

Women living under muslim laws  
النساء في ظل قوانين المسلمين  
Femmes sous lois musulmanes

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## DOSSIER 5-6

December 1988 – May 1989

### Islam, the Secular State and Muslim women in Malaysia

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Due to the multi-ethnic and multi-religious population of Malaysia, a dichotomy exists between Muslims who are predominantly Malays and the non-Muslims. Article 3 of the Malaysian Constitution enacts that Islam is the religion of the nation. However as a provision in Clause (1) of Article 3, it is guaranteed by the Constitution that non-Muslim nationals would be free to profess and practise their own religions. There is an unstated law that Malays only practise and profess the Islamic religion.

Malaysia was formed to become a secular state when it achieved its independence from colonial rule in 1957. Although Islam is the official religion of the state there is no condition whereby any law enacted in Parliament which is not consistent with Muslim law becomes void. In fact, the administration of Islamic matters does not rest with the Federal government but is a concern of the various state governments. In Malaysia, Muslim religious affairs are administered separately in each of the thirteen Malay states by a Council of Religion and Malay Custom, whose principal function is to aid and advise the Ruler on all matters relating to the religion of the state and Malay custom.

The origin of this peculiar situation lies in colonial rule. When the British colonised the country, they gave the local monarchs and sultans of each of the independent Malay states the power of control over Islam and Malay customs, while they themselves administered the country following the Western model. Besides this history of colonial rule, the multi-ethnic population of the country which led to the development of ethnic politics played a very important role in ensuring the dominance of secularism in all branches of public life.

As was speculated when the Malayan nation was in its infancy, the politics of balancing the various demands of a multi-ethnic community, especially mitigating the demand for an Islamic state, was not going to be an easy mission. Back in the late 1950's a former Lord President conveyed this impression:

The maintenance of Malaya as a tolerant secular state with religious freedom for all will require the utmost wisdom and statesmanship from the Government and the Opposition, for it must be very tempting sometimes to woo the important Muslim electorate by pandering to those who desire to set up an Islamic State in Malaya.' (Suffian, 1959,18).

Given the prominence of Islam in Malaysian history and contemporary politics, especially its overarching presence in a secular state, what has been its impact on women? In order to give a concise though far from comprehensive answer to that question, this paper will discuss several issues. The first part of the paper will review the role that Islam played in the emancipation of women during the anti-colonial struggles and later under the new independent government. The second part will move back into the present, where the issue of Islamic revivalism and its ramifications in Malaysian society will be discussed. Finally, to bring the paper back to a more

specific focus, the last part will attempt to evaluate some of the provisions of the Islamic family laws as they are enacted in Malaysia, and their implications for the rights of women in the country.

### **I. The role of Islam in Malay Women's Emancipation**

Historically, Islam did play a progressive role in planting the seeds of some of the earliest modernist movements in Malaya. Islamic reformers were in the forefront of the struggle for expanding access to education for Malay women.

The most important reform sought by the people was the expansion of formal schooling during the pre-war colonial years. This demand was conceded by the British, but only as it suited their purpose. The colonial administration not only needed to socialise the local ruling elites into the ways and orientations of the West, but also to train a native labour pool that could be employed to fill up some of the lower level administrative positions. Different types of schooling were thus provided for different classes of natives; English education for the elites and vernacular schooling for the lower classes (Loh, 1976). Schools, especially English schools set up for women, were few and were intended to serve one primary purpose: to train girls to become suitable wives of their future husbands, the emerging new local elites, who would become part of the colonial machinery (Windstedt, n.d, 29). (1)

#### **As very explicitly stated by a British Adviser in his Annual Report:**

It is not the intention of Kelantan government to aim at any very considerable extension of English education for Malay girls. This school is intended mainly for daughters of the ruling House and Malay officers. Special attention is paid to domestic science, handicraft and art. The general intention is to train girls to be alert and quick-minded and suitable wives for Malay officers who have received higher education, rather than to seek any high standard of technical education. (A.C. Baker, 1930. 45)

(1). Windstedt however sounded almost enlightened when he implied that girls were to be educated, "...to be the intellectual peers of their future husbands." (underline, our own).

