

**FURTHER DISCRIMINATION AGAINST MUSLIM WOMEN UNDER THE
ISLAMIC FAMILY LAW (FEDERAL TERRITORIES) (AMENDMENT) BILL
2005 THROUGH SELECTIVE GENDER NEUTRAL PROVISIONS**

by Sisters in Islam (SIS Forum Malaysia)

SIS is especially concerned that Muslim women are being discriminated against under the legal provisions in the Islamic Family Law statutes. SIS is even more concerned that, instead of removing or at least minimising the discriminatory provisions, the 2005 Amendments actually has the effect of increasing discrimination against Muslim women. SIS with other women NGOs have submitted several memoranda on discrimination against Muslim women, including the

- Memorandum on Reform of the Islamic Family Laws on Polygamy in 1996,
- Memorandum on Reform of the Islamic Family Laws and Justice in the Syariah System in 1997,
- Memorandum Pembaharuan Proses Perceraian dan Tuntutan Sampingan dalam Prosiding Mahkamah Syariah in 2000,
- Memorandum Perbandingan Rang Undang-Undang Keluarga Islam dengan Akta Undang-Undang Keluarga Islam in 2002, and
- Memorandum mengenai Enakmen Undang-Undang Keluarga Islam Negeri Selangor 2003.

In spite of the concerns expressed in the memorandum submitted in 2003, the Selangor Islamic Family Law Enactment has been used as a blueprint for other states and the federal territories to amend the Islamic family laws in the move towards uniformity. Areas of particular concern providing for legal discrimination against Muslim women include the gender specific provisions on polygamy, divorce and guardianship. Discrimination against Muslim women also results from the existence of selective gender neutral provisions, for instance, the provision on the distribution of harta sepencarian (matrimonial assets). Such selective gender neutral provisions have increased under the 2005 Amendment, where the approach appears to be to provide that many of the rights that were previously enjoyed by women only should now be extended to men as well, but that all the rights that have been enjoyed by men should continue to be retained by men only.

I. Erosion of women’s rights under the 2005 Amendments

Among the provisions in the 2005 Amendments that are detrimental to women’s rights and interests are the following:

1. Conditions on polygamy

Subsection 23(3) and (4)(a) in the 1984 Act imposes the conditions on the proposed polygamous marriage being both “just AND necessary”. Justice is mandatory in the Qur’an, as stated in the 1990 judgment of the Selangor Syariah Appeals Committee in the case of Aishah Abdul Rauf vs Wan Mohd Yusof Wan Othman. ([1990] 3 MLJ lx). The reason given by the husband for wanting to contract another marriage was that of

33legitimising his love for the other woman. The Appeal Committee observed that while this may be sufficient ground to show why the proposed marriage was “necessary”, it has no relevance to the question of whether the proposed marriage was “just”. As a Muslim, he should be in control of his desires and be able to restrain himself from committing adultery.

Unfortunately, the 2005 Amendment has now changed the condition from “just AND necessary” to “just OR necessary”. This appears to be a deliberate attempt to nullify the decision in the above case.

2. Division of harta sepencarian (matrimonial assets) upon husband’s polygamous marriage

In order to secure some justice for the existing wife and children in accordance with the requirement of justice in the Qur’an (Surah an-Nisa’ 4 : 3 and 4 : 129), women’s groups have proposed that the property interests of an existing wife should be protected by providing that she is entitled to claim a share of the husband’s assets as harta sepencarian (matrimonial assets) before the husband may be permitted to marry another wife. Unfortunately, the gender neutral language in the new subsection 23(9) allows “any party” to claim harta sepencarian before a polygamous marriage is contracted. Therefore, a husband who is going to marry a new wife would also be entitled to claim harta sepencarian from his existing wife or to apply that their matrimonial home should be sold and the proceeds divided.

3. Extending the right of fasakh to husband

The 2005 Amendment has generally extended the right to divorce by fasakh to men as well. In the 1984 Act Previously, only the wife was generally given the right to apply for fasakh under subsection 52(1). The 2005 Amendment extends the right to fasakh to husbands under paragraphs 52(1)(a), (c), (d), (f), and (i), and subparagraphs (h)(i), h(ii), (h)(iv) and (h)(v), as well as under subsection (2).

