

Modern Approaches to Islamic Family Law Reform

The Need for a Balanced Approach in the Malaysian Context

Pendekatan Moden Terhadap Reformasi Undang-Undang Keluarga Islam

Keperluan Pendekatan Seimbang Dalam Konteks Malaysia

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Abstract

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

Keywords: Women Rights, Muslim Reformist, Conservative Approach, Critical Analysis.

Abstrak

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Wanita-wanita Islam terperangkap diantara pemeliharaan identiti keluarga Islam dan pembaharuan kesaksamaan jantina dan Hak Asasi Manusia Antarabangsa. Melihat suasana sosio-politik semasa di arena global, ketegangan ini seolah-olah tidak akan hilang pada masa yang terdekat. Bertindak balas kepada kritikan hak asasi barat terhadap undang-undang keluarga Islam, kem konservatif menganggap sebarang percubaan untuk mereformasi undang-undang keluarga Islam sebagai pencerobohan imperialisme Barat terhadap domain peribadi Islam. Sebaliknya, penyokong reformasi mendakwa bahawa tafsiran undang-undang keluarga Islam secara konservatif sebagai punca utama penindasan wanita dalam masyarakat Islam. Oleh itu, mereka sentiasa berusaha melobi bagi pembaharuan undang-undang keluarga Islam melalui undang-undang antarabangsa atau kesaksamaan jantina sebagai framework. Akibatnya, hak-hak wanita Islam dalam keluarga telah menjadi satu masalah berparadoks. Untuk keluar dari kebuntuan ini, kajian ini berpendapat untuk penyelesaian mediasi (*wasatiyyah*) dengan menggunakan analisis kandungan kritikal dari dua trend sebagai satu cara pembaharuan berasaskan syariah di Malaysia.

Kata Kunci: Hak-hak Wanita, Reformis Islam, Pendekatan Konservatif, Analisis Kritikal.

Introduction

Muslim family law with the exception of some states like Morocco, by and large, embodies traditional Islamic law as espoused by the majority of the classical Muslim jurists. Women activists and liberal Muslim scholars consider them as chauvinistic and gendered in the context of social mores and cultural norms in which we live today. Viewed as such, the main restrictive laws to women's rights as embedded in Muslim family law is plagued with the problem of reconcilability with international human rights and the notion of gender equality, from several aspects including: men have autocratic authority over family affairs (*qiwāmah*), men have exclusive jurisdiction over the marriage of their female wards; men are endowed with unbridled right to practice polygamy, and men have unilateral right to divorce his wife at will. In contrast, in the male constructed classical *fiqh*, women have much limited rights on a host of family matters including: women's restricted right to divorce, their unequal right to child's custody, their reduced right of inheritance, and their agony to exclusively bear the responsibility of providing for an

illegitimate child even if it is from their own husbands and not to mention the outcast yields of free sex and adultery.¹

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

Muslim Family Law Reform in Retrospect

Since early nineties, to the modern reformists, traditional Islamic law has been bended to make ways for women's rights in the domain of Islamic family law. The most common vehicle to achieve this has been through constant reform of the codified Muslim personal law in the Muslim world. Among noted achievements, in which the optimists take pride, include subjecting polygamy to judicial restrictions, declaring extra-judicial divorce by husband if not repeated before a competent court as invalid, inserting stipulations against polygamy in the marriage contract, providing more avenues for women to initiate a petition for judicial separation. Legislatures have achieved these changes based on the traditional doctrine of elective choice (*takhayyur/talfīq*) from the body of legal opinions of various schools (*madhāhib*). For instance, Ottoman Law of Family Rights 1917, as the first codified model of Muslim family law, diverged from Ḥanafī School to provide more grounds on the basis of which a Muslim woman can petition for judicial separation based on Mālikī and Ḥanbalī schools.² Egypt gradually traversed the path of reform along the line of gender equality from within the Islamic tradition, such as freeing *Khula'* from the stipulation of husband's agreement.³ Tunisia,

¹ Gaenor Bruce (ed.), *An Introduction to Islamic Family Law* (London: UK Centre for Legal Education, 2011), pp. 16-28.

