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A study on Muslim women empowerment in Bangladesh and Malaysia

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Abstract: Bengal and Malaysian civilization is one of the oldest and most influential civilizations of history which has been ruled by a number of nations throughout history and have reflect glory and high level of economic and political power. Both of this society has a historical back ground for empowerment of Muslim women in their society. In this study, it is attempted to describe the near historical consequences and observing the important factors for empowerment of Muslim women of these two Muslim majority countries.

Keywords: Current status of women, Laws on rights, Comparison between Malaysia and Bangladesh.

Introduction

The empowerment woman is one of the most important Islamic values which are a buzz word now a days. Unlike other societies, there does not appear to be confusion or significant conflict in terms of the roles played by women in Malaysia and Bangladesh. In both society there have been fortunate in that many visionary scholars and intellectuals who opened up avenues for women more than a century ago. In many cases, Islam has empowered and enabled women to reach their full potential and capabilities just as much as men. If women are enabled to maximize their potential, they will be able to contribute to the empowerment of all citizens in society. This can happen without denigrating the social, cultural or religious obligations that are part of every woman's

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life. Considering the conditions above, it is necessary to explore the strategies that women employ to access the public sphere in the context of a patriarchal socio-political system. It is important to note that many of the women who have been successful come from a background in the political elite. Their background and class is perhaps the most important factor in their successful inclusion into the political system. Certain forms of support within the society are important for the development of women's role in politics, and there are already many success stories of this type. The most important is political awareness. Muslim women who had until recently been relatively invisible in the public sphere are suddenly filling up meeting halls and organizing campaigns for women's rights, civil rights, human rights, and for democracy. The second is education, which provides the core of informed and competent female opinion. Thirdly, there are now many women holding senior positions in the country's civil service. This has ensured women's input in the planning and implementation of government policy. In this study the empowerment of Muslim women has been described based upon some certain factors which have influential impact on everyday life on two Muslim dominated societies.

Marriage in the Bengali society

All most all Bengali marriages are arranged, but Hindu and Muslim marital performs vary in certain means admirations with relatively fewer choice (also referred to as "love") marriages. In Bangladesh Muslim society, caste-related restrictions are not practiced as in Hindu community. Another practice also observed that there is no barrier to cousin marriage, its incidence among Bengali Muslims is common, although empirical studies show that it is neither persistent nor necessarily favored. Similarly polygyny, rare and strongly discouraged Bengali Muslims and although its actual rate of occurrence is not high. Islam discourages divorce but nonetheless permits divorce. Islam also allows no barrier on remarriage for either sex after spousal death or divorce, although the incidence of remarriage of elderly Muslim widows is not high (Cain, 2004).

Arranged marriages are a long-standing tradition in many cultures and countries like Bangladesh. In arranged marriages, the families of both spouses take a leading role in the arrangement but the choice whether to consent remains with the individuals. In a forced marriage, at least one party does not consent to the marriage, and some element of duress or coercion is generally present.

Marriage laws

According to constitution of Bangladesh, marriage laws are based on a combination of *Shariah* and civil law. Civil laws state that minimum age for marriage is 18 for women and 21 for men and does not exist a specific law banning forced marriage. However, legally, the consent of both parties to a marriage is required. Marrying off minors is a criminal offence, and persons who marry off minors may be prosecuted under the Child Marriage Restraint Act. However, the marriage itself would not be invalidated by this process.¹

Most men marry before the age of 35, while the majority of women marry before the age of 25. While the past has shown that the average age for women getting married in rural areas is significantly lower (16 years of age) than that of those getting married in urban areas, even this age has recently increased significantly (to 20 years of age). The increase in the average age of women getting married reflects an increasing preference among men (and the families that are arranging marriages for them) for potential spouses with greater educational qualifications. These trends seem to be indicative of a preference for women who will be able to fulfill more traditional roles while simultaneously maintaining a job and contributing to the earned income of the family (Cain et al. 1989).

Women are becoming victims of forced marriage than young men in Bangladesh society. Socioeconomic and cultural factors are responsible for forced marriage. Families living in poverty with unstable or non-existent income sources see a daughter both as an economic burden who must be married as soon as possible to take financial strain off of the family, and also a potential financial relief if she is able to be married off to someone of higher economic standing (Cain, 2004).

But it is a matter of satisfaction that local police, lawyers, and foreign missions in Bangladesh play a significant role in the prevention of forced marriages and providing assistance to those who are victims of forced marriages. If an individual is above the age of consent and is the subject of a forced marriage he or she can challenge the legality of the marriage in court by providing evidence to show that there was no consent to the marriage at the time of the marriage. An underage girl who was married off against her will would have to repudiate the marriage upon attaining puberty and prior to reaching the age of 18. In Bangladesh gender inequality is closely linked to the institution of

¹<http://www.everyculture.com>

marriage. Limited education, early marriage of girls, social pressure to produce offspring, and women's lack of access to resources all limit women's life options, compromising reproductive health, and keeping fertility and population growth rates high (Amin, et al. 2008; Barua , 2001; Jejeebhoy, 1993, 1998; Mensch, et al.1998; Naved et al. 2001). Husbands are considered their wives' guardians and are the primary means through which women have accesses to social status, property, and control over resources (Cain et al. 1989). Marriage is understood to give men the right to sex on demand and the right to use physical force against their wives. Women themselves see men as having these prerogatives and control over them (Schuler, et al. 1998; Jejeebhoy, 2002).

