



SPECIAL REPORT

Women Leading Change

This collection of essays was developed as part of a project at the Wellesley Centers for Women, "Women's Leadership Network: Women's Political, Public, and Economic Participation in the Muslim World."

Introduction by:
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THE NANCY GERTNER HUMAN RIGHTS PAPER COLLECTION

On the occasion of the 35th Anniversary of the Wellesley Centers for Women (WCW) in 2009-2010, WCW was honored to dedicate the Human Rights Paper Series to The Honorable Nancy Gertner, U.S. District Court, District of Massachusetts, in recognition of her contributions to the Centers' work and to her tireless commitment to women and the law in the U.S. and around the world.

Learn more about the Wellesley Centers for Women project, "Women's Leadership Network: Women's Political, Public, and Economic Participation in the Muslim World" at:

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Women Leading Change

A collection of essays from women leaders advancing justice in the Muslim world

This collection was developed as part of a project at the Wellesley Centers for Women, "Women's Leadership Network: Women's Political, Public, and Economic Participation in the Muslim World." These analyses* are the work of individual authors and do not necessarily reflect the positions of the Wellesley Centers for Women, Wellesley College, or other Network members.

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**These essays have been edited for clarity and formatting.*

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Introduction

Rangita de Silva-de Alwis

"The written word is the most powerful tool we have to protect ourselves, both from the tyrants of the day or from our traditions. Whether it is the story teller of the legend of Scheherazade, staving off beheading by spinning a thousand and one tales.... Or lawyers like me, who defend the powerless...women have for centuries relied on words to transform reality." -

*- Shirin Ebadi, Nobel Prize Winner
Iran Awakening: A Lawyer's Look at Women's Human Rights in Iran*

Claiming Their Rights: Women in Muslim Societies

The Women's Leadership Network: Women's Political, Public, & Economic Participation in the Muslim World was founded in the fall of 2009 with the belief that transnational information-sharing networks can help strengthen partnerships between and across disciplines, regions, communities and national boundaries; thereby reinforcing a more dynamic understanding of women's leadership in the world. One of the unique facets of this Network is the way it strives to create partnerships between and across regions, nationalities and traditional alliances in the Middle East, North Africa, and South and Central Asia. Despite the fact that there is little homogeneity in these countries, all of them are influenced by/ruled by a construction of gender that has been informed by Muslim law.

The Network, although facilitated by the Wellesley Centers for Women (WCW), was conceived by partners around the world who sought transnational networks to advance their common goals. This transnational Network was created to share information and scholarship as a way to weave together a common platform of action. The working papers in this collection are the contribution of the steering committee members and are emblematic of their work.

These papers both join and respond to the call for Islamic feminism as part of a modernist movement bent on contextualizing Islam. The women leaders in this Network are at the forefront of reform across the Muslim world and are mining the egalitarian core of Islamic jurisprudence.

Women's struggle for equality and basic rights has been intensified by the rise of a male-dominated Islam that too often defines women's empowerment as anti-Islamic or Western cultural imperialism. The women leaders featured in this volume embrace a progressive interpretation of Islam to support women's rights. These leaders are working both within the tenets of Islam and the universal human rights framework to make changes for women and to broaden the frontiers of economic, political, and educational participation for women.

These efforts are critical to bridging the conflict between those championing reform and those seeking to oppress women in the name of religious tradition. The members of our Network are on the frontlines leading reform in their countries and are among the most influential feminist thinkers in the Islamic world. These essays are on-the-ground experiences of women who are

driving change and using a modernist interpretation of Islam to promote opportunities for women. These women leaders are catalyzing a women's empowerment process to change the terms of the religious and political debate and reclaim women's voices within Islam instead of silencing them.

In the last few years we have seen an unprecedented growth in the debates surrounding the role of women in countries with a critical majority of Muslims. This has been defined and marked by the growth of women's movements at the local level and the emergence of transnational feminist networks working at the regional and global level. Building these connections across and beyond local movements has become a powerful process by which to realize the transformative potential of women's leadership. These new networks also afford an opportunity to deliberate and strategize anew and the transnational networks help raise these issues beyond the domestic sphere.

The Network brings together women from 15 countries where Muslims form a critical majority and *Shariah* law or Islamic religious tenets inform and animate law and custom. This volume celebrates the work of these women who are at the forefront of change in their countries. At the helm of politics, public service, scholarship, business and law in their countries, these women are challenging patriarchal traditions, and claiming the human rights of women. They have redefined some of the most urgent problems of our times and transcended boundaries. They have all left their mark on national laws and policy on issues such as: trafficking in women and children, domestic violence, and children's rights laws. They have challenged sexual harassment, honor crimes, acid-related crimes, and gender discrimination in all its variant forms both in and outside courts. These women have given voice to gender issues that were silenced and erased from public discussion and thus validated the voices of all. They have put their lives at risk to defend principles of justice and equality. They are re-imagining these laws and religious norms in more egalitarian and democratic ways and have thus pierced the veil of parochial sovereignty in relation to chauvinistic laws that are legitimized in the name of tradition. Some have created important moments of resistance, changed paradigms, created new movements, and catalyzed international norms. They have rewritten the rules in the image of women, men, and children.

These essays focus on the often-excluded perspectives of women's experiences and examine how those experiences can inform change. These essays provide a unique window through which to examine some of the great political changes of our times taking place in countries either governed by Muslim law or with a Muslim majority. The relationship between the historical, the social and political context of these narratives are particularly powerful given their impact on women. While generating new understandings of gender and justice, these essays are also a powerful call for gender sensitive political action and institutional change.

These papers come at a defining moment in history and there is a call to take action on some of the many debates that engulf the Muslim women. For long, women's works and their voices have been devalued around the world. Women's writings have been an important way of creating a revisionist history by placing women at the focus of change.

Through the tasks of reinterpretation and reconstruction, our authors are marrying felt needs on the ground with the nobility of spirit that characterizes Koranic texts that have been submerged in favor of interpretations that led to patriarchal interpretations of the law.

Given the heterogeneity, divergences, and similarities in laws and customs in what we loosely term the Muslim World, this Network has, over the period of a year, become a powerful tool to share information, exchange strategies and create new alliances. If there is a common thread that runs through the essays it is that the empowerment of women is the most effective means of guaranteeing change. Therefore, a virtual community such as this Network can play an effective role in strengthening the empowerment of different communities.

Associations and connections among women are critical to realizing the transformative potential of women and facilitating a dialogic approach to re-examining cultural constructs. Transnational networks permit women to create alliances with similarly situated women and to mobilize attention around common issues locally, domestically, regionally and internationally. Furthermore, associations and networks offer spaces for deliberation and create opportunities to strategize.

Piercing the Veil: A Progressive Interpretation of *Shariah*¹

The term the “Muslim World” is used very loosely in this paper to include countries where a critical mass of the population is Muslim. We know that there is no homogeneity in the Muslim World and that religious communities are internally contested, heterogeneous, and constantly evolving over time through internal debate and interaction with outsiders. By drawing together women from different countries and regions, this Network’s work attempts to bridge those gaps in theory and practice.

Women’s rights scholars are reviving an egalitarian Islamic jurisprudence within the tenants of Islam to combat the politicization of Islam. They argue that chauvinistic interpretations of Islam are a distortion of Islam reinforced by patriarchal forces. By anchoring their arguments within the Islamic discourse, these feminists are presenting a culturally legitimate and credible framework within the human rights traditions to advance equality for women.

What is uncontested, however, is that a burgeoning body of scholarship on “Islamic feminism” has emerged in this field. The comingling of Islam and feminism is sometimes considered problematic by feminists of Muslim faith who espouse a feminism based on a secular framework. This tension can be best understood in the words of Shirin Ebadi, the Iranian Nobel Laureate who states:

If Islamic feminism means that a Muslim woman can also be a feminist and feminism and Islam do not have to be incompatible, I would agree with it. But if it means that feminism in Muslim societies is somehow peculiar and totally different from feminism in other societies so that it has to be always Islamic, I do not agree with such a concept.²

¹ Women’s human rights activists, especially in the Muslim World are, in the words of Madhavi Sunder, “piercing the veil of religion and culture” that is used as legitimate grounds to deny full and equal rights to women.

² Interview with Nayereh Tohidi, “Islamic Feminism: Perils and Promises,” Middle East Women’s Studies Review 16, nos. 3-4 (Winter 2002), <http://www.amews.org/review/reviewarticles/tohidi.htm> (accessed June, 1 2010).

Despite some ideological differences between Islamic feminists and secular feminists in Islamic countries, both groups agree on the need to reclaim Islam from male-dominated interpretations. Although secular feminists want to bring women's rights in their countries in line with international human rights norms, and Islamic feminists want to bring their laws in harmony with a progressive interpretation of the *Shariah*, both schools agree on the need for a gender friendly interpretation of the *Shariah* law consistent with universal principles of women's human rights.

In his *Toward an Islamic Reformation the 21st Century*, the well-known Sudanese scholar and law professor Abdullah An-Na'im, calls for an alternative Islamization which legitimizes the human rights framework through the reform of the *Shariah* based on both Islamic principles and egalitarian values. Zarizana Abdul Aziz, prominent Malaysian human rights lawyer and a member of our Network, agrees with An-Na'im that what subordinates women are the patriarchal interpretations of the holy texts that often disadvantage women. Anti-women aspects of Islamic law and culture result from male misinterpretations and culture-specific additions to those interpretations.

Our authors reject simplistic notions of a "clash of the civilizations" or conflict between the East and the West and seek to strike a balance between religious culture and international law norms. In essence, their work is a call for a heightened internal cultural discourse as well as a cross-cultural dialogue aimed at broadening and deepening international consensus.

Most of the writers rely on the power of *ijtihad*, which is a creative interpretation of the Koran based on independent and contextual reasoning in light of relevant societal, historic, and cultural reasoning. *Ijtihad* is a flexible tool which can be used to mold and shape traditional Islamic legal theory to fit the needs of changing times. They all recognize the need for a more dynamic interpretation of the Koran in order to advance women's rights. *Ijtihad* opens the door for the reinterpretation of traditional rules of Islamic jurisprudence in light of modern conditions. Similarly, *Siyasa*, the legal authority to supplement the broad criminal law principles of the Koran and other Islamic texts rejects rigidity in the application of Islamic Law. *Takhayyur*, or independent judgment expanded by the enforcement of *Shariah*, permits consideration of the opinions of individual jurists from different schools of thought.

Shirin Ebadi argues that, "[i]n Islam, there exists a tradition of intellectual interpretation and innovation known as *ijtihad*, practiced by jurists and other clerics over the centuries to debate the meaning of Koranic teachings as well as their application to modern ideas and situations."³

In recent times, even the judiciary has invoked *ijtihad* in its jurisprudence. For example, Justice Nasim Hasan Shah of the Supreme Court of Pakistan has spoken extensively on the subject of *ijtihad*. He noted:

The Commands of the Holy Qur'an that have been expressed in nass (clear edict) terms and cover a very small field and by far the much larger area of human activity has been left unspecified wherein the Lawgiver in the State is permitted to do whatever is necessary for the common good. Indeed the Almighty, in this field, has left it to us Muslims to provide for whatever may be necessary in the circumstances, through

³ P191 of Shirin Ebadi's Iran Awakening

additional legislation by the exercise of our ijtihad (independent reasoning) in consonance with the spirit of Islam.⁴

Despite the egalitarian underpinnings of the Koran, women have been subordinated by patriarchal interpretations of it that have distorted an understanding into the way in which Islam provides a foundation for a radical restatement of women's rights. Women's public sphere participation in the Muslim World is pivotal to the new currents of reformist thoughts sweeping over the world. In communities where religion and tradition are deeply entrenched, women have to work both within and outside of their traditions to achieve visibility and create change. In this context, Islamic feminism and secular feminism are not directly oppositional but mutually reinforcing. These essays located within the emancipatory and reformist potential of the human rights framework and rooted in the richness of the Islamic traditions set out a platform of action for women leading change in their communities and in the world.

Outlawing Female Genital Mutilation (FGM) and Child Marriage: Lessons from Egypt

Dr. Moushira Khattab shattered the glass ceiling for women across the world when she was appointed Egypt's Minister of Family and Population. Prior to this landmark appointment, she led the fight against FGM and child marriage as the head of the National Council on Childhood and Motherhood (NCCM) and honed her negotiation skills as Ambassador to South Africa. Khattab brought training and experiences acquired from these positions to the decision-making table while navigating the tense culture wars of Egypt as the architect of some of the most critical social reform legislation affecting women and girls in the country. Her pioneering efforts as a reformer have been recognized through multiple international-level appointments, such as her current position on the United Nations Committee on the Convention on the Rights of the Child. Her work has had enormous resonance in many parts of the world and has been instructive to similar reformist initiatives.

Dr. Khattab's reformist zeal and work is driven by the mantra that equal access to education is a key factor in the fight to empower girls. Education was thus integrated into the lawmaking process as an effective vaccine in her battle against FGM and child marriage. The Girls' Education Initiative (GEI), which she spearheaded, is a novel initiative that existed side by side with anti-FGM advocacy. One of the most contextually sensitive facets of this initiative was that the school day was made flexible enough to accommodate the girl child's familial responsibilities. Another radical departure from tradition was that education guardianship was granted to mothers, an effort to empower both mothers and their children.

A multi-disciplinary approach based on the overarching framework of gender equality and anti-discrimination was designed to criminalize FGM in Egypt. Community involvement was the critical cornerstone of reform. Under Khattab's leadership, the anti-FGM movement shifted from an elite movement to a local movement that involved mothers, fathers, and daughters. Changes to educational guardianship and the flexibility of the school days to accommodate girls' household responsibilities facilitated this shift, along with the toll-free hotline and counseling service that was set up under the law.

⁴ Justice Nasim Hasan Shah, Justice and Islam, Paper presented at the Conference of the Islamic Philosophical Association of Pakistan (Nov. 12, 1987), reprinted in 40 All Pak. Legal decisions, J 1, 4 (1988).

A highlight of the revised Children's Law of 2008 was the criminalization of FGM. Any party responsible for FGM is punishable by an imprisonment sentence from not less than three months and not more than two years, and/or a fine between 1,000 and 5,000 pounds. Defining FGM as a lifelong mutilation and disability to the body of a woman was a very strategic move directed at outlawing FGM. Another important strategy was to unlink the relationship between FGM and Islamic precepts in the social consciousness by delegitimizing the argument that FGM is permissible because it was not forbidden during the time of the Prophet. In order to do so, Khattab states with simple clarity that genital cutting harms the body of a young girl. She grounds this in the absence of references to female circumcision in the Koran and the absence of calls for FGM in the *Sunna* and different schools of thought. The teachings of Islam, however, do call for respecting the human body of both men and women alike. Khattab references the the *hadith* that prescribe the right to enjoy a healthy body and soul with the tenant: "[d]o not harm yourself or others."

Another major battle centered on raising the minimum age of marriage for girls to 18. To create public attention and spark opposition to child marriage, Dr.Khattab's NCCM highlighted the marriages of young girls to non Egyptian men in isolated villages. Most importantly, these new laws created criminal sanctions against those who register child marriage.

Reforming Family Law in Indonesia

Dr. Siti Musdah Mulia is an eminent scholar and professor on Islamic-political thought in Indonesia. She was the country's first woman to receive a Ph.D in Islamic political thinking and to serve as the head of research at the Central Board of the Indonesian Council of Ulama. She is the Chairperson of the Indonesian Conference on Religion for Peace, an NGO that actively promotes interfaith dialogue, pluralism, and democracy, and was awarded the Woman of Courage Award in 2007 by the U.S. government.

As Senior Advisor to the Minister of Religious Affairs, Dr. Mulia launched the Counter Legal Draft (CLD) 2004 to counteract the root of one of the most pervasive forms of discrimination against women: family law. Despite enormous critical acclaim from around the world, the CLD was met with much hostility by change resistant elements both in Indonesia and neighboring countries. Despite the fact that the CLD carries no authority as law, today it is the touchstone for analogous reforms of family law around the world.

The CLD, Dr. Mulia's counterpoint to Indonesia's Islamic Code created a firestorm when it recommended prohibiting child marriage, outlawing polygamy, allowing interfaith marriage, and permitting women to initiate divorce. These recommendations sparked a historical debate in Indonesia and elsewhere by premising their revisions of family law on principles of equality and fairness. One of Dr. Mulia's greatest achievements has been her ability to channel the pluralism within Islam; especially as she has noted that Islam has many faces.

In her study, *Toward Just Marital Law: Empowering Indonesian Woman*, Dr. Mulia provides a powerful model for an egalitarian bill of rights for women in family law in all countries. An analysis of some of the most important legal cases in Indonesia reveals that gender inequality in the legal field is pervasive in both on the face and the application of the law. Such inequalities

exist in a law structure marked by low gender sensitivity among law enforcers, particularly prosecutors and judges. Dr. Mulia argues that existing laws, such as the Criminal Code, the Marital Law (*Undang-Undang Perkawinan No. 1 Tahun 1974*) and the Islamic Code of Law (*Kompilasi Hukum Islam Tahun 1991*) are heavily loaded with gender bias and patriarchal values that reinforce the objectification and subordination of women.

Dr. Mulia's article opens with a *tour de force* of the reforms of family law in a number of Islamic countries before turning its attention to Indonesia and initiatives to revise the Indonesian Marital Laws and the Islamic Code of Law. In a panoramic sweep of law reform movements around the world, she highlights the role of Muslim intellectual reformers in this process. Starting in the early 20th century, the reformist spirit spread from Turkey to Lebanon, Jordan to Syria; the rights of women and children often underpinning these reforms of family law. At the heart of these reforms was polygamy. While Turkey was the first country to abolish polygamy, Tunisia and Syria, too, have prohibited polygamy. Egypt's family law was revised at many points in history to ensure that polygamy was allowed only with the wife's consent. Registration of marriage has also been an important provision of law reform. In Egypt and Jordan, the law has been revised to criminalize the lack of registration of marriage and the marriage registrar is subject to criminal sanctions if the marriage is not registered. These revisionist efforts provide a much needed space for the reconceptualization of laws in a modern context.

In 1991, then President Soeharto issued the Islamic Code of Law through Presidential Instruction No. 1/1991. The Law captured the majority views in Islamic jurisprudence and places women in a subordinate role by allowing polygamy, and prohibiting women to be guardians of minors. Dr. Mulia sees a correlation between gender inequality in these laws and the heightening violence against women in Indonesia at the time. Even though a majority of women are reluctant to report crimes of domestic violence, reports from the State Ministry of Women Empowerment in 2001 show that that 11.4 percent of the total population or 24 million women have been subject to violence.