² Qānūn al-Ḥuqūq al-Ā'ilah, 1917, Sections 126 and 127.

³ Qānūn al-Aḥwāl al-Shakhṣīyyah al-Miṣrī, 2009, Section 3

since 1956, has adopted a radical approach to the extent of making polygamy illegal. In the local scene, to the critics, the Malaysian experience has been one of regression from reform to conservatism.⁴ It is alleged that: “The parental law here is the Islamic family law (Federal Territories) Act 1984 (FTA), which most states follow literally or with necessary adaptation except some northern states with their own laws which are more restrictive of women’s rights”.⁵

To them, the equitable features of Muslim family law in Malaysia include: (1) insertion of stipulations favouring women in the marriage contract, such as protecting her against harm, abandonment and lack of maintenance provided that she as a wife does not become disobedient; (2) restricting polygamy by several conditions including: being just and necessary, the husband is financially capable, the husband is able to maintain equality between the co-wives; and such a marriage will harm the existing wife religiously, morally and materially (life, body, mind and property)⁶; (3) subjecting a husband’s extra-judicial repudiation of his wife to the approval of the court (by requiring him to repeat it again); (4) expanded grounds of petition for judicial separation by a wife, such as husband’s disappearance for more than a year; lack of maintenance for three months, or cruelty; (5), division of matrimonial property in the event of a divorce between the couple in the calculation of which even non-financial contribution of the wife, such as household chores and the raising of children⁷ are considered for determining the wife’s share.⁸

Nevertheless, its inequitable features include: (1) fixing unequal legal age of marriage, 16 for women and 18 for men; and (2) making the

⁴ Fournier Pascale *et al*, “Engendering Legal Reforms: Islamic Law in Africa and East Asia,” *Amsterdam Law Forum*, 2011, Vol.3:2, pp.104.

⁵ *Ibid*.

⁶ FTA, Section 23.

⁷ In the case of *Tengku Anun Zihar v. Dato` Dr. Hussin*, the wife’s moral support was regarded as sufficient contribution to grant her part of the family land upon divorce.

⁸ Fournier *et al*, “Engendering Legal Reforms: Islamic Law in Africa and East Asia,” pp. 107-108.

consent by a male guardian to the marriage of his ward mandatory unless waived by the court.⁹

Consequently, the modernists though considering such reforms as somehow liberating, view them as inadequate. To achieve full reformation of the law, for instance, Kamali proposes that two factors need to be trashed out: (1) disbanding the tenacious hold of prejudicial tribal customs; and (2) deconstructing the obstructionist stand of the conservative views, which has resulted in removing more egalitarian principles from the law and replacing them with more restrictive amendments.¹⁰ As to what is the alternative approach, the reformists advocate two methodologies as part of their strategies, namely drawing on gender equality principle and arguing for the adoption of international women rights documents by Muslim states to which we turn now.

Gender equality model

Kamali, as a representative advocate of gender equality camp, among others, maintains that the starting point to the full reform of Muslim family law should be to "turn to two cosmological equality principles established by the Qur'an, i.e., legal ruling should reflect it. The two principles in question are: (1) the selection of what is best (for women) out of a multitude of interpretations on the authority of the Qur'anic command: "... *believers are those who listen to speech and follow best of it.*"¹¹ To him, this verse subsumes all speeches including that of God, so as to choose best meaning from them. So if on a point there are many rulings, then the one which serves justice and secure welfare should be chosen. Hence this verse lays down the principle of no restrictive interpretation¹²; (2.) realising the Qur'anic vision of human equality, "*We*

⁹ Ibid, p.107.

¹⁰ Mohammad Hashim Kamali, *Islamic Family Law Reform: Problems and Prospects*, ICR. plutojournals. org. at www.hashimkamali.com (accessed 22 September 2015), p.38.

¹¹ Al-Zumar: 18.