At another level of the social strata, there also existed the local intelligentsia whose education was from the Middle East, and therefore greatly influenced by reform movements emanating from the Arab world during the early twentieth century. Their ideas about "progress", stemming from the then liberal interpretation of the Qur'an, also extended to the question of women's emancipation. The famous piece by Kassim Amin Bey, the Egyptian reformer, entitled *Tahir ul Mara'ah* (The Emancipation of Women) appeared in a local journal in 1930. (Roff, 1974,79). This article was first published in 1899 in Egypt. Using religious texts in the arguments, Kassim Bey challenged the interpretation of women's position in Islam and advocated education, legal reforms and women's right to work as well as attacking the practice of veiling. (2)

During these years, both the colonialist and nationalist forces advocated education for women. While the former's vision of female education was to further enhance the status of the local bourgeoisie and their women, the nationalist reformists were interested in education for women because it reflected progress and modernisation and a challenge against outmoded traditional values, especially the Islamic seclusion of women. Nevertheless, neither the Western-oriented bourgeoisie nor the reformists were prepared to see women give up their traditional domestic and feminine roles. For them, education for women was to enable them to become better wives and mothers who could socialise the future generation with progressive values, not to grant them the freedom to participate equally in public life (Mandersom, L, 1980,21).

(2) When it first appeared in Egypt, the article provoked a lot of reactions and criticisms, especially from the orthodox religious authorities. Debates on the women's issue ensued in Egypt throughout this period, resulting in the publication of Kassim Bey's second article, entitled, 'Al-Mara Al Jadida' (The New Woman). It is interesting that in this piece, he chose instead to base his arguments on the doctrine of natural rights and concepts of progress, rather than to argue within the Islamic precepts. (See Kumari Jayawardena (1984, 22-23)).

Despite the narrow vision of these early reformers, the pre-war involvement of Malay women in some social organisations served, nevertheless, to extol the virtues of formal education for women. Though limited and specific in objectives, the expansion of schooling in colonial Malaya also resulted in the entry of women into the teaching profession. Among Malay women, almost all of the early initiators of women's organizations were teachers. By then education had also become a most pressing issue for the Malay community which was feeling left out of the rapidly expanding urban economy. The Malay Women Teachers' Union, founded in 1929, was one of the earliest women's movements devoted to encouraging the entry of Malay women into formal schooling. Not surprisingly, this union was organised by Malay teachers from the Malay vernacular and religious schools, instead of those from the English schools. Given their distant association with the British, they were more likely to be stirred into action than the English educated women. Women in this early movement voiced their advocacy for female education in their own journals, particularly the *Bulan Melayu*, and *Kancana*, both under the editorships of women.

While for the most part women's organisations in Malaysia did not play effective roles in upsetting the scales of gender relations, there were instances in history which pointed out that when they did do so, they were met with strong resistance.

One of the earliest challenges was waged around the issue of the internal structure of the party. Khadijah Sidek, who was elected the leader of the Kaum Ibu in 1954, was expelled from the party in 1956 for several reasons, officially justified on the grounds that she had breached party discipline and rules. She in fact agitated for more female representation in the decision-making bodies of the party, for independent status of the women's section, a separate women's youth section and the increased nomination of women to contest the national elections. Although the pretext for her expulsion was centred around the question of party discipline, it is clear that her indiscipline involved challenging tradition. Khatijah Sidek in fact provided the first challenge against male dominance in the party (Manderson. 1980, 112/113).

Later on, when the Wanita UMNO, (3) was playing a more vocal pressure group role in society, the issue of Muslim marriage and divorce laws was brought to light. In 1973, the leader of the then Wanita UMNO, Aishah Ghani, called for some regulation of the laws so as to not bring about "...a raw deal for women" (Dancz, 1981, 389). Later on she referred to the issue as a "thorn in the flesh" for Muslim women (Danz, 1981, 389). Her remark provoked public outcry, and she was forced to disclaim her statements by admitting it was not Islamic laws that were at fault but only the unjust interpretation of them that needed to be rectified (Dancz, 1981, 395). In addition, the reforms put forward by the women's wing were not only strongly opposed by the conservative Religious Council but also by the Youth wing (*Pemuda UMNO*) of the party. Thus, the situation over the laws has only achieved minimal reforms until today.

(3) Women's wing of the dominant Malay party UMNO, (United Malays National Organisation).

In 1976, Wanita UMNO's call for the appointment of leaders as village heads was ruled by the Religious Councils of two states as contrary to Islamic law. Before this, two women were appointed *ketua kampung* or village heads, by the Negri Sembilan government. However, the state government later gave in to the religious opposition, and their appointments were withdrawn (Dancz, 1981, 389-9).