The pressures to marry and lack of alternatives to marriage mean that unmarried or widowed, divorced, or abandoned women are often severely disadvantaged, both socially and economically. They have little social legitimacy or control over their living arrangements and other circumstances (Rahman et al. 2002, Rahman, 2003). Laws establishing legal minimum ages at marriage have been "on the books" since 1929, and a law prohibiting the taking of dowry was enacted in 1980. These laws have been promoted in recent years through a variety of channels, but families typically disregard them. Similarly a law requiring legal registration of marriages has existed since 1974, and has recently been promoted by officials as well as NGOs interested in supporting women's rights. Although there is no legal statute requiring it, it has become customary when registering a marriage to insert stipulations related to divorce in the marriage contract. Legal registration of a marriage thus provides a woman with a basis for filing legal suit to recover both the dowry paid by her parents and a cash payment of an amount specified at the time of registration (den mohor)² should her husband desert or divorce her. In contrast to other laws and policies related to the family, such as those governing age at marriage and the practice of demanding dowry from the parents of a bride, the marriage registration law has been adhered to in the majority of recent marriages.

Marriage in the Malay society

Like other Muslim countries, young men and women in Malaysia seldom interact together in public, much less in private. The selection of a woman is initiated by the

² In Islamic traditional law, the mehr (known as den mohor), sometimes translated as "dower" is property to be given by the groom and his family to the bride at the time of marriage. Often it is "deferred" – that is, it is to be handed over only upon divorce or death of the husband (Mahbub ul Haq Development Centre, 2000, p. 82).

young man, who suggests his choice to his mother. The mother will discuss the choice with her husband, and they will determine if the girl is free or not. If so, a gathering of information takes place, with the parents of the hopeful groom asking their close relatives and friends to find background on the girl and her family. If she is of good repute and if her parents are agreeable, preparations begin for the engagement ceremony. The formal proposal and the acceptance are conducted by go-betweens (syaraks) from both families. The engagement is formally announced by the village headman at a mosque during Friday prayers. After prayers, the families meet to discuss the date of the wedding, wedding arrangements, and the time when the token of commitment (hantaran) will be sent.³

Muslims, who make up two-thirds of Malaysia's 30 million people, are permitted to marry after reaching puberty as long as they have consent from their parents and Islamic Shariah courts. For non-Muslim Malaysians, females must be at least 16 and males 18 to marry.

Marriage laws

Underage marriages are allowed for Muslims with court permission and parental consent but are not common in this Muslim-majority country. Underage marriage involving muslim parties are deal with under the respective Islamic Family Law Enactment. In Kuala Lumpur, the Islamic Family Law Act, (Federal Territory) 1984, (Act 303) came into force on the 29th April 1987 is the first point of reference. Section 8 provides that "No marriage may be solemnized under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah Judge has granted his permission in writinin certain circumstances. The requirement of consent in this situation is provided in section 13 which provides that a marriage shall not be recognized and shall not be registered under this Act unless both parties to the marriage have consented thereto, and (a) the wali of the woman has consented thereto in accordance with Hukum Syarak. In the event of objection, reference must be made to the Syariah Judge as resolved in section 13 (b) : the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorized in that behalf by the Syariah Judge has, after due inquiry in the presence of all parties concerned, granted his consent thereto as wali Raja in accordance with Hukum Syarak; such consent may be given wherever there is no wali by nasab in

³<http://www.associatedcontent.com>

accordance with Hukum Syarak available to act or if the wali cannot be found or where the wali refuses his consent without sufficient reason. Section 18(1)(a) further states that where either of the parties to the intended marriage is below the age specified in section 8, the Registrar shall, instead of acting under section 17, refer the application to the Syariah Judge having jurisdiction in the place where the woman resides for determination (www.everyculture.com).

Section 10 of the Law Reform Act 1976 provides for the avoidance of marriages where either party is under minimum age for marriage: "Any marriage purported to be solemnized in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years unless, for a female who has completed her sixteenth year, the solemnization of such marriage was authorized by a licence granted by the Chief Minister under subsection 21(2). Prohibited relationships." However, it must be acknowledged that in the event of a dispute, the Law Reform Act 1976 will be the arbiter for non-muslim parties, while the Islamic Family Law Act, (Federal Territory) 1984 will apply to muslim parties resident in the Federal Territory. Hence, it is a fallacy to make a simplistic assumption and social conclusion that 'laws are not the answer' under these circumstances. Laws are passed by Parliament as representing the whole public opinion in the country and to impose a particular social value contrary to the original intention of Parliament would amount to a miscarriage of justice (Stivens, 2003).