¹² Kamali, *Family Law Reform: Problems and Prospects*, p. 39.

created you from a single soul/ min nafsīn wāḥidah".¹³ The word *nafs* is feminine word, and the mate ensued from it is *zawj* which is masculine.¹⁴ The significance of such opening of the Women Chapter of the Qur'an is that *Homo sapiens* are created from a single soul, thus they, whether male or female genders, are equal. Accordingly, all the rulings of marriage should be guided by the principle of human equality. Hence, "any *fiqh* ruling which conflicts with equity and justice on account of entrenched patriarchal custom and vestige of medieval societal values should be scrutinised through systematic *ijtihād* to restore the balance of equality between the sexes."¹⁵ To Kamali, if this is not understood this way, 'epistemologically perhaps', this is the most obstructing challenge to the reform of family law particularly when Muslim societies are still plagued by "patriarchal, male dominance, poverty, women's low education and prevalence of tribalism."¹⁶ Nevertheless, approaching reform in line with the notion of gender equality, Kamali admits to be rocky because the intellectual landscape in which jurists operate by itself is buffering the revival of innovative *ijtihād* as "jurist look at the hallowed works of the *imams* and jurists of the past for definition of justice and fresh interpretation."¹⁷

Applying this strategy on specific cases, Kamali, among others, held: women can hold any political posts except if not advisable because of judicious policy (*siyāsah shar'īyyah*), for instance, not tasking women for public posts such as police in a male dominated society. As to whether women can hold the high executive position, Kamali sees no problem in it as there is no clear authority barring women from holding it except a presumptive consensus. Such a presumptive consensus may not

¹³ Al-Nisā':1.

¹⁴ Al-A'rāf: 189.

¹⁵ Kamali, *Family Law Reform: Problems and Prospects*, pp. 40-41.

¹⁶ Ibid.

¹⁷ Ibid. p. 42.

be invoked today on account of “material change in nature of leadership and human warfare.”¹⁸

As far as women’s participation in the administration of justice is concerned, Kamali held that women can hold the position of a *qāḍī* (judge) even according to al-Ṭabarī as opposed to majority in the classical *fiqh*. Because the majority view was based on faulty analogy to the position of political leadership (*imāmah*), which to al-Ṭabarī was a discrepant *qiyās* (*qiyās ma‘ al-fāriq*), since a female judge unlike an Imām not necessarily leads the *jihād*.¹⁹ Similarly, for women to be partially able as witnesses, he maintains that there is no clear text proof in the Qur’an or the Sunnah to affirm it. In the administration of justice, the overriding principle is that all avenues which vindicate truth and serve justice must be left open, particularly in critical situations. The limitation of women’s ability as established by the Qur’an was on the subject of debt transaction “was informed by the condition of women in Arabian society in the seventh Century.”²⁰

On women’s financial and civil rights, Kamali asserts that the rule should be one of equality. For instance, a woman is free to choose her spouse based on Ḥanafī view. But what we see in terms of restriction on marital rights is due to prejudicial customs and male domination in Muslim societies. For example, denying women’s right to inheritance. To correct it, there is a need for awareness campaign.²¹ However, reform advocacy must be minimum in the area of *mīrāth* (succession) because first, women are already important heirs to the estate of a deceased. For example, eight out of twelve legal heirs whose share are fixed by the Qur’an are women. Even a female’s half share (daughter) is a forward step in Islamic law as prior to the advent of Islam the estate of the deceased devolved only on adult males capable of fighting. Second, the

¹⁸ Ibid. p. 43.

¹⁹ Ibid.

²⁰ Ibid, p. 44.

²¹ Ibid.

conventional argument for disparity of shares for a man and woman is “still valid for societies where education and employment opportunities are severely limited for women. It also cannot be regarded as negative because in such societies men are protective of women and family.” Finally, the reform can still be pursued in other instances when the situation warrants. For example, in the case of grandchildren being barred from inheritance due to the death of their father during the lifetime of their grandfather, compulsory bequest (*waṣīyyah wājibah*) up to 1/3 of the estate if approved by other heirs can be the solution.²² Or *istihsān* can be invoked to correct unfairness which has been created by applying a strict rule. For instance, if a man leaves behind a daughter and a son but it was only the daughter who cared for her sick father (paid all the bills), then *istihsān* should be the remedy.²³

