

The Malaysian Shari'ah Courts: Polygamy, Divorce and the Administration of Justice

Raihanah Abdullah
Soraya Khairuddin
University of Malaya, Malaysia

Abstract

The Malaysian *Shari'ah* Courts are integral to the administration of justice for Muslims.¹ This can be seen especially in matters pertaining to personal laws as provided under the Malaysian Federal Constitution. However, women in particular, face various problems at the *Shari'ah* Courts when seeking to secure their rights as provided for under the Islamic Family Law Enactments. Do the provisions in the Enactments cause this situation or is it their implementation? The *Shari'ah* Courts, on the other hand, have made significant improvements in their administration, and the lingering perceptions of their inefficiency and biases may be simply an overhang from when they were struggling to remake themselves. This article attempts to clarify the situation. The analyses are based on the judgments and orders of selected *Shari'ah* Courts in order to gain an insight into how *Shari'ah* judges interpret written provisions and implement the law.

Key words

Shari'ah courts, Muslim women in Malaysia, polygamy, divorce, justice

Introduction

Western colonization and the encroachment of its political and legal norms had a profound impact on the traditional practices of Muslim lands. In particular, the once unassailable position of the *Shari'ah* weakened, and legal reform, once initiated, spread rapidly throughout the Middle East to India, Pakistan, and beyond. This momentum led to greater codification of the *Shari'ah*, increased substantive change, and the

¹ *Shari'ah*: Islamic law.

prediction that *Shari'ah* Courts using Islamic law would cease to exist (Anderson, 1959), and their jurisdictions would be combined in National courts as what happened in Egypt in 1955 (Hill, 2003). However, in Malaysia, such unification has not happened; on the contrary, the *Shari'ah* Courts remain separate from the civil ones, and have even seen an increase in their jurisdiction over Islamic matters. Admittedly, women have faced various problems when seeking justice at the *Shari'ah* Courts in securing their rights as provided for under the country's Islamic Family Law Enactments. Accordingly, the courts have attracted criticism, and they have responded with positive measures. Regardless, perceptions of their inefficiencies and biases linger on, but these, as will be shown, are not always justified.

Thus, this article examines the changes to the Malaysian *Shari'ah* Court and looks at how judges dispense justice in cases of polygamy and divorce based on the Islamic Family Law Enactments.

As a side-note, Malaysians an independent federation made up of 14 states. Twelve are in Peninsular Malaysia: Selangor, the Federal Territories, Melaka, Pahang, Kelantan, Terengganu, Perak, Johor, Negeri Sembilan, Kedah, Perlis, Pulau Pinang, and two are in East Malaysia: Sabah and Sarawak. The administration of *Shari'ah* is a state matter; therefore, each has its own Islamic enactments including Islamic family law.

The Coming of Islam to Malaya

Most historians agree that Islam arrived in the Malay Archipelago around the 13th century and reached Malacca a century later (Hall, 1970), where the Sultanate soon adopted Islamic Law. During the same period, two types of Malay Customary Laws governed the Malays: *Adat Papatih* and *Adat Temenggung* (Ahmad, 2007). The former is a unique matrilineal system of kinship that allows women to own and control ancestral property such as land and houses. It is more of a collective ownership derived from the clan rather than an individual one, it is different from individual ownership under Islamic inheritance laws.

During the era of the Sultanate, the *Undang-undang Melaka* was used, which is a legal digest of Islamic Law and local custom on family, contract, criminal and procedural matters. The substantive law was based on *Abu Shuja's al-Taqrīb* and *Ibn Qassim al-Ghazzi's Fath al-Qarīb* (Liaw,

1976), both *Shāfi'i* legal texts.² Reference is made to these legal texts because Islamic Law in Malaysia is predominantly based on the *Shāfi'i madhhab*.³ However, the *Undang-undang Melaka* is not considered a legal document as defined by modern legislation simply because it was not passed by a legal institution. Therefore, its importance has been downplayed, and it has been considered an ordinary document portraying Malay life and society that was ruled by a mixture of Islamic Law and local custom (Wilkinson, 1914).

The Displacement of Islamic Law

The position of Islamic law was severely tested when the British came to Malaya in the eighteenth century. They introduced legislation and statutes based on English principles and established a court system similar to that back home. Consequently, these changes marginalized Islamic Law within the country's legal system. As the historian R. J. Wilkinson put in, "There can be no doubt the Muslim Law would have ended up as the law of Malaya had not British Law stepped in to check it (Wilkinson, 1914)."

How did the British achieve this? Firstly, they signed various political treaties with Malay rulers, which provided that they must receive British advisors and follow their advice in all matters except Malay religion and custom, which included family matters, inheritance and *waqf*.⁴ Non-interference in these matters is illustrated in the case of *Choa Choon Neoh v. Spottiswoode*, 1 KY 216 (1969), which said that English Law could not be fully accepted if it did not suit society. Therefore, legislation concerning criminal, procedural and contract law was based on English principles whereas Family Law and Inheritance remained within the ambit of Islamic law (Ibrahim, 1987). The almost total displacement of Islamic Law with English common law severely limited the position of the former.

² This refers to a school of jurisprudence named after Muhammad ibn Idrīs ash-Shāfi'i (769-820 CE), a towering figure in Islamic jurisprudence.

³ *Madhhab*: a school of jurisprudence. There are four in the Sunnī tradition that have been preserved until today. The other three are Hanafī, Maliki and Hanbalī.

⁴ *Waqf*: Islamic Endowments for charitable purposes.

Secondly, the British controlled the court administration. As a result, the power of the *Qadi* Court (now known as *Shari'ah* Court) was restricted and its authority reduced as it was made inferior to the civil courts. Any parties who were dissatisfied with the decision of the *Qadi* Court could appeal to the Magistrate or High Court.

The jurisdiction of the *Qadi* Court was also limited. The second part of the Mohammedan Marriage Ordinance 1880, provided that the *Qadi* (Islamic judge) held jurisdiction only on matters pertaining to marriage and divorce but not those concerning property and criminal matters. In the early 1900s, several amendments were made that extended the *Qadi*'s jurisdiction, to property cases such as claims for *mut'ah* (consolatory payment upon divorce) and *mabr* (dower).

By the turn of the 20th century, English law and the administration of the courts based on such principles were firmly entrenched. On the other hand, Islamic law was confined to the personal lives of Muslims and had little impact on other areas. However, later cases would affirm the dominant position of Islamic Law but only in family matters. For instance, the court in *Shaik Abdul Latif and others v. Shaik Elias Bux*, 1 FMSLR 204 (1915) held that "the only law at that time applicable to Malays was Mohammedan Law modified by local custom." Furthermore, the Court of Appeal confirmed this in *Ramah v. Laton*, 6 FMSLR 128 (1927) and held that the *Shari'ah* was not a foreign law but the law of the land. Despite these judgments, Islamic law has never recovered its former position and remains limited in its jurisdiction till today.

A Brief History of the Malaysian *Shari'ah* Court

In 1948, the *Qadi* Court separated from the Federal court system as provided for under the Courts Ordinance and a year later the civil court separated from the *Qadi* Court, which was then established with the passing of the States Islamic Administration Enactments. Through this Enactment, the *Shari'ah* Court was considered a state court. However, the Federal Constitution limits Islamic Law only to personal matters, such as betrothal, marriage, divorce, maintenance, custody and *zakat*, of persons professing the religion of Islam.⁵ As a result, the jurisdiction of the *Shari'ah* Court is also limited to these areas. Furthermore, it does not have any jurisdiction over non-Muslim parties.