The proposed Counter Legal Draft (CLD) of the Islamic Code of Law spearheaded by Dr. Mulia was and remains one of the most critical reformist movements in Indonesia that has resonated with neighboring countries. The CLD is a pluralistic and humanistic interpretation consistent with the Koran's principles of justice and gender equality. Dr. Mulia argues that laws are a reflection of the values of society, and given that Islamic legal theory or *al-adat muhkamat* specifically allows tradition or custom in a community to become law, laws must be interpreted according to modern context.

The Counter Legal Draft of the Islamic Code of Law in Indonesia was drafted in 2004 through research by the Gender Mainstreaming Working Group Team (*Tim Pokja PUG*) of the Ministry of Religious Affairs in 2001. One of the first major goals of the CLD is to bring the marriage laws in compliance with major international conventions that Indonesia is a party to such as the Convention on the Elimination of Discrimination Against Women (CEDAW), the Cairo Declaration of Human Rights, and the Convention on the Rights of Children (CRC), which definitely prohibits marriage below the age of 18. A second goal of the CLD was to bolster the efforts to protect women from violence against them. The CLD provides a set of model recommendations to the Indonesian Marital Law. Consistent with Islamic teachings about

marriage that center on principles of equity, egalitarianism, and pluralism, the Counter Legal Draft of the Islamic Code of Law created a new paradigm of marriage based on a consensual agreement between a man and a woman. The third goal of the CLD was to reconcile *Shariah* law in provinces such as Aceh, West Sumatra, South Sulawesi, West Nusa Tenggara, and West Java with local wisdom and values and finally, to keep abreast of the new legal developments in other Islamic countries such as Tunisia, Jordan, Syria, Iraq, and Egypt.

The launch of the CLD was meant to raise awareness of critical issues of gender equality among all stakeholders including women activists, legal practitioners, and some *ulemas*. Some of the major issues addressed by the law include: the definition of marriage, guardianship, witnesses to marriage minimum age for bride, dowry, marriage registration, *nusyuz*, rights and obligations of husband and wife, income earning, polygamy, interfaith marriage, *iddah* (transitional period), *ihdad* (mourning period), and rights and status of children born out of wedlock.

Dr. Mulia argues that, “while we have to appreciate and honor the *ijtihad* of *ulemas*, it has to be taken into account that *ijtihad* is informed by context and therefore subject to change.” She raises to the surface the legitimacy of a modernist interpretation of the *Shariah*. Given that nearly 50 percent of the marriages are not registered, the CLD is also an attempt to provide criminal sanction against officials who fail to register marriages.

What follows below is a distillation of the major revisions proposed in the Counter Legal Draft:

- **Defining Marriage as a Union between a Man and a Woman**

The prevalent definition of marriage under the Indonesian law was a contract between two males: the groom and the guardian of the bride. The proposed change seeks to reinterpret marriage as a contract between a man and a woman instead of between two males. Another important change sought in the law was to present marriage as a choice and not an obligation for both men and women.

Another innovative proposal was that a woman could also serve as a guardian in marriage. In the Koran, although the witness must be a Muslim, nowhere does it say that it must be a Muslim male.

- **Allowing Interfaith Marriage**

Another major proposal sought to legalize inter-religious marriage. This proposal was based on the fact that in Islamic law there is no prohibition against marrying a non-Muslim. The only prohibition in the Koran is of a marriage between a Muslim and a *kafir* (a person who denies the glory of God).

- **Addressing Child Marriage**

Forty-two percent of marriages in Indonesia are child marriages. Hence, the model draft family law called for age 19 as the equal age of marriage for men and women.

- **Addressing Inequality in Dowry**

Another proposal in the Counter Legal Draft challenges existing customs that provide for a dowry by the husband to the wife and calls for dowry to be given by both wife and

husband as a token of love and affection and as a way to create a relationship based on equality.

- **Polygamy as Harmful to Women and Children**

The Counter Legal Draft also prohibits polygamy. Since data shows that polygamy increases the risks of child abuse, conflict between family and society, the proposed revision is grounded on concrete data on the harmful impact of polygamy on children and the family.

- **Marriage Registration**

Forty percent of marriages in Indonesia are not registered. The Counter Legal Draft proposes mandatory registration of marriage.

- **Equality in Inheritance**

Given that Islamic principles do not decree unequal inheritance practices, the Counter Legal Draft, too, proposes equality in inheritance and removes the stipulation that women can inherit only half of what a man can inherit.

Transformative Politics in Egypt

At the crux of Dr. Fatema Khafagy's essay is Egyptian women's political participation. Like Dr. Mulia, she locates this project in the context of other Arab countries allowing readers to understand it in its historical and political contexts. Her own critical role in these efforts serves as a powerful reflection on the transformative role of women reformers. As the first Ombudsman for Gender Equality in Egypt, Dr. Khafagy addressed thousands of complaints made by women who were victims of gender discrimination in Egypt. These complaints provided her with the unique prism to map the challenges facing Egypt's women. Despite the unprecedented reform of gender discriminatory laws in the Arab world, the region has one of the largest gender disparities in the realm of economic and political participation and one of the highest rates of female illiteracy in the world. Underpinning all of this is the fact that personal status and family laws remain largely patriarchal.

In the past decade, Egypt and other Arab countries in the region have seen some exciting new developments in the relationship between gender and the law, such as in nationality law, rape law, and social security law. Egypt and other countries in the region have raised the age of marriage for women, legislated women's right to divorce, and established family courts. However, family law itself, traditionally a locus for patriarchal control, continues to be a contested battleground for women. Family law remains ruled by the patriarchal notion of the male head of household who provides for his family: a notion that cannot stand the test of economic change. Family law must capture these changing gender roles and its reform is critical to true gender equality.

Despite regional legal transformations such as the criminalization of violence against women, there remain violent acts such as honor crimes that are tolerated with or without impunity. For example, Jordan has issued a law to protect women from family violence and countries such as Egypt and sultanate Oman have issued laws criminalizing female genital mutilation. In the last

two years, laws prohibiting the trafficking of women and girls have been passed in countries such as Algeria, Jordan, and the United Arab Emirates. Yet honor crimes continue to occur and there is a degree of impunity that is tolerated in several countries. For example, Dr. Khafagy notes that countries such as Jordan, Kuwait, Lebanon, and Syria have reduced penalties against a person who is able to plead provocation.

Dr. Khafagy attributes the stagnation in family law reform to extremist forces and cites examples of reformist projects in Egyptian family law that have been blocked by clergy who claimed that existing law is based on *Shariah*.

Even though countries face resistance to reform, countries like Morocco demonstrate the possibility of change and the power of movement mobilization. The reform of Moroccan family law was possible only because of the mobilization of over 30,000 women's groups and the signature of over a million women. The new quota system, introduced by legislative reforms, helped facilitate the election of 35 women who entered the Moroccan parliament in 2002. This was followed by a progressive family law or *Mudwana* which allows women to become judges.

In a similar vein to their Moroccan counterparts, women's groups in Egypt lobbied for family courts in order to bring about changes in their own lives. They lobbied the President's wife for the promulgation of family courts, arguing that these would allow them to address issues such as divorce and custody rights. Additionally, the groups demanded social workers and psychologists. The result was, indeed, the promulgation of family courts, which now allow cases on divorce, child custody, alimony, and marital residence to be filed under one roof.

Nevertheless, Khafagy argues that *ad hoc* reform is insufficient and in response, a number of NGOs in Egypt have come together to draft a new family law. The new law hopes to focus on principles of citizenship and human rights and recommends a legal framework for mutually supportive family relations and guarantees the rights of all family members. Currently, in order to garner grassroots support for the family law, the proposed law is being discussed in different communities at different levels.

My Prison, My Home

Dr. Haleh Esfandiari, a member of the Network does not share a paper with us but instead, *My Prison, My Home*, her highly acclaimed personal narrative of her struggle against political imprisonment in Iran published by Harper Collins, is a fascinating window to her work and life.

Dr. Esfandiari's memoir is a powerful invocation of one woman's intrepid journey to freedom from Iran's notorious Evin prison, set against the backdrop of post-revolutionary Iran.

In December 2006, Dr. Esfandiari faced charges of plotting against and endangering national security. Imprisoned in the Evin Prison, which housed both political and non-political prisoners, she was held by an Intelligence Ministry infamous for its attacks on those it considered enemies of Iran: intellectuals, writers, journalists, and secular and liberal scholars. She feared the same fate that befell Zahra Kazemi, the Iranian-Canadian journalist who died under similar interrogation. Leading up to her imprisonment, in a paranoid game of cross

examination, her interrogators tried hard to prove her complicity in an imagined “plan” to overthrow the Iranian regime. Each of her speeches, presentations, papers, writings, and academic conferences was scrutinized time after time in an attempt to find proof that could lead to the fabrication of charges against Esfandiari for attempting to destabilize the Iranian regime.

The Intelligence Ministry was determined to cast her as a Madame Defarge who could topple the Iranian government through a velvet revolution similar to those that swept over Eastern Europe in the 1990s. To Esfandiari, absurd interrogations that sought to cast the Ford Foundation and the Rockefeller Foundations as agents of Zionism served to underscore the desperation of the Ministry’s attempts to build a case against her.

Dr. Esfandari’s nightmare started with a staged robbery on her way to the airport to return back to the U.S. from a visit to her mother in December 2006. Accused of starting a soft revolution as Director of the Wilson Center’s Middle East Program, she was subject to hours of interrogations. Yet she was not able to convince them that organizing intellectual fora at the Wilson Center could not endanger Iran’s national security.

“You tried to help the enemy overthrow the Islamic Republic?” asks the interrogator.

“By organizing conferences?” replies an incredulous Esfandiari, who is the Director at the Wilson Centers Middle East Program.

“If this country can be destabilized by twenty of its scholars attending conferences, then how does Iran differ from a banana republic....?” Esfandiari demands of her interrogators.

The interrogation reads like a Kafkaian novel but what strikes the reader most is the intellectual energy and intrepid spirit of this fascinating woman. Through the prism of her ordeal she uncovers the intersections between her own past and the recent political history of Iran. Her interminable period of interrogation is only a prelude to her incarceration at Evin. Even through the trials and tribulations of prison life where she is blindfolded everytime she is taken outside her cell, her humanity and indomitable spirit shines through. Although she avoids memories of happy life she led as a scholar, a mother, wife, and grandmother outside prison, it is those memories that sustain her through the dark days.

Caught in the cross-fire of an undeclared war between her birth country and her adopted country, Dr. Esfandiari finds that she is a pawn in Iran’s paranoid intelligence gathering. Even during a dark time of unprecedeted crackdown on thought, reasoning, and freedom of expression, she draws hope from the vibrancy and intellectual curiosity of Iran’s youth. Paradoxically, seeds of reform were growing at the same time as the Revolutionary Guards, the Council of Guardians, and a group of senior clerics who could veto parliamentary legislation and unleash the secret police on anyone who dared to dissent.

Dr. Esfandiari was released finally in 2007 without being forced to participate in a show trial. This avoidance was due to the mobilization of an international network of human rights advocates and partners, including Senators Hillary Clinton and Barack Obama who rallied in her support.

Dr. Esfandiari's earlier publication, *Reconstructed Lives*, received much critical acclaim and tells the story of Iranian women, in their own words articulating their response to the Iranian revolution in the 1970s. Through a series of interviews with professional and working women in Iran—doctors, lawyers, writers, professors, secretaries, and businesswomen—Haleh Esfandiari weaves together the tapestry of women's lives in an Islamic society. At that time, little did she know that her own story would become an important narrative in post-revolutionary Iran.

Islamization of the Constitution in Malaysia

As the Deputy Director of the Human Rights Commission of the Bar Council in Malaysia and an architect of the Malaysian Domestic Violence Law, the amendments to the Rape Law and Islamic Family Law, and the sexual harassment provisions in the amendments to the employment law, Zarizana Abdul Aziz is one of Malaysia's most prominent women's human rights lawyers. Her thought-provoking essay analyzes the Islamization of the Malaysian Constitution in the context of an everchanging nation-state that constantly re-imagines itself. A central focus is the ambiguity of categories created to determine whether Malaysia is an Islamic state or a majority Muslim State. She writes that "Malaysians on both sides argue that the ambiguity in the Constitution is not designating Islam as either the state religion or official religion favour their stance respectively." She delves into Malaysia's political history to find the roots of this theory of the Constitution. An examination of comparative Constitutions in other parts of the Muslim World forms a backdrop to her innovative and seminal analysis of the Malaysian Constitution.

Abdul Aziz argues that the cry for an Islamic Constitution is reflective of a new reformist movement which is propelled by an Islamic movement in Malaysia. She locates her narrative of Malaysia in the context of the Islamization processes that occurred in Bangladesh, Iran, and Pakistan in the 1970s and recently, in Afghanistan, Iraq, and Somalia.

Zia, the dictator of Pakistan in the 1970s, charged the Council of Islamic Ideology in 1977 to propose ways to Islamize Pakistan, which resulted in the Hudood Ordinances (Islamic criminal punishments). These ordinances mandated courts to order punishment of amputation for theft, eighty stripes for drinking alcohol, and stoning for *zina*, sexual intercourse outside a marriage. The ordinances also conflated rape with *zina*, thereby exposing a woman who is unable to prove rape to punishment for *zina*. Most recently, the Afghan Constitution and the Iraqi Constitution have declared Islam the official religion of the State.

While Malaysia's Constitution does not embrace the primacy of Islamic law, it does apply it to personal laws and certain offences involving Malaysian Muslims. Abdul Aziz argues that it is naïve to think that only states who have officially Islamized their constitutions are translating religion into normative laws and public policies. Non-theocratic states that are sometimes avowedly secular have similarly adopted Islamization initiatives, driven by the presence of Islamist forces domestically or influences from neighboring states and other Muslim countries. She terms this a form of "creeping Islamization."

Abdul Aziz posits that Malaysia is not an Islamic theocratic state, citing the Federal Court's ruling from *Subashini Rajasingham v. Saravanan Thankgathoray*:

The fact that Islam is the religion of the Federation by virtue of Art. 3(1) of the Constitution does not make Islamic law, by virtue of Islam being the religion of the Federation, something like the supreme or prevailing law of Malaysia.⁵

Unlike the constitutions of Afghanistan, Bangladesh, Iran, Iraq, and Pakistan, Malaysia's constitutional reference to Islam is limited to the recognition that Islam is the religion of the Federation. However, Abdul Aziz notes that creeping Islamization has influenced Malaysian politics and jurisprudence. For example, following in the steps of Pakistan's ban of Ahmadiyahs' (a breakaway group of minority Muslims) teachings, Malaysia also issued a string of *fatwas*, declaring Ahmadiyahs non-Muslims.

She writes that in "many Muslim countries and autonomous regions, implementation of criminal *hudud* punishments appears as a semiotic marker of political legitimacy in an ever-expanding arc of conservatism."

The most common *hudud* punishments are whipping for illicit sexual intercourse (between unmarried persons) and amputation for theft. Stoning for adulterers is similarly not prescribed in the Koran. The punishment was adopted by Muslims from traditions that predate Islam. However, the Islamization process sees the regulation of private morality through criminal law.

At the same time, she agrees with Abdullahi An Na'im, the well known Sudanese *Shariah* law scholar and Emory Law Professor, that reform should be set in motion through a process of "internal discourse" within the framework of each culture. She argues effectively that: "[i]nternal discourse is important because any effort to reform a practice which derives its authority from religious and customary sources, must engage and draw authority from the same sources as the original practice."

As an example of an indigenous and endogenous reform, she cites the example of the fifth Prime Minister of Malaysia, Abdullah Ahmad Badawi, who propounded a political and ideological campaign that he called *Islam Hadhari* (civilization Islam). This was "authentic and rooted within the tradition, yet human, just, and compassionate." In short, this campaign was built on the fundamental cornerstones of a just Islamic jurisprudence.

Abdul Aziz asserts that there is no immutability or absoluteness to the interpretation of *Shariah* law. She points to the analogy of the abolition of slavery as an example of a reformist endeavor within Islamic jurisprudence. She argues that less than 100 years ago, slavery was widely accepted, even in Muslim communities. Many Middle Eastern Muslim countries formally abolished slavery in the last 60 years, spawning the possibility of reform in the *Shariah* law in line with changing contemporary values. A similar application of the Koran according to modern context could be thus justified. The call for an Islam that is a powerful answer to contemporary problems and the recognition of human dignity have resulted in attempts to view Islam in light of existing values, customs and ideologies. This call is rooted in a tradition of diversity in Islamic law and acceptance that Islamic law although divine is the result of human interpretation. In fact, Abdul Aziz argues that disagreement or *iktilaf* is pivotal to Islamic jurisprudence and critical to the interpretation of the Islamic tradition.

⁵ [2008] 2 CLJ 1 at pp. 91-92 per Abdul Aziz Mohamad FCJ affirming Che Omar Che Soh v. PP [1988] 2 MLJ 55. The Federal Court is the apex court in Malaysia.

Women's Political Participation

Gender quotas address inequality in political representation as an important element of democracy. Having women in positions of power is critical to achieving gender equality. However, there is concern that quotas do not necessarily guarantee that women who are elected go on to embrace women's concerns. Further, women's family responsibilities, costs of campaigning, and the recalcitrance on the part of parties to actively recruit women discourage women from seeking political office.

Around the world a rising tide of demands made by women's movements acted as the catalyst for the adoption of gender quotas. Quotas are based on the fact that women constitute half of the population in countries and should therefore be represented accordingly. It is also grounded on the fact that giving women access to decision making will place new issues on the agenda that engage all citizens, including women, men, and children.

Myriam Aucar, one of Lebanon's leading corporate lawyers and prominent business leaders and a much respected voice in Lebanon's legal, political, and economic circles, argues that despite the fact that women obtained the franchise and the right to be elected to political office in Lebanon in 1953, between 1953 and 1992, only one woman was elected to parliament to complete the term of her deceased father. In 2009, only four women made it to a 128-member parliament, constituting only three percent of the governing body. Despite the fact that Lebanon leads among Middle Eastern countries with its pool of educated women, politics remain a bastion of male domination.

Aucar locates women's unequal political participation in an interrelated web of unequal laws, policies, and social practices governing women's status in Lebanon. Despite Constitutional guarantees of equality, women in Lebanon face a host of covert discriminatory laws. Aucar perceptively highlights that in Lebanon's tax law a working man is allowed a tax deduction if his wife does not work, but the same benefit is denied to a working woman who supports her non-working husband. A woman is also not allowed to open a bank account for her minor child without the father's consent. The law is inadequate in protecting women from violence in the marriage, honor crimes, and child marriage. Women also have unequal rights to divorce and inheritance. Moreover, the concept of a male head of household still remains an immutable concept in Lebanon. Women's unequal status in society is a determinant of women's under representation in politics in Lebanon.