The question of *wilāyah* of the husband as the sole guardian over the child is problematic for a woman to enrol her child in school, particularly after a divorce. To Kamali, “Morrocan law (*Mudawwanah al-Ushrah*) recognising equal *wilāyah* (guardianship) and taking it to mean mutual friendship and support should be an example to be emulated so that a woman can pass her identity on to a minor child—the principle of *takhayyur*—cross fertilization of ideas from other schools and practices.”²⁴

On the issue of veiling, Kamali disagrees with its forceful assimilation. To him, *ḥijāb* is a cultural symbol and mark of identity and even of protest hence unwarranted demand for conformity and assimilation as some countries like France did in 2010 should not be the case. Nevertheless, he argues that much of what is regarded as *Shar‘ī* methods of veiling are cultural. For instance, “there is no mandate for face cover and veil in the Qur`an and the Sunnah except for the Prophet`s wives.”²⁵ The Qur`an only requires decorum and modesty and forbids provocative be-

²² Ibid, pp. 46-47.

²³ Ibid, p. 48.

²⁴ Ibid, p. 58.

²⁵ Al-Aḥzāb: 59.

haviour.²⁶ Modesty is important with no quantitative specifications but jurists and cultural setters made it so. *Niqāb* and *hijāb* represented the culture of Iran's Sassanid society and segregation policy of the Christian in the Middle East. They now are largely custom driven phenomenon and continued tool of male domination."²⁷

To Kamali, as a matter of strategy, prudence dictates that pressing for equality between the sexes must take into account Muslim cultural sensitivities so as "not to risk provocation and protest, which can be overwhelming". The approach should be "moderation between idealism and realism and traditional and modern values. Gender equality must take off from least challenging to more sensitive areas."²⁸

International Human Rights Approach

Drawing on several international human rights instruments, such as Universal Declaration of Human Rights, CEDAW and others together with a paradigm shift in social norms in Muslim societies, women rights activists are optimistic that finally Muslim nation states will live up to their international commitments to make changes in their personal law of status for improving the condition of women in their jurisdictions. For instance, Hursh echoes this by saying that "internal reform aimed at ameliorating certain gender disparities through evolving standard –an understanding which facilitate contextually salient legitimate reform emerging from shifting social religious mores analogous to American Eighth Amendment Jurisprudence's, evolving standard of decency, has started to take shape in Muslim countries."²⁹ To her, to date, a towering example of "religiously informed law reform is the 2004 Moroccan Personal Status Law (*Mudawwanah al-Usrah*) as it while advancing interna-

²⁶ Al-A'raf: 31.

²⁷Kamali, *Family Law Reform: Problems and Prospects*, pp. 49-50.

²⁸ Ibid, p.43.

²⁹ John Hursh, "Advancing Women's Rights Through Islamic Law: The Example of Morocco," *Berkeley Journal of Gender, Law, & Justice*, 2012.vol. 27, p.257. at <http://family.jotwell.com/internalreform-of-islamic-family-law-through-evolving-standards-of-religion/> (accessed 23 April 2017).

tional law and women's rights norms also meets the highest standards of Islamic law – a specimen of progressive laws on both international and Islamic standards.”³⁰ This law drastically reformed the Family Code of 1958 which in many ways was restrictive of women's rights as Aïcha El Hajjamihad dubbed it as “keeping women as eternal minors.”³¹

Women under the old law: “when marrying subject to the guardianship of their fathers; once married, they owed obedience to their husbands in exchange for maintenance (*nafaqah*). The husband had unrestricted access to polygamy and unilateral divorce. The wife had the right to judicial divorce, but only on limited grounds and if she could provide evidence; or to separation through compensation (*khul'*), which often allowed a husband to pressure his wife into giving up all her rights, including child custody. Upon divorce, the mother would be given custody (*hadānah*) of the children only if she did not remarry or take up residence far from the home of their father”³²

But the law reform of 2004, among others, altered some of those impediments: it declared joint management (*qiwāmah*) of the household by both the spouses; it made marriage guardianship optional in the case of women of pubescent age; it equalized age of marriage at 18 for both the sexes; subjected polygamy to conditions of necessity and the first wife's consent; extra-judicial divorce was abolished and the grounds for women to petition for judicial separation was expanded to include domestic abuse and violation of contractual obligation; wife's custodial right was made to continue even if she remarries; and women were also made deserving of share from acquired property during the marriage upon divorce. In addition, other breakthrough of the reform included: allowing grandchildren to inherit; and resolving paternity dispute by DNA test of paternity.³³

³⁰ Ibid.

