized official, in front of two witnesses. The only acceptable proof of divorce will be a formal document.¹¹⁵ He believed that, the introduction of an arbitration and advice of a judge, with not breach the rights of husbands to divorce, but in fact it will become a means for deliberation and reflection for the husbands before making discussion the matter. deciding the matter.¹¹⁶ It will also reduce the rate of divorce in Egypt.¹¹⁷

The method of *takhayyur*, selection of opinions among four *sunni* school of thought was proposed by Amin, so as to make divorce law more accessible to women and also less burdensome for them. The mixed application of Hanafi school of thought as well as other schools of thought, namely Maliki was proposed. To make divorce also accessible for women, he suggested the opinion under Maliki school of thought to be implemented, which gives women the right to present a legal appeal to the judge in any case that the husband may harm her, which was prohibited under Hanafi school of thought. He also believed that women should stipulate her right to initiate divorce whenever she wishes or under certain specified conditions which are accepted by all schools. According to him, this approach will bring about more just and humane condition for women.¹¹⁸

Abduh, who presided as the Grand Mufti of Egypt, had proposed a few methods based on the Maliki school of thought for divorce to circumvent the problems that arose in society especially among the poor. He proposed that, the judge could pronounce that the wife is divorced from the husband for his inability to support her adequately, whether because of his economically poor condition, sickness or imprisonment for a period that is deemed to harm the wife, or because of his absence for a certain limit of time without leaving his wife adequate support. He also proposed for the appointment of arbitrators of good reputation from both sides in the case of *shiqaq* (quarrel) between the spouses. If the arbitrators were able to reconcile the couple according to the prescribed

¹¹⁵ Ibid., p. 97.

¹¹⁶ Ibid., p. 97.

¹¹⁷ In 1898, there were 120 000 marriages and 33 000 divorces, which had been estimated that overall, one out of four marriages ends in divorce, Ibid., p. 98.

¹¹⁸ Ibid., p. 100.

methods, their arbitration would be acceptable. Otherwise, they should recommend a divorce or submit the matters to the judge. The judge would make the decisions based on their recommendations. The divorce is one *talaq* and irrevocable. The wife could also appeal to the judge for divorce, if the husband harms her, and if such harm was not legally permissible, such as desertion without legal reason, beating, and cursing without legal reason. The wife must prove these things by legal methods.¹¹⁹ Abduh's proposal which was primarily based on Maliki's opinion was approved by al-Azhar.¹²⁰

His proposal however, was not codified as the binding law at that time. The Feminist Union which shared his opinion felt that a husband's unilateral right to repudiate his wife without giving any reasons, even without his wife's presence or witnesses at any time and any place simply by uttering *talaq* among other things was a potential threat to all women. The life of many women and families were disrupted by divorce.¹²¹ They demanded that men be required by law to divorce their wives in front of the *qadi* and only for serious reasons, and before permitting divorce, the *qadi* should oblige both parties to submit to the arbitration. Their demand was not incorporated into subsequent draft of the code of personal status.¹²² However, in 1929 the men's right to divorce was controlled whereby divorce pronounced by a man who was intoxicated or under duress was invalid, and irrevocable divorce could not be effected at one time by a word or gesture indicating triple repudiation.¹²³

The same situation applied to women in Malaysia before the law reforms took place in early 1960s, when divorce was also not made easily accessible to women. Women who were married to Indians from the Indian subcontinent as second wives for instance, might be waiting for the return of their husbands who went back to the first wives in India for the rest of their lives and were unable to dissolve the marriage. It was a

¹¹⁹ Ibid., pp. 202–203.

¹²⁰ The Rector of al-Azhar at that time was Salim al-Bishri, who sent the letter to the Grand Mufti of Egypt, Muhammad Abduh. Ibid., p. 203.

¹²¹ Badran, *Huda Sha'arawi and the Liberation of the Egyptian Woman*, pp. 221–222.

¹²² Ibid., p. 223.

¹²³ Ibid.,

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great suffering for women. Although there were prospective males available and willing to give them security to them economically and socially by marrying them, but that was not possible. They were unable to contract other marriages for they were not legally divorced. Although there was *fasakh* (annulment) which could be obtained by the women, however it was not easy. It required specific conditions which needed to be fulfilled before the *fasakh* could be granted by the *Kadis*.