Aucar argues that although the electoral law is facially neutral, its application has a disproportionate impact on women. For example, traditionally, political leaders are former leaders of war, therefore women are often unable to break into this entrenched bastion of male hierarchy. Although political parties do not directly discriminate against women, there are no affirmative action provisions to equalize a historically unequal playing field.

Aucar argues that traditional gender stereotypes, more than religious traditions, contribute to women's subordinate role in politics. These stereotypes reinforce women as primary care givers and the media casts women in traditional roles in the family and home.

The Lebanese political and community structures are dominated by male hierarchies. These patriarchal elements head the family, the most basic unit of society, as well as clans and political

parties which are to some extent extensions of the male hierarchical family structure. Aucar argues that unless the concept of the head of the household is reconceptualized, women will remain underrepresented in politics. She argues, "In Lebanon, politics is a family business that has to stay within the hands of the "head of the family." ...Since women are never the "head of the family" in the patriarchal society (except some widows), it is very hard for them to be accepted as political leaders."

Aucar argues cogently that women's political participation is linked with gender equality in the private and public spheres. Women's political participation cannot be isolated from other factors that inhibit women's empowerment. Until a holistic and comprehensive reformist agenda addresses the environment of impunity surrounding violence against women, and impediments to women's equal participation in business, women will remain underrepresented in politics and Lebanon will be denied the contributions of half of its population and the powerful potential of equal leadership.

Gender Equality Lawmaking in Kazakhstan

Dr. Leila Baishina, a prominent gender and human rights scholar in Kazakhstan who has helped inform gender-based law-making processes in her country argues that an equal distribution of money, education, knowledge of the mechanisms of decision-making, leisure and access to mass media is an essential concomitant of equal political participation. She writes that false assumptions of what constitutes the natural role for women have an enormously negative impact on women's political participation. She, like Aucar, argues that the concept of the male head of the household spills over into the political sphere and shapes and constructs the roles of men and women in the public sphere.

She makes the argument that when women in many countries of the world are shut out from the traditional structures of political parties, they redirect their attention to alternative structures such as the running of NGOs.

The revival of nationalism in Kazakhstan has also led to women being asked to take on more traditional roles of care giving. The Constitution of Kazakhstan calls for women to return to the private sphere activities of child bearing and child rearing. The mantle of national traditions based on stereotyped gender roles has been placed upon women and women are now seen as the bearers of paternalistic traditions.

Dr. Baishina argues that limited financial resources inhibit women from participating in politics and thus make women invisible to political parties. She argues that national courts and other official bodies must play an important role as arbiters of gender equality and thus as promote women's equal political rights. Unless women's unequal status in the family and in the labor market is redressed, women will remain underrepresented in politics.

She urges a re-examination of laws and practices through the lenses of the CEDAW especially, General Recommendation 22 that calls for temporary special measures that could ensure the participation of a minimum quota of 30-35 percent of women in political office.

Reforming the Violence against Women Law in Bangladesh

Salma Ali is the Executive Director of the Bangladesh National Women Lawyers Association (BNWLA), the largest non-governmental organization of women lawyers in Bangladesh. Salma Ali has played a defining role in advancing women's rights through lawmaking, litigation, and advocacy in Bangladesh. She has been at the forefront of drafting the domestic violence law which is now before the president of Bangladesh, the acid control law, and the sexual harassment guidelines through court directives in Bangladesh. As part of a vanguard of leading women lawyers, she has conducted groundbreaking advocacy on trafficked women, women with disabilities, and on women in custody.

In this paper, she explores the manner in which violence against women is addressed in Bangladesh. Ali argues that harmful traditional practices built on the foundations of patriarchy are often the greatest threats to violence against women. She reviews a mélange of new legal and institutional developments that have played a significant role in women vindicating their rights in courts and advancing their rights in the political arena.

Ali discusses the new revisions to the laws on political participation that not only mandate 45 reserved seats for women but in 2008 called upon registered political parties to make specific provisions to include at least 33 percent women as office bearers in their central committees and other committees at different level. Although political parties, including the two major parties, failed to fulfill completely this provision citing the lack of candidates, this measure did increase the participation of women representatives in the parliament in the 2008 election in Bangladesh.

Though acid attacks against women are relatively unheard of in the West, they are a heinous tool of violence against women in countries in South and Southeast Asia. Acid attacks appear to be spreading and are reported in Cambodia, Vietnam, Malaysia, and Egypt. The free availability and relative inexpensiveness of acid makes it an easy weapon against a woman. While approximately 96 percent of women attacked with acid die, the mutilation of a woman's face and beauty is often a far worse burden to shoulder than death. Acid injuries often results in the rejection of the woman by society and her chances of economic and social independence are completely doomed. Honor killings and acid attacks are also interlinked in that they seem to take place in a climate of impunity and are legitimized at the altar of family honor.

In 2002, Bangladesh passed two groundbreaking laws to combat acid violence: the Acid Control Act and the Acid Crime Control Act. The goal of the Acid Control Act is to monitor the import, production, transportation, storage, sale, and use of acid. The Acid Control Act also contains provisions to provide treatment, rehabilitation, and legal assistance to acid burning victims. The purpose of Acid Crime Control Act was to prosecute acid crimes. The Acid Crimes Control Act contains a number of crucial provisions that are instrumental in effectively combating acid crimes. Although there is data that acid attacks have decreased in Bangladesh, there is still an under-enforcement of the laws.

The laws on Acid Crimes are some of the most important gender based laws in Bangladesh. The adoption of these laws was catalyzed by a writ Petition brought in 2000 before the High Court Division of the Supreme Court asking for court directives to control importing, selling and distribution of acid in open market and for the prevention of easy availability of acid so as to

check the spree of acid attacks on women. The court issued necessary directives upon the government to ensure special provisions for treatment of acid survivors in the society and in 2002, the Bangladeshi Parliament passed two laws dealing with acid attacks. Despite the passage of the laws, Bangladesh still has one of the highest worldwide incidence of acid violence. Acid burns constitute 9 percent of the total burn injuries in Bangladesh. Under the auspices of the Acid Control Act, the national acid control council is charged with to sit every month along with selected NGOs to monitor acid sale but it does not happen in a regular basis. Despite harsh punishment under the law, weak or defective First Information Reports, gender bias and corruption hamstrung investigations and lead to faulty trials and the acquittal of the defendants.

However, these laws have had resonance in other countries. The Supreme Court of India has cited Bangladesh's laws in addressing acid violence in India and Cambodia is currently in the process of passing a similar law. The campaign against acid violence in Bangladesh is a critical example of the power of a bottom up campaign could become the "face" of a successful movement against violence against women.

Another recent development in Bangladesh was the recent high watermark case on sexual harassment. In May 2009, the High Court of Bangladesh issued a set of guidelines in response to a writ petition filed by the Bangladesh National Women Lawyers' Association (BNWLA) to prevent sexual harassment of women at all workplaces and Educational Institutes. The Guideline on Sexual Harassment covers a range of conduct including: unwelcome sexually determined behaviour (whether directly or by implication); to the prevention of participation in sports, cultural, organizational and academic activities on the ground of sex and/or for the purpose of sexual harassment. The Court has directed that this guideline be treated as law until a law is enacted is important because it allows no excuse for non-compliance by public and private institutions.

New General Recommendation to the CEDAW on the Rights of Ageing Women

Like most members of our Network, Ferdous Ara Begum has played a leading role both nationally and globally. She is a leading public administrator in Bangladesh and an expert on the Committee on the Convention on the Elimination of Discrimination against Women (CEDAW). She played a groundbreaking role in chairing a committee on drafting a CEDAW General Recommendation on Elder Women to be adopted in the near future.

The CEDAW Committee in the span of a little over 30 years has adopted 25 General Recommendations on issues to which CEDAW Committee feels States should pay greater attention. Begum's paper on discrimination and older women's rights uses the lenses of the CEDAW to bring an urgent focus on the multiple forms of discrimination against elderly women. Her paper explores the pivotal role of the landmark CEDAW convention in monitoring the rights of all women including ageing women.

Begum argues that it is important to structure laws, policies, and institutions that capture the way in which ageing has a disproportionately negative impact on women and the manner in which women experience old age differently to men. She posits that it is important to develop gender sensitive policies and practices at all levels in all sectors so that the enormous potential of ageing women in the 21st century may be fulfilled within a framework of empowerment. While all women are vulnerable to gender discrimination, older women are doubly vulnerable to discrimination and abuse due to poverty, lack of mobility, and declining health. Begum quotes the former UN Secretary General Kofi Annan who stated in March 1999 during the International Year of Older Persons, “[w]omen comprise the majority of older persons... and more likely to face discrimination.” Allegations of witchcraft, killing of older women in order to access their property, lack of identity documentation, unequal and early retirement for women are rampant in different parts of the world. All over the world, older women are invisible to the law and in public.

The CEDAW Committee, at its 42nd session, made an important decision to adopt the *General Recommendation on Older Women and the Protection of their Human Rights*. This General Recommendation explores the relationship between all the Articles of the Convention and ageing with an eye to gender and older women’s rights. The proposed General Recommendation is meant to provide guidance to both States Parties and NGOs on the inclusion of older women’s rights in their reporting. As a key figure who headed the committee set up to draft this important General Recommendation to the CEDAW, Begum’s paper is a timely analysis of this new and urgent jurisprudence that can change the way in which law and practice will apply to ageing women.

Conclusion

These essays reflect on reformist work in progress in different countries and regions. They are also clarion calls for further reform around the world. These initiatives have often connected to larger global movements and expanded beyond the boundaries of national sovereignty. These projects also demonstrate ways in which the local to global and the global to local often converge and coalesce. For example, Moushira Khattab’s work on raising the age of marriage in line with the CRC and the law prohibiting FGM has resonance around the world and are blueprints for action. As an expert member of the Committee on the Convention on the Rights of the Child, global norms inform her national work and her national and local work informs and animates the Committee’s jurisprudence. Similarly, Ferdous Ara Begum is helping to shape global policy by assisting in drafting a CEDAW General Recommendation on older women that is rooted in the evidence-based research of different countries. She is seeking ways to translate the global norm into local practice. Myriam Aucar’s analysis on women’s political participation in Lebanon identifies barriers and challenges that are common to most patriarchal communities and are connected to projects larger than the case study she discusses. Salma Ali, a pioneer of gender-based law reform in Bangladesh focuses on the Acid Control Act, 2002 and the Acid Crime Control Act, 2002 of Bangladesh. These were laws that were drafted in response to some of the most egregious forms of violence against women in Bangladesh. Although these laws are imperfectly implemented they have spawned tremendous interest in countries such as Cambodia, India, and Pakistan where acid crimes have become some of the most heinous forms

of patriarchal power and control over women. Currently, both Pakistan and Cambodia are writing similar laws based on the seminal laws in Bangladesh. Zarizana Abdul Aziz locates what she calls the “Creeping Islamization” in Malaysia within the political framework of several other Islamic States in South Asia and the Middle East and urges the call for a reinterpretation of the Koran in keeping with the diversity of Islamic jurisprudence. Fatema Khafagy traces the development of law, policy, and advocacy in Egypt within a web of interrelated and analogous movements in other countries and looks ahead at the reform of family law in Egypt to be built on the cornerstones of citizenship and human rights. Siti Mulia is the architect of the thoughtful and provocative Counter Legal Draft which sets out an alternative set of rights based on equality for men and women in different aspects of personal life. The Counter Legal Draft resonates not just among progressive elements in Indonesia as a model law based on a modernist interpretation of Koran but in countries around the world as a blueprint that is founded on the egalitarian underpinnings of the Koran. This volume amplifies the voices of these women and carries them across borders.

Islam in Constitutional and Legal Frameworks of Nation States

Abstract

This paper explores why Muslim nations, such as Malaysia, turn to Islamization. It analyses the evident trend toward Islamization by comparing the constitutions of various Muslim countries, including Pakistan, Iran, Bangladesh, Afghanistan, Iraq and Malaysia. The paper posits that Islamization is not necessarily initiated by Islamic radicals, but rather is often instigated by moderate, socialist or nationalist Muslims, as a political strategy. Once implemented, Islamization inadvertently draws governments to more fully embrace and strictly enforce Islam in law and policy. The paper concludes that normative laws should ensure and protect the principles of justice, equality, dignity and human rights. Such principles duly enforced are capable of fulfilling the needs of citizens and solving problems in today's dynamic world. While societies may embrace religions, a sovereign state should not preoccupy itself with interpreting and encapsulating religion in normative laws and policies, which will ultimately stifle the natural development of religion in society.

Part I introduces the current unrest in Malaysia due to the Islamization of politics. Part II provides examples of commonly understood 'Islamic Constitutions' and compares them to the Constitution of Malaysia. Part III discusses the politics of Islamization. Part IV examines whether Islamization only takes place under the umbrella of an Islamic Constitution. Part V concludes by suggesting that Muslims need to seek a common understanding of a lived Islam in which the state's role is to provide a fertile and neutral ground for the development of religion and not, as is increasingly the case, to interfere with the growth of religion through a politicized and stifling monolithic lens.

Part I. Introduction

In June 2002, the fourth prime Minister of Malaysia, Dr. Mahathir Mohamad, declared Malaysia a model Islamic State that abides by the fundamentals of Islam.¹ Almost on the eve of the fiftieth anniversary of Independence in August 2007, the Deputy Prime Minister, Najib Abdul Razak, who went on to become the sixth and current Prime Minister of Malaysia, described Malaysia as an Islamic State.² Less than ten days later, the fifth Prime Minister, Abdullah Ahmad Badawi, who had earlier declared Malaysia, as neither a secular nor theocratic State, declared Malaysia to be an Islamic State "which is administered based on the principles of Islam and at the same time adheres to the principles of parliamentary democracy."³

¹ <http://edition.cnn.com/2002/WORLD/asiapcf/southeast/06/18/malaysia.mahathir/>

² Najib Abdul Razak when officiating an international conference said, "Islam is the official religion and we are an Islamic State". 17th July 2007 http://www.bernama.com/bernama/v3/news_lite.php?id=273699 accessed January 5th 2010

³ It is possible that he meant to say Malaysia was a Muslim State, as the Malay language term used by the Prime Minister could mean either an Islamic State or a Muslim State. See Malaysiakini 27th August 2008

<http://www.malaysiakini.com/news/71676> accessed January 5th 2010

For concerned Malaysians, the question of whether Malaysia is an Islamic State or a Muslim [majority] State determines the extent Islamic law, generally referred to as Syariah law, shall inform and be the foundation of the Constitution, legislation and public policy.⁴

Article 3 of the FEDERAL CONSTITUTION, which declares Islam the religion of the Federation, triggers discussion over Malaysia's secular or theocratic status. Furthermore, Malaysians on both sides argue that the Constitution's ambiguity about Islam's role in society, as either the State religion or official religion, favours their stance respectively. In order to understand the importance of Article 3, however, it is pertinent to delve into the socio-historical reasons Malaysia's founding fathers adopted the article.

As a British colony, Malaysia had open immigration policies to encourage economic immigration, as a means of supplying cheap foreign labour. Britain was compelled to turn to foreign and migrant labour, as local Malays were disinterested in Britain's colonial endeavour of exploiting the land's natural resources. Migrant labour was divided by economic activities; namely Indian labourers worked in agro-industries, Chinese labourers in the mineral extractive industry, and Ceylonese in colonial administrative offices, as low-level public servants.⁵

The local Malay population became a minority prior to World War II because of the high influx of migrant labour. The 1931 census for example, showed that Chinese constituted 39 percent of the population, Malays 37.5 percent and Indians 14.2 percent.⁶ However, by 1957, the Malays constituted approximately 56 percent of the population. Colonial British immigration policies left a legacy of ethnically and economically segregated communities at the threshold of Malaysia's independence.⁷ Furthermore, the Malays' disinterest in colonial economic endeavours resulted in their diminished economic status at independence.

In order to assuage local Malays' fears of being disadvantaged after independence, the Malays were granted special privileges under the FEDERAL CONSTITUTION. This included guarantees on i) the role and prestige of the Malay rulers; ii) the status of Islam as the religion of the federation; and iii) the recognition of a unified Malay-Islam identity.

The first guarantee is achieved through the formation of Malaysia, as a federation of the existing Malay States, each ruled by a Malay ruler - generally called "Sultan" - and a rotating King of Malaysia, chosen from amongst the Malay rulers. A few States, namely the strait settlement States of Penang, Malacca and Singapore, which were the subject of early colonization, had

⁴ Syariah (also spelled shari'a or shari'ah) literally means "the path" and consists of immutable Islamic doctrines derived from the Qur'an and traditions of the prophet Muhammad. However, the term Syariah or Syariah law is used generally and inaccurately to refer to Islamic law. The latter should more accurately be referred to as fiqh but is generally referred to as Syariah law in most Muslim countries, including Malaysia. In this paper, the term Syariah is used in the latter context, unless otherwise specified.

⁵ For further discussion on British colonial migrant policies, see Bruce Boon, Malaysia: 50 years after Independence (Part 1) – Colonialism at the Root of the National Question, <http://www.marxist.com/malaysia-fifty-years-independence-part-one.htm> accessed December 15th 2009

⁶ As cited by Salbiah Ahmad, Islam in Malaysia: Constitutional and Human Rights Perspectives, [2005] 2 Muslim World J. Hum. Rts. 24 at 4-5

⁷ Malaya became independent on August 31, 1957. In 1963, the States of Sabah and Sarawak, situated in northern Borneo, joined the federation of Malaya. Malaya was renamed Malaysia. In 1965, after ideological disagreements between Singapore and the federal government, Malaysia's first Prime Minister made the decision that Singapore would secede.

governors, as the ceremonial heads of State, instead of Sultans. The second is entrenched in Article 3 of the FEDERAL CONSTITUTION, declaring Islam the religion of the Federation. The last guarantee is entrenched in Article 160(2) of the FEDERAL CONSTITUTION, which defines a Malay, as a person who professes the faith of Islam, speaks the Malay language, conforms to Malay customs, and has at least one parent, who was domiciled in the Federation or Singapore before Independence or is a descendant of such a person.⁸

As religion became increasingly politicized, the Islamic credentials of Malaysia gravitated from social cultural practices to a political and legal identity, wherein Article 3 became increasingly politicized. The ruling government's repeated public-demonstrations of its espousal and implementation of Islamic tenets, through legal and administrative means, are reflective of attempts to seek religious legitimacy on the litmus test of Islam. The government's efforts are particularly salient, as the Malaysian Pan Islamic Party (PAS) is the largest opposition political party in Malaysia, which espouses the establishment of a Malaysian Islamic State.⁹

Based on the belief that the majority Malay-Muslims would welcome Islamic reformation, Malaysian Prime Ministers, since Dr. Mahathir Mohamad's term of duty, have employed a pre-emptive strategy claiming that Malaysia was already an Islamic State, and the federal government, an Islamic government; thus setting the stage for a government race toward the demonstration of Islamic credentials, which had gathered momentum over the last couple of decades, in tandem with heightened global religiosity.