## **II. Post-Independence Developments and Islamic Revivalism**

Malaysia's plural population, consisting of three predominant ethnic groups, Malays, Chinese and Indians, has always provided the stage for the political balancing acts both of governments and non-governmental groups. The state, while maintaining the political dominance of the Malays, also attempts to accommodate the demands of each ethnic group. Nevertheless, despite the Malays' dominance in politics, they have yet to achieve economic status on a par with the other ethnic groups. In 1970, the New Economic Policy (NEP) was promulgated and implemented to redress the so-called backwardness of the Malays. The policy instituted affirmative action in the areas of education, employment and equity ownership.

The NEP was meant to bring about drastic changes in the economic status of the Malays. To be able to do so it had to upset all 'natural' phases of development. For example, the migration of Malays into towns was speeded up by policies such as awarding scholarships and aid to students to study in institutions of higher education at home and abroad. Employment which enables the intake of a large proportion of Malay labour was also created in towns, to ensure that the Malay urban population equalled that of the non-Malays. The sudden impact of being thrown into the 'modern', urban but alienating environment created an ideological and social vacuum for a lot of Malays students and youths who came from a traditional, rural and non-competitive social background. Since Islam was already rooted in the culture of the Malays, at least at the level of social and cultural rites, it became a source of moral and spiritual guidance for a lot of students and youths (Zainah Anwar, 1987).

Together with this sense of individual inadequacy, students became disillusioned with capitalist development as a whole, which they identified as the excessive accumulation of material wealth and obsession with materialism. Corruption at government levels, the inability of the state to deliver goods and the perpetuation of social ills such as poverty and backwardness, have contributed towards the politicization of Malay students. There was no better rallying point than Islam, which by itself contained adequate philosophies, principles and teachings with which to address the above problems. Although socialism was also a popular ideology among students during the sixties, it has got severe disadvantages. Firstly, it is identified as having its roots in Western traditions and philosophies. As modernisation-cum- Westernisation was considered to be one of the roots of the social problems at hand, it was not an easily acceptable ideology to a majority of the Malay students. Secondly, the strong and uncompromising anti-Communist policies of the government resulted in people becoming wary of the ideology, as direct state repression in the form of legislation can always be used to clamp down the movement. Thus in the earlier stages, Islam was a much safer alternative, whether as a social pillar for individual moral guidance, or as a political movement to question, challenge and eventually overthrow the establishment.

The impetus for the Islamic revivalist movement in Malaysia was also being provided by the global trend of Islamisation. The burgeoning movements in places such as Iran, Pakistan, India and the Arab countries lent strength and credibility to similar movements in the country. When the Iranian revolution successfully established an Islamic state in Iran it legitimised even further the necessity for capturing state power through militancy and more aggressive strategies. The concept of Islamisation as being the ultimate goal of capturing state power and the realization of Islam as a viable alternative to both the capitalist and socialist systems became actively promoted. The dominant political party in the country, the Parti Islam se Malaysia or PAS, although in existence for a long time and almost defunct at one point, reassessed its political platform and rebuilt the party on this new fundamentalist-revivalist base. It continued to challenge the existing government, not merely by playing its role as parliamentary opposition, but also by presenting itself to society as able to provide an alternative system which is not merely a changed government, but a changed state, one that would incorporate the Islamic way of life - from jurisprudence to the economic system.

The existing government consisting of an alliance of several ethnic-based parties, though never identified with the Islamic cause as the rallying point for election victories, nevertheless had to pander to these new developments. Nonetheless, this Islamisation process was spread much less speedily than it otherwise could have been. For one thing, Malaysia was still a secular state with Islam only declared as an official religion in the Constitution. Furthermore, the often-conflicting interests of the multi-ethnic population had the effect of levelling the demands of one group.

Despite the checks provided, society as a whole was deluged by the implications of this 'new' Islamic revivalism and made conscious of the presence of Islam in their lives. There is a sense that Islamisation is more overt today than a few years back.

At the most conspicuous level is the change in the form of Muslim women's dress. More women are donning the veil or *tundung*. It used to be only young women who would be seen in their *tundung*, who would cover their hair and whose veils extended all the way over the chest, leaving only the

face visible. Nowadays it is common to see elder women and even children in them. Although there have been no official directives and policies to enforce veiling upon Muslim women, there exists strong social pressure, especially among women in a collective situation such as students and office and industrial workers, to don the veil.