Status of Muslim women in Bangladeshi society:

Bangladeshi Muslim women enjoy the legal status by the Sharia law ⁴ is defined by the principles of Muslim Personal Law along with the general law which is non-religious and secular in its character. Marriage, divorce, maintenance, guardianship of children and inheritance is covered by the Muslim personal law whereas the general law covers the rights under the Constitution, penal codes, the civil and criminal procedure codes, evidence act etc.

The large majority of people in Bangladeshi Muslims are Hanafi ⁵. Therefore, pure Islamic Law are based upon Quranic utterances have been applied to the reformation of

⁴ 85.47 per cent of the total population in Bangladesh are Muslims according to the Bangladesh Statistical Year Book 2005- 2006, P.29; and Women constitute 48.1 percent, Bangladesh Population Census, Buylletin 2, P.1.

⁵ 91 per cent of the total Muslim Population are Hanfi Muslims.

the pre-Islamic Arabian customary law (Sobhan, 1978)⁶. Fyzee (1974), stated-"The Koranic reform came as a super-structure upon the ancient tribal laws : it corrected many of the social and economic inequalities then prevalent."⁷ Sobhan (1978) also focused the same point, "Whereas the spirit of the Quranic legislation exhibits an obvious direction towards the progressive embodiment of the fundamental human values...nonetheless the actual legislation of the Quran had partly to accept the then existing society as a term of reference."⁸

However, it is notable that though Quran has immensely improved the status of women in several directions, society as a whole maintained the inequalities that still remained. There is, therefore, no reason to suppose that all the rules that are going to be considered meant to be definitive for all times.⁹

Bangladeshi Muslim woman rights on property, marriage, divorce and connected matters

Payment of dower is the buzz word in Bangladesh Muslim society, however be confused with "dowry" which consists of presents made by father and other relations of the bride and Muslim Law does not make any provision for payment of dowry. Dower is the sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage. (D.F. Mulla, Principles of Mohamedan Law, 17th Ed.P.277). The amount of dower may be fixed either before or at the time of marriage or after marriage. The law does not say anything about the quantum of dower. The amount of dower is generally split into two parts- "prompt dower" which is payable immediately on demand by the wife and "deferred dower" which is payable only on dissolution of marriage by death or divorce. In view of the provisions of Muslim Family Laws Ordinance, the entire amount is now to be treated as "prompt". The claim to dower is not lost even when the marriage is dissolved by Court at the instance of the wife or when the wife exercises the right to divorce. It is in the field of divorce that the most flagrant inequality between husband and wife exists. The husband has the right of unilateral divorce, for no cause at all. The wife has no such right, and when her husband exercises his right, the wife has no redress.

⁶ Salma Sobhan - Legal Status of Women in Bangladesh, Bangladesh Institute of Law and International Affairs, Dhaka 1978, P. 20.

⁷ A. Fyzee - Outline of Mohammedan Law, 4th Edition. Oxford University Press, Delhi 1974. p.388

⁸ Ibid, P-39

⁹ Salma Sobhan - Legal Status of Women in Bangladesh, Bangladesh Institute of Law and International Affairs, Dhaka 1978, P. 20.

The women can have judicial separation on specified grounds through intervention of Court. The Muslim Family Law Ordinance 1961 though has already provided for arbiters, the arbitration council cannot prevent the Talak by the husband even if it be highly arbitrary and unjust and can only delay the action in the hope that some conciliation will result. The most common mode of divorce by man prevalent in Bangladesh is Bedai Talak (Irrevocable Divorce) which takes effect immediately without the requirement of communication to the wife for its validity. The husband pronounces three times that he divorces his wife and with the third pronouncement the Talak becomes irrevocable and takes effect on completion of a certain period. This may also be done by writing on a piece of paper. Once this right was exercised the parties could not re-marry without the intervention of another marriage, i.e. unless the wife was married to a third person and then divorced after consummation of the marriage. (D.F.Mulla, 1972 Principles of Mohammedan Law, 17th Ed.) With the introduction of the Muslim Family Law Ordinance 1961, the position has changed. Section 7 of the Ordinance provides that Divorce given by the husband shall not take effect until the husband has given notice of the Divorce to the chairman of local administrative unit, Union Parishad and ninety days have elapsed after issuance of the said notice and within the said period the husband can revoke the Divorce. The husband is also to give a copy of the said notice to the wife. The Chairman on receipt of the notice would constitute.¹⁰

Muslim marriage can be dissolved by agreement between the husband and wife and it may take the force of Khula or Mubarrat. In Khula, the marriage is dissolved by an agreement between the parties for a consideration paid, or to be paid, by the wife to the husband, it being necessary condition that the desire to separate should come from the wife. Where desire to the separation is mutual, it is said to be Mubarrat. A wife is entitled to Khula as of right or restoration of what she had received in consideration of marriage, if she satisfies the conscience of the court that it otherwise means forcing her into a hateful union. The Dissolution of Muslim Marriage Act, 1939 (Act No. VIII of 1939 (Vide Pakistan Code 1 Vol.IX, P.716) was passed in order to consolidate and to clear those grounds and also to add some new grounds.¹¹

A wife is entitled to obtain a judicial divorce on neglect or failure of the husband to provide maintenance for two years. But if the wife refuses herself to her husband

¹⁰ Sec7(6), Muslim Family Laws Ordinance, 1961.