Amending the law to provide for a husband’s right to fasakh would have been justified if he is no longer allowed to unilaterally divorce his wife by talaq. But it is most unfair when the husband still retains the unilateral right of talaq. There is a conflict of juristic views among the four Sunni schools of law as to whether the right to fasakh should be given to the husband. For instance, the Hanafi view grants the right to fasakh only to the wife, while the other views grant the right to both spouses in cases of one spouse suffering from infectious disease or physical unfitness for conjugal relations. In the 2005 Amendment, the grounds for a husband to apply for fasakh have been extended further than that. What is the implication of the husband being allowed to divorce his wife either through talaq or through fasakh? Perhaps the benefit for the husband is that, in cases of fasakh, he need not pay iddah maintenance and mut’ah to his former wife.

We find it most peculiar that when there is a conflict of juristic views over a certain rule, there is now a tendency to adopt that which is more advantageous for the husband, and even to further extend his advantage. On the other hand, when there is a conflict of juristic views over another rule which may be advantageous for the wife (for instance the

rule that extends the right of ta'liq or tafwid (delegated divorce) to the wife), the view that is beneficial to the wife is set aside and rejected.

In fact the new paragraph (1)(h)(i) has the effect of extending to the husband a right that has not been given to him in the early days of Islam, for it provides for fasakh on the ground that the husband or wife:

“disposes of her or his property or prevents her or him from exercising her or his legal rights over it”

According to Hukum Syara, the husband certainly has no right to dispose of his wife's property, but the wife has the right to dispose of such part of her husband's property as may be reasonable if the husband has failed to provide sufficient maintenance for her and their children. According to the Prophet's hadith regarding Hendon and her husband Abu Suffian, in which Hendon told the Prophet (saw) that her husband was miserly and so she sometimes took from his property without his knowledge, and asked whether it was proper for her to do so, the Prophet (saw) informed her that she may take whatever is reasonably sufficient for herself and their children. The effect of **paragraph (h)(iv)** may deprive the wife of her right to provide for herself and their children from the husband's property that was allowed by the Prophet (saw).

Subsection (4) is very protective towards the husband by providing that the Court should not make an order for dissolution of marriage, even if the wife has a cause for fasakh under subsection (1) if the dissolution of marriage would be regarded as “unjust to the husband. The 2005 Amendment has extended the right of fasakh to the husband, but it has not amended subsection (4) to provide that the Court should not make an order for dissolution of marriage, if the dissolution of marriage would be unjust to the wife.

4. Prohibitory order against wife's property

The 1984 Act allows the Court to grant injunction preventing the disposition of property by a husband or former husband, in order to protect the wife or former wife's financial claims. The 2005 Amendment, in the new section 107A, uses gender neutral language, and also allows the court to grant injunction preventing the disposition of property by a wife or former wife, to protect the husband and former husband's financial claims.

Is this amendment made on the grounds of providing for gender equality? It is emphasized that under traditional Islamic law, the husband has no rights over his wife's property. The wife's property is exclusively her own, and she also has the right to maintenance from her husband. According to the Tradition (Hadith) of the Prophet regarding Hendon and her husband, Abu Suffian, the wife has the right to take what is reasonable from the husband's property even without his knowledge, if he had been miserly and had not provided sufficient maintenance for her and their children. The different rights and responsibilities under traditional Islamic law are related to men's greater inheritance rights. However, the administration of the syariah laws on inheritance emphasize the provision that male heirs be given a double share under the *faraid* distribution, without emphasizing on the rationale for this rule -- that the man has the legal responsibility to provide maintenance for the family, and thus every female should

always have a man to provide for her needs, be he a father, a brother, a husband or a son. In today's society, however, many women have to earn a living and contribute towards the family needs. Moreover divorced or widowed mothers often have to provide for their children's needs without assistance (or adequate assistance) from the father or male relatives who were traditionally regarded as responsible for the children's maintenance. There is no mechanism in the present legal system for women to obtain the redress that would reflect on the balance and justice that was originally intended by the syariah.

5. Penalties

Women's groups have recommended increasing the penalties for husbands who contract polygamous marriages without the permission of the court and for husbands who pronounce talaq outside the court, as the penalties under the 1984 Act appear to be ineffective to act as deterrence.

