

# MODERN APPROACHES TO ISLAMIC FAMILY LAW REFORM: THE QUEST FOR A BALANCED APPROACH IN THE MALAYSIAN CONTEXT

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**Abstract-** Muslim women have been caught in a tag- of- war between the forces of preserving Muslim family identity and advocates of its reform along the line of gender equality and International human rights. Given the current socio-political milieu at the global arena, the horizons for this tension to evaporate seem dim anytime soon. Reacting to Western human rights criticism of Islamic family law, the conservative camp regard any attempt at reforming Islamic family law as a naked invasion of Western imperialism on Muslim personal domain. Reform proponents, on the other hand, indict conservative interpretation of Islamic family law as the primary cause of women oppression in Muslim societies. Accordingly, they constantly endeavour to lobby for reform of Muslim family law using either international bills of rights or gender equality as the framework. Consequently, Muslim women's rights in the family has become a matter of paradoxical exegeses. To break this deadlock, this paper argues for a mediated solution by using critical content analysis of the two trends as a way forward for Shari`ah-based reform in Malaysia.

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**Keywords-** Women Rights, Muslim Reformist, Conservative Approach, Critical Analysis.

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## I. INTRODUCTION

Muslim family law with the exception of some states like Morocco by and large embodies traditional Islamic law as espoused by the majority of the classical Muslim jurists. Women activists and liberal Muslim scholars consider them as chauvinistic and gendered in the context of social mores and cultural norms in which we live today. Viewed as such, the main restrictive laws to women's rights of Muslim family law which pose the problem of reconcilability with international human rights and the notion of gender equality, to the modernist critics include: man's sole authority in managing the family, his exclusive jurisdiction over female next of kens` marriage, his unbridled right to practice polygamy, and his unilateral right to divorce his wife at will. This is in contrast to women's restricted right to divorce, their unequal right to child`s custody, their reduced right of inheritance, and their agony to exclusively bear the responsibility of providing for an illegitimate child even if it is from their own husband and not to mention the outcaste yields of free sex and adultery( see Bruce, pp. 16-28) .

To remedy the situation, it is argued that there is a need to reform Muslim family law from within by domesticating either the international instrument of women rights or notion of gender equality to affect positive changes in favour of women. The question which the paper proposes to explore is to see as to whether the above two strategies adequately provide solution to women's predicament in the family with the purpose of identifying a balanced course for the discourse on Muslim family law reform

### Muslim family law reform in retrospect

Since early nineties, to the modern reformists, traditional Islamic law has been bended to make ways for women`s rights in the domain of Islamic family law. The most common vehicle to achieve this has been through constant reform of the codified Muslim personal law in the Muslim world. Among noted achievements to which the optimist pride itself include, subjecting to polygamy to judicial restrictions, declaring extra-judicial divorce by husband if not repeated before a competent court as invalid, inserting stipulations against polygamy in the marriage contract, providing more avenues for women to initiate a petition for judicial separation. Legislatures have achieved these changes based on the traditional doctrine of elective choice (*takhayyur/talfiq*) from the body of legal opinions of various schools (*madhahib*). For instance, Ottoman Law of Family Rights 1917, as the first codified model of Muslim family law, diverged from Hanafi School to provide more grounds on the basis of which a Muslim woman can petition for judicial separation based on Maliki and Hanbalischools. Egypt gradually traversed the path of reform along the line of gender equality from within the Islamic tradition. Tunisia, since 1956, has adopted a radical approach to the extent of making polygamy illegal. In the local scene, to the critics, the Malaysian experience has been one of regression from reform to conservatism (Fournier *et all*, 2011, p.104). *The parent law here is the Islamic family law (Federal Territories) Act 1984(FTA) which most states follow literally or with necessary adaptation except some northern states with own laws which are more restrictive of women`s rights.*

To them, the equitable features of Muslim family law in Malaysia include: 1) insertion of stipulations

favouring women in the marriage contract, such as protecting her against harm, abandonment and lack of maintenance provide that she as a wife does not become disobedient; 2) restricting polygamy by several conditions including: being just and necessary, the husband is financially capable, the husband is able to maintain equality between the co-wives; and such a marriage will harm the existing wife religiously, morally and materially (life, body, mind and property) (FTA, Section 23); 3) subjecting a husband's extra-judicial repudiation of his wife to the approval of the court (by requiring him to repeat it again); 4) expanded grounds of petition for judicial separation by a wife, such as husband's disappearance for more than a year; lack of maintenance for three months, or cruelty; 5) division of matrimonial property in the event of a divorce between the couple in the calculation of which even non-financial contribution of the wife, such as household chores and the raising of children<sup>1</sup> are considered for determining the wife's share (Ibid, pp. 107-108).