The *Shari'ah* Court's criminal jurisdiction covers offences committed by a Muslim, which are punishable under any written law passed by Parliament. Punishment for criminal acts as provided for under the *Shari'ah* Court Act 1965 used to be relatively low with a maximum of six months imprisonment or a fine not exceeding RM1 000 or both, compared to the Magistrate's court. However, the amendment of this Act in 1984 raised the penalties to a maximum of 3 years imprisonment or a fine of RM 5 000 or both. Under the Act, the offences punishable with the maximum penalties are those related to sexual impropriety such as adultery, incest or *khalwat*.⁶ These penalties are significantly less than those prescribed by *Hudud* and *Qisas*.⁷

Before 1988, the *Shari'ah* Courts occupied an inferior position in relation to the civil courts. After all, its jurisdiction and power had been severely limited after decades of British rule that had eroded the position of the *Shari'ah* by controlling the power of legislation and introducing English law (Ibrahim, 1997). Furthermore, in some matters, there was a jurisdictional overlap between the two courts, and in the case of conflicting judgments, those of the civil courts would prevail.

The *Shari'ah* Court System

The High Courts of Malaysia, which are the general courts of the country, have residual powers over every subordinate court in Malaysia. In several cases decided before 1988, it overruled the decisions made by the *Shari'ah* Court (Borhan, 1998). Eventually, this untenable position resulted in the Amendment of Article 121 of the Federal Constitution, which precluded the High Courts and its subordinate courts from having jurisdiction over any matter that came under the jurisdiction of the *Shari'ah* Courts. (Ibrahim, 1993) This worked to safeguard the decisions

⁵ *Zakat* is a tax on income and wealth, and is one of the 5 articles of Islamic worship; the others are the Testimony of Faith, Prayer, Fasting in the month of Ramadhan and Pilgrimage to Mecca (Hajj).

⁶ *Khalwat* means in proximity and refers to an unmarried man and woman who is not within the prohibited degrees of marriage and are alone together in a private place.

⁷ *Hudud*: Offences and punishments fixed by the *Quran*.
Qisas: Retaliation.

of the latter from conflicting decisions of the former (Ibrahim, 1992).

Article 121 of the Federal Constitution provides, *inter alia*, "The courts decreed (1) shall have no jurisdiction in respect to any matter within the jurisdiction of the *Shari'ah* Courts." Although many scholars welcomed the constitutional amendment and saw it as the first step towards a better position for the Malaysian *Shari'ah* Courts, the High Court still possesses the power to determine the jurisdiction of a particular case (Ahmad, 2007). The Federal Court, in the case of *Sukma Dharmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia and Anor*, 2 MLJ 241 (1999) held that,

... We have come to the conclusion that the expression 'jurisdiction of the *Shari'ah* Courts' refers to the 'exclusive jurisdiction' of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code and the *Shari'ah* Criminal Offences (Federal Territories) Act 1997, then the courts referred to in article 121 (1) will have jurisdiction to try such an offences (sic). It is only in respect of offences under the Act that a *Shari'ah* Court may have exclusive jurisdiction. For example, the offence of adultery, which is prescribed as an offence under the Act has no equivalent in the Penal Code or other federal criminal statute. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in the *Shari'ah* Courts.

Weaknesses in the *Shari'ah* Court System

The government has taken efforts to improve the position of the *Shari'ah* Courts in Malaysia not only in its jurisdiction but also its personnel, hierarchy and infrastructure. Furthermore, legislation was introduced to consolidate the Islamic Judiciary system. In 1996, the chairman of the Technical Committee of Civil and *Shari'ah* Law suggested that the *Shari'ah* Court be upgraded to a Federal *Shari'ah* Court in order to discard its second-class image. Despite these efforts, the *Shari'ah* Courts still face public criticism. Inefficient administration, unprofessional personnel, gender-biased judgments and a large backlog of cases are some of the

common complaints regarding these courts that give rise to negative perceptions.

Preliminary research has shown that these perceptions are a result of the problems women face when dealing with the *Shari'ah* Courts. There have been complaints of unfair treatment and having to wait several years for court judgments and orders, (Mohamad, 2000) not only in cases involving divorce (Hassan, 1986) but also custody, child support and ancillary rights. Certainly, this has caused them great hardship and emotional strain.

In some states, family matters represent the highest number of cases registered at the *Shari'ah* Court. Divorce proceedings can be lengthy and may take more than 2 years to settle. A large backlog of cases and frequent adjournments are partly to blame; however, the latter is integral to the whole process. By adjourning the divorce for a certain period, ample time is provided for both parties to reconsider their decision to end the marriage. Indeed, the *Qadiis* duty-bound to facilitate reconciliation before divorcing a couple (Hassan, 1986). Nonetheless, research in the northern state of Kedah demonstrates in many cases that the wife may be granted a divorce after only three hearings, which take about seven to eight months (Hassan, 1986).

Likewise, other research comparing the length of time taken for divorce proceedings between the Civil courts and the *Shari'ah* Courts reveals that cases were concluded much faster in the latter (Ismail, 1999). On average, it took only six months to settle a divorce petition in the *Shari'ah* Courts provided both parties were present during the hearing, compared to about nine and a half months in the civil courts.

Furthermore, research done in the *Shari'ah* Court of the northern state of Perlis, shows that most of the sixty divorce cases chosen at random were settled in only one or two hearings (Abdullah, 2001). In some cases, the *Qadi* even settled the divorce cases during mention of the case. However, there was a trade-off. Although these women were granted a quick divorce, they had to choose between this and their ancillary rights after divorce. In most cases, they decide to renounce their rights, and by doing so, the matter was settled quickly and inexpensively.

On one hand, the media and NGOs complain of long delays, and on the other, research shows that divorce hearings in some states are settled expeditiously. These findings provide valuable information on divorce

proceedings and balance the negative discourse surrounding the *Shari'ah* Courts. However, further studies are needed to obtain a detailed and accurate picture nationwide.

Another factor contributing to case backlogs is the unequal distribution of divorce cases among state judges. Detailed research has shown that the number of judges and courts is inadequate in most of the states (Kamaruddin, 1999). For example, Kedah had four judges covering eleven administrative districts, which recently was increased to seven, still below what would be required to administer justice efficiently. Furthermore, judges only hear cases on certain days of the week, and if they take leave, the situation inevitably worsens.

Zaleha has also pointed out that there is a relationship between rural areas and case backlogs. For one thing, the *Shari'ah* Courts in the rural districts have fewer cases than those at the central level, and these cases are disposed of more efficiently.

Furthermore, *Shari'ah* lawyers also contribute to delays by frequently applying for postponements. This occurs especially where the parties have just appointed them, thus allowing more time to study the case before the actual hearing starts. At other times, they are unable to cope with handling several cases in different courts all on the same day, especially where the distance between the different courts precludes a punctual arrival. In addition, some lawyers who are both advocates and solicitors give priority to their cases in the civil courts.

Allegation of Gender-Bias in the Courts

In the mid-1990s, proposals were made to appoint women as *Shari'ah* judges (Othman, 1988). So far, no action has ensued although the issue has received serious debate. Women's groups have urged that women be appointed to hold positions in the *Shari'ah* Courts, which they contend consistently mete out judgments unfair to women. Therefore, the appointment of women judges might correct this bias. In their memorandum to the Prime Minister, they say, "The best of laws designed to protect women will remain ineffective if prejudicial social attitudes towards women prevent them from getting access to the rights granted to them under the law (Sisters in Islam, 1996)." Furthermore, "All *Shari'ah* judges, religious officials and counselors must undergo gender

sensitization training to enable them to better serve their clients, the majority of whom are women. Only then will the *Shari'ah* Courts engender confidence among women that they can be assured of justice within the system." Finally, they suggested appointing women as *Shari'ah* judges in order to settle the gender bias issue.