These concerns were not addressed by the 2005 Amendment. Instead, it has –

- i. extended the penalty for “ill-treatment of wife” to be gender neutral as “ill treatment of spouse” (section 127) i.e. ill-treatment of husband as well. In the 1984 Act, the penalty against the wife was provided under “disobedience of wife” in section 129. This provision is also retained in the 2005 Amendment. This could mean that a wife may be liable to a double penalty -- for ill-treating her husband and for disobeying him, while the husband is liable to the penalty of ill-treatment only.
- ii. The 2005 Amendment extends the penalty for apostacy to “attempt to be murtad” in order to annul marriage (section 130). The provision is expressed in gender neutral language, but who would go to the extent of attempting to be murtad to annul marriage? Obviously only desperate wives, as husbands can easily dissolve marriage by talaq.

II. Women's concerns and proposals ignored in the 2005 Amendment

Among the earlier concerns and proposals submitted by women's groups that are completely ignored in the 2005 Amendment are the following:

1. Payment of mut'ah to divorced wife

The payment of mut'ah is obligatory under the Shafi'i law even if the wife has been nusyuz (e.g. in *Piah v. Che Lah* (1983) 3 JH 220, a Perlis case where the wife's claim for iddah maintenance was dismissed on the ground that she was nusyuz in leaving the matrimonial home, but her claim for mut'ah was allowed). However, it is unfortunate that the language of the statutory provision translates mut'ah as “consolatory gift”, thus giving the layman the impression that it is merely a voluntary gift that may be made to a divorced wife, rather than as a mandatory form of compensation. The statutory provision also does not mention the factors to be taken into consideration in assessing a “fair and just” amount for mut'ah e.g. means and needs of the parties, duration of marriage and circumstances of the divorce

2. Payment of tebus talaq to divorced husband

By contrast, the statutory provision regarding the payment of tebus talaq to a husband is to be assessed “having regard to the status and means of the parties.” The statutory provision on tebus talaq is rather curious, as under traditional Islamic law, the amount of compensation due to the husband was limited to the mahr or gifts that had been made by the husband to the wife. The statutory provision therefore allows a husband to claim an unlimited amount for tebus talaq, an amount that may be grossly in excess of any mahr or gifts that he had made to the wife. This is particularly unfair to women as the amount of mahr in local marriage is purely nominal e.g. RM80 in some states and as little as RM22.50 in some other states. There is no provision for limitations on husband’s claim for payment of tebus talaq, although under the traditional view, it should be limited to amount of maskahwin and hantaran that had been given by husband to wife, less reciprocal gifts and benefits that had been given by wife to husband.

3. Provisions on children

a. Guardianship of Children

The amendments to the Guardianship of Infants Act granting mothers the equal right to guardianship of their children only apply to non-Muslims as Muslim women come under the jurisdiction of syariah law which currently recognizes only the right of men to be guardians. Even though an administrative directive was issued to enable all mothers, including Muslim mothers, to sign official documents on matters related to their children, it is hoped that the right of Muslim mothers to be guardians of their children will also be explicitly recognized by law.

The 1984 Act and the 2005 Amendment only recognize the father, paternal grandfather and their executors as entitled to guardianship. Traditionally, the legal guardians were persons associated with responsibility for the children’s maintenance. However, the actual situation in the present day realities is that the mother often has to contribute towards the family needs, even if it is not her legal duty to do so, and divorced or widowed mothers often face difficulties in obtaining financial assistance from the ex-husband or his relatives. There is no statutory provision for the father’s loss of guardianship in the case of irresponsibility regarding the children’s maintenance.

b. Custody of Children

Although the mother is said to be “of all persons the best entitled to custody of her infant children”, various conditions are attached to her right of custody. Some of the conditions are fair and proper e.g. the right of custody is lost “by her neglect or cruelty to the child”. However, the right of custody is also lost “by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child”.

Loss of custody on the ground of the mother’s remarriage is based on a *hadith* of the Prophet, where he said to a divorced wife, “You have the first right to look after [your child] unless you marry”. It is unfortunate that this hadith has often been interpreted as meaning that the mother loses the right to custody upon her remarriage, and that custody reverts to the father, regardless of whether he has remarried or not. However, it should be

possible to interpret this Hadith as conferring a prior right upon the mother before her remarriage, and if she remarries, than the mother and the father would have equal rights to custody, and the case should be considered on its individual merits.