The first major step regulating divorce was introduced in Singapore Muslims Ordinance 1957, which provided that *Kadis* were only to register divorces if both parties consent to the divorce. If one of the parties do not agree to the divorce, the application had to be decided in the *Shariah* Court, which would hear both parties and make such order as is lawful under Islamic law.¹²⁴ In 1960, further steps were taken where all cases would be referred to an arbitration or conciliation before divorce is determined. It was reported that, these legal and administrative steps have been successful in reducing the divorce rate.¹²⁵ Similar reforms had also been introduced in other states in Malaysia in 1960s and later on maintained in the reformation of Islamic law enacted in 1970s–1980s and 2000s.

Although the law reforms, had not deprived the husband's rights to divorce, however had subjected those rights to certain limitation. As opposed to the husband's absolute right to divorce previously, this right had been curtailed, whereby the husband had to give reasons for requesting the divorce. The procedural restrictions on the exercise of divorce by the husbands basically were based on Quranic teachings which were against unrestricted exercise of the right of divorce. There were ample warnings against unjust exercises of divorce. According to Ahmad Ibrahim (the main figure in modernising Islamic Family Law in Malaysia and Singapore), the divorce law reform manifested an attempt

¹²⁴ Singapore Muslim Ordinance 1957, section 12 and 21, quoted in Mehrun Siraj, "Recent changes in the administration of Muslim family law in Malaysia and Singapore," *The International and Comparative Law Quarterly*, Vol. 17, No. 1, 1968, p. 225.

¹²⁵ M. Siraj, "The shariah court of Singapore and its control of the divorce rate," *Malayan Law Review*, Vol. 5, 1963, p. 148; Also *ibid.*, M. Siraj, "Recent changes in the administration of Muslim family law in Malaysia and Singapore," p. 225.

at implementing the Quranic requirement, addressed to the husband of “kindness and equitable treatment” that he must grant to his estranged wife as required in the Quranic teachings. To prevent the husband from divorcing the wife unjustly that was deemed injurious to the wife, it was required that all pronouncements of *talaq* should be made before the Shariah Court and with the permission of the court.¹²⁶

Under the new law, a husband as well as a wife is entitled to apply for the divorce, and both are required to give sufficient reasons supporting their applications.¹²⁷ The husband who pronounced *talaq* outside the court without its permission should be liable to fine and punishment.¹²⁸ The *talaq* uttered outside the court, although considered in breach of the law will also be considered by the court, to be determined whether it is valid according to Islamic law or not.¹²⁹

Apart from that, access to divorce for women is also possible with the provisions stipulated in the marriage contract that had been proposed by Amin in 1899.¹³⁰ It was regulated that the husband must utter the *taklik* (stipulation)¹³¹ during a marriage ceremony which entitled the wife the

¹²⁶ Ahmad Ibrahim, “Justice in the Shariah Court”, In Aidit Ghazali (ed.), *Islam and Justice*, Institute of Islamic Understanding Malaysia, Kuala Lumpur, 1993, p. 101.

¹²⁷ Section 47, The Islamic Family Law Act (Federal Territories), 1984 ; Section 47, The Islamic Family Law Enactment of Kelantan No 6/2002

¹²⁸ Fine up to RM1000 or a maximum imprisonment of six months. Section 124, The Islamic Family Law Act (Federal Territories), 1984.

¹²⁹ Ahmad Ibrahim, “Justice in the Shariah Court”, p. 101.

¹³⁰ Qasim Amin, *The Liberation of Women*, p. 98. However, the writer does not suggest that Qasim Amin was responsible for this development in Malaysia.

¹³¹ The declaration by the bridegroom states that, I [name] solemnly declare that I have made taklik as follows:

Every time I leave my wife [name] for a period of four months continuously;

- (1) or that I do not give her the compulsory maintenance for a period of four months or more;
- (2) or that I cause hurt to her person;
- (3) or that I neglect her for four months, my wife can complain to any *Kadi* or *Shariah* Judge which if found to be true by the *Kadi* or *Shariah* Judge I shall be deemed to have divorced her by one *talak*; and every time I *rujuk* her without her consent then I shall be deemed to have divorced her by another *talak*.

right to a divorce on the grounds that the husband does not pay her maintenance for a period of four months or more, or assault her physically. If the husband breaches the stipulations prescribed in their marriage agreement then the wife could apply for a divorce to the *Kadi*. If it was confirmed that he did breach the condition then, she was entitled to one *talaq*. Women could also apply for divorce by the method of *khuluk*¹³² and *fasakh*.¹³³