Regardless of the merits of such proposals, there appears to be some confusion regarding the role of a *Shari'ah* judge. Underlying these claims and suggestions is the misconception that cases tried by a woman judge would be decided differently from that of a man. However, the Malaysian *Shari'ah* is heavily codified and does not allow a judge to "embark on a frolic of his (or her) own." After all, the *Shari'ah* Court's decisions are made in accordance with the law and the evidence presented. The judge, male or female, must abide by the rule of law. The gender of the judge is not the only reason for court inefficiency or bad judgments. Assumptions that simply adding more women judges would result in woman-friendly judgments and end gender bias, perceived or actual, are simplistic. It is not the question of gender but of understanding the current needs in solving problems faced by Muslim women in the *Shari'ah* Courts. Nevertheless, appointing women knowledgeable in Islamic Law and well trained in court procedures and current Malaysian legislation should be regarded as a means to solving the shortage of judges.

Most of the approximately 120 *Shari'ah* judges are men. Only one woman holds a high position as Chief registrar of the Selangor *Shari'ah* High Court. In December 2008, she was promoted to the position as Director (Training section) at the Department of *Shari'ah* Judiciary Malaysia. Therefore, women *Shari'ah* legal officers hold the administrative posts of research officer, assistant registrar and *sulh* officer.⁸

Many scholars have supported the idea of appointing women as registrars or *Shari'ah* judges. Furthermore, the *Jawatankuasa Muzakarah Fatwa Kebangsaan* has agreed to appointing women as *Shari'ah* judges in property matters.⁹ In contrast, a *fatwa* issued in Terengganu in 1986 stated that "it is not valid for a woman to be appointed as a *Shari'ah*

⁸ *Sulh*: Mediation.

⁹ National Fatwa Council Committee.

judge since one of the qualities is to be a man."¹⁰ If such a difficult issue can be resolved, then it is possible that in the future, women judges will try family and property cases in the *Shari'ah* Courts.

It has been asserted that the provisions in the law itself are not the real reason for the negative image of the *Shari'ah* Court. The real problem is the administration system on which Zaleha commented: "They have adequate substantive law but due to weak and ineffective administration, the law had (sic) not managed to yield justice. Justice will not be reached if adequate protection cannot be given to women and children (Kamaruddin, 1999)."

Defining Justice

In Arabic, the meaning of justice is contained in the root word *'adl*, which has been defined as equity, justice or rectitude (Lane, 2009, p. 259). In English, equity and justice have almost similar meanings; the former is the quality of being fair and impartial while the latter is the quality of being fair and reasonable. Rectitude includes morally correct behavior or righteousness (Pearsall, 1999). From these definitions, it may be concluded that justice is more about fairness and equity rather than equality. However, there are those who differ.

A brief survey of the feminist literature on Islam shows that usually the term justice is not defined even though it is widely used and forms a central part of its discourse. Instead, it has been linked with the concept of equality in such a way as to imply an inextricable connection, as in "...there cannot be justice without equality" (Anwar, 2009, p. 14) and "They have to accept Islam as a religion of justice and therefore accept the concept of human equality (Sonbol, 2003, p. 119)."

The Malaysian Islamic family law provisions do not appear to equate justice with equality. Although men's polygamy and divorce rights have been restricted, women have not been given similar rights. Nevertheless, improving the administration of justice is an important part of the equation to ensure that women obtain their lawful rights and are not mistreated. This represents the thrust of Malaysia's legal reforms.

¹⁰ *Fatwā*: A considered opinion by a qualified scholar on a religious point of law.

Islamic Family Law Reform in Malaysia

Malaysia's reform in the 1980s produced considerable efforts to "clarify, reform and codify" (Ibrahim, 1987, p. 56) the *Shari'ah* and to improve its administration. Various high-level committees were tasked with these objectives, and with studying the experience of other countries in implementing *Shari'ah*. As a result, the *Shari'ah* Judicial system was standardized, upgraded and expanded throughout the nation and made more independent (Hamayotsu, 2003). Furthermore, Islamic family law legislation was passed at the federal and state level (Ibrahim, 1987).

These Enactments repealed the Muslim Law Administration Enactments on family matters. Their substance is largely congruent to the *Shari'ah*, particularly that of the *Shafi'i* school, but diverges sharply in matters relating to polygamy, *talāq* and minimum marriageable ages (Ibrahim, 1997).¹¹

Generally, the public supported the passing of the Islamic Family Law Enactment, and believed that it would improve the position of women, as the provisions provided under this law were more detailed than the previous enactments. However, it has been argued that the law did not do this rather it streamlined administrative aspects (Joned, 1988). In this respect, Siraj (1989) has pointed out that "The most significant development in relation to the *Shari'ah* Law has been the removal of the Family Law provision from the Administration of Muslim Law Enactment and its inclusion in a specifically enacted enactment." Othman (1985) also supported the promulgation of the law and stated that "The passing of the Islamic Family Law is a significant milestone in the progress of Islamic Law in Malaysia." The preamble of this new law states "the Act is to enact certain provisions of the Islamic Family Law in respect of marriage, divorce, maintenance, guardianship, and other matters connected with family life." Regardless of intent, the significance of this law has been framed as a struggle for women for better protection in marriage and divorce.

On the other hand, certain groups have criticized the passing of this law. They argue that these provisions contradict the principles of Islamic

¹¹ *Talāq*: Divorce.

jurisprudence and they disagree with the regulations that require polygamous and divorce applications to be made through the court. They assert that nothing in the *Qur'an* gives power to a court to restrict the husband's intention to enter a polygamous union or to divorce his wife unilaterally. Therefore, they argue that the provisions restricting polygamy and divorce contradict the teachings of Islam (Muhammad, 1998).

These are valid criticisms as law reform challenges the immutable nature of the *Shari'ah*. In addition, some provisions are based on non-*Shari'ah* legal doctrine (Ibrahim, 1992), and the restrictions on polygamy and divorce are not found in classical *fiqh* (Horowitz, 1994).¹²

To reform the laws on polygamy, the drafters had borrowed sections from the Pakistan Muslim Family Laws Ordinance 1961 (Momen, 1993). However, they do not seem to have been fazed by the denouncements and protests of the Pakistani *ulama* or the considerable debate between the modernists and traditionalists that centered around the ordinance or even that the Ordinance had to be imposed under martial law on 2 March 1961 (Momen, 1993).

In the end, the reforms of the *Shari'ah* have been in place now for more than 20 years and appear well established. A survey of the academic literature shows that the legislation is widely accepted and hardly questioned. Instead, public concern remains focused on its implementation, which has created confusion and resentment towards the *Shari'ah* Court.

¹² *fiqh*: Islamic jurisprudence.

The Implementation of Islamic Family Law: Polygamy and Dissolution of Marriage

1. Polygamy: Theological Background

The traditional consensus of the various *madhhabs* is that the Qur'an permits a Muslim man to marry up to four wives at any one time subject to certain conditions.¹³ These include issues of equity and fairness between wives and the financial capability of the man. On this last point, there has been some disagreement (Kamali, 1985). Furthermore, the existing wife's permission or agreement is not required to validate her husband's subsequent marriages. Therefore, no individual or institution, such as a court, has the authority to examine the capability of a Muslim man to enter into a polygamous marriage.

However, some Muslim jurists argued that the permission to contract another marriage has been abused by some husbands. The Qur'an in verse 129 of the same *surah* says, "You are never able to be fair and just between women, even if it is your ardent desire." This verse is a clear indication that to be equally fair to all wives is an impossible task and has been extended to mean that polygamy should be prohibited.