The government has also stepped up its efforts to demonstrate to its Islamic constituents that it is in fact infusing Islam in its administration. The government has certainly been very active in enhancing the symbols of Islam. For instance, the use of government controlled media to project the image of Islamisation has been quite effective. Government television and radio are broadcasting more religious programmes today than before. Islamic standards of morality are also adhered to by the zealous censoring out of suggestive scenes in films. Television programmes are also interrupted to remind viewers of the commencement of the five prayer times. Other symbols of these state sponsored Islamisation drives are such things as the introduction of Islamic lessons and courses in the curricular of schools and universities. In local universities today, it is compulsory for all students to take a specially drawn up course on Islamic civilisation.

Other examples of Islamisation can be seen in the appointment in the early 1980's of a Deputy Minister within the Prime Minister's Department to be in charge of Islamic affairs. There never used to be such position as this, as religion is a state concern. The appointment of this Federal position seems to imply that Islamic matters are increasingly becoming the concern of the Federal government, moving towards centralisation and therefore an intensification of its influence.

In the 1980's too, the International Islamic University was set up, together with construction of an expensive and prominent Islamic centre in the capital city. All these are examples of developments carried out by the government to justify its Islamic stance.

The above moves of the government have undoubtedly been very well received by the Malay community, however, whether the public is ready to accept an Islamic government remains to be seen. Going by electoral popularity, the Islamic party ranks miserably low. PAS, the sole Islamic party in the country, although seemingly able to garner large gatherings at their public forums and religious sermons, suffered a dismal loss in the last election in 1985. The party only managed to win one parliamentary seat.

Nonetheless, this might not say anything about the degree of Islamisation that has permeated Malay society. It has to be remembered that the largest constituencies are still rural based, whereas it has been asserted that the Islamic movement is urban based. Many of their followers are students and young professionals. They were either not of a voting age or were indifferent towards electoral politics in 1985. The other reason is that those who are in the *dakwah* (4) movement might not even want to partake in electoral politics, as it is a Western and non-Islamic system of legitimizing governments.

(4)*Dakwah* is a term commonly used in the country to generically refer to the Islamic revivalist movement.

However, if in fact the Malays showed their reluctance in accepting an Islamic government, then it could be because they are not ready to profess and practise Islam in its true but extreme form. The Malays will cling to Islam though perhaps only to its nominal version.

One trend in the Islamisation process which has received mixed reactions from Muslims and which has caused many to feel slightly wary of Islam is in the area of legislation. Islamic groups have strongly advocated the penetration of Islamic laws into the legal system, for example, the adoption of the Islamic penal code, which includes the imposition of capital punishment such as chopping off the hands for stealing and flogging in public for adultery. So far this has not materialised, as there strong opposition has been voiced by non-Muslims, with the support of many Muslims.

Although there has been little success in trying to introduce new Islamic legislation, there has been an intensified move to implement many Islamic provisions that have previously been either

ignored or loosely implemented. For example it has been enacted that the following, if committed by Muslims, are criminal offences punishable with a fine or imprisonment or both: (5)

- a) not attending Friday prayers at the Mosque;
- b) consuming intoxicating liquor in public;
- c) eating during the hours of daylight in the month of Ramadan;
- d) wilful disobedience by a woman of any order lawfully given by her husband;
- e) a male being found in retirement alone with and in suspicious proximity to any woman other than a woman whom he is forbidden by Islam to marry, or any female Muslim who abets such as offence;
- f) any female Muslim found in retirement alone with and in suspicious proximity to any man who does not profess the religion of Islam;
- g) teaching save in his own residence and in the presence only of members of his own household, any doctrine of the religion of Islam without authority;
- h) teaching or publicly expounding any doctrine or performing any ceremony or act relating to the religion of Islam in a manner contrary to Muslim law;
- i) printing or publishing any book or document giving or purporting to give instruction on rulings on any matter of Muslim law or doctrine or Malay customary law; if such book or document contains any matter contrary to Muslim law or doctrine or to any lawfully issued *fatwa*;

(5) Cited from Suffian, 1959, 16-17. The examples are taken from Selangor Enactment n°. 3 of 1952.