¹¹ Act No. VII of 1939 (Vide Pakistan Code 1966 Vol.IV, p.716, quoted in Women's Legal Status in Bangladesh by Sufia Ahmed and Jahanara Choudhury. P.313.

without any lawful excuse and deserts her husband, or otherwise willfully fails to perform her marital duties, she has no right to claim maintenance and cannot obtain a decree for dissolution of marriage on the ground of non- payment of maintenance. The fact that the wife is a woman of means would not be a defense to the claim of judicial divorce for non-payment of maintenance. A muslim woman can obtain judicial divorce on any ground recognised by Muslim Law. Thus a wife is entitled to judicial divorce if the husband brings false charge of adultery against her unless the husband bonafide retracts the charge of adultery. To constitute a valid retraction, it must be made before the commencement of the hearing of the suit, it must be bonafide and there must be an admission by the husband about making the charge and an unconditional acknowledgement by him that the charge is false. Incompatibility of temperament as results in a hateful union has been accepted as a ground for seeking judicial divorce. Before the Dissolution of Muslim Marriage Act 1939 apostasy from Islam of either party operated as a complete and immediate dissolution of marriage. After passing of the Act, apostasy from Islam of the wife does not dissolve the marriage (Sec.4 of the Act) while apostasy of the husband dissolves the marriage immediately. (Mulla,1972, P.305)

Another important issue is maintenance of Muslim women, according to Muslim Law, the father is bound to maintain his daughter until she is married (Mulla). If the father is poor, but the mother is in easy circumstances, the mother has the obligation to maintain the daughter (Mulla). A Muslim mother is entitled to maintenance from her son if she is poor or if the son is financially solvent (Mulla,1972). A Muslim husband is bound to maintain his wife so long the wife remains faithful to him and obeys his reasonable orders. If the wife refuses herself to her husband without any lawful excuse and deserts her husband or otherwise wilfully fails to perform her marital obligations she has no right to claim maintenance from the husband. But if the wife refuses to perform her marital obligations on the failure of the husband to pay the prompt dower the husband will not be absolved of his liability to maintain his wife (Mulla,1972).

The social milieu and cumbersome court procedure made it difficult for the wife to have maintenance through Court. Muslim Family Laws Ordinance, 1961 tried to evolve a procedure through which the wife can easily have her remedy, but it has not produced any appreciable improvement. The Family Courts Ordinance, 1985, however, has been promulgated to deal with divorce and related matters and provisions have been made to dispose the cases of within the shortest time possible. A Muslim widow is essentially dependent on her son, for, generally even her share in the property of her husband remains in the hands of the son and ironically enough, her fate depends upon the

attitude of the daughter-in-law. But if the widow has no son to depend upon the relations of the husband; her condition in most cases is miserable.

In the matter of guardianship of children, a Muslim woman is definitely at odds. Under Muslim Law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian either of the person or property of the child; the father alone, or if he is dead, his executor is the legal guardian. The father is responsible for their maintenance during that period. A mother may lose custody of her children, particularly her daughters, if she re-marries a stranger, someone that is, who is not barred to the children by the rule of consanguinity. These are the basic rules, but they have been modified, not only by the Guardian and Wards Act, but there is also a fairly substantial amount of case-law on the subject, which on the whole has been very sane.¹² It is laid down by the Guardian and Wards Act, 1890 that the courts have stated that these provisions are for the benefit and protection of the child, and that it is the courts paramount duty to consider the welfare of the children over the rights of the parent.¹³

"Thus remarriage of the mother outside the permitted degrees has not been held an absolute reason for depriving her of the custody of her children. Were the children having been all along in the custody ceased, it was still considered advisable to let them continue in her care and control, as the father had re-married and it was felt that the children's interests would not be so well looked after by their step-mother. The father is only free from the burden of maintaining his children where they are being withheld from him illegally. The mother's poverty is never a sufficient reason to deprive her of her right to the custody of her children." (Dhaka Law Reports, 1955, 1958, 1964 and Guardian and Wards Act, 1890.) (Sobhan, 1978), Under the Guardian and Wards Act, further, a mother can always apply to the court to be appointed the guardian of her children.