Scholars have discussed the issue of equity and fairness extensively (Abdullah, 2006) and the word '*ad'alah*' (justice) in the above verse "refers to justice in matters of the heart and not those within a person's control such as time, inclination and material possessions (Khairuddin, 2008)." The scholars came to such an understanding based on the following *hadith* of Prophet Muhammad (s.a.w.) who said, "O Allah! This is my division in what I own, so do not blame me for what You own and I do not own (Al-Mubarakpuri, 2003)."¹⁴ Therefore, a man has to exercise great care in dividing things that are within his control such as material things.

¹³ Verse 3 of *Surah (chapter) Al-Nisā'*, Q[4:3].

¹⁴ *Hadith*: The reported actions and sayings of Prophet Muhammad (Peace be upon him) including his tacit approval of things.

Polygamy: History of Reform in Other Muslim Countries

The early reform of family matters took place in the beginning of the 19th century, to provide Muslim wives with expanded rights to petition for divorce. This began during the Ottoman Empire when the Ottoman Law of Family Rights was promulgated and inspired other Muslim countries to pass and enforce specific legislation on family matters particularly relating to polygamy and *talaq*.

There have been several legislative reforms of the laws on polygamy in many Muslim countries (Hinchcliffe, 1970). Syria was the first country to control polygamy by empowering the court to refuse or reject any application for polygamous unions if the court was dissatisfied with the husband's financial capability in supporting his wives. In Jordan, the only legal protection against a polygamous marriage is for the wife to insert a stipulation in the marriage contract giving her the option to seek divorce.

On the other hand, the Islamic Family Law in Pakistan, Bangladesh, Malaysia, Singapore, and Indonesia have provided several conditions that the husband is required to fulfill before the court grants permission for polygamous unions (Ibrahim, 1997 Hinchcliffe, 1970; Siraj, 1989). The conditions are, among others, that the proposed marriage is just and necessary; the husband has financial ability to treat and support his wives equally; and the proposed marriage should not cause any harm to his existing wife or wives. In this context, the husband has to prove to the court that he has met the legal requirements and produce evidence such as his pay slip and witnesses to support his application.

Tunisian and Turkish personal laws, however, went further by taking the radical step of declaring polygamy invalid and a criminal offence. The reformers in Tunisia had argued that the declaration to invalidate polygamous unions is based on contemporary *ijtihad* (Hinchcliffe, 1970).

Polygamy: Reform of laws in Malaysia

The incidence of Polygamy in Malaysia is low, and according to the Malaysian Ministry of Women and Family Development, a 2000 survey demonstrated that only 15 out of 1000 marriages are polygamous. Even so, the practice carries some stigma, and a number of polygamous marriages are solemnized overseas to bypass local restrictions.

The first provisions on polygamy were enacted in the 1980s by all 14 Malaysian states, and were almost similar in their details; however, three states drew up their own provisions. The major reform present in all the state enactments was the requirement that a man intending to contract a polygamous marriage must obtain written court permission. The only differences were in the detailed conditions, or lack of, imposed on the applicant. For this, he had to prove that the marriage was just and necessary having regard to circumstances such as sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives. Also, that he had the means to support all his wives and dependents; that he would be able to treat them equally; and that the proposed marriage would not cause harm to the existing wife or wives. Hence, in Malaysia, the right to practice polygamy was no longer the unilateral prerogative of the man but a judicial decision of a *Qadī*. The significance of such a considerable deviation from the *Sharī'ah* seems to have been lost among the endless negotiations for more restrictions between the reformists and legal authorities.

The New Islamic Family Law Enactments

From 2002 onwards, 11 states have passed new enactments resulting in a uniformity of laws previously unrealized. Three states have either retained their previous enactments or have yet to gazette the new one. The new enactments of the 11 states include most of the previous provisions with some amendments and additions. These include (Khairuddin, 2008, p. 22):

1. A man wishing to marry an additional wife must submit an application stating the grounds on which the proposed marriage is just or necessary (S23 (4), Islamic Family Law Enactment of the State of Selangor, IFLA, 2003), as opposed to just and necessary in the previous enactment.
2. In addition to the applicant's existing wife or wives, the court will also summon to the hearing the prospective wife, her *wali* and other persons it feels may provide information relating to the proposed marriage, see S23 (5),

- IFLA Selangor 2003.¹⁵ Previously, only the existing wife or wives were required to attend the hearing.
3. The court may grant the permission applied for if it is satisfied that the proposed marriage is just or necessary having regard to various circumstances such as sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives, see S 23 (5) (a), IFLA Selangor 2003.
 4. Upon granting permission or ordering registration of the marriage, the court shall have the power to require a man to pay maintenance to his existing wife or wives or to order the division of jointly acquired property between the parties of the marriage, see s.23 (10) (a) and (b) IFLA Selangor 2003. This new section is not found in the previous Islamic Family Law enactments.

Other provisions include financial means to support wives and dependents, the ability to be fair, and that the marriage will not cause harm to the present wives, see s 23 (5) (b), (c), and (d) of the same enactment.

A husband who wishes to practice polygamy has to submit a specific form to the *Shari'ah* Court. It requires background information on the husband and existing wife, reasons for the proposed marriage and most importantly, whether the existing wife has been informed of the husband's intention.

Whether the wife's consent has been obtained or not is not binding on the court when deciding on an application. Upon receiving one, the court will summon the existing wife or wives to be present at the hearing, to be conducted in chambers. During the hearing, the current wife is informed of her husband's intentions and to avoid any false allegations made by him. However, in Perlis, the court summons the husband only to give testimony in support of his application. There, the *Shari'ah* Court requires the husband to bring two witnesses to support his allegation together with one *Imam* (a religious man of the village) to

¹⁵ *Wali*: Male guardian.

obtain any agreement (if any) from the existing wife. It is interesting to note that the existing wife is not required to attend the hearing, neither if she allowed to protest her husband's application. The court will grant permission for polygamy only if the husband can fulfill the conditions set out by the law, and supported by the testimony of two witnesses.

Most polygamous applications do not go to trial because the current wife usually allows her husband to marry another. The court, upon receiving this oral permission will approve the application. Generally, it does not question whether the consent is genuine or otherwise. However, the oral permission from the existing wife should be challenged since in some cases it may have been given under duress because the husband had threatened her with physical violence or divorce. Proof of this is hard to attain. In this respect, the law does not have adequate safeguards to protect the existing wife who protests against her husband's polygamous intentions.

Polygamy Cases

Case 1

In this case, it was revealed that a 37-year-old housewife, who had graduated from a university in the United States and had seven children aged 3 to 17, was threatened with divorce by her husband, a senior engineer, if she created trouble during the hearing process. He had proposed to marry a 19-year-old woman who was almost the same age as his eldest daughter. During the hearing before the *Shari'ah* judge, the wife consented to the husband's additional marriage but demanded that the husband agree to certain terms and conditions concerning maintenance and property acquired during the marriage.

Two years after her husband's second marriage, the first wife's monthly allowance proved to be insufficient; the property had not been transferred to her; and her outdoor activities had been restricted. Furthermore, the husband threatened her with divorce if she complained to the *Shari'ah* Courts. For the sake of the children, she did not proceed with her intention to file for divorce, as she was not financially secure to support her children. For the wife, divorce was a worse option than polygamy.

In the mid-1990s, there were public seminars and conferences organized by women's organizations to discuss the issue of justice for women in the *Shari'ah* Courts. One of the central issues was polygamy and the wife's right to property that was acquired before the husband's additional marriage. Complaints had been received from the first wives of polygamous unions that their husbands had transferred some or all of the property acquired during their marriage leaving them without their share.