The above provisions have existed for a long time, although it is only recently that they have become controversial. Prohibitions against drinking in public, against close proximity to the opposite sex or *khalwat*, and eating in public places during Ramadan have all been zealously imposed. Almost daily it is reported in Malaysian newspapers that couples are caught in the act of *khalwat*. A man was also flogged in the state of Kelantan for being caught drinking in public. There have also been plans to impose the fines on Muslims not attending Friday prayers in mosques. All these have created furores and worries among Muslims, while non-Muslims fear that someday even they might have to abide by these Islamic dictates.

### **III. Islamic Family Law and Women**

It is very significant that the *Dakwah* movement in the country has made many women's groups conscious of the implications of Islamisation upon the status of women. Women who belong to the *Dakwah* movement perceive their involvement as being based on a conscious and informed decision to partake of all of the provisions contained in Islam. To them there is no question or issue in the precept that the position of women in Islam is secondary to that of men. The Vice-President of the Islamic party PAS pronounced the position of women in Islam to be thus:

In Islam the position and role of women is rather comprehensive because they are the ones who nurture and mould the future generations with patience - which is enough for them not to be further burdened with workloads not compatible with their physiological and psychological make-up. (Haji Nakhaie Haji Ahmad, 1986)

Undoubtedly Islamic adherents feel that this relegation of woman to the domestic role is not demeaning for her. They are quick to point out that it is in fact is an honoured role. A model of an Islamic constitution drawn up by the Islamic Council of Pakistan is one which Muslim groups in the country have turned to. In the model constitution, article 13 (c) stipulates that, "Motherhood is

entitled to special respect, care and assistance on the part of the family and the organs of the State and society." There is no provision for equality on the basis of gender. It has been said that all the concern over gender equality and women's status, and the attack on Islam's position on this, are merely the sentiments expressed by Western-influenced women;

"Only those who have been influenced by the so-called 'women's liberation movements' cultivated by the West may not agree with our stand. Those who hold on fast to the traditions of the East - be they Chinese or Indian - and those who are committed to Islam are not the least bothered about these 'women libbers', whose antics are propagated by a small section of women intellectuals in Malaysia." (Haji Nakhaie Haji Ahmad, 1986).

The sum effect of all this is that women, whether they adhere to the Islamic viewpoint or not, are forced to look deeper into the ramifications of Islam. One area in which much material action can be undertaken is in the area of legalities. Since the administration of Muslim law in the country deals almost wholly with Islamic family laws, and Islamic family laws significantly affect women, it has been in this area that the tension between Islam and the rights of women has become so prominently projected.

The Islamic laws in Malaysia, the most comprehensive of which lie in the area of the family laws, are based on the *Shafii* school of law. In the fields of criminal law, the law of contract and tort and commercial law, English law is followed. Only Muslims have to abide by the Muslim family laws, while non-Muslims are governed by the country's civil laws on the family. (6) Muslim family laws are administered separately by each Malay state under their various state enactments. With the exception of the Islamic Family Law (Federal Territory) Act, 1984, which was passed by Parliament, all other enactments were not legislated by Parliament but by the various state legislative bodies.

(6) Law Reform (Marriage and Divorce) Act 11976.

A salient question to be asked is whether the Islamic family laws as they exist, and as they are interpreted and administered in this country, have the overall effect of protecting women, especially in the espousal of their role as mothers and nurturers of the future *ummah*.

We can look at four areas dealt with in the Islamic family laws in order to answer the question above. These are the areas of marriage, divorce, custody and inheritance. In Malaysia, Malays also observe the *Adat* or customary laws. At times these customary laws, especially on inheritance are in complete opposition to the Islamic laws. It is thus useful to compare the different provisions laid down by these two sets of laws in order to draw out their implications for the rights and position of women in society.

Some comparisons will also be made between the provisions contained in the civil law on the family, called the Marriage and Divorce (Reform) Act 197, and the Islamic Family law. Patriarchal notions might not just exist in Islam but may very well be prevalent in the civil legislation. The discussion below will be based on the provisions contained in the various versions of the family laws enacted in Malaysia.

## **Marriage**

Under the Shafii school of law, the consent of the virgin girl is not required for her to be given in marriage by her father or paternal grandfather. It is expected that the father will naturally consult her, although no assurance is required that the consent has been genuinely obtained. The only check that consent is eventually obtained is when the marriage is to be registered. Couples have to sign the marriage register in order to legalise the marriage; even so some states in the country do not require the signature of the bride, as the *wali* or representative can act on behalf of the girl.