It is also unfortunate that there is no specific statutory provision on how a man may lose his right to custody, even if he is cruel or neglectful of the child. Is this an oversight, an assumption that the person having custody would be a woman? But such assumption is incorrect, as a man may also be given custody of his children.

c. Illegitimate children

Under the 1984 Act and the 2005 Amendment, the custody of illegitimate children appertains exclusively to the mother and her relatives, and the court may order a woman to pay maintenance to her illegitimate child. Prior to an amendment made to the 1984 Act in 1994, a magistrate's court may order a man to contribute towards the maintenance of his illegitimate child, but this provision has been repealed., and there is still no provision for the syariah court to order a man to pay maintenance or to contribute towards the maintenance of his illegitimate child.

The traditional Shafi'i legal ruling is that no relationship whatsoever is recognized between a father and his illegitimate child. The authority often referred to in that ruling is a *hadith* relating to a dispute over custody of a child [re. Sahih Muslim Vol. II *Hadith* 3435]. Sa'd ibn Abi Waqas claimed that the child was his nephew as his brother Utba had disclosed to him that the child was his natural son, and the child bore a clear resemblance to Utba. 'Abd ibn Zaman, however, claimed that the child was his brother as he was born on his father's bed. In the Prophet's time, this was a case involving a tug of love, not a case involving a neglected child, and the Prophet granted custody to the family of the legal father and not to the family of the biological father, on the principle that a child belongs to the marital bed.

The present day realities are often quite different. The lack of legal responsibility may encourage irresponsible men to indulge in illicit affairs, secure in the thought that even if a child is born as a result of the union, only the unfortunate mothers will have to be responsible for it.

4. Confusion as to division of harta sepencarian

The traditional view on *harta sepencarian* is that a wife may claim one-third of the properties acquired by the husband during the marriage in recognition of her contributions in looking after the family. Harta sepencarian is based on Malay customary law which is found to be in accordance with the principles of syariah e.g. in *Mansyur v. Kamariah* ([1988] 3 MLJ xlv) the wife who had assisted the husband in cultivating the land was awarded one half of the land based on the principle of *musha* (mixed properties) and *syarikatul abdan* (partnership of efforts), and in *Rokiah v. M. Idris* ([1989] 3 MLJ ix) the wife who was a housewife was awarded one-third of the matrimonial home and other assets that had been acquired by the husband's money, based on the principle that it is not part of the wife's marital obligations to perform domestic duties under traditional

Islamic law, and that therefore she should have a share in the properties acquired by the husband in return for looking after his home.

The gender neutral language on harta sepencarian in the 1984 Act (section 58) and the 2005 Amendment¹ (section 122) enables either spouse to claim a share in the properties acquired by the other spouse during the marriage. The gender neutral language is similar to the provisions on matrimonial property in the Law Reform Act. However, the effect is discriminatory to Muslim women because the other provisions in the Islamic family law are not gender neutral.

Muslim men are allowed to contract polygamous marriages, are entitled to double shares of inheritance, and may unilaterally divorce their wives. Therefore the marriage contract itself, allowing polygamy, is not gender neutral but the gender neutral provision on harta sepencarian would mean that a Muslim man with more than one wife could claim harta sepencarian from each of his wife.

As for the man's double share of inheritance, in traditional Islamic law, a woman's property is regarded as exclusively her own, while a man is obliged to apply his property for the upkeep of his wife and children.

Regarding divorce, unlike the divorce process under the Law Reform (Marriage and Divorce) Act, the divorce process under the Islamic family law is not gender neutral, and while husbands can easily divorce the wife even without the permission of the court, wives often face numerous difficulties when the husbands do not consent to their application for divorce. Thus, the Muslim wife's negotiating position on divorce and ancillary reliefs would be further weakened if the husband disputes her application for divorce and could also bring a claim for *harta sepencarian* against her.

The problem for Muslim women in Malaysia is also compounded due to some confusion regarding the traditional "one-third rule". This confusion has led to cases where, during the financial negotiations, the wives are offered only one-third of the matrimonial home or property concerned, even if the properties had previously been registered in their joint names. It is said that women are entitled to "one-third of the properties acquired during the marriage". What is meant by this is that women are entitled to one-third of the properties acquired by the husband, as traditionally, the husband was the sole acquirer of the properties and the wife's contribution is regarded as the passive contribution in managing the household. Even in those days, however, the wife may be given as much as one-half in the then-exceptional circumstances where she had made some active contribution towards the acquisition of the properties.