Now, before the permission for a polygamous marriage is granted, the court will automatically record the amount of maintenance for the wife and children (if any), their basic requirements, which include food, clothing, accommodation, and any services and articles in connection with the wife's contentment. In addition, the court will also record any agreement as to any jointly acquired property during the marriage. In a situation where the husband contracts an additional marriage without the court's permission, there is no such avenue for this type of protective order. Therefore, the first wife has no legal protection pertaining to property or financial assurance.

Case 2

In this case, a 39 year-old housewife with 6 children lost all her rights to jointly acquired property when her husband took an additional wife without the court's permission. The husband married a 20-year old woman somewhere in Kuala Lumpur using a *nikah sindiket* (marriage syndicate). Two years later, the first wife discovered the truth of her husband's additional wife from her friends. She was very upset, but her husband did not threaten her with divorce. She argued that she needed her husband's financial support for her children's education and personal needs and never intended to file a complaint with the *Shari'ah* Court even though he had committed the offence of contracting another marriage without prior permission from the court. The property that was registered under her name was transferred to the third party, as she could not afford to pay the bank loan. The husband decided to sell the house and she received nothing from the sale.

Case 3

Similarly, in another case decided by the *Shari'ah* High Court in Shah Alam, Selangor, the court overruled the decision made by the lower *Shari'ah* Court in Petaling. Earlier during the trial, the court refused to grant permission for a polygamous application as the husband could not fulfill the conditions laid down by the law. He was unable to prove that the proposed marriage was just and necessary as his wife was sexually, physically and mentally fit. His financial background was insufficient to support his present and proposed wife equally. The *Shari'ah* High Court of Shah Alam allowed the appeal and granted permission to the husband for an additional marriage. Here, the court was satisfied that the husband did have the means to support all his wives and dependants and therefore fulfilled section 23 (5) (b) of the Islamic Family Law (the State of Selangor) Enactment 2003. It was clear that the earlier case of *Aishah Abdul Raof*, decided by the Selangor Appeal Court in 1992, was not followed (see below).

Case 4

In one of the leading cases in Malaysia on the subject of polygamy, *Aisha Abdul Raof v. Wan Yusuf*, 7 JH 152 (1990), Wan Yusuf, an engineer, the husband of Aisha, also an engineer, applied to the *Shari'ah* Subordinate Court in the District of Petaling for permission to contract another union with a well-known artiste. The judge gave permission and held that the applicant had the means to support more than one wife. The court also agreed with the husband's assertion that he feared committing adultery with the prospective wife if they were not allowed to wed. However, the wife was dissatisfied with the decision made by the court and appealed to the Court of Appeal. In allowing her appeal, the Court, which consisted of three experienced judges, held that the trial judge at the *Shari'ah* Subordinate Court had only considered the condition of sufficient means but had not considered other conditions stipulated by the law. In particular, the trial judge had accepted the husband's statement about his strong financial background without any evidence to support it.

In the written judgment of this case, the Appeal Court held that the four conditions laid down by the law are of equal importance and should be proved separately. The trial judge had been satisfied with only one condition that was the husband's financial ability to support his wives equally. The husband had not proven the other three conditions required by law.

In addition, the judge failed to consider whether the proposed marriage was just and necessary. During the trial, Wan Yusuf conceded that his wife had no physical defects and had never rejected any sexual relations with him. This acknowledgment was enough to enable the judge to dismiss the application as there were no necessary and just grounds present to permit a second marriage.

Although the Appeal Committee refused to grant permission for the marriage, Wan Yusuf and the artiste were able to marry in Terengganu because the polygamy provisions in this state are more lenient. The law has no conditions except one, that the court is satisfied with the husband's financial capability to contract an additional marriage.

Today, the *Shari'ah* Judicial Department of Malaysia has reviewed this matter and has finally agreed to the proposal, made by various women's organizations, to decide on the division of *harta sepencarian* before granting permission for polygamous unions.¹⁶ At the time this article was written, a new Islamic Family Law (Federal Territories) 2005 was under consideration to amend section 57. It provides that *harta sepencarian* must be determined before granting sanction to a polygamous union. This provision already exists in the enactments of most of the other states.

Under the new Malaysian Islamic Family Law Enactments, the husband is required to declare the grounds or reasons on which the proposed marriage is alleged to be just or necessary. The law allows just or necessary reasons such as sterility, physical infirmity, and physical unfitness for conjugal relations or insanity on the part of the existing wife. These examples, however, are not absolute, as the applicants may produce any reasons that the court might consider valid according to *Hukum Sharak*.¹⁷

¹⁶ *Harta sepencarian*: Jointly acquired property.

¹⁷ *Hukum Shara'*: Islamic Law.

The records of the *Shari'ah* Court have revealed that polygamous marriages are contracted for various reasons. Among the most popular ones is that the husband has fallen in love with the new women, and marriage will prevent them from committing adultery. This is seen mainly in cases where the subsequent wife is much younger than the first wife, by 5 to 20 years.

Other reasons include the existing wife's childlessness or when she has not had a son. Malay Muslim society has been more or less influenced by the patriarchal system in which a son is important. Some believe that only a son can continue their lineage and name. In addition, the system of Islamic inheritance (*faraid*), contributes to the importance of a son. Under this law, only sons exclude their parent's siblings from inheriting property, not daughters. As such, the husband believes that a son guarantees security for his property in that it will pass on to his children, grand children and soon.

A short study carried out in the *Shari'ah* Court in the District of Petaling revealed that in the period from 1997 until August 2000, 141 polygamy applications were received. Of this total, the court approved 104 applications, approximately 73.7 percent, and rejected 9 others (6.38 percent). The court deemed that these husbands possessed the requirements to enter additional marriages, namely those of necessity, financial capability and the ability to treat both or all wives equally. In the remaining 28 cases (19.8 percent), the applications were either withdrawn or dismissed because both parties were not present at the hearing or the husband had divorced his wife.

In cases where permission had been refused, couples crossed the Malaysian border to a neighboring country, such as Thailand or Indonesia, to solemnize the marriage. This incidence is not only common among the Muslims in the northern part of Peninsular Malaysia but also among Muslims in other states in Malaysia such as in Selangor, Federal Territory and Johor. Songkla, Narathiwat and Yala in Southern Thailand are popular as is North Sumatera in Indonesia. Usually, the husband decides to violate the law in two circumstances: One, a Malaysian *Shari'ah* court has denied his application and two, he wishes to conceal his multiple marriages.

Although there are no official figures, it is estimated that about two-thirds to three-quarters of all polygamous marriages in Malaysia are

not sanctioned by the *Shari'ah* Court, significantly outnumbering those that are (The Associated Press, 2006).

Before 1995, any polygamous marriage that contravened the law could not be registered and was deemed invalid. Therefore, women involved in such unions were denied recourse to the courts for their share of property, maintenance, and inheritance. This caused much hardship and in 1995, the law was amended to enable the court to register such marriages provided it was shown that the marriage was valid according to *Hukum Shara'*.

Although the law provides that polygamy without the court's permission is still considered a matrimonial offence, the couple may register their marriage subject to the appropriate penalties. The punishment is a fine not exceeding RM 1 000 or imprisonment of not more than 6 months or both.