Nevertheless, its inequitable features include: 1) fixing unequal legal age of marriage, 16 for women and 18 for men; 2) making the consent by a male guardian to the marriage of his ward mandatory unless waived by the court (ibid, p.107).

Consequently, the modernists though considering such reforms as somehow liberating view them as inadequate. To achieve full reformation of the law, for instance, Kamali proposes that two factors need to be trashed out: 1) the tenacious hold of prejudicial tribal customs; 2) the obstructionist stand of the conservative views, which has resulted in removing more egalitarian principles from the law and replacing them with more restrictive amendments (Kamali, p.38).

As to what is the alternative approach, the reformist projects advocate two methodologies as part of their strategies, namely drawing on gender equality principle and arguing for the adoption of international women rights documents by Muslim states to which we turn now.

### Gender equality model

The chief advocate of this trend are Muslim feminist groups in the Muslim world whose approach I have critiqued in other studies. For the purpose of this study, I take the example of Kamali, as a representative advocate of gender equality camp. Kamali maintains that the starting point to the full reform should be to "turn to cosmological equality

principles established by the Qur'an, i.e., legal ruling should reflect it. The two principle in question are: 1) the selection of what is best (for women) out of multitude of interpretations, "believers are those who listen to speech and follow best of it" (al-Zumar: 18). This verse subsumes all speeches including that of God- so as to choose best meaning from them. So if on a point there are many rulings, then the one which serves justice and secure welfare should be chosen. Hence, this verse lays down the principle of no restrictive interpretation (p.39); 2) realising the Qur'anic vision of human equality, "We created you from a single soul/ *min nafsawahidah*" (al-Nisa:1). *The world nafs* is feminine word, and the mate ensued from it is *zawj* which is masculine (al-A'raf:189). The significance of such opening of the Women Chapter of the Qur'an is that *Homo sapiens* are created from a single soul, thus they, whether of male or female genders are equal. Accordingly, all the rulings of marriage should be guided by the principle of human equality. Hence, *any fiqh ruling which conflicts with equity and justice on account of entrenched patriarchal custom and vestige of medieval societal values should be scrutinised through systematic ijihad to restore the balance of equality between the sexes* (pp.40-41). To Kamali, if this is not understood this way, *epistemologically perhaps*, this is the most obstructing challenge to reform of family law particularly when Muslim societies are still plagued by "patriarchal, male dominance, poverty, women's low education and prevalence of tribalism." (ibid). Nevertheless, approaching reform in line with notion of gender equality, Kamali admits to be rocky because the intellectual landscape in which jurists operate by itself is buffering the revival of innovative ijihad as "jurist look at the hallowed works of the imams and jurists of the past for definition of justice and fresh interpretation" (p.42).

Applying this strategy on specific cases, Kamali, among others, held: women can hold any political posts except if not advisable because of judicious policy (*siyashashariyyah*). For instance, not tasking women for public posts such as police in a male dominated society. As to whether women can hold the high executive position, Kamali, sees no problem in it as there is no clear authority barring women from holding it except a presumptive consensus. Such a presumptive consensus may not be invoked today on account of "material change in nature of leadership and human warfare" (p. 43).

As far as women's participation in the administration of justice is concerned, Kamali held that women can hold the position of a qadi (judge) even according to al-Tabari as opposed to majority in the classical fiqh. Because the majority view was based on faulty analogy its analogy to the position of political leadership (imamah), which to al-Tabari was a discrepant *qiyas (qiyasma`a al-fariq)*, since a woman

<sup>1</sup> In the case of *Tengku Anun Zihar v. Dato` Dr. Hussin*, the wife's moral support was regarded as sufficient contribution to grant her part of the family land upon divorce.

judge unlike an Imam not necessarily lead the *jihad* (ibid). Similarly, for women to be partially able as witnesses, he maintains that there is no clear text proof in Qur'an or the Sunnah to affirm it. In the administration of justice the overriding principle is that all avenues which vindicate truth and serve justice must be left open- particularly in critical situations. The limitation of women's ability as established by the Qur'an was on the subject of debt transaction "was informed by the condition of women in Arabian society in the seventh Century"(p. 44).