In order to analyze the political claims of the Malaysian government, this paper will first examine the constitutions of several Islamic nations and compare their respective constitutions and legal structures to those of Malaysia's.

Part II. Islamic Constitutions

a) Constitutional Theory and Islam

In constitutional theory, the individual surrenders part of his personal liberty to the state in exchange for the state's protection. This is referred to as the social contract. The state in turn guarantees that it will govern by respecting, promoting and fulfilling the public good. In order to discharge this duty, the nation state delineates the extent of its powers in an "assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed" in the body of a constitution.¹⁰

⁸ Defining ethnicity is not an easy task. It is not exclusively racial, cultural, or religious. The FEDERAL CONSTITUTION defines a Malay not by ethnic ancestry, but by language, custom and religion. Based on this definition, some Malaysians, who embrace Islam, or are born of one Malay parent, consider themselves and are considered by the state to be Malays.

⁹ PAS generally acts as an opposition political party. It has, however, managed to wrest control of two States in Malaysia, Kelantan and Terengganu. While PAS has not managed to regain Terengganu, Kelantan is still under PAS rule. Malaysia has been ruled by a coalition led by the United Malay National Organisations (UMNO) since independence with every Prime Minister hailing from UMNO. PAS's manifesto calls for the establishment of a Malaysian Islamic State. <http://news.google.com/newspapers?nid=1309&dat=19991025&id=SA4WAAAIBAJ&sjid=dxQEAAAIBAJ&pg=5539,5070309> accessed January 5th 2010

¹⁰ Per Lord Bolingbroke (1733) as quoted in Gordon S. Wood, Eighteenth-Century American Constitutionalism at <http://www.apsanet.org/imgtest/Eighteenth.pdf> accessed on November 2, 2009

Constitutions have since come to entrench a government's basic structure, context and purpose and have come to be judged by their efficacy on delivering fairness, social justice and good governance. Constitutionalism, having persisted for decades after colonialism with post-colonial nation states amending and enacting various versions of their own constitutions, can no longer be dismissed as a relic of colonialism.¹¹

In carving out the history, meaning and purport of constitutions, it is crucial to note that Muslim majority states have maintained the Westphalian model of a nation state, defined as an autonomous territorial entity inhabited by people of a common culture, history and language and governed by a constitution. Constitutions enshrine a full range of fundamental civil, political and social rights, and effective methods for the enforcement of rights and protect the full equality of all citizens. Any shortcomings in meeting these criteria are fatal for modern constitutionalism.¹²

As nation states become universal, constitutions assume pivotal roles in defining relationships among nations and between a state and its citizens. Constitutions encapsulate the identities and core values of nation states. They have thus become the latest site of contestation for a state's cultural and religious legitimacy. In September 2006, Somalia's Union of Islamic Courts' first vice chairperson, A. Rahman Mohomood Jinikow, stated, "We will only approve a constitution based on theology, because an Islamic constitution is the only one that serves all of us justly."¹³

The call for a theocratic constitution is reflective of the emergence of a reformist movement, which has at its core, the belief of a return to the rule of Islam. The call by Somalia's Union of Islamic Courts echoes the constitutional Islamization processes that had occurred in Pakistan, Iran and Bangladesh in the 1970s, and recently, in Afghanistan and Iraq.

b) Examples of Islamic Constitutions

PAKISTAN

In Pakistan's 1956 Constitution, Islam was the "official" religion. In 1973, the CONSTITUTION OF PAKISTAN was revised to allow for the formation of the Islamic Republic of Pakistan (formerly West Pakistan) and a more central role of Islam.

The preamble to the 1973 Constitution provides that the "sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust" where "the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed" and where "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah."¹⁴

The PAKISTANI CONSTITUTION provides for the establishment of the Islamic Republic of Pakistan and for Islam to be the State religion of Pakistan. Article 31 meanwhile obliges the State to take steps "to enable the Muslims of Pakistan, individually and collectively, to order their lives in

¹¹ ABDULLAHI AHMED AN-NA'IM TOWARD AND ISLAMIC REFORMATION, Syracuse University Press (1996) at 73-75

¹² Id.

¹³ <http://allafrica.com/stories/200609070009.html> accessed January 8th 2010

¹⁴ Sunnah is the tradition of the prophet consisting of his deeds and sayings.

accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Qur'an and Sunnah," to make "teaching of the Holy Qur'an and Islam compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Qur'an" as well as to promote unity and the observance of the Islamic moral standards."¹⁵ The Constitution also establishes the Council of Islamic Ideology, comprised of religious scholars, whose task is to advise legislative bodies on whether legislation and proposed legislation conforms to the tenets of Islam.

President Zia ul-Haq, after he came to power in the late 1970s, set in motion the further Islamization of Pakistan by introducing the Federal Shariat Court. The Court consists of Muslim judges, who can decide by an independent motion or upon the petition of any citizen, "the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet". Under the Constitution, the Court's decisions are binding and must be observed by every court in Pakistan. The Federal Shariat Court rulings can only be appealed to a special appellate division within the Supreme Court, composed of two religious scholars and three judges, all of whom must be Muslims.

In 1977, Zia commissioned the Council of Islamic Ideology to propose ways to Islamize Pakistan, resulting in the HOODOOD ORDINANCES (Islamic criminal punishments). The ordinances mandate courts to order specific punishments based on the extent of one's transgression against Islam, including amputation for theft, 80 stripes for drinking alcoholic drinks and stoning for sexual intercourse outside of marriage (*zina*). The HOODOOD ORDINANCES also indirectly conflate rape with *zina*, as a woman who is unable to prove rape exposes herself to punishment for *zina*.

IRAN

The collapse of the Iranian Pahlavi dynasty in 1979 signified the triumph of the Iranian Islamic Revolution and the rise of Islamic fundamentalism, as interpreted through the machinations of the nation state. Following the overthrow of the Pahlavi dynasty, a new IRANIAN CONSTITUTION was passed.

Article 1 of the Constitution establishes Iran as an Islamic Republic endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and Qur'anic justice. Article 2 outlines the founding principles of the Islamic Republic: i) the unwavering belief in Allah and His exclusive sovereignty and right to legislate ii) the necessity of submission to His commands, iii) divine revelation and its fundamental role in establishing law, iv) the justice of God and His continuous leadership and perpetual guidance, and v) Islam's fundamental role in ensuring the uninterrupted process of the revolution.¹⁶

Article 4 specifies that all civil, penal, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic principles, which uphold the Constitution and align with other laws and regulations. The Constitution also establishes the Guardian Council of clerics. The Council wields power over electoral and legislative politics; for example,

¹⁵ <http://www.pakistani.org/pakistan/constitution/> accessed January 3rd 2010

¹⁶ <http://www.iranchamber.com/government/laws/constitution.php>

it vets aspiring candidates, and audits all legislation, including the Constitution, for compliance with Islamic principles.¹⁷

Although Iran was not the first country to Islamize, the triumph of the Iranian Islamic Revolution and the overt public rejection of western influences serve as proof for other Muslim nations that Islamization is both possible and viable.

BANGLADESH

Part II of the BANGLADESH CONSTITUTION affirms the fundamental principles of sovereign nationhood, namely secularity, nationalism, democracy and economic and social justice. However, later amendments included Article 2A, which provides that Islam shall be the State religion and absolute trust and faith in the Almighty Allah shall be the basis of all individual and collective actions. It also replaced "secularity" in the original constitution with "absolute trust and faith in the Almighty Allah."

Article 7 declares the Constitution to be the supreme law of the Republic and any law inconsistent with the Constitution, to the extent of the inconsistency, shall be void. However, Article 8 states that the four principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and economic and social justice shall guide the interpretation of the Constitution and laws of Bangladesh.¹⁸

AFGHANISTAN

In 2003, the Loya Jirga passed the CONSTITUTION OF AFGHANISTAN, which proclaims Afghanistan to be an Islamic Republic and the religion of Afghanistan to be the sacred religion of Islam; no law can be contrary to the beliefs and provisions of the sacred religion of Islam. Simultaneously, the Constitution guarantees equality, the protection of human dignity and human rights – including the right to education, legal representation, and privacy, the freedom of expression and assembly, the realization of democracy and respect for the UNITED NATIONS CHARTER, the UNIVERSAL DECLARATION OF HUMAN RIGHTS and international treaties signed by Afghanistan.

Article 6 obliges the State to create a prosperous and progressive society based on social justice, the protection of human dignity and human rights, and the realization of democracy and to ensure national unity and equality among all ethnic groups and tribes, as well as to provide for balanced geographic development.¹⁹

IRAQ

The IRAQI CONSTITUTION declares Islam to be the official religion of the State and the foundation of legislation. No law may be enacted that contradicts the "established provisions of Islam," the principles of democracy and the basic freedoms stipulated in the Constitution. The Constitution also guarantees the Islamic identity of the majority of Iraqi people.

¹⁷ "[T]he righteous will assume the responsibility of governing and administering the country." see http://www.servat.unibe.ch/icl/ir00000_.html

¹⁸ <http://www.commonlii.org/bd/legis/const/2004/index.html> accessed on January 6th 2010

¹⁹ <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN015879.pdf> accessed on January 6th 2010

Akin to the BANGLADESH CONSTITUTION, the IRAQI CONSTITUTION declares itself the “preeminent and supreme law in Iraq.” It stipulates, “[n]o law that contradicts [the] Constitution shall be enacted and any text in any regional constitutions or any other legal text that contradicts [the] Constitution shall be considered void.” Similar to the AFGHAN CONSTITUTION, the IRAQI CONSTITUTION guarantees equality, and civil, political, social and economic rights.²⁰

c) Comparison with Malaysia

Malaysia’s FEDERAL CONSTITUTION is the supreme law of the land.²¹ The Constitution recognizes Islam as the religion of the Federation.²² The Constitution does not include a provision in relation to the primacy of Islamic law. Islamic law is applicable in selected matters, namely personal laws and restricted offenses, over those professing the religion of Islam.

The Constitution confers the power of administering matters pertaining to the Islamic faith to individual States of the Federation. The States may only exercise such power over Muslims. The Sultans are thus proclaimed head of religion in their State. The Constitution sets up a dual legal system, the common law system, which applies to everyone in Malaysia, and the Syariah system, which only applies to Muslims. In relation to the latter, the Constitution stipulates that the States shall have power over many aspects of state organization, including Islamic family and inheritance laws, Muslim charitable trusts and institutions, the collection and allocation of Islamic revenue, and the creation and punishment of offenses by persons professing the religion of Islam against precepts of that religion, save for matters included in the Federal List; Syariah courts “shall not have jurisdiction in respect to offenses except in so far as conferred by federal law.²³” Jurisdictional conflict does arise between the Syariah courts and the civil courts. A 2001 constitutional amendment ensured that the civil courts would not hear cases that are matters within the jurisdiction of the Syariah courts. The civil courts retain a supervisory role on the interpretation of the constitutional delineation of Syariah jurisdiction.

The reference to Islam, as the Federation’s religion in its Constitution, does not make it the state religion, whereby all laws derive from Islam. Nor does the Constitution set up a council of *ulamas* (religious scholars) to vet laws and public policies or the suitability of persons aspiring for public office, as is the case in Iran.

²⁰ http://www.uniraq.org/documents/iraqi_constitution.pdf accessed on January 6th 2010

²¹ Article 4 of the FEDERAL CONSTITUTION

²² Article 3 of the FEDERAL CONSTITUTION

²³ List II of the State List of the Ninth Schedule of the FEDERAL CONSTITUTION provides that the States shall have jurisdiction over, amongst others, “Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, the creation and punishment of offenses by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offenses except in so far as conferred by federal law.”

The afore-mentioned provisions in the Constitution are insufficient to constitute Malaysia as an Islamic theocratic state. This is exemplified by the Federal Court's conclusion in *Subashini Rajasingham v. Saravanan Thankgathoray*:

"The fact that Islam is the religion of the Federation by virtue of Art. 3(1) of the Constitution does not make Islamic law, by virtue of Islam being the religion of the Federation, something like the supreme or prevailing law of Malaysia."²⁴

Compared to the constitutions of Pakistan, Iran, Bangladesh, Afghanistan and Iraq, Malaysia's constitutional reference to Islam - limited to the recognition of Islam as the religion of the Federation and the setting up of a dual legal system - appears not to be far-reaching enough to constitute Malaysia as a nation ruled by Islamic law. Unlike the constitutions of other Islamic theocratic states, the Malaysian Constitution does not declare Malaysia to be an Islamic Federation, its laws, including the Constitution, to be incapable of contradicting the established principles of Islam, nor that Islam shall form the basis of all State actions. A guardian council of clerics or Syariah bench does not vet all Malaysian laws, propose law reform initiatives to ensure that all laws comply with Syariah or scrutinize the Islamic credentials of electoral candidates.

The archived papers of the Reid Commission, an independent constitutional commission, indicate that it formed "to make constitutional recommendations for a fully self governing and independent Federation of Malaya within the Commonwealth."²⁵ The actions of Malaysia's founding fathers illustrate that Malaysia was not intended to be an Islamic State.

The Reid Commission did not propose the incorporation of a State religion, as the Malay Rulers were "not in favor of such a declaration to be inserted." The Commission did note however that one of its members, Justice Abdul Hamid, believed such a declaration ought to be inserted. Ultimately, the leader of the political coalition, who became the first Prime Minister of Malaysia, supported the conditional inclusion of Islam in the Constitution, as the religion of the Federation. The inclusion of Islam was subject to the proviso that the Sultans of each State within the Federation would remain heads of religion in their respective States and the practice and propagation of other religions would be guaranteed.²⁶ In fact, aligning with the court ruling in *Subashini Rajasingham*, the early Prime Ministers maintained that Malaysia was founded as a secular, not an Islamic State. Prior to independence, many progressive and reformist Malays were inspired by nationalism rather than Islamism. In the 1930s, for example, several books in Malay were published detailing the Kemalist Revolution. The United Malays National Organization (UMNO) was arguably styled after Turkish party-progressive secularism.²⁷ Not until Mahathir Mohamad assumed political office as the fourth Prime Minister of Malaysia, did a Malaysian Prime Minister regard Malaysia as an Islamic State.

²⁴ [2008] 2 CLJ 1 at pp. 91-92 per Abdul Aziz Mohamad FCJ affirming *Che Omar Che Soh v. PP* [1988] 2 MLJ 55. The Federal Court is the apex court in Malaysia.

²⁵ The members of the Commission include the Rt. Hon. Lord Reid, Chairman, Sir Ivor Jennings, the Rt. Hon. Sir William McKell, Q.C., Mr. B. Malik, and Mr. Justice Abdul Humid (hereinafter referred to as "the Reid Commission"). See R.H. Hickling (1997), *Malaysian Public Law* (Petaling Jaya: Pelanduk Publications) at 12-13 as cited by Salbiah Ahmad, *supra* n.6

²⁶ *Supra* n.6 at 6-7

²⁷ Ozay Mehmet, *ISLAMIC IDENTITY AND DEVELOPMENT: STUDIES OF THE ISLAMIC PERIPHERY* London & NY: Routledge, 1990 at 28, as cited by Salbiah Ahmad, *Islam in Malaysia: Constitutional and Human Rights Perspectives*, [2005] 2 Muslim World J. Hum. Rts. 24 at 6

Upon consideration of the pre-Malaysia socio-legal history and evinced by the Federal Constitution, the interpretation of the apex Malaysian court, and early Malaysian political leaders, Malaysia is not a theocratic State.²⁸

Part III. The Politics of Islamization

It is a fallacy to conclude that only states, which have officially Islamized their constitutions, translate religion into normative laws and public policies. Non-theocratic states, which are sometimes avowedly secular, have similarly adopted Islamization, driven by the presence of domestic Islamist forces or influences from neighboring states and other Muslim countries. The governments of Islamic theocratic states are similarly pressured by radical Islamist forces, which may deem the Islamization incomplete or impure.

Increasing religiosity and the emergence of a supremacist and moral exceptionalist movement in modern Islam have set the precedent for a contest toward complete Islamization in most Muslim States.²⁹ Malaysia's status, as a Muslim majority state, has similarly placed Malaysia in a dilemma. In Malaysia this is exemplified by the shift in political rhetoric from that of the early Prime Ministers to that of the last three Prime Ministers, namely from the insistence of Malaysia as a secular state to Malaysia as an Islamic theocratic state.

Both the federal government, led by UMNO, the political party of all six Prime Ministers of Malaysia, and the Pan-Malaysian Islamic Party (PAS), which presently controls one state government and in coalition, controls three other state governments, are caught in a political rivalry to display their Islamic credentials. Both UMNO and PAS appear to have harnessed the power of law with the belief that Muslim Malaysians, the *ummah*, seek religious and cultural legitimacy through law.³⁰

Lessons from Pakistan

In Malaysia, the force of Islamization is not driven solely by PAS or radical Islamists, but by an otherwise "moderate" Muslim majority party and their leaders, many of whom have western educations, and the newly-emergent Malay-Muslim middle-class.³¹ Akin to Malaysia, radical Pakistani extremists were not solely responsible for pressuring the government of Pakistan to

²⁸ See also Professor Shad Faruqi, "If by a theocratic State is meant a State in which the temporal ruler is subjected to the final direction of the theological head and in which the law of God is the supreme law of the land, then clearly Malaysia is nowhere near a theocratic, Islamic State. Syariah authorities are appointed by State governments and can be dismissed by them. Temporal authorities are higher than religious authorities." Shad Saleem Faruqi, Jurisdiction of Federal and State Authorities to Punish Offenses against the Precepts of Islam: A Constitutional Perspective at <http://www.fnmalaysia.org/article/Presentation%20paper-%20Prof.%20SHAD%20-%20jurisdiction%20of%20federal%20and%20State%20authorities%20to%20punish1.pdf> accessed on November 26th 2009

²⁹ Khaled Abou El Fadl, The Human Rights Commitment in Modern Islam in WANTED: EQUALITY AND JUSTICE IN THE MUSLIM FAMILY, (Zainah Anwar (ed.), Musawah, 2009)

³⁰ William H. Sewell, The Concepts of Culture in BEYOND THE CULTURAL TURN (Victoria E Bonnell and Lynn Hunt (eds) University of California Press, 1999)

³¹ Maznah Mohamad, Zarizana Aziz, Chin Oy Sim "Private Lives, Public Contention: Muslim-Non-Muslim Family Disputes in Malaysia" in MUSLIM-NON-MUSLIM MARRIAGES, RIGHTS AND THE STATE IN SOUTHEAST ASIA (Gavin W. Jones, Chee Heng Leng and Maznah Mohamad (eds.) Singapore: Institute of Southeast Asian Studies, 2009) at 59 - 101

declare the country an Islamic State. Zulfikar Ali Bhutto introduced the constitutional amendments and consequent Islamization of Pakistan. Bhutto was, by all accounts, a pseudo-socialist from a Westernized family, whose objective was to appropriate the Islamist agenda, rather than Islamize Pakistan.