Data gathered from the Registrar's book of records of the *Shari'ah* Court in the District of Petaling for 1997 to 2000 demonstrate the type of penalties meted out for this matrimonial offence. Out of 119 cases, 64 or 53.8 percent were punished with fines between RM 500 - RM 1 000 and 55 cases or 46.2 percent were punished with fines below RM 450. These amounts are relatively low, and most people can afford to pay. In reaction, the *Shari'ah* Court gradually raised the fine after 1998 at the behest of a newly appointed judge who argued that the court should impose a stringent punishment to deter husbands who violate the law. This shows that determining the amount of fines meted out to offenders depends largely on judges' discretion. Therefore, they should pay between RM 900 to RM 1 000, which is the maximum fine provided for by the law.

However, the maximum punishment is no deterrent to those husbands who have contracted polygamous unions without courts permission. Lately, the lower *Shari'ah* Court started to hand out jail sentences, but on appeal these have been overturned by the higher *Shari'ah* Court.

Even though there is support for harsher penal sanctions, they may be counter-productive for the families of the man. There is the possibility of loss of income and employment, which may bring deprivation to the wives and children. Furthermore, polygamy advocates disagreed with the provision, arguing that polygamy in Malaysia is too infrequent to warrant court attention. They further asserted that the issue of plural marriages

was not the central problems of Muslim women.

To a certain extent, the official statistics issued by the *Shari'ah* Court should be treated with some caution because they do not reflect the true number of polygamous unions (Kamaruddin & Abdullah, 2008). Cross-border and syndicate arranged marriages are not included in the data. It should be assumed that the actual figures are higher (Jones, 1994).

2. Dissolution of Marriage

The most common type of divorce among Muslims in Malaysia is *talaq* (Mohamad, 2000), which is a unilateral repudiation whereby the husband has exclusive power to divorce his wife without her consent. Once it is pronounced, the matter becomes extra-judicial and is not subject to any external check. On the other hand, Muslim women have no corresponding power of divorce and may only relinquish themselves from the marriage by mutual consent between the spouses or judicial proceedings.

Like other Muslim countries, divorce law reforms have taken place in order to safeguard the rights of the wife (Anderson, 1970). The 1980s reforms of Malaysian Islamic Family Law limited the husband's right of extra-judicial divorce, requiring him to pronounce *talaq* before a court. However, this reform does not affect the husband's right to divorce his wife by the way of *talaq*.

In Malaysia, any divorce pronounced without court permission is a matrimonial offence and shall be punished with a fine not exceeding RM 1 000 or 6 months imprisonment or both. In such a situation, one of the spouses has to apply to the court to validate such a divorce. If the court is satisfied that the *talaq* pronounced by the husband is sound according to *Hukum Shara'* then the dissolution is valid, following which the court will issue an order formalizing the divorce.

In spite of these changes, a number of cases exist where the *Shari'ah* Court has ruled in favor of the husband's unilateral divorce pronounced outside of court (Kamaruzaman, 1998).

Divorce Cases

Case 1

In this case, the husband left his wife in 1992. She suspected that he had contracted another marriage and therefore asked him to release her in kindness. He refused and they both went for a counseling session at the Religious Department. Eventually, the husband agreed to divorce his wife. In 1995, after 2 years of waiting for this to materialize, she filed for a *fasakh* divorce.¹⁸ During the hearing, the husband told the court that he had divorced his wife in 1993, 2 years before the wife filed for *fasakh*. He claimed that he had divorced her between August-October 1993 after having a quarrel over the telephone. The wife disputed this and argued that she was the one who wanted the divorce. She presented evidence to the court to prove that they were still husband and wife during that particular time. It included income tax returns for the period of 1993-1996 in which the husband had declared that he had only one wife. Further proof came from the *Qadi* who conducted the counseling session who said that the husband admitted to having only one spouse. However, the court rejected the wife's evidence in full and relied only upon the husband's testimony. The wife's application to the court to take an oath was also rejected. It was held that *talaq* was pronounced sometime between August and October 1993 (Kamaruzaman, 1998).

Case 2

In this 1991 case, the court granted a divorce to a husband without the presence of the wife during the hearing. The wife, aged 50, had suffered a severe stroke that affected her physical and mental capability. At the end of 1992, the family found out that the husband had been neglecting her to which he claimed that he had divorced her. The family further discovered that a court had declared a divorce without the wife present during the proceedings, during which she was hospitalized. What shocked the family was that the court had validated the husband's *talaq* since 1981, 11 years earlier. The court relied only upon the husband's

¹⁸ *Fasakh*: Judicial divorce.

oral testimony without the presence of the wife to counter the husband's allegation (Kamaruzaman, 1998).

These two cases illustrate the inefficiency and the weaknesses of the *Shari'ah* Courts in settling divorce proceedings. Although these cases are regarded as "exceptions to the rule", they still happen in the *Shari'ah* Courts. This situation creates a negative image of the *Shari'ah* Courts. Today, validation of a divorce uttered outside the court is not easy to obtain. Either, the husband must produce evidence or witnesses to prove that he had divorced his wife at a particular time and place, or both parties concede that the divorce had occurred according to Hukum Syarak. In either case, the court will issue an order to validate the *talaq*.

Another type of divorce is called *taaliq*.¹⁹ It is a divorce applied for by the wife when the husband breaches a condition of the marriage contract agreed upon during the solemnization of the marriage. In most of the states in Malaysia, except in Terengganu and Perlis, the formula pronounced by the husband is similar to that prescribed in the Federal Territories and is as follows:

I do solemnly declare (that) when I leave my wife for four Hijri months spontaneously or more voluntary (voluntarily) or with force (involuntarily), and I or my representative(s) do not give her maintenance for such period whereas she is obedient to me, or I cause hurt to her person, then she makes a complaint to the *Shari'ah* Court and if found by the *Shari'ah* Court to be true, and she gives to the *Shari'ah* Court, which received (sic) on my behalf, a sum of RM 10, then she is divorced by a *talaq khulu* (Kamaruddin, 1998).

The husband recites this declaration soon after the marriage contract is concluded. The marriage registrar hands over the marriage certificate to him, and after making the declaration, he signs the certificate as proof. The conditions consist of three elements, namely:

1. That the husband leaves his wife for 4 months or more.
2. That the husband fails to provide maintenance for such

¹⁹ *Taalig*: stipulations or conditions.

period.

3. That the husband causes injury and hurt to his wife.

If a wife believes that her husband has breached one of the three conditions laid down, the onus is on her to make a complaint to the *Shari'ah* Court, which will then try to establish the truth of the allegation. If the court is satisfied as to the veracity of the claim, the wife is required to pay a nominal sum of RM 10 and the court will grant her a divorce by way of *talaq khulu*.²⁰

The provision, which recognizes cruelty as a ground for judicial divorce under the Islamic Family Law Act is a recent effort on behalf of the authorities. Before this, a wife could only dissolve her marriage on very limited grounds based on the traditional *Shāfi'i* school of law, which are: the husband suffers from a contagious disease; has a sexual defect such as impotency; or has failed to provide maintenance for his wife. The grounds for a wife to initiate divorce have now been extended. Based upon the *Maliki* doctrine, she may apply to the court for dissolution of the marriage on the grounds of cruelty.

Case 3

In the case of *Hairun v. Omar*, 8 JH 289 (1990), the wife had claimed *fasakh* on the ground that her husband had treated her with cruelty by assaulting her. The trial judge at the subordinate *Shari'ah* Courts held that the husband had assaulted the wife and found that action in violation of *Hukum Shara'*. The court held that the assault was not habitual although it found that the husband had assaulted his wife grievously, an act unjustifiable in Islamic Law. The judge interpreted the word "habitually" to mean frequently, as provided by the law under section 52(2) (h)(i) that states "a woman shall be entitled to obtain an order for the dissolution of marriage through *fasakh* 'habitually' assaults her or makes her life miserable by cruelty of conduct." In this respect, the husband's physical assault on two occasions did not amount to 'habitually'. The wife, dissatisfied with the decision made by the court, appealed to the Appeal Court whereby the Appeal Court allowed her

²⁰ *Talaq khulu*: repudiation by redemption.

appeal and held that the learned trial judge had wrongly interpreted the section.