On women's financial and civil rights, the rule should be one of equality. For instance, a woman is free to choose her spouse based on Hanafi view. But what we see in terms of restriction on marital rights are due to prejudicial customs and male domination in Muslim societies. For example, denying women right to inheritance. To correct it, there is a need for awareness campaign (ibid). However, reform advocacy must be minimum in the area of *mirath*(succession) because: first, women are already important heirs to the estate of a deceased. For example, Eight out of twelve legal heirs whose share are fixed by the Qur'an are women. Even a female's half share( daughter) is a forward step in Islamic law as prior to the advent of Islam the estate of the deceased devolved only on adult males capable of fighting. Second, the conventional argument for disparity of shares for a man and woman is "still valid for societies where education and employment opportunities are severely limited for women. It also cannot be regard as negative because in such societies men are protective of women and family." Finally, the reform can still be pursued in other instances when the situation warrants. For example, in the case of grandchildren being barred from inheritance due to the death of their father during the lifetime of their grandfather, compulsory bequest (*wasiyahwajibah*) up to 1/3 of the estate if approved by other heirs can be the solution (pp.46-47). Or *istihasn* can be invoked to correct unfairness which has been created by applying a strict rule. For instance, if a men leaves behind a daughter and a son but it was only the daughter who cared for her sick father (paid all the bills), then *Istihsan* should be the remedy(p.48).

The question of *wilayah*, husband as the sole guardian over the child, is problematic for a woman to enrol her child to the school, particularly after a divorce. To Kamali, "Morrocan law(Mudawwanat al-Usrah) recognising equal *wilayah* (guardianship) and taking to mean mutual friendship and support should be an example to be emulated so that a woman can pass her identity on minor child- the principle of *takhayyur*-cross fertilizatiion of ideas from other schools and practices"(p.51).

On the issue of veiling, Kamali, disagrees with forceful assimilation. To him, Hijab is a cultural

symbol and mark of identity and even of protest, hence, unwarranted demand for conformity and assimilation as some countries like France did in 2010 should not be the case. Nevertheless, he argues that much of what is regarded Shar'i methods of veiling are cultural. For instance, "there is no mandate for face cover and veil in the Qur'an and the Sunnah except for the Prophet's wives (al-Ahzab:59). Qur'an only requires decorum and modesty and forbids provocative behaviour (al-A'raf:31.. Modesty is important with no quantitative specifications but jurists and cultural setters made it so. Niqab and hijab represented the culture of Iran's Sassanid society and segregation policy of the Christian in the Middle East. They now are largely custom driven phenomenon and continued tool of male domination"(pp.49-50).

Overall, to Kamali as a matter of strategy, prudence dictates that pressing for equality between the sexes must take into account Muslim cultural sensitivities so as "not to risk provocation and protest, which can be overwhelming". The approach should be "moderation between idealisms and realism and traditional and modern values. Gender equality must take off from least challenging to more sensitive areas."(p.43).

#### **International Human Rights Approach**

Drawing on several international human rights instruments, such as Universal Declaration of Human Rights, CEDAW and others together with aparadigm shift in social norms in Muslim societies, women rights activists are optimistic that finally, Muslim nation states will live up to their international commitments to make changes in their personal law of status for improving the condition of women in their jurisdictions. For instance, Hursh echoes this by saying that "internal reform aimed at ameliorating certain gender disparities through evolving standard – an understanding which facilitate contextually salient legitimate reform emerging from shifting social religious mores analogous to American Eighth Amendment Jurisprudence's, evolving standard of decency, has started to take shape in Muslim countries"(Hursh,2012: p.257). To her, to date, a towering example of "religiously informed law reform is the 2004 Moroccan Personal Status Law (Mudawwanah al-Usrah) as it while advancing international law and women's rights norms also meets the highest standards of Islamic law – a specimen of progressive laws on both international and Islamic standards" (Ibid). This law drastically reformed the Family Code of 1958 which in many ways wasrestrictive of women's rights as Aïcha El Hajjamihad dubbed it as "keeping women as eternal minors."