## **The dissolution of marriages**

Divorce is, by and large, the unilateral decision of the man. The pronouncement of the *talak* need

not be communicated to the wife, nor are witnesses required under the Hanafi school of law. Under the Islamic law enacted in the country, all divorces have to be registered in order for it to be valid. However a *talak* will only be registered after the wife agrees to it and it is approved by the *kathi*. Reforms in the administration of Muslim laws have thus provided the women with some protection, that is protection against the uncertainty of the status of her marriage.

A man is given the right to pronounce the number of *talaks* he wishes as this gives him a chance to revoke the divorce if he wants to. In cases where women can seek a divorce, for example under *khold*, (in which the marriage is repudiated by redemption), the divorce when granted is irrevocable. This is likened to punishment for the woman, especially because she dares to initiate the divorce process.

Under Muslim laws women may apply to a *kathi* or a court for divorce. There are three kinds of divorce that can be initiated by the woman. The first is by *fasakh*, that is to declare the marriage null on the basis of certain grounds. The woman can also apply for divorce called the *cerai taklik*, or divorce by stipulation, that is based on conditions for divorce agreed to by both parties. This is perhaps the closest to a mutual agreement for divorce. In this case the Registrar of Marriages is required, in registering a marriage, to prepare a *surat taklik* or letter of *taklik*, in a prescribed form and to obtain the signatures of the parties entering into the marriage contract. Some examples from various states of what is stipulated in the form are as follows:

On every occasion that I am estranged from my wife for a continuous period of four months, whether I leave her or she leaves me by her free-will or by force, and upon application by her to the *kathi* or *naib kathi* and upon his being satisfied of such estrangement, my marriage shall be dissolved by one *talak*. (quoted from Ahmad Ibrahim, 1965, 35) (7)

Another example of the conditions under which a woman can be granted a divorce is as follows:

If I fail to maintain my wife for more than three months or if I assault her, and she complains to the Shariah Court and the Court is satisfied of the truth of the complaint, my marriage shall be dissolved by one *talak*. (Ahmad Ibrahim, 1965, 35).

A woman may also obtain a divorce by means of the *kholo*. In this case, the wife agrees to pay compensation to the husband in order to release his material rights. However, the husband still has to pronounce the *talak* and when he does the divorce is irrevocable.

Finally, a woman governed by the Islamic law can apply for a divorce on her own by judicial decree. The grounds on which such a decree can be granted are similar to those laid out in the Law Reform (Marriage & Divorce) Act 1976, which is the legislation applicable to non-Muslims. One important difference is that in the Islamic case only the woman can apply for the dissolution of marriage under *fasakh*, while in the civil law, both parties are entitled to the decree.

Some conditions specified by the Islamic law seem to be more inclined towards the protection of the woman than the conditions laid down under the civil act. Under the Muslim law a woman can repudiate her marriage by reason of her husband neglecting her or failing to provide maintenance for three months, and of treating her with cruelty and assault. These conditions are not included under the grounds for the nullifying of marriage under the Civil law.

However, neither the Islamic nor the Civil Acts afford as much leeway to the woman in the question of divorce as customary procedure and laws do, especially among the Negri Sembilan Malays. In the Malay state of Negri Sembilan the rules of inheritance are based on a matrilineal principle. Women act as trustees of all property of the tribe which is considered communal property. Although patriarchy is not absent, especially insofar as leaders must be male, there are many provisions in the customary laws which exist in the woman's interests.

### **(7). Terengganu Enactment**

In Negri Sembilan a husband who wishes to divorce his wife will first have to go through arbitration



ceremony called *bersuarang* or settlement. A feast has to be held for his wife's and his own relatives, in which the husband will state the reasons for his intended divorce. Part of the purpose of the gathering is to provide the opportunity for relatives to act as arbitrators or to try to patch up the marriage. However, if no hope of a patch-up occurs, then the divorce will go through, but only after the settlement of the conjugal property.