The Appeal Court held that the main point under the above section was the issue of cruelty, which could be either physical or mental. The question of whether the act of cruelty was habitual was relevant only in cases of mental suffering. Any physical assault or battery though not habitual may be sufficient to establish cruelty.

Case 4

In the case of *Abdul Hanif v. Rabiab*, 11 JH 47 (1996) the wife filed for *fasakh* on the grounds of the husband's ill treatment and failure to provide maintenance. The evidence of two female witnesses was considered sufficient to support her allegation. However, the trial judge dismissed the wife's application for *fasakh* even though it found her claim to be true, because she failed to provide evidence from two male witnesses, or one male and two female as required by the *Shari'ah*. The court dismissed the application because the rules of evidence were not adhered to.

The wife then appealed to the *Shari'ah* High Court where the judge granted her *fasakh*. The husband, dissatisfied with this judgment, took his case to the *Shari'ah* Appeal Board. Interestingly, the Board of Appeal approved the decision of the *Shari'ah* High Court that had granted the *fasakh* divorce and held that:

It is impossible to call witnesses to witness the act of cruelty. In this situation it is not necessary that the evidence should be given under the concept of *shahadah*, but enough to accept it under the concept of *bayyinah*.²¹

Case 5

In another case, *Adiba Yasmi v. Abdul Rani*, 7 JH 44 (1986), the wife alleged that her husband had beaten her and produced a medical report

²¹ *Shahadah*: witnesses

Bayyinah: evidence

of her physical injuries. The husband denied the allegations and countered that the injuries were self-inflicted. One female eyewitness, a maid, supported the wife's allegation, while the husband produced three male eyewitnesses. The court held that the evidence produced by both the plaintiff and defendant was weak. The wife's evidence did not comply with *Hukum Syarak*, while the husband's witnesses had contradicted each other. The court then asked the husband to take a *sharie* oath, which he did, and based on this, the court rejected the wife's allegation. Her application for *fasakh* was dismissed.

It appears that the attitude of the *Shari'ah* Court in interpreting evidence has changed recently. Previous requirements stipulating only male witnesses are no longer applied. In addition, female oral testimony is now accepted in the *Shari'ah* Court, perhaps because of the nature of most domestic assault cases that rarely have eyewitnesses to the fact.

Case 6

A case in Perlis, *Hasnah v. Saad*, 3 JH 84 (1975) shows how the *Shari'ah* Court granted the wife *talaq taaliq*. The wife filed for this divorce on grounds that her husband had beaten her and produced a medical report as evidence to support her allegation. However, the husband denied it and accused her of self-inflicting the injuries. The court held that the husband's allegation was unreasonable. In the end, the court believed the wife's testimony and could not see any reason for her to lie, as she had lodged several police reports about her husband's cruelty.

Case 7

Similarly, in the case of *Shabeila Abdul Majid v. Roslan Abdul Aziz*, 8 JS 155 (2000), the trial judge of the Federal Territory *Shari'ah* Court granted the wife a divorce by *talaq taaliq*. The husband refuted the wife's allegation that he had assaulted her in April 1998. Conversely, the wife produced four eyewitnesses, her siblings, to support the allegation. During the trial, they gave evidence that they only saw the bruises and blood on the plaintiff's mouth but not the assault itself. In addition, the plaintiff produced medical and police reports on, and photos of, the

injury. Based on these, the court was satisfied that the husband had breached one of the conditions of the marriage contract; therefore, the plaintiff was entitled for divorce through *talaq taaliq*.

In Malaysia, marrying an additional wife in contravention of any of the Islamic Family Law Enactments does not constitute an injury to the first wife. Therefore, polygamous unions are not regarded as a form of cruelty and do not entitle a wife to file for divorce. Malaysian legislators are not prepared to amend the law to make this act a ground for divorce. Therefore, the only grounds for divorce in such situations are that the husband does not treat his wives equitably according to *Hukum Syarak*. No test cases exist in which a wife has inserted stipulations disallowing another marriage contract with the consequence of divorce. The *Hanbali madhhab* stands alone in allowing such a stipulation and thus gives the wife the right to judicial dissolution if the husband should subsequently conclude a second marriage. In this regard, Anderson, referring to the *Maliki madhhab*, says that:

A wife whose husband marries another woman can claim - contrary to the ordinary Maliki doctrine - that the deprivation and indignity involved in being reduced to the status of co-wife in a polygamous household itself constitutes such an 'injury' (Anderson, 1970).

Conclusion

The *Shari'ah* Courts have undoubtedly improved their ability and efficiency. In April 2008, the Minister in the Prime Minister's Department announced that 90 percent of the *Shari'ah* Courts cases were settled within twelve months. Moreover, Dato' Sheikh Ghazali Abdul Rahman, Malaysian ex-Chief *Shari'ah* judge and previously the Chief Director of the Malaysian *Shari'ah* Judiciary Department, has refuted allegations that *Shari'ah* judges have passed unfair judgments especially in cases involving women.

In addition, there is the appointment of female academics, well versed in Islamic Law, to review the laws. Their involvement is an achievement for Muslim women in Malaysia. For one thing, these women sit on law committees and discuss matters concerning Islamic Law where previously

this area was predominantly male territory.

Meanwhile, *sulh* was recently introduced into the Federal Territories, Selangor, Malacca and Terengganu *Sharī'ah* Court systems in order to reduce the backlog of cases. Since then, it has been used to settle many divorce proceedings. For instance, if there is a mutual agreement between the husband and wife on matters concerning divorce and alimony, then they no longer have to wait months before the court issues the relevant orders. Now, applications for divorce that are agreed to by both husband and wife may be settled in one or two appearances with a mediator (*sulh* officer) rather than a *Sharī'ah* judge. Therefore, cases go for trial only where there are disputes between the parties.

Generally, positive developments have taken place in terms of justice for and rights of Muslim women in Malaysia due to the improvements of the administration of justice in the *Sharī'ah* Courts despite their limited jurisdiction. As such, the negative perceptions that have been expounded by the media, public, NGOs and politicians are not always rooted in reality.