Women under the old law: "when marrying subject to the guardianship of their fathers; once married, they

owed obedience to their husbands in exchange for maintenance (*nafaqa*). The husband had unrestricted access to polygamy and unilateral divorce. The wife had the right to judicial divorce, but only on limited grounds and if she could provide evidence; or to separation through compensation (*khul'*), which often allowed a husband to pressure his wife into giving up all her rights, including child custody. Upon divorce, the mother would be given custody (*hadana*) of the children only if she did not remarry or take up residence far from the home of their father" (Hursh, p.258).

But the law reform of 2004, among others, altered some of those impediments: it declared joint management (*qiwamah*) of the household by both the spouses; made marriage guardianship optional in the case of women of pubescent age; equalized age of marriage at 18 for both sexes; subjected polygamy to conditions of necessity and the first wife's consent; extra-judicial divorce was abolished and the grounds for women to petition for judicial separation was expanded to include domestic abuse and violation of contractual obligation; wife's custodial right was made to continue even if she remarries; and women were also made deserving of share from acquired property during the marriage upon divorce. In addition, other breakthrough of the reform included: allowing grandchildren to inherit; and resolving paternity dispute by DNA test of paternity (Hursh, 261).

To Hursh, such an internal reform is possible in all jurisdictions as Islamic law contrary to what Western Feminist claim (patriarchal) is elastic enough to be harmonised with CEDAW and UDHR. The reason is twofold: first, Islamic law is not monolithic; second, patriarchal persistence is culturally Arab than Islamic, hence can be challenged by Islamic law itself (as Goren Therborn(2004) and Nusrat Choudhury have argued(2007). Thus, it is accommodative of reform through "evolving standards of cultural –religious mores and legal thought." This silent reform neither provokes resistance on the part of the general populace nor is seen as un-Islamic because: 1) it does not involve changing the text but "renders old regime untenable"; 2) it naturally dislodge its medieval baggage as modern sensibilities undermines them(Hursh, Ibid, 262).

### **The Problem of Contextualization and the Way forward**

From the above analysis, it is submitted that forsaking the traditional methodology of reforming and renewing Islamic law, in favour of methodologies which are suspected as alien, may not yield the intended reform. For instance, similar to Muslim feminists, Kamali, conceded this contextual impediments when he maintains that: 1) equality and justice for women must be inaugurated from within

Islamic tradition and condition of each society(not put Islamic veer on foreign ideas); 2) find Muslims own realistic solution and not to get "entangled in confrontation of secular verses ultra-conservative etc. as gender equality requires long-term engagement"; 3) need imaginative *ijtihad* as "medieval society's` values are entrenched in Qur`ani hermeneutics" and to overturn them you need imaginative *ijtihad* as some leading schools and scholars upheld the equality of *diyah* between men and women against the odds of the majority jurists` stand(p.42). Capturing this, Hursh also held that Secular approach will not bear fruition as Islam is the marker of cultural idenity, national pride and legitimacy (pragmatic reason)(p.262).

To me, however, the problem is more complex as reforming Islamic law is a question of methodology. Accordingly, constructing a theory of gender equality purely based on the Qur`an academically is hard to come by. The reason is simply because of specificity of principles of interpretation, *ijtihad* and fresh *ijtihad*. The general equality of sexes definitely is a principle which finds support from many textual proofs from the Qur`an and the Sunnah. But can this be stretched to the extent of equality of marriage between the opposite sexes for legalising polygyny. The suggestion that reform finally take effect if we move from less sensitive to more sensitive, may be utopianism of a situation where Muslim regard plurality of husbands as normal, which I cannot visualise. Furthermore, the suggestion that imaginative *ijtihad* can overturn patriarchal understanding the text is also paradoxical as the change of circumstances cannot override definitive rulings the Shari`ah. Equality of diyah was solved by reading of other texts dealing with the value of human life.

In the Malaysian context, the reform project along the above lines is unrealistic on two grounds. First, at the academic level, it has been facing stiff resistance from the local scholars since 1980s. Reform advocacy by its chief proponents, namely Sisters in Islam to alarge extent has been impeded by their arch rivals. To Fourier, there has been a" tussle between conservative (advocate patriarchal interpretation)and feminists(call for equality between the sexes). Neither side has been completely victorious but each group has earned some reforms. The competition became stiffer between the two camps with the official inauguration of Islamizationproject during 1990s (Fournier *et all*,ibid, p.106). To Fourier, the reform of Muslim family law as championed by Sisters- in - Islam in contrast to its rival, namely "the conservative Ulama who enjoygreater social acceptability and cultural authenticity," face the problem of legitimacy( seen as overly Western) when calling for reform through reinterpretation of Islamic law(Ibid).