The amendment of divorce law in 2005 which had extended the right of *fasakh* towards the husbands has been criticised by women's organisations. They argued that husbands had already possessed the absolute right of *talaq* to divorce their wives. They criticized the tendency of the authorities regarding conflict of views in certain rules to adopt views which are more advantageous to the husbands.¹³⁴ Their suggestions to maintain the right of *fasakh* only to the wife were accepted.¹³⁵

The Islamic Family Law Enactment of Kelantan 1983, Fifth Schedule, Form 3F (Marriage Certificate).

¹³² The wife applies to the *Kadi* for a divorce. The judge then summons the husband to the court and asks whether he agrees to divorce the wife or to divorce by redemption Section 49, The Islamic Family Law Enactment of Kelantan No 6/2002.

¹³³ The wife could obtain an order for the dissolution of marriage (*fasakh*) under Section 52, IFL 1984 on the grounds; a) the husband whereabouts have not been known for a period of more than one year ; b) husband's failure to maintain the wife for a period of three months; c) husband's imprisonment for a period of three years or more; d) the husband's failure to maintain marital obligation; e) husband's inability to perform sexually such as impotence that was present at the time of marriage without the knowledge of the wife; f) insanity, or leprosy, vitilago and venereal disease for two years; g) unconsummated child marriage that is repudiated by the wife before attaining 18 years old; h) habitual assault and cruelty of the husbands and his indulgence in immoral activities or attempt to force her to lead an immoral life, and also violation of the wife's property rights. Section 52 The Islamic Family Law Act (Federal Territories), 1984; Section 53, The Islamic Family Law Enactment of Kelantan No 6/2002.

¹³⁴ Memorandum to Ahli Dewan Negara to Review the Islamic Family Law (Federal Territories) (Amendment) Bill 2005, <http://www.sistersinislam.org.my/memo/08122005.htm> as retrieved on 16 April 2008.

¹³⁵ Section 52 (1), The Islamic Family Law Act (Federal Territories), 1984 (Amended in 2006); However, the extension of *fasakh* towards the husband

CONCLUSION

The Egyptian reformists' thoughts which had been transmitted through Azharites had been among the major factors in shaping the perspective of Malay society towards gender justice. The works of the reformists advocating the liberation of women using Islamic arguments and judgment were widely referred to and translated into the Malay language and had gained support from the public. Other factors such as the interactions with western values and norms, as well as increasing awareness towards women's position and role in society had created the diversity of thoughts among the Muslims regarding the questions of gender and justice. Different groups with different ideas such as the conservative Muslims, reformists, and Islamic feminists had been engaged in arguments as to what constitutes the right interpretation of gender justice in the debates regarding these issues, and these activities had contributed much to the reformation of Islamic family law in Malaysia.

Considering the attitudes of the Malays who placed high regard on Islam in their socio-cultural lives, the arguments which were based on Islam could attract support as well lively debates on any particular issue. Hence, it is not surprising that those who are comfortable with western moral values and egalitarian concept of justice and equality could use that framework to demand changes in Islamic family law. An increasing number of feminist scholars have turned to Islamic texts to find solutions to women's problems and issues. Argument within and Islamic framework is perceived as the only terrain on which legitimate effective discourses can be developed to fight for justice and equality.

Although Islamic feminists had proved to be influential in demanding women's rights, however the voices of moderate reformists have been considered during the reformation of Islamic family law which sought to create an acceptable law that was appropriate to the circumstances of the 20th century. The existing Islamic family law reform which was based on the methods of *takhayyur* and *talfiq* were claimed by Islamic

had been applied in other states which had already passed their respective Islamic family law early 2000s, before such issues were raised by women's organisation in 2005. See Section 53, The Islamic Family Law Enactment of Kelantan No 6/2002.

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feminists as not sufficient to bring about gender justice within Islamic family law. They hoped for more radical and positive changes in the law to accommodate concepts such as gender equality and human rights. The continuing debates regarding gender justice especially between Islamic feminists and moderate reformists within the government and a number of academicians and religious scholars responsible with the reformation of Islamic law had created hopes for positive changes for securing gender justice, not just for women but also for men according to the spirit of divine injunctions.

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