Instead of placating the Islamist agenda, the 1973 constitutional amendments created unforeseen opportunities for those demanding Islamization.

"[T]he open affirmation of a religious approach led Pakistan's Islamists, primarily those of the Jamat-e-Islami party, to grow insistent. They immediately demanded that Bhutto officially declare the Ahmadiyya sect to be non-Muslim. In 1974, the Prime Minister engaged in what became, in the nation-state era, the first act of collective excommunication in the Muslim world. No postcolonial Muslim State had previously thrown people that self-identified as Muslim officially out of the religion. Contrast this with India, where under a 1971 court case, the Ahmadiyya were allowed to refer to themselves as Muslim, even as the vast majority of Muslims were not obligated to acknowledge them as such."³²

Despite these amendments under Zia ul Haq's Islamization, militants in the quasi-autonomous Swat region waged a war in their quest for Islamization. The government failed to bring order to the Swat region, where thousands of civilians had been terrorized and displaced. Consequently, it caved to the demands of militant groups and entered into a Syariah-for-peace deal with the militants. As part of the deal, the government allowed the militants to implement Syariah law in Pakistan's SWAT region. The Taliban and Tehrik-e-Nifaz-e-Shariat-e-Mohammadi (Movement for the Implementation of Mohammad's Sharia Law (TNSM)) were to locally enforce Syariah. The government's rationale for the deal was based on its assumption that once it conceded to the militant's implementation of Syariah, there would be no justification for the militants to take up arms and attack government installations.³³

Ironically, the critical issue was not whether Pakistan was an Islamic State. It is. The 1973 Constitution of Pakistan expressly provides for Islam to be the state religion and delineates the mandates of the Council of Islamic Ideology to ensure that government law and policy are consistent with Islam. When religion is politicized and reified through normative laws, a critical issue ensues, as political competition shifts from the Islamization process to who controls Islam and the Islamization process.

Part IV. Is an Islamic Constitution a Necessary Precursor to Islamization?

Increasing religiosity has resulted in state control over religion. A state has the power to create, enforce, abrogate and destroy cultural norms by selectively criminalizing, normalizing, marginalizing, excluding and encapsulating social practices. Such power has created a monolithic interpretation of Islam in Islamic States.³⁴

³² Ali Eteraz, Pakistan is Already an Islamic State, Dissent Magazine Online <http://www.dissentmagazine.org/online.php?id=235> accessed January 5th 2009

³³ Ziad Haider, Is Pakistan trading Syariah for peace? at <http://www.sun2surf.com/article.cfm?id=31221> accessed January 5th 2009

³⁴ Supra n.30

Indonesia, akin to Malaysia, is not an Islamic State, but rather a Muslim State. Yet the lack of Islamic constitutional provisions in Muslim states does not mean that Islamization is absent. Both states have demonstrated emerging similarities and cross-fertilizations in their implementation of religious policies and norms; whether it be akin to the model Islamic State anchored in Syariah, or gradual Islamization, as practiced by UMNO.³⁵

Increasing religiosity has resulted in the heightened intolerance of religious diversity. Only certain interpretations of Islam are adopted by states into policy and law. In doing so, states categorically reject religious diversity. Political mechanisms, which “streamline” religion, are the institution of *fatwa* and the creation and punishment of Islamic offenses, known as *hudud* laws.

a) Fatwas and Cross-Fertilization

Following from Pakistan’s banning of Ahmadiyahs’ teachings, Malaysia has also issued a string of *fatwas*. One *fatwa*, for example, declares non-Muslims to be social deviants, whose unIslamic teachings threaten the faith of Muslims.³⁶ By assuming the role of supreme guardian of Islam, the State has taken on the sole right to define what constitutes Islam and who is a Muslim.

Malaysia issued a *fatwa* declaring Ahmadiyahs non-Muslims.³⁷ Consequently, Ahmadiyahs cannot be buried in Muslim cemeteries.³⁸ In the past few years, the Ahmadiyah community has been targeted by religious authorities, which forbade the community from worshipping and attempted to remove the *kalimah syahadat* (pronouncement recited by every Muslim that there is no God but Allah, and Muhammad is the messenger of God) from their headquarters. Perhaps at a loss with what to do with the 2,000 Ahmadiyahs in Malaysia, the government continued to list Ahmadiyahs’ religion as Islam in their identity cards. Thus, Ahmadiyah children in public schools took Islamic religious classes with other Muslims.³⁹

Malaysia recognised the contradictory offense in only two Shiite schools, the schools of Al-Zaidiyah and Jaafariah.⁴⁰ In 1996, only Sunni Islam was recognised and accepted⁴¹. Thus,

³⁵ In 2008, the Indonesian government, passed the ANTI-PORNGRAPHY ACT banning “pornographic” images, gestures and speech. This sparked protests by artists, women’s groups and non-Muslim minorities, who said they could be victimized and traditional practices could be banned under the law. The government, however, maintains that the law would ensure that Islam is “preserved and guaranteed” <http://news.bbc.co.uk/2/hi/7700150.stm>, <http://www.tourismindonesia.com/2008/11/bali-rejects-new-anti-pornography-law.html> accessed December 26th 2009

³⁶ The declarations and decrees were issued as *fatwas*, which are religious edicts of religious scholars. Malaysia has set up a National *Fatwa* Council, who meet to discuss aspects of Muslims’ daily lives and issue edicts. As matters of religion are within the jurisdictions of the eleven Malaysian States, these *fatwas* are then transmitted to each state, who may accept the *fatwas* and publish them, as laws binding upon Muslims. Questioning or acting in breach of a *fatwa*, which has been published in the government gazette, is an offense punishable by imprisonment. See Syariah Criminal Offenses Act (Federal Territory) 1997

³⁷ The spelling of Ahmadiyahs is used alternatively with ahmadiyya; spelling differs depending on the country.

³⁸ Fatwa dated 24th September 1984 http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=112 accessed January 5th 2010.

³⁹ Shahnon Shah, Living with the Ahmadiyahs <http://thepersecution-org.blogspot.com/2009/09/malaysia-living-with-ahmadiyah.html> accessed January 8th 2010

⁴⁰ Fatwa by the National Fatwa Committee for Islamic Religious Affairs dated 24 and 25 September 1984 http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=158 accessed January 5th 2010

⁴¹ On May 5, 1996, the 1984 *fatwa* was repealed. The Committee then decreed that all other Islamic teachings except the Islamic teachings of Ahli Sunnah Wal-Jamaah (Sunni) are against Islamic laws and the public dissemination of other Islamic teachings was prohibited. http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=150 accessed January 5th 2010

alongside the Ahmadiyah community, the State declared Sufism to be against the teachings of Islam.⁴² Wahdatul Wujud was legally deemed unIslamic and its followers non-Muslim, who became vulnerable to internal family conflict and to the forfeiture of their property.⁴³ Even communal movements, such as the Darul Al Arqam, which was popular until the 1990s, were disbanded and their publications banned.⁴⁴ The activities of such movements were declared deviationist.

The Sky Kingdom, a communal movement established in the early 1980s, suffered a severe attack. On July 18, 2005, unknown masked persons destroyed the buildings and infrastructure erected by Sky Kingdom members in their commune in Besut, Kuala Terengganu.⁴⁵ The perpetrators of the crime tossed petrol bombs at the buildings and set car tires ablaze. Many community members called the authorities, beseeching public officials to protect the rights and freedoms of Malaysian citizens and to act against the perpetrators of violence.⁴⁶ Despite the community response, the masked persons were never brought to justice.

Instead, fifty-eight Sky Kingdom followers were arrested and charged in the Syariah court for practicing deviationist teachings. Some of the followers were prosecuted under the TERENGGANU SYARIAH CRIMINAL ENACTMENT for flouting a *fatwa*, which decreed that the Sky Kingdom's leader, Ayah Pin's, teachings and beliefs, had strayed from Islam.⁴⁷ The local authorities quickly moved to demolish the commune's infrastructure, despite a pending court action. Forty-five of Ayah Pin's followers were charged in court and had difficulty getting Syariah lawyers to represent them. This prompted the Malaysian Bar Council to write to all Syariah lawyers in Terengganu reminding them of their responsibility to provide professional services irrespective of an individual's religion.

In another case, five charges were laid against Abdul Kahar bin Ahmad, a self-styled prophet. He expounds a doctrine contrary to Islamic law, defying and disobeying a fatwa and "disseminating opinions concerning an issue contrary to Islamic Law and a *fatwa*."⁴⁸

In Indonesia, the Council of Ulemas (MUI) similarly issued fatwas on a wide range of subjects. Akin to the National Fatwa Council of Malaysia, these fatwas have a broad impact on Muslims. Interestingly, the fatwas issued by both the National Fatwa Council and MUI are similar. This

⁴² Fatwa dated 15th November 1981 on Tarekat Naqsyabandiah Khalidiah and dated 3rd April 2000 on Tariqat Naqsyabandiah Al-aliyyah Syeikh Nazim Al-haqqani. http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=158 accessed on January 5, 2010.

⁴³ Fatwa dated 3rd April 2000 http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=159 January 5th 2010

⁴⁴ Fatwa dated 31st March 1994, 6th October 1986 http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=110 accessed January 5th 2010. The members of the banned commune, however, are suspected to have resurfaced in the form of a polygamy club called the Ikhwan Polygamy Club. Liz Gooch, Malaysina Polygamy Club Draws Criticism, <http://www.nytimes.com/2010/01/06/world/asia/06malaysia.html> accessed January 5th 2010

⁴⁵ http://www.bernama.com/bernama/v3/news_lite.php?id=148073,

<http://www.sun2surf.com/article.cfm?id=10213> both accessed on January 5th 2010

⁴⁶ http://www.malaysianbar.org.my/press_Statements/the_ayah_pin_saga.html accessed on January 5th 2010

⁴⁷ Terengganu Fatwa and Malay Customs Committee http://www.e-fatwa.gov.my/mufti/fatwa_search_result.asp?keyID=1982, <http://www.sun2surf.com/article.cfm?id=10254> both accessed January 5th 2010

⁴⁸ Abdul Kahar bin Ahmad v State Government of Selangor and the Government of Malaysia (Intervenor) and Anor 2008 MLJU 229

indicates close co-operation between the councils in shaping Muslim consciousness in Indonesia and Malaysia; for example, the councils have made decisions that have led to the excommunication of Ahmadiyahs, and the formal prohibition of religious pluralism and yoga - on account of its Hindu origins.

In 2005, the Indonesian Ulema Council issued a fatwa calling for the government to ban Ahmadiyah teachings. In Indonesia the declaration that Ahmadiyahs are "outside the pale of Islam, heretical and deceiving" has resulted in the persecution and subjugation of Ahmadiyahs. This community has experienced different forms of religious-based violence in Indonesia, which included assault with incidences of homicide, harassment, and the destruction of private property and places of worship.⁴⁹ In July 2009, MUI also decreed that Sufis must cease their religious activities because they are against Islam or be subject to legal allegations.⁵⁰

In July 2005, MUI issued a fatwa banning secularism, pluralism and religious liberalism. In July 2006, the Malaysian *Fatwa* Council issued a fatwa decreeing pluralism, liberalism and contextual interpretation of the Qur'an constituted deviant teachings in Islam. Both the Malaysian Fatwa Council and MUI banned these ideologies because they are founded on rational, free thinking instead of religious-based thinking.⁵¹ Pluralism was banned because the ideology embraced all religions, considering them to be equally legitimate and characteristically relativistic. Thus, no one group can rule another because of a divine claim of religious truth.⁵²

When the Malaysian *Fatwa* Council issued a *fatwa* banning yoga, the MUI declined to ban yoga. At this time, the MUI preferred to view the commercial yoga taught and practiced at gyms and yoga centers as sport.⁵³ Not surprisingly, following Malaysia's lead, MUI soon issued a *fatwa* banning yoga.⁵⁴ Both MUI and the National *Fatwa* Council have also issued *fatwas* banning smoking.

Traditionally, *fatwas* are interpreted as legal guidance rather than law. As there is no a central religious authority like a national church, Jurists are the public officials, who issue opinions known as *fatwas* to guide Muslims. Yet under the authority of the State, *fatwas*, such as those issued by the National *Fatwa* Council in Malaysia, are institutionalized and enforced as law. The use of *fatwas* to shape Muslim consciousness appears to be a less intrusive process than

⁴⁹ See press Statement of Ahmadiyah Community of Indonesia on Jakarta, 21 August 2005 at http://www.thepersecution.org/world/indonesia/05/jai_pr2108.html accessed January 8th 2010

⁵⁰ The decree was aimed at a small band of Sufis known as Tarekat/Tariqat Naqsabandiyah in Indonesia. <http://www.indonesiamatters.com/5804/tarekat-naqsyabandiyah/> accessed January 8th 2010

⁵¹ In contrast, other Muslims describe the gift of rationality and the ability to differentiate right from wrong, as a trust from God. Such trust vests humans with the tools to enjoy good and eschew evil as well as discharge their heavy responsibility, as God's vice-regents on earth.

⁵² Malaysian fatwa dated 25th July 2006 http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=257 accessed on November 20th 2009 and Agus Hadi Narowi, Religious Pluralism in Indonesia: Helpful and Hindering Aspects http://pluralism.org/research/reports/nahrowi/Pluralism_Indonesia.doc both accessed December 10th 2009

⁵³ Fatwa dated 24th October 2008 http://www.e-fatwa.gov.my/jakim/keputusan_view.asp?keyID=176 accessed December 10th 2009. See also the Jakarta Globe, 24 November 2008

<http://www.thejakartapost.com/news/2008/11/24/no-ban-yoga-ri-muslims-yet-ulema-body.html> where MUI reportedly declined to ban yoga, accessed January 8th 2010

⁵⁴ <http://www.thejakartapost.com/news/2009/01/27/mui-edicts-condemned-039pointless039.html> accessed December 10th 2009

criminalization, particularly as *fatwas* span a range of Muslim concerns from smoking cigarettes to proscribing rationality and pluralism. *Fatwa*, when reformed and cloaked in legal power, has proven to be an important tool in the Islamization process.

b) Hudud Offenses

In many Muslim countries and autonomous regions, the implementation of criminal *hudud* punishments appears as an indicator of political legitimacy in an ever-expanding arc of conservatism.

Hudud (sometimes spelled *hudood*, singular *hadd*) literally means boundaries or limits in Arabic and generally refers to certain criminal offenses for which maximum sentences are prescribed under Islamic law. The most common *hudud* punishments are whipping for sexual intercourse outside of marriage and amputation for theft. Some scholars maintain that *hudud* punishments are confined to those specifically mentioned in the Qur'an. Other scholars insist that *hudud* includes offenses for which punishments were delivered during the time of the prophet and the early caliphs. Examples of offenses for which no punishment is mentioned in the Qur'an, yet are sometimes included under *hudud*, are the consumption of intoxicants and apostasy. Stoning adulterers is similarly not prescribed in the Qur'an. Muslims adopted this punishment from traditions that predate Islam.

In Malaysia, PAS state governments twice passed *hudud* laws.⁵⁵ The SYARIAH CRIMINAL CODE (II) ENACTMENT, KELANTAN, 1993 was passed in 1993 in the State of Kelantan. The SYARIAH CRIMINAL OFFENSE (HUDUD AND QISAS) ENACTMENT, TERENGGANU 2002 was passed in 2002 in the State of Terengganu. However, in July 2002, the Deputy Prime Minister, Abdullah Ahmad Badawi, reportedly declared that the Malaysian police were not required to enforce the Islamic law provisions introduced in Terengganu by PAS "on the grounds that they go against the constitution."⁵⁶

The federal government has engaged in the Islamization process, which has increased the regulation of private morality through criminal law. Akin to state governments led by PAS, the UMNO government created offenses in each state under its leadership through various SYARIAH CRIMINAL PROCEDURE ENACTMENTS. These offenses include sexual intercourse outside of marriage, conceiving a child out of wedlock, consuming alcoholic beverages and engaging in homosexual sex. These offenses are similar to the offenses constituted under *hudud* laws. The maximum punishment for offenses under the SYARIAH CRIMINAL PROCEDURE ENACTMENTS is three years imprisonment, a RM 6,000 (approximately 1,430 USD) fine or six strokes of the cane. Not only has the range of Syariah offenses expanded, but Syariah punishments have also become more extreme to a level that bears no proportionality to federal criminal punishments.⁵⁷

⁵⁵ Salbiah Ahmad, Islam in Malaysia: Constitutional and Human Rights Perspectives, [2005] 2 Muslim World J. Hum. Rts. 24

⁵⁶ <http://www.encyclopedia.com/doc/1G1-96279858.html> accessed November 30th 2009. However, both Abdullah's and PAS' statements on the constitutionality of the Syariah criminal enactments passed by the States of Kelantan and Terengganu require further re-examination in light of the latest Federal Court decision of Sulaiman Takrib v Kerajaan Negeri Terengganu [2009] 2 CLJ 54 which suggests that the Hudud Enactments may not have been unconstitutional.

⁵⁷ For example a husband's sentence of three cane strokes for using force to have "unnatural sex" with his wife without her consent (a Federal criminal offense under the Penal Code) was set aside on appeal by the civil criminal court. Yet, Kartika, a woman charged for drinking beer was fined RM 5, 000 (approximately 1,430 USD) and ordered to be administered six cane strokes by the Syariah court. http://www.nst.com.my/Current_News/NST/articles/20091104200810/Article/index.html and <http://www.cnn.com/2009/WORLD/asiapcf/08/24/malaysia.model.caning/index.html> accessed November 30th 2009 and January 3rd 2010 respectively.