References

- Abdullah, R. (2001). Wanita, perceraian dan mahkamah syariah [Woman, divorce and *shari'ah* court]. In R. Abdullah (Ed.), *Wanita dan Perundangan Islam* (pp. 94-120). Kuala Lumpur: Ilmiah Publisher.
- Abdullah, R. (2006). *An analysis of the current legal mechanism in curbing abuse of polygamy in Malaysia: A socio-legal perspective*. doctoral dissertation, International Islamic University Malaysia.
- Ahmad, S. S. S. (2007). *Malaysian legal system* (2nd ed.). Kelana Jaya, Selangor: MLJ Sdn Bhd.
- Al-Mubarakpuri, S. S-R. (2003). *Al-mubarakpuri al-mi'âbi' al-munir fi tabdhib fi tafsir Ibn kathir* [The guiding light for the refinement of Ibn Kathîr's interpretation of the *qur'ân*]. Riyadh: Darussalam.
- Anderson, J. N. D. (1959). *Islamic law in the modern world*. New York: New York University Press.
- Anderson, J. N. D. (1970). Reforms in the law of divorce in the Muslim world. *Studia Islamica*, Vol. 3, 41-52.
- Anwar, Z. (2009). *Wanted: equality and justice in the Muslim family*. Petaling Jaya: Musawah.
- Borhan, A. J. (1998). Penubuhan mahkamah-mahkamah syariah dan bidang kuasanya di malaysia [The establishment of the *shari'ah* court and its jurisdiction in malaysia]. In A. H. Buang (Ed.), *Undang-undang Islam di mahkamah-mahkamah syariah di malaysia* (pp. 24-30). Kuala Lumpur: University of Malaya.
- Hall, D. G. E. (1970). *A history of southeast Asia*. London: Macmillan.
- Hamayotsu, K. (2003). Politics of syariah reform: The making of the state religio-legal apparatus. In V. Hooker & N. Othman (Eds.), *Malaysia: Islam, Society and Politics*. Singapore: ISEAS.
- Hassan, S. Z. S. (1986). Women, divorce, and Islam in Kedah. *Sojourn*, 1(2), 183-198.
- Hill, E. (2003). Implementation of Islamic law in a modern state: The experience of egypt. In Zainal Azam (Ed.), *Islamic law in the contemporary world*. Kuala Lumpur: Institute of Islamic Understanding Malaysia.
- Hinchcliffe, D. (1970). Polygamy in traditional and contemporary Islamic law. *Islam and the Modern Age*, 1(3), 13-38.
- Horowitz, D. L. (1994). The *qur'ân* and the common law: Islamic law reform and the theory of legal change. *American Journal of Comparative Law*, XLII(2),

- 233-293.
- Ibrahim, A. (1987). The shari'ah and codification: Malaysia experience. *Syariah Law Journal*, 4(2).
- Ibrahim, A. (1992). *Islamic law in Malaysia since 1972 In Developments in Malaysia Law-Essays to Commemorate the 20th Anniversary of the Faculty of Law, UM*. Kuala Lumpur: Pelanduk Publications.
- Ibrahim, A. (1993). The future of the *shari'ah* and the *shari'ah* courts in Malaysia. *Journal of Malaysian and Comparative Law*, Vol. 20, 41-57.
- Ibrahim, A. (1997). *Family law in Malaysia* (3rd ed.). Kuala Lumpur: MLJ.
- Ismail, N. R. R. (1999). *Kajian perbandingan mengenai jangkamasa yang diambil untuk menyelesaikan kes-kes berhubung penceraian serta kekerapan penangguhan kes-kes di antara mahkamah syariah dan mahkamah sivil* [Study on the comparison of period taken to settle divorce cases and postponement frequency of cases between shariah and civil courts]. Unpublished diploma dissertation, Nation Institute of Public Administration. Kuala Lumpur.
- Joned, A. (1988). Keupayaan dan hak wanita Islam untuk berkahwin: Indah khabar daripada rupa [The possibilities and rights of Muslim women in marriage: Sounds better than it really is]. In Fakulti Undang-Undang Universiti Malaya (Ed.), *Makalah undang-undang membormati abmad Ibrahim* (pp. 1-41). Kuala Lumpur: Dewan Bahasa and Pustaka.
- Jones, G. W. (1994). *Marriage and divorce in islamic southeast asia*. Kuala Lumpur: Oxford University Press.
- Kamali, M. H. (1985). *Law in Afghanistan: A study of the constitutions, Matrimonial law and the judiciary*. Leiden: Brill.
- Kamaruddin, Z. (1998). *Introduction to divorce laws in Malaysia*. Kuala Lumpur: International Islamic University Malaysia Cooperative Limited.
- Kamaruddin, Z. (1999). Delays in disposition of matrimonial cases in the shari'ah courts in malaysia (1990-1997). *IIUM Law Journal*, 7(1), 95-134.
- Kamaruddin, Z., & Abdullah, R. (2008). Protecting muslim women against abuse of polygamy in malaysia: Legal Perspective. *HAWWA: Journal of Women of the Middle East and the Islamic World*, 6(2), 176-201.
- Kamaruzaman, K. A. (1998). Undang-undang perkahwinan dan penceraian dari aspek amalan. [The law of marriage and divorce] In A. H. Buang (Ed.). *Undang-undang Islam di mahkamah-mahkamah syariah di malaysia* (pp. 70-83). Kuala Lumpur: University of Malaya.
- Khairuddin, S. (2008). *Stemming the tide: A critique of the reform of polygamy laws in Malaysia*. Unpublished master dissertation, International Islamic University

- Malaysia.
- Lane, E. W. *Arabic-English lexicon dictionary*. Retrieved 12 March 2009, from www.studyquran.org/LaneLexicon/Volume5/00000259.pdf
- Liaw, Y. F. (1976). *Undang-undang melaka* [Malaccan law]. The Hague: Martinus Nijhoff.
- Memorandum of Reform of the Islamic Family Laws on Polygamy*. (1996). Kuala Lumpur: Sisters in Islam.
- Mohamad, M. (2000). Islamic family law reforms in malaysia: Problems and prospects for women's empowerment. In M. Mohammad (Ed.), *Muslim women and access to justice: Historical, legal and social experience in Malaysia*. Penang: Women's Crisis Centre.
- Momen, M. A. (1993). *The Muslim family laws ordinances 1961*. New Didar Publishing House: Dhaka.
- Muhammad, A. K. (1998). Poligami dan pengamalannya di malaysia [The practice of polygamy in Malaysia]. In A. H. Buang (Ed.) *Undang- undang Islam di mabkamab-mabkamab syariah di Malaysia* (pp. 84-92). Kuala Lumpur: University of Malaya.
- Othman, M. S. A. (1988). *Kadi, perlantikan, perlucutan dan bidangkuasa* [Sharī'ah court judge appointment, dismissal and jurisdiction]. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- Othman, Z. (1985, February). *The administration of islamic law in malaysia and the syariah courts*. Paper presented at the *Islamic Law Seminar*, Kuala Lumpur, Malaysia.
- Pearsall, J. (1999). *The new oxford dictionary of English* (thumb index ed.). Oxford University Press: Oxford.
- Siraj, M. (1989). *The Development and implementation of syariah laws in Malaysia: The position of muslim women*. Workshop on Sharī'ah and Civil Laws: Developments and Implementations and the Position of Muslim Women, Kuala Lumpur, Malaysia.
- Sonbol, A. (2003). Discussion on methodological approaches to reform. In Nik Noriani Nik Badlishah (Ed.). *Islamic family law and justice for Muslim women* (pp. 118-122). Kuala Lumpur: Sisters in Islam.
- The Associated Press. (December 28, 2006), *International Herald Tribune*. Retrieved November 11st, 2007, from http://www.iht.com/articles/ap/2006/12/28/asia/AS_GEN_Malaysia_Polygamy.php
- Wilkinson, R. J. (1914). *Law, papers on malay subjek*. Kuala Lumpur: F. M. S. Govt Press.

Biographical Note: **Raihanah Abdullah** (Ph.D) is an Associate Professor at the Department of Shariah and Law, Academy of Islamic Studies, University of Malaya, Malaysia and is currently the Deputy Director of the Center for Civilisational Dialogue, University of Malaya. She is actively involved in research in the area of Islamic Family Law, Islamic Law and Gender and Islamic Law and Society. Among her current publications is Zaleha Kamaruddin and Raihanah Abdullah, 2008, Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective. *HAWWA: Journal of Women of the Middle East and the Islamic World*, 6(2) pp.176-201.

Biographical Note: **Soraya Khairuddin** (MA) is an independent researcher of Islamic family law issues and a freelance editor. She is also a part-time English instructor at the International Institute of Islamic Thought and Civilization, ISTAC, a distinguished postgraduate institute of the International Islamic University of Malaysia.