³¹ Ibid.

³² Ibid, p. 258.

³³ Ibid, p. 261.

To Hursh, such an internal reform is possible in all jurisdictions as Islamic law contrary to what Western Feminist claim (patriarchal) is elastic enough to be harmonised with CEDAW and UDHR. The reason is twofold: first, Islamic law is not monolithic; second, patriarchal persistence is culturally Arab than Islamic, hence it can be challenged by Islamic law itself, as Goren Therborn³⁴ and Nusrat Choudhury have argued.³⁵ Thus, it is accommodative of reform through “evolving standards of cultural –religious mores and legal thought.” This silent reform neither provokes resistance on the part of the general populace nor is seen as un-Islamic because: (1) it does not involve changing the text but “renders old regime untenable”; and (2) it naturally dislodge its medieval baggage as modern sensibilities undermine them.³⁶

Critical Evaluation

From the above analysis, it is submitted that neither gender equality project nor international human rights or women rights for that matter have adequate legitimacy to serve as an alternative method of reforming a law which has its origin in revealed scriptural texts. The reason is that forsaking the traditional methodology of reforming and renewing Islamic law, in favour of methodologies which are suspected as deriving their ideological assumptions from alien cultural constructs and being informed by them, may not yield the intended reform. My reasons are as follows:

- 1- It fails to address the sociology of the law as far its contextualization in Muslim situation is concerned. This is a fact which even has partly been acknowledge by these advocates: For instance, similar to Muslim feminists, Kamali, concedes that : (1) equality and justice for women must be inaugurated from within Islamic

³⁴ Goran Therborn, *Between Sex and Power: Family in the World, 1900-2000* (2004), at <https://books.google.com>, (accessed 28 April 2017).

³⁵ Nusrat Choudhury, “Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan,” *Yale Journal of law & Feminism*, 2007, vol.19, p. 155.

³⁶ Hursh, “Advancing Women’s Rights Through Islamic Law: The Example of Morocco,” p.262.

tradition and condition of each society(not put Islamic veer on foreign ideas); (2) find Muslims' own realistic solution and not to get "entangled in confrontation of secular verses ultra-conservative etc. as gender equality requires long-term engagement"; (3) need imaginative *ijtihad* as "medieval society's values are entrenched in Qur'anic hermeneutics" and to overturn them you need imaginative *ijtihad* as some leading schools and scholars upheld the equality of *diyah* between men and women against the odds of the majority jurists' stand.³⁷ Capturing this, Hursh also held that Secular approach will not bear fruition as Islam is the marker of cultural identity, national pride and legitimacy (pragmatic reason).³⁸

- 2- Using "gender equality" which owes its genesis in international human rights and supplementary conventions and protocols cannot be projected as an absolute intellectual launching path for reforming Muslim family law from an Islamic methodological point of view because of three epistemological reasons: First, The general equality of sexes definitely is a principle which finds some support by virtue of numerous textual proofs from the Qur'an and the Sunnah. But the cumulative effect of these textual evidences cannot override other textually prescribed specific laws, which specify differentiated roles/rights for men and women by virtue of standard methods of legal deduction detailed in Islamic legal theories. Taking on feminists for their postulate on gender equality, Mirza maintains the conclusion that the Qur'an basically was/is egalitarian and it is patriarchy which has marginalized and debunked them into discriminatory laws against women is unrealistic due to two reasons: (1) The Qur'anic passages imbuing equality can hardly provide a sure framework for gender equality when viewed against those Qur'anic provisions which legislate limiting rulings to the effect; and (2) the social settings which the

³⁷ Kamali, *Islamic Family Law Reform: Problems and Prospects*, p. 42.