Under the Bangladesh Constitution (The Constitution of the People's Republic of Bangladesh, 1972), various provisions exist relating to women both directly and indirectly. In a section where the state accepts a fundamental responsibility towards raising the standard of living of the people, it specifically undertakes responsibility for providing social security to widows. Another section runs, the state shall take effective

¹² Naimuddin Ahmed - Maintenance of Wives under Muslim Law, published in Law and International Affairs Vol.8, No.2, 1985, Journal of the Bangladesh Institute of Law and International Affairs. P.64

¹³ Act No. VII of 1939 (Vide Pakistan Code 1966 Vol.IV, p.716, quoted in Women's Legal Status in Bangladesh by Sufia Ahmed and Jahanara Choudhury. P.313

measures to prevent prostitution". Further on it is stated categorically, "All citizens are equal before the law and are entitled to equal protection of the law" and also that "The State shall not discriminate against any citizen on grounds ofsex" and "Women shall have equal rights with men in all spheres of State and Public life", and "No. citizen shall on grounds only of.....sex..... be subject to any disability, liability, restriction or condition with regard to any place of public entertainment or resort, or admission to any educational institution. "There is a further section which reads, "Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizen." In the sections relating to service with the Republic there are also similar passages securing equal opportunity for all citizens on the one hand while reserving the right to make special provision in favour of any backward section of citizens for the purpose of securing them adequate representation or reserving for members of one sex any class of employment or office on the ground that is considered by its nature to be unsuited to members of the opposite sex. Further, in exercise of these provisions, 30 seats of Parliament were reserved for women members exclusively for a period prescribed in the constitution. To their credit their consciences were sensitive to the particular vulnerability of widowed women and they show commendable awareness of the fact that prostitution exists not usually because of the "weakness" of the prostitute but rather as a means of exploitation by society. Yet it would appear to be implied that the vulnerability or exploitability of women was something inherent to their sex rather than a commentary on the society itself," writes Salma Sobhan. Women are thus bracketed with children and "other backward sections of society". The assumption is that it is women who are backward, not the society in its attitudes towards women. Thus we may say that the Constitution operates on two assumptions. The first is that women are in need of greater protection than men. This is not so much for women are privileged, but because they are weaker. And because of this the identity of the woman is submerged with the stronger identity of her male counterpart or guardian. It should be noted that where it appears that the women are being accorded privileged treatment it results often in the so-called privilege under-writing a social custom rather than attempting to eradicate it.

The women are allowed maternity leave in addition to other leave facilities enjoyed by men in public service. In private employment no employer shall knowingly employ a woman during the six weeks immediately following her date of delivery. (Rule 197 of Government Service Rules, Vide East Pakistan Service Rules; Part-1 P.82 and Sec. 3 of the Maternity Benefit Act, 1939 Vide East Pakistan Code 1962; Vol.VI;P.1). The em-

ployer also is bound to pay maternity benefit at a certain rate according to the Maternity Benefit Act of 1939. But due to want of proper check, these provisions are often violated. Moreover, the employers feel inclined not to employ women to avoid that extra cost. Similarly, Acts that every factory employing more than fifty women must provide for suitable room for use of children of those women (The Factories Act, 1965) and that the Government has been given power to extend this facility to the plantation labour (The Tea Plantation Labour Ordinance, 1962) have not proved effective at all. Looking at how women are treated in Penal Code, let us first consider the Act regarding abortion (Act No.XIV of 1860). Under that act whoever (including the woman herself) voluntarily causes a woman with child to miscarry, shall, if such miscarriage be caused in good faith (which now invariably is considered to limit family size) for the purpose of saving of life of the woman be punishable, and who commits this offence without the consent of the woman miscarried shall be liable to higher sentence. It should be noted here that in the recent past abortion has been "justified" in the name of "menstruation regulation" or "medical termination of pregnancy" as a birth control measure, and the "good faith" has changed its connotation from "for the purpose of saving of life of the woman" to "birth control" and abortion as a free choice of a woman to terminate her pregnancy has remained socially as well as legally "undesirable". Assault or criminal force to woman with intent to outrage her modesty and kidnapping and abduction of woman to compel her to marriage, inducing girl under 18 years of age to go from any place or to do any act with the intent that such girl may be forced or seduced to illegal sexual intercourse or importation of girl below 21 years of age for the said purpose selling or otherwise disposing of girl under 18 years of age for prostitution or illicit sexual intercourse and buying or obtaining possession of such girl for prostitution or illicit sexual intercourse are offences under the Penal Code Rape is an offence and sexual intercourse with the wife under 15 years of age without her consent is treated as rape.

Cohabitation caused by a man deceitfully inducing a belief in the woman of lawful marriage or enticing or taking away or detaining with criminal intent another man's wife are offences. Adultery and bigamy are also offences, but the woman involved in the adultery is not liable to punishment. (Act No.XIV of 1860, Bangladesh Code, 1978 Vol.I). It is interesting to note that when a woman is accused of an offence, "womanhood" is one of the grounds for release on bail. Sec.497, Code of Criminal Procedure Vide Pakistan Code 1966 Vol. IV). The Cruelty to Women (Deterrent Punishment) Ordinance, 11983 and the Dowry Prohibition Act 1980 have been promulgated to

expedite the court procedures and enhance the punishment, no substantial change, however, in law has been made to really improve the situation.¹⁴ The weakness in the Muslim Family Law Ordinance 1961 is that not only is the second marriage not made void, but that the right of unilateral divorce is not effectively curbed, so that any woman opposing her husband's remarrying, in a system where there is no alimony for a divorced woman, and where she will rarely have been given an appropriate education to enable her to earn her own living, runs the risk of destitution. It is true that the social attitude contributes to this dismal state of affairs, but the situation can considerably be improved by reform of law. When the Constitution professes equality of women with men, the need to review and revise the law to ensure fundamental rights to equality hardly requires any emphasis. Not only that the law should be revised, but its enforcement should be made easy, speedy and similar so that the women can get some benefit out of whatever the law is offering. Unless the law itself along with the procedure for its enforcement is changed, the position of Muslim women in Bangladesh will continue to remain subject to such humiliating condition because of erroneous concept of law, of women's position in society and also of humanity as a whole.