Dissolution of marriages under the *kholo* or *cerai taklik* provision but practiced under customary laws are more accommodating towards women. A woman can redeem the man in several ways if she wishes to repudiate the marriage. According to the Ninety Nine Laws of Perak, there are several ways in which a woman can obtain a divorce. First, by establishing a complaint at the court on three occasions. She will then be granted the divorce if the husband is found to be guilty of her complaints. However if divorce is granted, she must redeem herself by returning an amount equivalent to her dowry. The second instance is when she does not wish to consummate the marriage, in which case she has to forfeit her dowry plus a fine (in those days a specified amount of gold). (Rigby, 1908, 22-34). Malay custom allows for the woman to leave her husband even if he is not guilty of any offence towards the wife according to religious or customary laws. She will have to leave him in the clothes she wears, return the dowry and pay for the divorce. A woman can also divorce the husband if she cannot tolerate his behaviour. She will have to return half her dowry including all joint property or property acquired during marriage. However, she does not lose her own personal property. (Kempe & Winstedt, 1952,6). The amount of redemption under *cerai taklik* that a woman has to pay to the man, as specified under the newly legislated Islamic act on the family, is subjected to the agreement reached together by both parties and in consultation with the *kathi*. This actually has the effect of stalling the process of dissolution.

Under civil law a woman cannot force a man to repudiate his marital rights by redemption. Instead, a divorce petition has to be filed by either party first. This too would involve a long drawn out process.

On the question of compensation, a man is at most encouraged to pay the *mutaah* or consolatory gift to the woman if she is wrongly divorced. However, the onus is upon the woman to apply to the court for the *mutaah*. On the other hand a woman has to pay much more in order to secure a divorce. In the case of the *kholo*, the woman would first have to apply to the court to carry out the action. The amount of compensation to be paid to the husband has to be agreed to by him first before the *talak* is pronounced. Thus the man is able to hold the *talak* against the woman for his compensation while a woman can only apply to get her consolatory payment after the divorce has come through.

### **Custody of Children**

The custody of children normally rests with the mother below a certain age, although it is the father that is the guardian of the children and they are his property. In Singapore the Guardianship of Infants Ordinance 1952 provides that it is the father of the infant who will ordinarily be the guardian of his person and his property. Under the Guardianship of Infants Ordinance of Sarawak, the father and mother have equal rights to the custody and upbringing of the child. The right of *hadanah* or custody remains that of the mother. However, the right of the *hadanah* terminates upon the child attaining the age of seven years in the case of a male, and the age of nine years in the case of a female. After this termination, the custody is transferred to the father. (8). The right of *hadanah* of a woman is also lost once she remarries.

On this issue too customary laws seem to give more credence than Islamic laws to the recognition of the woman as custodian of the child. In Perak during the eighteenth century, if a child was under nine he could decide with which parent he wished to live. However, a girl had to live with her mother. In Negri Sembilan, where the tradition is matrilineal, all children belong to the mother's tribe, thus on divorce the mother has custody of all the children. (Ahmad Ibrahim, 1965, 74).

### **Property and inheritance rights**

The distribution of property among Malays is still largely based on customary laws, although Malay

society is becoming more inclined towards the Islamic system at the present time. Under customary law, a wife can claim a substantial share of land acquired during the marriage. For example, if a woman has helped to cultivate the land, she is entitled to one-half of the property. If she is not involved in the cultivation she is entitled to one third of the jointly acquired property. Under customary law if the husband wants a divorce without any fault accrued to the wife, then the joint property is divided into three; two parts to the woman and one part to the man. (Kempe & Winstedt, 1952, 6). In certain cases, the wife is still entitled to one third of the value of lands acquired during marriage even if it is proved that she was divorced for adultery. (Hooker, 1976, 240, Ahmad Ibrahim, 1956, 56). In the case of the *cerait aklik*, or divorce by stipulation, the wife retains the whole of the property, whether the husband's own property or joint property. (Ahmad Ibrahim, 1965, 59).

As can be seen, customary laws on inheritance are in direct opposition to Islamic laws. However legislation in the country has provided for the continuance of the *Adat* or customary rules because to not do so would be

(8) Islamic Family Law (Federal Territory) Act, 1984, (Act 303). Section 84.

To dismiss a matter of great concern to the peasantry, which is land ownership and inheritance. Nonetheless, no clear rules have been written as to how the two axioms, Islam and customs, are being compromised or dealt with. The negation of the *Adat* rules as being opposed to Islam has been promoted by one side while the assertion of the *Adat* laws has been done only by females (Hooker, 1976, 211). There have been many instances in which Islamic laws have been used to overturn the decisions made on the basis of *Adat* Laws. (9) In the case of *Bongah vat in*, the court overturned the decision of the kathi to award a half share of the joint earnings acquired during marriage. The civil court ruled that joint earnings were the property of the husband (Hooker, 1976, 229).