When the State of Aceh succeeded in achieving partial autonomy from Indonesia in the aftermath of the tsunami of 1994, it passed Syariah laws. Despite Indonesia's avowed commitment to secularism, in September 2009, the Aceh State passed *hudud* criminal laws, which allowed for the stoning of adulterers and severe punishments for homosexuality, alcohol consumption and gambling.⁵⁸ Incidentally, Aceh also introduced a Qur'an reading test for local political candidates for the Aceh Provincial Parliament (DPRA) and the Aceh district/city parliaments (DPRK). Aceh political candidates must also be capable of implementing the Islamic Law (Syariat Islam) in a holistic way.⁵⁹

Part V. Trends Lessons and Conclusion

The struggle for human dignity, human rights and human civilization draws inspiration from multiple sources. Muslims have struggled to find a contemporary Islam, which is moderate and expansive enough to accommodate new conceptualizations, understanding and ideologies of Islam as well as respond to contemporary problems of Islamization.

While the re-interpretation and reformation of Islamic political philosophy and jurisprudence is key, such work can only take place in a relatively dynamic environment where states do not implement a monolithic interpretation of Islam.

a) Interpreting Islam

The Muslim search for an Islam capable of solving contemporary problems, and promoting human dignity and rights have resulted in attempts to view Islam in light of existing values, customs and ideologies.⁶⁰ In Malaysia, the fifth Prime Minister, Abdullah Ahmad Badawi, propounded a political and ideological campaign, which he called Islam *Hadhari* (civilization Islam).⁶¹ Abdullah advocated a progressive interpretation of Islam. He questioned the applicability of Muslim legal principles, purportedly final and complete fourteen hundred years

⁵⁸ <http://news.bbc.co.uk/2/hi/8254631.stm>. For reactions from Indonesians, see <http://www.thejakartapost.com/news/2009/09/14/indonesia039s-aceh-passes-law-stoning-death.html> and <http://www.thejakartapost.com/news/2009/09/18/issues-aceh-council-passes-bylaw-stoning.html>. Aceh sent a delegation to the State of Kelantan, presumably to study the *hudud* laws, prior to passing the Aceh legislation.

⁵⁹ Chapter IV Article 13 of Qanun No. 3 year 2008 stipulates that to be a local political party candidate for the DPRA and DPRK in Aceh Province, one has to be an Indonesian citizen and above twenty-one years of age, have faith in the One Almighty God, be devoted to practicing the teachings of their faith, capable of implementing the Islamic Law (Syariat Islam) in a holistic way, and able to read the Al-Qur'an, as well as reside within the Aceh Province. The local legislation has raised issues of constitutional conflict with such guidelines.

<http://www.idlo.org/DocNews/290DOC.pdf>

⁶⁰ Islam, during an earlier period of rapid expansion, did not obliterate the customs of the local populace, but sought to integrate local customs and cultures (urf). In fact Malaysia serves as an example of having forged cultural integration. All Malaysian States have incorporated in their respective ISLAMIC FAMILY LAW ACTS, the Malay custom that specifies joint property ownership. This custom allows wives to claim a division of matrimonial assets in a Muslim divorce e.g. section 58 of the ISLAMIC FAMILY (FEDERAL TERRITORIES) ACT 1984. The concept of matrimonial assets in the form of "jointly acquired property" (harta sepencarian) is derived from the local custom.

⁶¹ [Abdullah Ahmad Badawi, ISLAM HADHARI: A MODEL APPROACH FOR DEVELOPMENT AND PROGRESS, MPH Group Publishing Sdn Bhd, 2006. See also http://www.pmo.gov.my/islamhadhari/index.php?menu=konsep, http://www.currenttrends.org/research/detail/islam-hadhari-in-malaysia](http://www.pmo.gov.my/islamhadhari/index.php?menu=konsep) accessed January 6th 2010

ago, in solving the problems that confront contemporary Muslim societies today.⁶² Islam *Hadhari*, “which is authentic and rooted within the tradition, yet [also] human, just and compassionate,” is premised on ten principles. These include a just and trustworthy government, a mastery of knowledge, the protection of women’s and minority rights, environmental conservation, and comprehensive and equitable economic development. Abdullah was quick to point out that Islam *Hadhari* is neither a new teaching nor a new Islamic jurisprudential school. Instead, he considered it an attempt to return the *ummah* [Muslim community] to the cornerstones of Islamic civilizations.⁶³

Public efforts to reform a practice, which derives its authority from religious and customary sources, must engage and draw authority from the same sources as the original practice.⁶⁴ Thus, internal discourse is important in the reformation of a practice. In order for such discourse to take place, Muslims must first recognize that Syariah law, although derived from the fundamental divine sources of Islam, is itself not divine because it is the product of human interpretation. Secondly, in Islamic tradition, diversity or *iktilaf* (disagreement) is an essential part of Islamic jurisprudence. Thus, each jurist interpreted and understood the divine sources from their own specific historical contexts.⁶⁵ Once Muslims accept that Syariah law was interpreted through the subjectivities of human reasoning, the possibility of alternative formulations of Syariah legal principles becomes possible. Such reasoning allows for the reformulation of contemporary social justice and a human rights paradigm in Islam.

This premise has been used by many contemporary scholars, who strive to contextualize *fiqh* and search for *maqasid* Syariah (the objective of Syariah), in their work. In contextualizing justice, these scholars re-read texts, revisit and analyze the structure of judicial systems and apply useful social practices to the local community context. The belief that all laws should serve society guide this scholarly endeavour.⁶⁶

⁶² Inaugural lecture by the Abdullah Ahmad Badawi at the annual Abdullah Ahmad Badawi Women’s Institute of Management annual lecture series, 15 January 2005, Kuala Lumpur speech given at the Non-Aligned Movement ministerial meeting on the advancement of women at Putrajaya 9th May 2005.

⁶³ Supra n.68. However as often the case in politics, Islam *Hadhari* gradually fell out of favor when a new Prime Minister entered office.

⁶⁴ Abdullahi An-Na’im, *State Responsibility under International Human Rights Law to Change Religious and Customary Laws*, Rebecca J Cook (ed) *HUMAN RIGHTS OF WOMEN NATIONAL AND INTERNATIONAL PERSPECTIVES*, University of Pensylvannia Press (1994) 167

⁶⁵ Muhammad Khalid Masud, *Iktilaf al-Fuqaha: Diversity in Fiqh as a Social Construction* in Zainah Anwar (ed.) *WANTED: EQUALITY AND JUSTICE.*, Musawah (2009) at 65-69. A study of the Syariah family law implemented in different nation states discloses a wide array of diversity. This diversity is also apparent and reflected in the diversity of the different Syariah laws adopted by each of the thirteen constituent States of the Malaysian Federation. *Women Living Under Muslim Laws, KNOWING OUR RIGHTS: WOMEN, FAMILY LAWS AND CUSTOMS IN THE MUSLIM WORLD* (2006)

⁶⁶ Examples are the works of Ziba Mir Hosseini, *ISLAM AND GENDER – THE RELIGIOUS DEBATE IN CONTEMPORARY ISLAM*, Princeton University Press (1999), Amina Wadud, *QUR’AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN’S PERSPECTIVE*, Oxford University Press (1999) and *INSIDE GENDER JIHAD: WOMEN’S REFORM IN ISLAM*, One World Oxford (2007) as well as the works of Indonesian Islamic scholars, such as Nur Rofiah

<http://www.prayerwear.info/spip.php?article11> accessed November 30th 2009 and Syafiq Hashim, *Kesetaraan Laki-Laki dan Perempuan (Equality between Men and Women)* and Ihsan Ali-Fauzi *Islam dan Hak-Hak Asasi Manusia (Islam and Human Rights) in ISLAM & MULTIKULTURALISME (ISLAM AND MULTICULTURALISM)* (Ahmad Mahromi (ed.) International Centre for Islam and Pluralism, 2007)

“[Meaning] is a slippery customer[construct], changing and shifting with context, usage and historical circumstances. … it is always being negotiated and inflected to resonate with new situations.”⁶⁷

Those who advocate for reforming Islamic jurisprudence, argue that the traditional diversity of Islamic thought makes reform possible. They also support this argument by referencing the indisputable fact that less than one hundred years ago, slavery was widely accepted in Muslim communities. The Convention to Abolish the Slave Trade and Slavery was first signed in 1926. Many Middle Eastern Muslim countries formally abolished slavery in the last 60 years, exemplifying a shift in social values. This sets an effective precedent for reforming Syariah law to align with changing contemporary values. Muslims should be able to undertake a similar process of interpreting and applying the Qur'an and Sunnah in the present historical context to develop and implement an alternative public law.⁶⁸

A sovereign state's responsibility to ensure and protect human rights extends to domestic law and practice and is applied in the name of religion and custom. While states have a responsibility to protect and promote human rights, a lively internal discourse can only take place in the absence of state interference. The government and opposition parties politicized Prime Minister's Abdullah's Islam *Hadhari*. It swiftly fell out of favor, however, when Abdullah stepped down from office in 2009. Robust scholarship requires freedom from state censorship and independence from government. States, which implement a monolithic interpretation of Islam, set up religion as an obstacle to the human struggle, instead of as a source for human inspiration.

b) Responses to Modern Ideologies

Changes to political ideologies, models of nation state systems, and constitutionalism attributed to modernization, have revolutionized the Muslim world. In the Muslim world, the response to the political, social and economic re-ordering of modernity has differed depending on the society and nation. The Turkish Kemalists, for example, adopted western values and ideals, while others such as the Wahabbis eschew modernity and seek to return to literal textual answers.⁶⁹

Moderate modernists maintain that modern rationalism is consistent with Islam and attempt to reconcile Islam and modern theories. Zulfikar Ali Bhutto, President of Pakistan and father of slain Benazir Bhutto for example, described his redistribution programs in Pakistan as “Islamic socialism,” drawing inspiration from Arab socialism and most closely aligning with the political expression of the Ba’ath Socialist Party.⁷⁰ Islamic socialists insist that the teachings of Islam are compatible with principles of equality and the redistribution of wealth. Islamic Marxism on the other hand, was fostered by the rise of socialists in Iran during the progressive National Front

⁶⁷ Stuart Hall, Introduction in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES (Stuart Hall (ed.) Sage Publications (2003 Reprint) 9-10

⁶⁸ Supra n.11 at pages 185 – 186

⁶⁹ Wahabbis are suspect of anything originating from outside Arabia, including early Persian and Greek influences, which contributed to the Islamic civilization, and attempt to recreate the austere pristine early Muslim life. Khaled Abou El Fadl, THE GREAT THEFT – WRESTLING ISLAM FROM THE EXTREMISTS, Harper Collins (2007) at 46-48.

⁷⁰ The Ba'ath Party continues to govern Syria while the party in Iraq was overthrown by the 2003 U.S. led invasion of Iraq.

government of Mohammad Mossadeq.⁷¹ Similarly, some contemporary Muslim feminists describe themselves as Islamic feminists, who draw from the Islamic tradition of justice and equality, as the basis of their feminist ideals.⁷²

Muslims, who support socialist, Marxist and feminist ideologies, consider them to be very close to Islam teachings of equality and egalitarianism. Similarly, capitalism and free markets have garnered widespread support and been adopted by many Muslim and Islamic states. This had led to a flourishing Islamic finance sector. These Muslims subscribe to the desirability, if not necessity, for Muslims to be open to modern concepts and ideologies. Indeed, Islamic cultural revival depends on the ability of Muslims to be dynamic in a changing world.⁷³

The majority of the Islamic constitutions analyzed in this paper reference equality, fundamental liberties, democracy and/or human rights. This indicates that Muslim public officials do not perceive these values to contradict Islamic doctrines and creates opportunities to situate these ideals within the discourse of Islam. Akin to nation states, institutions, such as the Organization of the Islamic Conference (OIC), feel the need to debate human rights. For example, the OIC issued its own Cairo Declaration on Human Rights in Islam. While Islam purports that values of equality and individual liberty are cherished in Islam, the articulation of these values in the language of human rights and democracy, indicate Muslims' sincere willingness to accept Islam as a dynamic construct that can accommodate new conceptualizations, understandings and ideologies.

c) The Function of Normative Laws

Normative law should enforce and protect the principles of justice, equality, dignity and human rights. To this end, law should seek to promote community concepts, which enable individuals to build cultures of shared understandings and values. This will enable communities to interpret the world through a similar socio-cultural and political lens.⁷⁴

Unfortunately nation states, which implement Islamic laws, most often pass immutable laws and brook no criticism of an interpretation of Syariah law that opposes their laws. Legal opinion, refracted and enforced through the prism of the modern state, cannot be said to be God's law. Law is as much about concepts and ideas as it is about emotions, feelings and attachments. Both aspects - theoretical legal concept and emotion - are used to forge shared cultural values and identities. Under the power of the state, religion becomes politicized and is

⁷¹ Nadeem F. Parach, Whatever happened to 'Islamic Socialism'?

<http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/columnists/16-nadeem-f-paracha-whatever-happened-to-islamic-socialism-hs-07> accessed January 5th 2010

⁷² Islamic feminists argue that women may be heads of State and *imams*. In the private sphere, Islamic feminists challenge the conventional notion of male authority over females in marriage and the family. Islamic feminists also call upon all Muslims, including men, to live by the egalitarianism of Islam, "something secular feminism side-stepped". Margot Badran, Exploring Islamic Feminism, http://www.wilsoncenter.org/index.cfm?topic_id=1426&fuseaction=topics.event_summary&event_id=42775 accessed January 5th 2010.

⁷³ The absorption of contemporary knowledge is not unknown in Islamic history. Following the fall of the Roman Empire, Greek philosophy was almost completely forgotten in Western Europe while it continued to flourish in the Muslim world. Fakry Majid, A SHORT INTRODUCTION TO ISLAMIC PHILOSOPHY, THEOLOGY AND MYSTICISM, Oneworld, 1997 p.4

⁷⁴ Stuart Hall, The Work of Representation in Stuart Hall (ed) REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES, Sage Publications (2003 Reprint)

often the cloak for a nationalist agenda that supports a publicly defined cultural identity. The call to return to religion is often conflated with a political call to return to traditional customs and cultural practices. This sheds insight on the politicization of Islam, as more often than not, the call to religion in Muslim states is part of a wider strategy to “preserve” cultural and national identity.⁷⁵

Normative law and rules are mundane, not divine.

“God is too great to be embodied in a code of law. The law helps Muslims in the quest for Godliness, but Godliness cannot be equated to the law. The ultimate objective of the law is to achieve goodness, which includes justice, mercy and compassion, and the technicalities of the law cannot be allowed to subvert the objectives of the law.”⁷⁶

Clinging to a set of inaccessible and unaccountable rules, equating them to the heart and soul of Islam, creates a false sense of religiosity. While the need to turn to such rules for security and stability is understandable, the problem “is that history is relentless in its progress, and the high cost of this false sense of security is marginalization and irrelevancy to a constantly moving and developing world.”⁷⁷

d) Religion and the Nation State

When national constitutions and laws prop the state up, as the ultimate guardian of Islam and Syariah, it reifies Islam in favor of a state’s monolithic interpretation of Syariah. Religion, which is lived and practiced in society, cannot be subjected to the political will of the State.

The challenges confronting Muslims today cannot be met by cloaking constitutions, laws and policies in theocratic language reflective of Islamization. The challenge for Muslims today is to demonstrate that Muslim states are able to play a critical role in today’s world consistent with justice and equality for all citizens. Good governance, bureaucratic transparency, democracy and freedom should be the pillars of the nation state’s public political domain. Religion is a part of a community’s public social domain. The territorial state should not preoccupy itself with interpreting and encapsulating religion into normative laws and policies, which will ultimately stifle its development.

⁷⁵ For example, the Islamic Constitutional Movement of Kuwait (ICM). ICM is dedicated to the proposition that Islamization of Kuwaiti politics and society could be most effectively pursued through constitutional means. From the movement’s founding, however, the ICM has focused on two kinds of Islamic causes: implementation of Islamic Sharia and the protection of a fairly conservative vision of Kuwaiti traditions and values. Indeed, a good portion of its electoral support may come from its ability to present itself as the defender of Kuwaiti morals. See Nathan J. Brown, *Pushing toward Party Politics? Kuwait’s Islamic Constitutional Movement*

http://www.carnegieendowment.org/files/cp79_brown_kuwait_final.pdf accessed January 5th 2010

⁷⁶ Khaled Abou El Fadl, *THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS*, Harper One (2007) 131

⁷⁷ Supra n.29 at 278-279

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Addressing Violence Against Women in Bangladesh

Introduction

Gender discrimination visibly persists in Bangladesh in the form of harmful practices against women. Discrimination on account of one's sex is deeply embedded in the country's patriarchal laws, and socio-cultural norms and practices. A profound power imbalance between men and women is one of the root causes of violence against women. An underlying objective of a perpetrator of gender-based violence is to control and dominate the weaker sex. Bangladesh is a classic example of a male-dominated collectivist society in which an overwhelming majority of women have been raised to submit to the will of male family members. For decades, women have been encouraged to seek the protection of a male breadwinner, be it their fathers, husbands or brothers. This financial reliance has reduced a daughter's value and increased the status and position of men in their families and society. Women are denied many opportunities to further their education. Their inability to access education leads to a subsequent lack of economic independence. This common situation renders women vulnerable in family life, where they are perceived to be a burden. Consequently, they are forced to please men at any cost, which is also one of the main reasons why women tend to forgo their claim to family property. Decades of gender-based discrimination and the lack of equal access to opportunities and resources for women have greatly influenced the law-making process and created the social conditions for violence against women to thrive and prosper in Bangladesh.

The prevention of violence against women has become a major challenge for Bangladesh's legislature in recent times. For the purpose of eliminating decades of gender discrimination and combating violence against women, the Bangladesh government has developed a set of best practices outlined in different legislation. Due to the long-term efforts of politicians and civil society groups to eliminate and reduce gender-based violence, the government has enacted special laws to deter perpetrators. It also supports the incorporation of gender equality provisions in the Constitution and procedural laws. The purpose of this chapter is to review and highlight innovative practices that have played a significant role in encouraging women to seek legal redress in the wake of violence committed against them.