Women privileges in Malaysia in the light of Islam

Malaysia considers relatively democratic and liberal Islamic country, consists Federal Constitution that esteems basic liberties and equal opportunity of individuals ahead of the law.

In certain states (i.e. Kelantan) Shariah law is completely followed by the folks which naturally alarmed Malaysians of other faiths as well as those who consider themselves moderate Muslims. But the most Muslim women who must now worry about how they demeanor themselves in public; how they can serve their husbands lest they take second wives; and how they should dress – to keep away sexual exploitation and aggravation. Today's definition of a good Muslim woman would include words like "submissive," "selfless," and "obedient." Most worryingly, Muslim women are being taught that they are inferior to men.¹⁵

¹⁴ Naimuddin Ahmed - Maintenance of Wives under Muslim Law, published in Law and International Affairs Vol.8, No.2, 1985, Journal of the Bangladesh Institute of Law and International Affairs. P.64

¹⁵ Kaur, Amarjit. 1986. Women at Work in Malaysia. In Hing Ai Yun and Rokiah Talib (eds.), Women and Employment. Kuala Lumpur: Department of Anthropology and Sociology, University of Malaysia (Women's Association) and Asian and Pacific Development Center.

In Malaysia there are some women groups like 'Sisters in Islam' fighting for women's rights within an Islamic structure – and persons who point out the unreasonable of certain declarations made by the ulama (religious teachers), have all been accused of confusing the community and insulting Islam. In direct and subtle ways, Islamic laws pertaining to divorce, inheritance, child custody, and maintenance are giving men a decided advantage over women. Even in Islamic criminal laws, women face inbuilt discrimination said to be sanctioned by God.

In fact, for decades, Muslim women, especially in Malaysia and Indonesia, have enjoyed far more freedoms and rights compared to their sisters in the Middle East and South Asia. Our cultural traditions or customs defined and affirmed women's role and their public contribution or participation, often in positive, non-hierarchical ways.¹⁶

Malaysia successfully portrait herself as a country where the women's role in public spaces world recognized. The Malay Muslim women always owned and inherited property and worked outside the home, whether as farmers in the earlier agrarian society or as factory girls, teachers, lawyers, doctors, and engineers in today's industrializing society.

The tradition for wearing the *tudung* (headscarf) started early 80's which was not part of the Malaysian Muslim culture. Instead, what was used was a *selendang*, a long soft shawl which covered the head and was draped loosely over the shoulder. Nor were women expected to be veiled when outside their home. In public spaces, men and women mixed freely whether at work, at weddings, or other public functions.

Another important issue compared to women in many Muslim countries, Malay muslim women have never needed the written permission of their husbands or male guardians to travel abroad. And there was no tradition of a segregated women's room or quarters in a Malaysian Muslim household. Because of these democratic beginnings, Malay women today enjoy equal access to education. In fact presently the number of women is more than men, as is reflected in trends in the West and other Asian countries, girls are outperforming boys in their studies.¹⁷

Over the years however, the Government has worked towards reducing this disparity and though reforms, particularly in the field of law, have been somewhat slow and in

¹⁶ Rashila Ramli and Saliha Hassan. 1998. "Trends and Forms of Women's Participation in Politics." In Sharifah Zaleha Syed Hassan (ed.), *Malaysian Women In The Wake Of Change*. Kuala Lumpur: Gender Studies Programme,

¹⁷ Rose Ismail, *Women and Islam in Malaysia*, *Newsbreak* (Philippines)

some matters far too slow, the position of women today has greatly improved. The Government commitment to promote gender equality is evidenced by several policies, administrative decisions, programmes and amendments to laws that have attempted to grant equal rights to women and/or to remove discrimination against them¹⁸. Later, in 1971, tenure was accorded to women civil servants who hitherto had not been accorded permanent employment, with married women being more disadvantaged as their appointments were on a monthly basis¹⁹

The National Policy on Women was formulated in 1989. It has been the basis of many subsequent policies and programmes and has resulted in the incorporation of a full chapter on women's issues in the five-year national plans beginning with the Sixth Malaysia Plan (1991 – 1995) with the chapter entitled Women in Development.

The establishment of the Ministry of Women and Family Development in 2001, now known as the Ministry of Women, Family and Community Development, is seen as a further acknowledgement of the importance of women's role in national development and also as evidence of the governments aim to promote the equality of women with men.