³⁸ Hursh, "Advancing Women's Rights Through Islamic Law: The Example of Morocco", p. 262.

Qur`an was aiming to reform was patriarchal. The feminists` singular insistence that the re-reading of scriptural text constitutes the bastion of women-affirming Islamic legal reform is unsociological as it discounts the significant place of secular factors, such as socio-political and cultural variables in the formulation of women`s Islamic legal rights in the classical works of the jurists.³⁹ Viewed from a macro level, it can be argued that that in the Qur`anic outlook and Prophetic scheme, harmonious families and value based societies can only be established where male and female members of society share their resources and potentials by complementing each other in principled ways without being driven with rage for supremacy and mutual antagonism for power. Particularly bringing gender politics into personal arena and family would rock the very foundation of a harmonious family life which constitutes the bedrock of establishing stable individuals and societies. Accordingly, it is untenable to argue that “gender equality” can be used as overriding principle by which all classical Islamic laws, whether embedded in definitive textual sources or founded on the basis of analogical deduction from explicit texts of the Qur`an and Sunnah which assign somewhat reduced legal rights for women, based on its moral vision of equity and complementarity of male and female genders in society. Advocacy to gender equality as conceived by the West can open a floodgate for a host of other equality demands, such as equality of marriage between the opposite sexes for legalising polyandry, which defies justice to women as it is unnatural and damaging to both men and women`s wellbeing.

³⁹ QudsiaMirza, “Islamic Feminism and Gender Equality,” ISIM Review, 2008, vol. 21, p. 4. at https://openaccess.leidenuniv.nl/.../ISIM_21_Islamic_Feminism_and_Gender_Equalit, (accessed 29 April 2017).

- 3- Kamali's assertion that the so called cosmological principles, namely the Qur'anic authorisation to select from among the varying meaning even that of the Qur'an together with principle of equality of men and women in terms of creation can be used as frameworks for assimilation of "gender equality" is farfetched. First, his understanding of the verse 18 of *Suūrah al-Zumar* is irrelevant due to two reasons: (1) it is un-methodological for severing it from its context as this verse was revealed to praise three companions, Zayd ibn 'Amr, Abū Dharr and Salmān al-Fārsī, who even prior to Islam when listening to proselytising speeches from the polytheists affirmed the Abrahamic faith that there was no God but Allah.⁴⁰ Even if we go by the *uṣūlī* principle that "the significance is attached to the ruling and not to the reason which evokes it" such an extrapolation is untenable since the verse in question juxtaposes human laws against what God truly commands, hence its extension to revoke other God-enacted rules is a clear contradiction with dangerous consequences such as damaging the coherent readings of the Qur'anic themes. And (2) More problematic is Kamali's polemical statement that the opening verse of the al-Nisā' Chapter in the Qur'an negates gender discriminatory laws for two reasons. First, this suggestion presupposes a stark contradiction on the part of God as the Supreme Law giver as it is in this section that God enacts several laws (apparently discriminatory to women), such as half share of inheritance for the son as opposed to the daughter of the deceased, men's right to polygamy, men's managerial authority in the house and a husband's right to reform refraction on the part of his wife etc. Second, such a legal construction has the potential to overthrow the whole discipline of Islamic legal theory on the subject matter of methods of legal deduction (*turuq istinbāt al-ḥukm*) from scriptural texts, about which the advocate claims to be an authority.

⁴⁰ Ṭabarī, Al-Muhammad ibn Jarīr, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān* (Beirut: Dār al-Fikr al-Ma'rifah, 1970), Vol.3, p. 242.