In relation to inheritance rights under Muslim law, especially when they relate to a Muslim dying intestate, the widow who is left with no child is entitled to one-quarter share of the deceased husband's estate. If the man dies leaving a widow with children, the wife will only get one eighth share, while the rest is divided among the children; two parts going to the sons and one part going to the daughters.

In the civil law, if a man dies intestate leaving his wife but no children, then she is entitled to half of his estate. This appears to be a better deal than the one-quarter share that a Muslim widow is entitled to. However, under civil law, if a woman dies leaving the man with no children then he is entitled to all of her estate.

In customary law, the widow is entitled to a special share in the *harta sepencarian*; or joint property acquired during marriage. In smaller estates she may even be entitled to the whole estate (Ahmad Ibrahim, 1965, 83). Under customary laws, only property obtained before marriage goes back to either parties' relatives. In the matrilineal society, all property acquired during marriage goes back to the woman's family after the man has died.

In Malaysia's history, Islamic laws of inheritance are sometimes ironically used to justify economic progress. In 1968 there was a proposal from the Chief Minister of Negri Sembilan to terminate the continuance of the customary laws of inheritance. The reason given was that as a result property was resting in the hands of females. 80% of farm occupiers are women which "therefore" makes the farms unproductive. Secondly, he argued that customary inheritance results in excessive fragmentation so that farm sizes are uneconomical. As land was being acquired for cash crop farming they did not come under ancestral property. It was freehold land and thus not conducive for *Adat* law. In this instance, Islamic law is considered progressive and customary law anti-progress, as it merely encourages peasant subsistence farming which could lead to stagnation. (Hooker, 1972, 216).

(9) In the case of *Bongah v. Mat Din*, quoted in Hooker, 1976, 229.

While Islam exalts the role of women, even as mothers, it does not go as far in placing the importance of women as the bridging line of communities and generations. Customary laws on the other hand, place an emphasis on the female line, even if patriarchal system of leadership prevails.

### **Conclusion**

In the past and in traditional societies it cannot be said that women's freedom and rights were excessively curtailed. This is because certain rights of women, particularly property and inheritance rights, are recognised under customary Malay laws, which existed in the Malay culture independent of the spread of Islam and survived despite it. Secondly, women have enjoyed some degree of freedom in work, resulting from secular schooling.

The forces that have kept the participation of women low in the public sphere were factors such as lack of access to formal schooling. More women were confined to statistically invisible jobs such as in the fields of agriculture, cottage industries, informal sectors and domestic work. Today, more women are receiving higher education than before. More women have entered into the urban work force and many more are also entering the professional fields.

More than it challenges capitalism, this surge of women into the public domain since the country's independence is challenging the institution of patriarchy. Islam does play its part in curbing the entry of women into the public sphere, through several means. Muslims are conscientized as to the proper role of women in Islam. The Islamic doctrines are used to justify why women should not be allowed to take up high level jobs. The lowering in the rate of fertility of women has also caused alarm and has been perceived as a threat to the survival of the family and eventually the Islamic ummah. Here Islam has played its part in opposing family planning policies. Finally, Islam has the means to forbid totally the conferment of leadership positions on women. It is at the leadership level that the perpetuation of male dominance is assured. Right now Muslim adherents seem to perceive that it is only through maintaining patriarchy that the other goals of Islam can be properly achieved, i.e. goals such as social justice, equality and peace. Is Patriarchy then the ultimate end of Islam?

The revival of Islam in the country is perhaps a manifestation of a need to reassert patriarchy in society. It has brought to the fore even more starkly than other movements, the issues of women and their rights. Islam is far from silent on this, and in fact the role of women is very much highlighted in Islamic law governing the institution of the family. While Islam professes to revere motherhood and the role of women in bringing up the family, this is barely evident in the provisions of the Islamic family laws as enacted in the country. In comparison with customary laws and the civil laws on the family applicable to non-Muslims in the country, Islamic family laws as enacted here have still a long way to go before they can ensure women that they are actually being protected. It would appear that limitations of the Islamic family laws would have to be mitigated by other reforms, perhaps of a secular nature, to ensure that the end goal of Islam is not merely patriarchy but the greater goal of bringing good to all human beings.

August, 1988.

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