2001 also witnessed the amendment to Article 8 of the Federal Constitution which provides for equality before the law. Article 8(2), in its original form, prohibited “discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession,

¹⁸ Some notable amendments are (a) Constitution Amendment Act, Act 14 of 1962, section 3 of which amended Article 15(2) of the Federal Constitution which relates to the registration as a citizen, of a person below the age of 21 years, to enable a woman citizen to transmit citizenship to her children if her husband was not a citizen of Malaysia. Article 15(1) however remains discriminatory and needs to be amended. (b) Section 375 of the Penal Code amended by Penal Code (Amendment) Act 1989, Act A727, to create the offence of marital rape in three circumstances. (c) Evidence Act 1950 (Revised 1971) Act 56, amended by Evidence (Amendment) Act 1989, Act A729, to repeal paragraph (d) of section 155 which permitted evidence of a victim's generally immoral character, and the addition of section 146A which deals with restrictions on evidence at trials of rape. (d) The Distribution (Amendment) Act 1997, Act A1004, amending the Distribution Act 1958 (Revised 1983), Act 300 giving a widow the same right that a widower had on intestacy. (e) There are many other amendments as well as new laws passed before 1999 which aim to provide rights for women and/or remove disparity between men and women. Those passed after 1999 will be discussed in the main text below.

¹⁹ Government of Malaysia and UNDP Joint Report on Developing an Index for measuring and monitoring Gender Equality – Malaysia's Gender Gap Index, 2007, p 28.

vocation or employment.” It did not include the term “gender” as one of the prohibited grounds for discrimination. This omission may have been considered necessary so as to not render unconstitutional, the many existing laws that treated women differently from men. These laws were protectionist in nature²⁰ and the omission of “gender” from Article 8(2) was not intended as a licence to enact laws that discriminate against women. Nevertheless, the addition of “gender” to Article 8(2) was the subject of much lobbying by women’s groups and in 2001 the Constitution was amended to add the word “gender” to Article 8(2).²¹

In any case, the equality provision in Article 8(1) is not absolute. The Federal Court has decided that “the equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere. The equality provision is qualified. Specifically, discrimination is permitted within clause 5 of Article 8.”²² The courts have evolved the Doctrine of Due Classification and applied it to the equality provisions. In other words, a law can apply to a class of persons provided that the classification is founded on “intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and the differentia has a rational relation to the objects of the statute.”²³ Therefore it is possible to have laws that govern Muslim and non-Muslim women separately if there is a reasonable nexus between the basis of classification and the object of the law in question. For example, Muslims must be governed by the Syariah in family matters, so Islamic family law which is based on the Syariah can be different from civil family law. However, domestic violence affects all women in the same way regardless of their religion, therefore the Domestic Violence Act and other laws that protect women from violence must apply equally to all women. Hence, Malaysia may not need to heed the recommendation of the Committee on the Elimination of Discrimination against Women (CEDAW) to undertake a process of law reform to remove inconsistencies between civil law and Syariah law.

However, the omission of “gender” in Article 12(1) of the Federal Constitution has clearly no effect on women’s rights to higher education in Malaysia.

²⁰ For example, under the Employment Act, 1955, Act 265 (Revised 1981), section 34 prohibits night work for women in the industrial and agricultural sectors and section 35 prohibits underground work for women.

²¹ Constitution (Amendment) Act (No. 2) 2001, Act A1130, which substituted “descent or place of birth” with “descent, place of birth or gender”

²² See judgement of Tun Suffian LP, in *Datuk Haji Harun bin Idris v. P.P.* [1977]2MLJ155 at 165.

²³ See judgement of Hashim Yeop Sani J, in *P.P. v. Su Liang Yu* [1976]2 MLJ 128 at 130.

In 2006, Malaysia submitted its First Report to the Committee on the Elimination of Discrimination against Women. The Committee commended Malaysia for its achievements in the field of women's education, the amendments to laws to remove discrimination against women, and the withdrawal of some of the reservations to the Convention but it also made many recommendations for Malaysia to implement. These recommendations relating to the Syariah law and Syariah courts will be addressed in the second part of this paper which discusses Religion and the dual system of courts.

The *Shariah* Family Law

The Islamic Family Law (Federal Territory) (Amendment) Act 2006, Act A126, was passed in 2006 and has been criticized by specific women groups as adversely affecting the rights of Muslim women because of Malaysia's restrictive interpretation of Syariah law. "Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or to any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years."

This section is another step towards making marital rape an offence (Mehrun, 2009).

There are at least three articles in the Federal Constitution that touch on religion in a major way – Article 3, Article 11 and Article 121(1A) (Mehrun, 2009).

Article 3 of the Federal Constitution provides that Islam is the religion of the Federation but the Supreme Court (as the Federal Court was named then) has decided that this is only for ceremonial purposes.²⁴ Nevertheless, it should be noted that Islam does have a special position in Malaysia and to understand this and how the dual system of courts evolved.