- 4- Kamali's other suggestions, such as that reform finally takes effect *if we move from less sensitive to more sensitive*, may be utopianism of a situation where Muslims would regard plurality of husbands as normal, a kind of wishful thinking about full secularization of the Islamic world. Furthermore, his proposal that that imaginative *ijtihad* (which can mean *takhayyulī*) can overturn patriarchal understanding of the text is an unprincipled argument as the change of circumstances, how radical, cannot override definitive rulings of the *Shari'ah*.
- 5- Using international human rights and that of women's rights indisputably have impacted to a great extent Muslim Personal law of status in the Muslim world. But, by and large, with the exception of Tunisia, Muslims have domesticated such laws in line with *Shari'ah* parameters with strong commitments to resist any changes to the basic structure of Muslim family law by way of reservations to several provisions of such laws like freedom of marriage etc. Hursh's celebration of Moroccan law as the most successful achievement on gender equality is not all that rosy neither at the canonical level nor in practice. The reason is that in terms of content, it is still based on classical *Fiqh* and its only women empowering feature is imposing some judicial restrictions on polygamy and divorce, which from Islamic perspective cannot be *ultra-vires* of some core principles of the *Shari'ah*.

The Malaysian Scenario

Contextualizing the debate in the Malaysian context, the reform project along the above lines is unrealistic on two grounds. First, at the academic level, it has been facing stiff resistance from the local scholars since 1980s. Reform advocacy by its chief proponents, namely "Sisters in Islam" to a large extent has been impeded by their arch rivals. To Fourier, there has been a tussle between conservative (advocate patriarchal interpretation) and feminists (call for equality between the sexes). Neither side has been completely victorious but each group has earned some reforms. The competition became stiffer between the two camps with the official inauguration of Islamization project during 1990s. To Fourier, the

reform of Muslim family law as championed by Sisters-in-Islam in contrast to its rival, namely, “the conservative Ulama who enjoy greater social acceptability and cultural authenticity,” face the problem of legitimacy (seen as overly Western) when calling for reform through reinterpretation of Islamic law.⁴¹ Second, some of the reform accomplishments apparently worked more for women’s oppression than their liberation. Some of the cogent examples include:

- 1- Restriction to polygamy practically cannot restrain those men with resources and audacity to criss-cross territory and get their marriage registered later on by merely paying a fine. In other cases, it provides an avenue for extra-marital affairs if two couple in love cannot get their relationship legalized because of the first wife’s refusal of the consent.
- 2- The judicial stipulation requiring that extra-judicial divorce to be repeated before the judge for legal validity has created the problem of “hanging marriages”. Being disillusioned with this law, some men revenge on their wives by deliberately refusing to pronounce *talāq* before the court or even by refusing to attend the hearing. But practically, they have ended their marriage by virtue of unofficial divorce, and consequently the women are left in limbo, neither being divorcees nor wives.
- 3- The conditions inserted in the marriage contract for desertion or lack of maintenance are practically disbanded when a husband accuses his wife to have committed *nushūz* (disobedience).
- 4- Cruelty as a ground for judicial separation (*faskh*) practically, if in the beginning was in the form of emotional abuse, may culminate in full scale physical assault for the sake of reporting it to the police and then presenting it to the court as a proof. Because mere claim of emotional abuse, happening in the private sphere, is difficult to prove unless there is a “tell-tale” sign of such abuse in the form of external injuries supported by police report. Hence,

⁴¹ Fournier, et *all*, “Engendering Legal Reforms: Islamic Law in Africa and East Asia”, p.106.

compelling such victims to incite her abuser so that he can physically assault her.

Conclusion

Overzealous ambition to impose any non-indigenous value loaded constructs, such as gender equality, irrespective of its underlying premises, on Muslims would not only be polemical methodologically but impractical and harmful for women. Advocates of sociological factors, who advocate gender-equality fail to appreciate and land themselves on epistemological paradoxes. Pragmatically, it would be imprudent to coerce the male segments in Muslim communities to be protective of their womenfolk by overthrowing their religious based assumptions in a way which they perceive it as less Islamic if not secularist. Definitely, Muslim personal law needs reform due to the changing needs of society and the accretion of problematic customary contents into it. Yet, the point of departure for its reform must be based on indigenous methodology of reform and parameters (on the principle of *ta'sīl and tajdīd*). The accomplishment of such an agenda requires a complex process of balancing between the requirement of textual laws and juristic rational interpretation (integration between *wahy* and *'aql*).