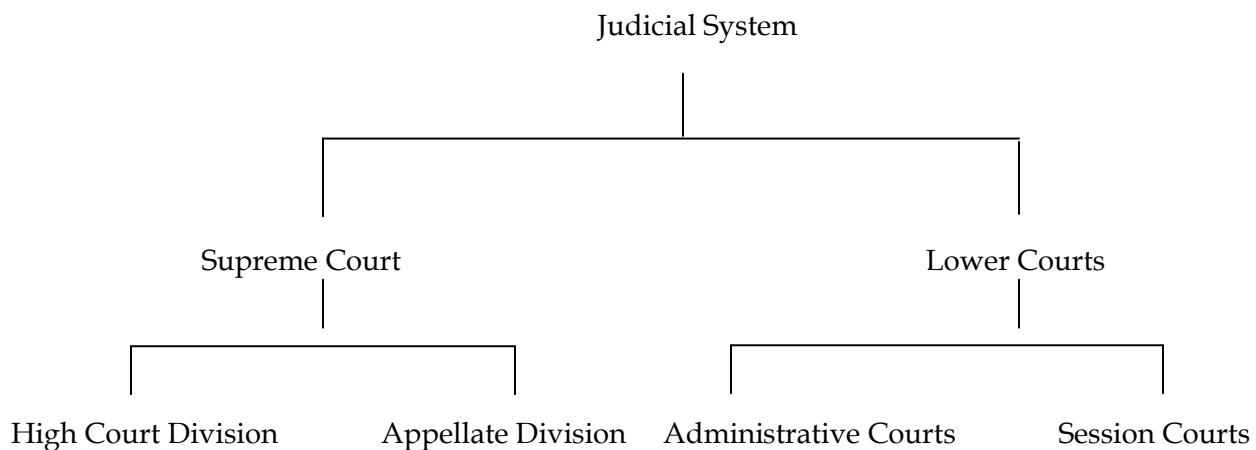
Legal framework in Bangladesh

The legal system is based in part on English common law. Bangladesh seceded from Pakistan in December 1971. Pakistan legislation from the British colonialist and post-partition eras

¹ Executive Director Bangladesh National Women Lawyer Association (BNWLA)

continues to form the basis of Bangladeshi personal status laws. However, Bangladeshi legal developments since 1972 have been distinct.

- **The Constitution** is the supreme law of the country, taking precedence over domestic and international law.
- The **Parliament** and the **Ministry of Law, Justice and Parliamentary Affairs** are responsible for enacting laws that establish national standards of behaviour and uphold human rights.
- The **Judiciary** is responsible for interpreting laws and judgments. The **law enforcement agencies**, such as the Bangladesh Police, are responsible for enforcing the laws. The Judiciary is the repository of law and justice.
- **Individuals** can seek redress in court, if they are unlawfully treated.



Best Practices

Although the right to exercise one's basic human rights is guaranteed under the Constitution of Bangladesh, the overwhelming majority of poor and disadvantaged people are effectively denied this right because of socio-economic challenges. The formal justice system is inaccessible for many disadvantaged groups because it is expensive, and fraught with protracted and cumbersome legal proceedings. The justice system's chronic delays and widespread corruption undermine the effective delivery of justice to the people. In recognition of this, the government established several legal reform committees and commissions after independence. The committees and commissions have made legal and administrative recommendations that call for the creation of Commercial Courts and a Judicial Ombudsman, a time limit for the disposal of civil and criminal cases, the establishment of a state legal aid scheme and an independent and effective Human Rights Commission to monitor human rights violations and provide effective redress and compensation to successful claimants. The Government has repeatedly amended procedural laws to include specific time limits within which hearings and other procedures in both civil and criminal cases are to be completed.

Examples of different steps taken by successive governments to reform the legal system include:

- **Establishment of Speedy Tribunals:** The government under its legal reform program enacted the Speedy Trial Tribunal Act in 2002. It proceeded to set up six speedy trial tribunals for the expeditious settlement of certain cases.
- **Introducing the Alternative Dispute Resolution (ADR):** The government amended the Code of Civil Procedure in 1908 in order to introduce the ADR. The ADR ensures access to justice for disadvantaged people, particularly women. The ADR component was introduced in the Family Courts of fifteen districts, as a part of a pilot initiative. The initiative proved to be so successful that the government has envisaged introducing ADR to Family Courts in other districts. The Code of Civil Procedure (Amendment) Act of 2003 included a provision for arbitration and mediation of civil disputes. Under Section 89 C mediation may occur in the appellate stages of legal proceedings.
- **Setting up the government legal aid program:** Legal aid is a powerful tool to empower disadvantaged people and reduce poverty levels. In recognition of its positive social attributes, the government enacted the Legal Aid Services Act in 2000. Under this law, legal aid includes free legal assistance. It covers lawyers' fees, process fees and other incidental costs incurred by individuals, who are denied access to justice because of poverty, indigence and/or other socio-economic factors. The law mandates the establishment of a registered Legal Aid Institution to be governed by a National Legal Aid Board. The Board will be a part of the Minister for Law, Justice and Parliamentary Affairs. The Act was amended in 2006 after government consultations with legal aid NGOs. Since then, the law has been amended to extend legal aid committees beyond the district level by establishing new legal aid committees at the upazilla and union levels. Over 50,000 people from disadvantaged groups have reportedly benefited from the government's legal aid program.
- A permanent **Law Commission** has been created to reform and update existing laws. The government has also established a **Human Rights Commission**.
- **Enactment of special laws:** *"Special law provides stricter punishment and in cases where general law and special law apply, the provisions of the special law shall prevail."² "If any remedy is stipulated in both general law and special law, the remedy prescribed by the special law must be sought in lieu of the one specified under the general law."* ³[]. Examples of special laws, which have been enacted to combat harmful social practices and violence against women, include:
 - The Child Marriage Restraint Act, 1929;
 - The Muslim Family Laws Ordinance, 1961;
 - The Muslim Marriage and Divorce Registration Act, 1974 and 1975;

² [Kamruzzaman Vs. The State, 10 BLD (AD) (1990), 190].

³ Managing Director, Rupali Bank Ltd. And others Vs. Tofazzal Hossain and others, (1992) 44 DLR (AD) 260

- The Dowry Prohibition Act, 1980 and 1986;
- The Family Courts Ordinance, 1985 and 1989 (amended);
- The Immigration Ordinance, 1982;
- The Acid Crime Prevention Act and Acid Control Act, 2002;
- The Legal Aid Services Act, 2000 and 2006 (amended);
- The Women and Children Repression Prevention Act, 2000 and 2003 (amended);
- Bangladesh Labor Laws, 2006;
- Bangladesh Citizenship Act, 1951, and The Citizenship (Amendment) Act, 2009;
- And a guideline to prevent sexual harassment in academic institutions and work places.

Examples of gender-based legal provisions to prevent harmful practices against women:

- **Gender Equality under the Constitution:** Women's rights to equality are guaranteed in the Constitution of 1972. Article 27 of the Constitution states, "all citizens are equal before the law and are entitled to equal protection of the law." Similarly, article 28(1) outlines, "the State shall not discriminate against any citizen on the grounds of religion, race, caste, sex or place of birth." Article 28(2) further specifies, "women shall have equal rights with men in all spheres of the state and of public life." Additionally, article 28(4) states, "nothing shall prevent the state from making special provisions in favor of women or for the advancement of any backward section of the population." Article 29(1) provides, "there shall be equal opportunities for all citizens in respect to employment and to holding public office in the service of the republic." The Constitution further advances and incorporates the principle of women's special representation in local self-governing bodies, outlined in article 9, and in Parliament, as article 65(3) specifies that thirty seats are reserved for women in the national legislature.
- **Civil law:** Under the Civil Procedure Code of 1908, section 132 exempts certain women from appearing in court. Section 56 also prohibits the arrest or detention of women in order to fulfill a decree for money.
- **Criminal law:** Section 52 of the Code of Criminal Procedure, 1898, specifies that whenever public officials must search a woman, they are to exercise caution and ensure that her modesty is not harmed. Section 313 of the Penal Code stipulates the punishment for an individual, who causes a miscarriage without the woman's consent. Section 354 of the Penal Code lays down punishments for aggravated assault with the intent to insult the modesty of a woman. Section 375 defines a rape offence, while Section 376 stipulates the punishment for committing rape. Section 493 outlines the punishment for cohabitation, when a man dupes a woman into believing she is or will be lawfully married. Section 495 delineates the punishment for entering into a marriage while

concealing information regarding a former marriage. Similarly, section 496 delineates the punishment for parties involved in a marriage ceremony that fails to abide by its legal requirements. Section 497 specifies the punishment for committing adultery, while Section 498 outlines the punishment for kidnapping or detaining, with criminal intent, a married woman. Section 509 stipulates the punishment for committing acts and using language with the intent to insult a woman's modesty.

- **The Family Courts Ordinance, 1985:** The Ordinance is an initiative to ensure equal access to justice for economically disadvantaged people. This is especially important for women, who are otherwise unable to access the legal system on account of financial resource and knowledge constraints. The Ordinance establishes as many Family Courts as Assistant Judge Courts in Bangladesh except in three hill districts. The Family Courts provide a forum for women in particular to understand how to best access and make use of the legal system in the event of a family dispute. The Ordinance supersedes the application of the Evidence Act and the Code of Civil Procedure, with the exception of sections 10 (stay of suit) and 11 (*res judicata*), because these acts prolong the adjudication process of family disputes. The Ordinance outlines a simple procedure for adjudicating disputes. This results in fast case settlements in Family Courts.

The Ordinance has provided a uniform forum for people, particularly women, of all faiths to exercise their rights relating to divorce or dissolution of marriage, dower, and maintenance, restitution of conjugal rights and the custody and guardianship of children. Section 3 of the Ordinance states,

"the Ordinance [will] override other laws...The provisions of this Ordinance shall have effect notwithstanding anything contained in any other laws, for the time being in force. From the expression 'other laws' used in section 3 of the Ordinance, it appears that the Family Courts Ordinance 1985 controls the Muslim Family Laws Ordinance, 1961, and not vice versa. Any person professing any faith has a right to bring a case before the court for the purpose mentioned in Section 5 of the Family Courts Ordinance. A Hindu wife is therefore entitled to file a maintenance case against her husband under the Family Courts Ordinance."

In the case of *Meher Nigar vs Md Mujibur Rahman*,⁴ a Division Bench of the High Court observed:

"The Muslim Family Laws Ordinance, 1961, introduced some changes in the orthodox Muslim personal laws relating to polygamy, talaq and inheritance and in order to keep those reformative provisions of the Ordinance of 1961 effective it has been provided in Section 5 that the provisions of the earlier Ordinance of 1961 shall not be affected by the provisions of the Ordinance of 1985...But this, in our opinion, does not mean that the provisions of the Family Courts Ordinance, 1985, are applicable to the members of the Muslim community only and not to other communities, which constitute the populace of Bangladesh."

⁴ 14 BLD 467

During the final hearing of *Pochon Rikssi as vs. Khuku Rani Dasi*⁵ the Honourable Chief Justice created a Special Bench made up of three judges to decide on the applicability of the Ordinance to other communities. The Special Bench sought the opinion of some senior members of the Bar to advise the court as *amici curiae*. After a long hearing, the Special Bench held,

"The Family Courts Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights, as is evident from Section 4 of the Ordinance...Family Courts Ordinance applies to all citizens irrespective of religion...After coming into force of the Family Courts Ordinance, the Criminal Court's jurisdiction has been ousted in respect to awarding maintenance, except in case of pending proceedings."

In view of the above interpretations of the Apex Court, the court system has established that people of any religion may claim their matrimonial rights in Family Courts.

Another great attribute of the Ordinance has been the introduction of the ADR. The ADR has proven to be a highly effective tool, especially for women, in the settlement of family disputes. Matrimonial disputes are different than other disputes, such as property and commercial disputes. Matrimonial issues, such as divorce and custody of children, have broader implications on individuals and societies. The pain, stress, shame, guilt and social stigma associated with the dissolution of one's marriage cuts across cultural, racial and occupational lines in society. In our society, women and children generally suffer most when a marriage dissolves. While a wife may struggle to earn a decent living after her marriage ends, her children may suffer from lack of parental care and mental trauma. The children's struggles may ultimately affect their normal growth and lead them to develop certain prejudices against society. To avoid these personal and social problems, religious structures, social norms and laws emphasize the efforts individuals must make to sustain a marriage, rather than terminate it on a whim. However, in a civilised society individuals should not be expected to stay apart of an unhappy marriage forever. Therefore, laws, customs and social norms have to maintain a delicate balance when dealing with the family issues. The social and legal systems have to ensure that if a marriage is terminated, its impact on the individuals involved and their local community shall be kept to a minimal level.

The Ordinance allows the court to hold a pre-trial to attempt to bring the parties to a compromise or reconcile them to prevent a divorce.⁶ After presenting the evidence of all parties, the court is required to make another attempt to facilitate a compromise or reconciliation between the parties.⁷ If a dispute is settled by a compromise or reconciliation, the court rules to uphold that decree.

⁵ 50 DLR (1998) 47

⁶ Section 10 (3)

⁷ Section 13

The Ordinance includes a provision for camera trial.⁸ An overwhelming majority of women have reaped the benefits of this gender-friendly provision. The law states that if a Family Court deems fit, it may hold the whole or any part of the proceedings under this Ordinance in camera. This practice was introduced to encourage women female litigants in particular to claim exercise their rights in a confidential and dignified environment without fear of publicity.

- **Legal Aid Services Act, 2000:** Many Bangladesh people, particularly women who survive acts of violence committed against them, are unable to access support services and legal aid. Recognizing the lack of access, the government has undertaken a laudable initiative to establish a state run free legal services program that parallels the services offered by other legal aid NGOs. Accordingly, the law stipulates the eligibility criteria for those accessing legal aid includes:
 - People with an average annual income less than Tk.3000
 - Physically disabled, jobless people and freedom fighters with an annual income less than Tk. 6000
 - Recipients of retirement benefits
 - Impoverished mothers holding VGD cards
 - Women and children who are victims of acid burns and/or trafficking
 - People who have land or a house in Adarsha Gram (model villages)
 - Financially insolvent widows, economically disadvantaged women, and/or deserted wives
 - Handicapped people who are helpless and incapable of earning a living
 - Under-trial prisoners who are unable to afford legal representation
 - Persons declared insolvent by a court
 - Persons declared insolvent or helpless by a jail authority
 - Persons considered to be eligible for legal aid by the Institution due to their insolvency, helplessness or socio-economic backwardness (Regulation 2001)
- **Women and Children Repression Prevention Act, 2000:** The Women & Children Repression Prevention Act of 2000 (Bangla name – Nari O Shishu Nirjatan Damon Ain – 2000) deals specifically with violence perpetuated against women and children and includes measures to combat domestic violence against women and children. By enacting this special law, politicians have made significant and noteworthy changes to the legal provisions that address the issues of exploitation, trafficking, and other forms

⁸ Section 11

of maltreatment and violence against women and children. This act deals with different manifestations of violence including rape, prostitution, trafficking and acid throwing. The new act includes strict punishments for perpetrators; it sentences offenders to life in prison and death. Punishment under this law is very severe to deter offenders. As such, all offences tried under this law have been made cognizable and non-compoundable with little or no opportunity for bail.

Some of the innovative provisions under this Act include:

- **Provision for victim compensation:** While the main purpose of penal law is deterrence, sections 4, 9, 10, and 11 of the Women and Children Repression Prevention Act provides avenues for victims to seek redress and compensation after acts of violence, including rape, sexual abuse and dowry related violence, have been committed against them.
- **Provisions for the punishment of an Investigating Officer:** Section 24(3) of the Act provides that the Tribunal, as established under section 25 of the Act, may direct concerned authorities to take the necessary actions to submit a complaint of negligence against an investigating officer, if the Tribunal is convinced that the investigation was not completed within the stipulated timeframe.
- **Maintenance of a child born out of rape:** Pursuant to the 2003 amendment to the Act, Section 13 has been substituted with a new provision. The law provides that any child born as a result of rape may be raised under the supervision of the mother and/or maternal relatives. The state will bear the subsistence living costs of children born out of rape until a male child is twenty-one years of age and a female child is married; and in the case of a disabled child, until s/he can maintain him or herself independently. The law further stipulates that a child shall go by either or both of the names of his/her father and/or mother.
- **Punishment for filing false cases:** Section 17 of the Act outlines the punishment for filing a false case or complaint. The law states that an individual shall be sentenced to rigorous imprisonment for a term not exceeding seven years and shall be liable to pay fine, if he or she intentionally files a false case or complaint against another person or files a false case or complaint with the objective of causing harm to any other person.
- **Specific timeline for holding trial:** Section 20 of the Act states the procedure for completing a trial. The law includes a timeline whereby a trial must be completed within one hundred and eighty days from the date the case was filed.
- **Provision for camera trial:** Considering the psychological trauma and stigma associated with reporting an incident of rape, rape victims and witnesses are able under Section 20 (6) of this law to depose evidence in camera.
- **Provision for the punishment of rape when a woman is in custody:** Section 9(5) of the Act includes a punishment for rape committed by any law enforcement officer against a woman while she is in police custody.

- **Restriction on publishing the identity of a victim in media sources:** In the law's articulation of media guidelines, it prohibits the publication of the names of victims of violence under Section 14. This provision's purpose is to ensure that a survivor is not re-victimized in the process of seeking legal redress.
- **Accountability of a tribunal, public prosecutor and police officer:** Section 31A is a new provision that includes accountability measures for a tribunal, public prosecutor and police officer. The law provides that if a trial cannot be completed within one hundred and eighty days, as stipulated in section 20, the tribunal shall submit a report to the Supreme Court within thirty days. The report shall cite the reasons for the tribunal's delay in completing the trial. It is further laid down that a copy of the report shall be submitted to the government. Similarly, a public prosecutor and police officer shall be duty bound to submit a report to the government and Supreme Court within thirty days, citing reasons for the delay in completing a trial within the allotted timeframe.
- **Safe Custody:** Section 31 of the Act ensures that women and children in custody are entitled to a safe environment over the course of their trials.
- **The Birth and Death Registration Act, 2004:** This Act may be effectively used to prevent early marriage, ensure that all children are enrolled in school at the right age, protect underage children from working and ensure special treatment for children in juvenile justice system.
- **Laws for Indigenous Women:** Under Section 22 of the Act and First Schedule of the Rangamati Hill tract District Local Government Council Act, 1989 (Act No. 19 of 1989), the Khagrachari Hill Tract District Local Government Council Act, 1989 (Act No 20 of 1989), and the Bandarban Hill Tract District Local Government Council Act, 1989 (Act No. 21 of 1989), it is the responsibility of the Rangamati, Khagrachari, and Bandarban Hill Tract District Local Government Councils to prevent prostitution. Section 69 of these Acts empowers the Councils to develop and pass regulations relating to prostitution, juvenile begging and other unsocial activities. These laws contain a considerable number of pragmatic provisions.