It is true that some women encounter difficulties due to the Syariah court procedural requirement of filing every claim as a separate application resulting in multiple hearings and numerous attendances in court. This however is not the fault of the Syariah law but is the result of a policy decision as funding for the Syariah courts is based on the number of cases registered. If State governments could allocate a fixed sum for the courts and leave the Chief Syariah Judge of that state to divide it among the courts in his state, there would be no need to continue with that procedural arrangement.

²⁴ See judgement of Tun Salleh Abbas LP in *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55

It takes a proper understanding of the responsible authority to realize that they do not discriminate against women. There is, in fact, no need to amend the laws. The Government is right therefore to refuse to withdraw the reservation. I would urge the Government to organise a separate seminar and have an in-depth discussion on all relevant issues before making any decision to re-consider the reservations.

The legal history and constitutional provisions relating to the dual system of law and courts have been set out in detail so that it can be understood that any reform in the nature of having just one system is well-nigh impossible. The dual system must remain even though it has given rise to conflicts of jurisdiction between the two sets of courts. These conflicts, it is submitted, can be resolved by providing clear legislation in relation to recurring specific problems, for example, the conflict relating to the case where only one spouse to a non-Muslim marriage converts to Islam. The measure that had been taken to resolve the jurisdictional conflict was to add Article 121(1A) to the Federal Constitution.²⁵

Amendments to the Law Reform (Marriage and Divorce) Act 1976, Act 164. [LRA]:

All non-Muslim marriages are either registered or deemed to be registered under the LRA.²⁶ Section 3 deals with the application of the LRA and provides as follows:

“This Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage one of the parties of which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.”²⁷

Though this decision has enabled the civil courts to exercise jurisdiction over a Muslim in relation to his non-Muslim marriage, the situation should be righted by an amendment to section 3(3). Before this decision, the literal effect of section 3(3) was that the LRA as a whole could not be applied to a Muslim except when a divorce is applied for under

²⁵ The Constitution (Amendment) Act, 1988, Act A704

²⁶ Sections 4 and 8 of the LRA

²⁷ Tan Sung Mooi v Too Miew Kim [1994] 3 MLJ 117

section 51, in which case, the decree of divorce and the ancillary relief ordered will be binding on the Muslim respondent. The joint effect of sections 3 and 51 is that a person who has converted to Islam after going through a civil marriage will still be subject to the jurisdiction of the High Court (otherwise referred to as the civil court) and the provisions of the LRA but only if the non-Muslim spouse who has not converted chooses to petition for a divorce using conversion as the ground for divorce. If the non-Muslim spouse is a woman, she may want to stay married for a number of reasons - the community she belongs to disapproves of divorce or as a divorced woman of her community she may have to face social stigmatization or she may wish to share his derivative pension or retirement fund which may be his only "property".²⁸ The spouse who converts cannot petition as this option to divorce is only available to the non-converting spouse. Hence the converting spouse is not in a position to take action to settle his/her affairs with his/her non-Muslim family before proceeding with his/her new life as a Muslim. In such a situation, it is unfair to accuse the man of converting to Islam simply to escape his responsibilities to his non-Muslim family. Section 51 must be amended to make it available to a converting party to seek a divorce on the ground of his conversion. This would also enable the civil court to determine ancillary relief including the custody of children of the marriage at the request of the Muslim party. A non-Muslim who is sincere about his conversion to Islam and does not have the ulterior motive of avoiding his obligations under his previous non-Muslim marriage, will be willing to settle his affairs with his first family before taking another wife and starting another family.

In 2004 there was an attempt to amend section 51 but after much consultation with many groups, the proposals were withdrawn. The officials of the Attorney General's Chambers are now engaged in further consultations but this time, the purpose is a review of the entire Act and not just section 51. This is perhaps a strategy to avoid focusing on section 51 as some quarters object to its amendment. The fear of some non-Muslims is that the converting spouse will get away altogether if he can initiate the divorce but this fear is unfounded as the court will be able to make orders for all ancillary relief when awarding the decree of divorce (Mehrun, 2009). In fact, the non-converting spouse will be better protected because apart from the custody of children, the court may make orders for maintenance and division of property.

²⁸ In *Eeswari Visuvalingam v. Government of Malaysia* (1990) 1 MLJ 86, the court held that the spouse from the deceased's earlier non-Muslim marriage which had not been dissolved by the Civil Court was still his wife and therefore entitled to his pension

Conclusion

In this study the empowerment of Muslim women in Bangladesh and Malaysia have been focused based on the law and order, social status, legal rights on property, impact of conventional and Shariah law upon to protect their rights. Also some conclusion can be drawn, for instance, Bengali marriage is arranged by parents of their senior relatives whereas in Malay society allows the freedom of choice for man or woman. On the other hand, in Bangladesh under aged marriage is strictly prohibited by law but in Malaysia under aged marriage can be functioned by the permission court. In Malaysia the women rights have been defended more sustainable way than in Bangladesh. Though it is true that some women are holding the supreme power of the state in Bangladesh i.e. prime minister and leader of the opposition both is female and other key position in ministries have been occupied by females but over all women privatization situation is not better than Malaysia.

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