In the present day circumstances it is unjust and discriminatory against women to regard one-third as the "normal" share to be given to the wife. Even one-half may be inadequate in circumstances where the woman has carried a double burden i.e. giving her financial contributions for the upkeep of the family as well as her non-financial contribution in doing most of the housework and looking after the children. In such cases, it is the wife who should be given a greater share of the properties acquired during the marriage. The

interests of the children should also be considered in the division of harta sepencarian. These considerations are taken into account in the Singapore syariah court under their Islamic family law, and also in the Malaysian civil courts under the Law Reform Act. The Singapore syariah court generally awards wives in long term marriages between one-third to one-half of the matrimonial home even though she had made no financial contribution, and in cases where she had made financial contribution, it generally awards her more than one-half, even though her financial contribution was less than one-half. The civil court under the Law Reform Act has accepted that where the matrimonial home was already jointly owned by both spouses, the wife is automatically entitled to her half share, and may in some cases also claim one-third of the husband's half share. However, the Muslims in Malaysia appear to lack understanding on this point.

Moreover, as long as other aspects of the Islamic family law are not gender neutral, it is unjust and discriminatory against Muslim women to allow husbands to claim a share in assets acquired by their wives in gender neutral language. The language for division of harta sepencarian should be gender specific in favour of the wife.

III. General Comments

1. Confusion on Traditional and Modern Practices

In traditional societies, men had greater rights but were expected to shoulder greater responsibilities, while women had fewer rights but were expected to shoulder fewer responsibilities. In progressive societies, men's traditional rights have been reduced and so have their traditional responsibilities, while women's rights have been increased and so have their responsibilities. However, lack of understanding as to the rationale behind the formulation of certain roles, and the balance between rights and responsibilities, may lead to a distorted view resulting in injustice and greater discrimination.

SIS is concerned that our society's confusion regarding traditional and modern practices may lead to greater discrimination against Muslim women in the sphere of family law. There is a tendency to regard men's traditional rights as immutable and unquestionable, instead of as the result of the development of fiqh rules by human juristic interpretations and understandings in accordance with the socio-cultural conditions of those times. On the other hand, women's traditional rights are apparently regarded as subject to change of circumstances. Women are often told that they should be patient with their husbands' shortcomings, and not to be "unreasonable" and "materialistic" in demanding for full maintenance from their husbands, as it is usually "unrealistic" to have such expectations in today's society. But husbands are not being told that under the circumstances it is unreasonable for them to continue to expect full obedience from their wives.

It therefore appears that :

- i. Muslim women are expected to continue bearing their traditional responsibilities, and are also expected to shoulder new responsibilities, while their traditional rights have been reduced, but on the other hand, --
- ii. Muslim men are allowed to enjoy their full traditional rights and are also granted new rights, while their traditional responsibilities have been reduced.

Isn't this a gross distortion and imbalance, a violation of Muslim women's human rights that could lead to excessive injustice and oppression?

2. Status of Muslim and non-Muslim women

SIS is greatly concerned that the use of religion has often perpetuated discrimination against Muslim women and denied them the increasing sphere of rights that is being granted to their non-Muslim counterparts. It would be most unreasonable for Muslim women to find themselves occupying a legal status that would be inferior not only to the legal status of Muslim men but also to that of non-Muslim women, and to find that they are unable to exercise some of the de jure rights that may be exercised by all the other citizens in Malaysia i.e. the men and non-Muslim women. Although Article 8(2) of the Federal Constitution now prohibits discrimination that is solely on the basis of gender, it is feared that discrimination may still be allowed if such discrimination is said to be on the ground of gender coupled with that of religion.

Women's liberation under Islam began at the time of the Prophet, and attempts to enhance the rights of Muslim women cannot be undertaken without consideration of the rights accorded to women as Muslims in the Qur'an and Sunnah. However, there is often a misconception nowadays that women's rights are based on Western, and hence "un-Islamic" concepts. Thus, Muslim women who seek to reclaim our rights are often unfairly accused of being influenced by the West.