Secondly, practically, some of the reform accomplishments apparently has worked more for women's oppression than their liberations. Some of the cogent examples include:

1. Restriction to polygamy practically cannot restrain those men with resources and audacity to criss-cross territory and get their marriage registered later on by merely paying a fine. In other cases, it provides an avenue for extra-marital affairs if two couple in-love cannot get their relationship legalized because of the first wife's refusal of the consent;
2. The judicial stipulation requiring that extra-judicial divorce to be repeated before the judge for legal validity has created the problem of "hanging marriages." Being disillusioned with this law, some men revenge on their wives by deliberately refusing to pronounce talaq before the court or even by refusing to attend the hearing. But practically, they have ended their marriage by virtue of unofficial divorce, and consequently the women are left in limbo, neither being divorcees and not a wives.
3. The conditions inserted in the marriage contract for desertion or lack of maintenance are practically disbanded when a husband accuses his wife to have been *nushuz*(disobedient).
4. Cruelty as a ground for judicial separation(*faskh*) practically, if in the beginning it was in the form of emotional abuse, may culminate in full scale physical abuse for the sake of reporting it to the police and then presenting it to the court as a proof. Because mere claim of emotional abuse, happening in the private domain, is difficult to prove unless there is a tell-tale sign of such abuse in the form external injuries supported by police report. Hence, compelling such victims to incite her abuser so that he can physically assault her.

To remedy the situation, I suppose that any effective reform of the Muslim law must proceed by taking into account the following:

1. Avoid uncritical use of value loaded concepts such as "gender equality" and "human rights" in any academic discourse on renewal and reform

by merely trying to force them into the reading of revealed texts(back –reading of *nusus*). Uncritical adoption of ideas considered alien to Islamic law even by one segment (ultra-conservative) will render such attempts as unacceptable as part of Islamic family law. The reason is that family issues are not matters for intellectual discourse but touching the sensitive domain of ordinary folks. Accordingly, the point of departure for indigenous reform must be the Islamic tradition itself and its renewal in line with Islamic methodology of reform and its parameters( on the principle of *ta'sil and tajdid*);

2. Refrain from reckless push for reform when it proves counter-productive due to non-existence of national consensus and unpreparedness of the common folk to receive and abide by them( on the principle of *i'tibarna`alatafal*);
3. And finally always endeavour to balance between the requirement of textual laws and juristic rational interpretation when advocating change and reform(on the principle of marriage between *wahyu and aql*).

## REFERENCES

- [1] Bruce, Gaenor(ed.).(2011).*An Introduction to Islamic Family Law*. London: UK Centre for Legal Education.
- [2] Fournier, Pascale *et all.*(2011).” Engendering Legal Reforms: Islamic Law in Africa and East Asia,” *Amsterdam Law Forum*, Vol.3:2, pp.103-129.
- [3] Goran Therborn.(2004).*Between Sex and Power: Family in the World, 1900-2000*, p. 116.
- [4] *Haneef, Sayed Sikandar Shah. (2011). “Women and Malaysian Islamic Family Law: Towards a Women-Affirming Jurisprudential Reform,” Journal of Social Welfare and Family Law*, Vol.33:1,pp. 47-60.
- [5] Hursh, John.(2012).“Advancing Women’s Rights Through Islamic Law:
- [6] The Example of Morocco,” *27 Berkeley Journal of Gender, Law. & Justice*. 252 at <http://family.jotwell.com/internalreform-of-islamic-family-law-through-evolving-standards-of-religion/> (accessed 23 September 2015).
- [7] Kamali, Mohammad Hashim.(2011). *Islamic Family Law Reform: Problems and Prospects*, ICR.plutojournals.org. at [www.hashimkamali.com](http://www.hashimkamali.com/) (accessed 22 September 2015).
- [8] Nusrat Choudhury.(2007). “Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan,” *Yale Journal of law & Feminism*, vol.19, p. 155.

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