Lessons Learned and Best Practices

Acid Crime:

The government filed a **writ petition (No. 3655/2000)** with the High Court Division of the Supreme Court. The Court directed the government to take necessary steps to control the importation, selling and distribution of acid in open markets. By tightly regulating the acid market, the government will prevent the easy availability of acid and decrease the number of acid attacks against women. The *learned judges issued the Rule Nisi* on August 13th, 2000, against the Government of Bangladesh, represented by the secretary to the Ministry of Law, Justice and Parliamentary Affairs. The Court also issued directives to the government to ensure that the government would enact special provisions detailing the treatment of acid survivors in society. An inter-ministerial commission and the Ministry of Commerce, Ministry of Law, Justice and

Parliamentary Affairs followed the High Court ruling. In 2002, Parliament passed two laws titled Acid Control Act-2002 and Acid Crime Prevention Act-2002. All of Bangladesh's acid related crimes are addressed in these laws.

While Bangladesh law criminalizes acid-related crime, due to the lack of police enforcement acid crimes are increasing in Bangladesh. Bangladesh has the highest number of acid-related crimes in the world. Acid burns constitute nine percent of the total burn injuries in Bangladesh. It is evident that the number of acid burn victims is higher than the number of isolated incidents. Thus, perpetrators often target one individual, but also injure other people when committing an acid-related crime.

Implementation of the Acid Crime Control Act of 2002⁹:

Rina worked in a garment factory. She lived in Dhaka's Mohammadpur neighborhood and sublet an apartment with another woman. Some neighborhood miscreants regularly harassed Rina with indecent proposals on her way to work. As Rina showed no interest in their proposals, the severity of the miscreants' harassment increased. In response to their actions, Rina was forced to leave her flat in Mohammadpur and move elsewhere. On the day of the acid-burning incident, Rina went to visit her former flat mate. The miscreants saw her on the road. When Rina was chatting with her former flat mate, they entered the house. They made indecent proposals to her. Rina refused to comply with the proposals and threatened to commit suicide. Then the miscreants grabbed her and threw acid on her face. The acid burnt the lower part of Rina's face and her chest and elbows. The miscreants ran away leaving her in such a condition. Her previous flat mate took her to Dhaka Medical College Hospital for treatment.

Rina filed a case against the perpetrators under Section 5 of the Acid Crime Control Act. The accused was sentenced to fourteen years in prison, fined 50,000 Bangladeshi Taka (BDT), and subject to an additional two years of imprisonment in case he defaults on the fine. Since the accused absconded from Mohammadpur, the sentence will come into force from the date he surrenders himself to the court.

Implementation of Women and Children Repression Prevention (Amended) Act of 2003¹⁰:

Shila had refused Sobhan's indecent proposal. In response to her refusal, on May 19, 2003, Shila was threatened and finally forcefully abducted for the purpose of trafficking by Sobhan. Shila's mother filed a case of trafficking under the Women and Children Repression Prevention Act of 2000 against Sobhan and his companions in crime.

The Bangladesh National Women Lawyers' Association (BNWLA) applied to the Honorable High Court to access the testimony of the victim and witnesses. After the hearing, the Honorable High Court ordered the Tribunal of Women and Children in Faridpur, to take the testimonies of the victim Shilpi and Shirajul Munshi. Due to this order, both the victim and witnesses gave their testimonies in court.

The case was tried under Section 5 of the Women and Children Repression Prevention Act of 2000. On August 29th, 2007, the judge sentenced Sobhan and his companions, Mannan and Atiar, to lifetime imprisonment and to pay a fine of 10,000 BDT.

⁹ Source: Legal Cell, BNWLA. The name of the individual was changed to respect her privacy.

¹⁰ Source: Legal Cell, BNWLA. The name of the individual was changed to respect her privacy.

Progressive Interpretations by the Courts:

Judicial Interpretation around Fatwas:

Fatwa is a religious edict or injunction and a deadly weapon, particularly for repressing women, used by religious fundamentalists. *Fatwas* have negative consequences in society, such as inducing women to commit suicide. Surprisingly, however, no new law prohibiting or intending to control *fatwas* has been introduced. The Women and Children Repression Prevention Act, which has been amended numerous times, does not mention *fatwa* or make it a punishable offence. The apex court of Bangladesh published in the Editor an expansive interpretation to the indefeasible right to life, as upheld in Banglabazar Patrika vs. DM & DC, Noagaon.¹¹ In this case, a Division Bench of the High Court delivered a milestone judgment prohibiting *fatwa*. The application of the judgment was later stayed by the Appellate Division of the Supreme Court, which is now pending for hearing. The apex court held that *fatwa* refers to a legal opinion, which, can only be declared by a lawful person or authority. It further observed that the legal system of Bangladesh empowers the courts alone to decide and rule on questions relating to legal opinions of Muslim law and other laws in force. The Honourable Court, therefore, concluded that *fatwa* is both illegal and unauthorized.

Milestone judgment on violence perpetrated by the State of Bangladesh:

Although the Constitution of Bangladesh prohibits torture, successive governments create conditions that facilitate torture and repression. Torture is a punishable offence under the penal code, yet state actors have enacted a number of laws in Bangladesh that allow for both torture and repression to occur. Law enforcement agencies most commonly abuse section 54 of the Code of Criminal Procedure. Section 54 enables the police to arrest people without an arrest warrant and keep them in detention for up to twenty-four hours on vaguely formulated grounds. Bangladesh has witnessed unprecedented levels of political persecution and violence against supporters of the opposition parties. In particular, women are targeted by henchmen of the ruling parties. This political violence adds a new and frightening dimension to life in Bangladesh, which specifically targets women and girls based on the political affiliations of their families. Although police officers and state agents rarely commit acts of targeted political violence, the perpetrators are often supporters of the ruling party, while the victims are in most cases supporters of the opposition party. Thus, the crimes appear to be politically motivated. The police rarely offer assistance to the victims, as the police service is controlled and influenced by the ruling party. Thus, the police service is not sympathetic to crimes committed against these victims, which results in a lack of due diligence. Law enforcement agencies use section 54 of the Code of Criminal Procedure as a weapon of repression that tends to aid henchmen of political parties in perpetrating violence against women.

On April 7, 2003, the High Court delivered a milestone judgment on a writ petition. The Bangladesh Legal Aid and Services Trust (BLAST), other rights groups and concerned individuals filed the public interest petition before the court in November 1998. The petition was in response to the July 1998, death of a brilliant student while in police custody. The petition called upon the government to enforce mandatory guidelines to prevent torture in custody under section 54 of the Code of Criminal Procedure.¹² The judgment outlined in a 15-

¹¹ W.P No. 5897 of 2000

¹² 54(1) A police officer may, without an order from a Magistrate and without a warrant, arrest.

point directive restricts the arbitrary use of detention law, including the Special Powers Act. The judgement requires police officers to inform the family members of an arrested individual; for the accused to be interrogated by an investigation officer at the jail gates in prison, instead of in a police interrogation cell, and behind a glass screen so that his/her family members and lawyers can observe whether or not s/he is being tortured; and for the detainee to undergo a medical examination before and after he/she is in police custody. The judgement empowers the courts to take action against an investigating officer, who is accused of committing acts of torture, when the accusations are confirmed by medical examination. It directs the government to amend relevant laws, including section 54, within six months to provide safeguards against their abuse, and recommends increasing the prison terms for wrongful confinement and malicious prosecution.

Domestic Violence:

Domestic violence against women is the most unrecognized and under-reported form of violence against women in Bangladesh. There exist laws that guard women against violence, but these laws do not include domestic violence. Anomalies in law and procedural discrepancies discourage women from filing cases against perpetrators. Women are further discouraged from accessing the legal system, as most often seeking redress in court further victimizes the victim.

Bangladesh's major laws are based on the inherited laws from the British colonial period. The colonial laws include procedural laws and penal offences, as illustrated by the Penal Code of 1860, which categorizes such offences as assault, rape, and sodomy. The Penal Code also covers almost-offences. In order to address violence against women, politicians introduced laws, such as the Dowry Prohibition Act of 1980, the Women and Children Repression Prevention Act of 2000, amended in 2003, and the Acid Crime Control Act of 2002. These laws address violence against women outside of the domestic sphere, yet fail to acknowledge forms of domestic violence committed against women and children.

The afore-mentioned laws address dowry giving. For example, the Women and Children Repression Act of 2000, amended in 2003, has strict provisions regarding dowry related injuries.

- I) a person who has been involved in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so involved;
- II) a person having in his possession (CANNOT HAVE a "burden" in ONE'S POSSESSION) without lawful excuse, the burden of proving which excuse shall lie on such person, any implement (DOESN'T MAKE SENSE - CONSIDER CHANGING "IMPLEMENT") of house-breaking;
- III) a person who has been proclaimed as an offender either under this Code or by order of the [Government];
- IV) a person in whose possession anything is found, which may reasonably be suspected to be stolen property, [and] who may reasonably be suspected of having committed an offence with reference to such thing;
- V) a person who obstructs a police officer while the officer performs his duties, or who has escaped, or attempts to escape, from lawful custody;
- VI) a person reasonably suspected of being a deserter from [the armed forces of Bangladesh];
- VII) a person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of Bangladesh, which, if committed in Bangladesh, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in Bangladesh;
- VIII) a released convict committing a breach of any rule made under section 565, sub-section (3);
- IX) a person for whose arrest a requisition has been received from another police officer, provided that the requisition specified the person who is to be arrested and the offence or other cause for which the arrest is to be made[; and it appears there [] that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

However, the legal provisions do not account for an offence, if it does not seriously harm a woman. In addition to this Act, other laws similarly do not include acts of violence against women that occur within the family sphere, if they are not related to dowry giving. In Bangladesh's existing legal framework, there are no provisions to protect women, who suffer from domestic violence and seek assistance to leave a violence-prone living situation.

In such circumstances, the Alternative Dispute Resolution (ADR) has become a popular tool to maximize the interest of women while reconciling disputes through "mediation." This solution only applies to family disputes and petty criminal offences, as the law prohibits serious criminal incidences from being settled through a "mediation" process. Considering the above mentioned gaps and legal constraints - the lack of criminal offences related to domestic violence and protection for victims of domestic violence, - the Ministry of Women and Children Affairs finalized the proposed *Domestic Violence (Prevention & Protection) Bill in 2009*. In the drafting of the 2009 Bill, public officials were able to take into consideration the Domestic Violence Bill of 2005 drafted by the Bangladesh Law Commission and the Domestic Violence (Prevention & Protection) Bill of 2008 drafted by the Citizen Initiative against Domestic Violence (CiDV), a coalition of NGOs. The 2009 Bill will be introduced in Parliament in its upcoming session.

Sexual Harassment:

No Bangladeshi law addresses sexual harassment in the workplace. In 2009, the BNWLA filed a **writ petition No. 5916/08** to the High Court, calling for government action to address sexual harassment in the workplace. On May 14, 2009, the Court issued a set of guidelines to prevent the sexual harassment of women in workplaces and academic institutions. The guideline has defined sexual harassment as:

- Unwelcome sexual behaviour in the form of physical contact and advances between two people, where the behaviour is either direct or subtly implied;
- Attempts to establish physical relations that have sexual implications with another by abusing one's own administrative, authoritative or professional powers;
- Choosing to include sexual language in one's speech;
- Demanding or requesting an individual to perform sexual favours;
- Publicly screening pornography;
- Sexually charged remarks or gesture;
- Indecent remarks and gestures, such as teasing with abusive language, stalking, and joking with a sexual implication;
- Insulting an individual through letters, telephone calls, text-messages, pottering, public media notices, and cartoons, and by writing on public spaces, such as benches, chairs, tables, notice boards, and the walls of an office, factory, classroom, and/or washroom; where the content of one's writing has sexual implications;
- Taking still photographs or videotaping for the purpose of blackmailing;

- Preventing an individual's participation in sport, cultural, organizational and academic activities on the ground of sex and/or for the purpose of sexual harassment;
- Making love proposals to and exerting pressure upon another, such as posing threats, if she/he refuses the proposal;
- Attempting to establish sexual relations by intimidation, deception or false assurance.

Such conduct outlined in clauses (a) through (l) can humiliate both parties in a harassment case and may constitute health and safety problems in workplaces and academic institutions; a woman is being discriminated against when she has reasonable grounds to believe that her objection to a sexual advance would disadvantage her academic and/or professional pursuits or create hostile academic and/or workplace environments. The Court requires confidentiality to be maintained on behalf of the plaintiff. The Court's directive to the government to treat this guideline as law, until a sexual harassment law is enacted, is important because public and private institutions must comply with the guideline immediately.

Violence Against Women in Politics:

The Constitution of Bangladesh has eleven parts from which Part II, III and V deal directly with women issues. These sections include articles that guarantee women's equal rights in every sphere of life, including the political.

The Constitution of Bangladesh provides 300 seats for the members of Parliament. Male and female political candidates are eligible to directly participate in the electoral process. In the initial stage, fifteen seats were reserved for women in the 315-seat parliament. The seats were reserved for a ten-year period, and Members of Parliament (MPs) indirectly elected the women to fill them. After the first ten-year tenure, the number of reserved female MP seats and the length of time for which these seats are reserved have increased. In 2004, a new law increased the size of Parliament to include forty-five reserved seats for women. In effect, the number of female Members of Parliament has now surpassed the government's record; now 18.5 percent of Members of Parliament are women.

Article 90A(9) of the Representation of People's Order (RPO), 2008, states that every registered political party shall make specific provisions in its party mandate to include women in organization operations; at least 33 per cent of office bearers of each of the party's committees must be women. Although the political parties, including two leading parties, failed to fulfill this due to the lack of female candidates. However, the State's initiative to enact measures in favour of female politicians has increased the participation of female representatives in Parliament. While women are still a minority in Parliament, in the 2008 national election, many women were directly elected to serve as Members of Parliament. Similarly, due to the aforementioned Constitutional provisions, special measure provisions are also initiated by local institutions that operate under the auspices of local governments. The national and local institutionalization of female politicians has increased women's political participation in many levels of government.

Although there are some affirmative laws and provisions, women's full and equal participation in politics is not satisfactory. Within the male dominated political arena, men formulate the rules of the political game. They set the norms and decide upon the values around which

political life evolves in Bangladesh. Female politicians, unfamiliar with the inside operations of government, are in most cases disadvantaged. The traditional patriarchal political culture creates a barrier for female politicians that make it extremely difficult for them to exercise their power. For example, according to the Local Government (City Corporation) Ordinance of 2008, one third of the total seats of the city corporation seats are reserved for women. If a female candidate is elected by way of this provision, she is subjected to discrimination.

A writ petition (No. 3304/2003) was filed with the High Court Division of the Supreme Court. The Court directed the government to take the necessary steps to ensure all Bangladeshi citizens have the equal right to exercise political power. Under this writ petition, the elected ward commissioner of Khulna City Corporation mentioned that the Vide memo no Poura-1/MMM-02/2002/1133 bared them from participating in the activities of the corporation and enjoying its facilities. The judgment, however, declared that the circulation of materials, such as the Video memo, is illegal and without lawful authority. The judgment also declared that once elected, the Commissioner whether in the general or reserved seats, male or female, is equal in all respects and shall be so treated by all citizens.

Myriam Aucar¹

Women's Participation in the Public Life of Lebanon

Introduction

Lebanese women participate in electoral politics. They contribute to political campaigns and vote in elections, yet their public engagement in politics, as political candidates and Members of Parliament, is less noticeable. In fact, despite women obtaining the right to vote and serve the public as an elected official in 1953, only one woman was elected to Parliament, between 1953 and 1992. She was elected to fulfill her deceased father's seat in Parliament until the legislative session ended. Furthermore, in 2004 the first time women were appointed to serve in a state ministry. In 2005, six women were elected to serve as Members of Lebanon's Parliament out of a total of 128 members. In 2009, only four women were elected to Parliament. Lebanon has one of the highest percentages of educated women in the Middle East. In addition to the lack of female political candidates, however, women are surprisingly unaware of political alliances or caucuses in Lebanon. In a recent survey distributed to fifty women above the age of twenty-one, the results indicate that only forty-three percent of women surveyed were aware of the political alliances of female Members of Parliament.² In light of women's minimal political participation, yet high levels of educational achievement, this paper questions why Lebanese women are not more aggressive in asserting their presence in the traditionally male-dominated field of politics.

To better understand the obstacles women face when entering Lebanon's political arena and their obvious lack of interest in overcoming these barriers, this paper examines: a) the laws and regulations to which women must submit; b) discriminatory social norms, including gender-based discrimination in workplaces, academic institutions, and cultural practices; and c) women's dependence on men. This paper considers the impact of regional politics on women's active participation in politics because social barriers in one's local political environment will inhibit her from becoming significantly involved in all levels of Lebanese political life. This paper will conclude by addressing the necessary steps to empower women in the political sphere.

Legal Challenges that Impact the Active Political Participation of Women

Neither the Lebanese Constitution nor any other Lebanese law differentiates between men and women's ability to participate in all facets of political life. Article 7 of the Lebanese Constitution states that all Lebanese citizens are equal before the law and have equal rights and obligations. Consequently, the relative absence of women from the public political scene is not due to any regulation limiting their political participation.

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² Survey conducted by Alexandra Saadeh and Rachel Obeid on June 4, 2009 for RootSpaceOnline

Due to the efforts of many women's organizations, several discriminatory legal provisions have been amended. Despite the amelioration of Lebanese statutes, women are still victims of gender discrimination because of state law. For example, certain legal provisions directly impact women's equal participation in public and private decision-making processes, freedom to make independent decisions, self-esteem and understandings about how others perceive them. Therefore, gender-discriminatory legal provisions must be identified and amended to ensure the full and equal participation of Lebanese women in society.

In tax laws, for instance, if a man works while his wife does not, he is entitled to a tax deduction; however, a woman, who works outside the house, is not entitled to a tax deduction, if her husband does not work. Furthermore, women are not allowed to open bank accounts for their children, who are minors, without the father's approval.

Shockingly, the Criminal law differentiates between men's and women's involvement in and punishment for committing "honour" crimes. Lebanese law also fails to adequately address marital violence and does not provide sufficient protection for women, who are exposed to domestic violence. In most cases, women who suffer from domestic violence are unable to access police services for protection because the police often refuse to interfere. The failure of police to reliably act on domestic violence cases reflects a common attitude that domestic violence is a personal matter outside the state's sphere of regulation. The fact that women are still forced into early and unwanted marriages is a form of violence against women.

Discrimination occurs in personal status matters that are governed by the religious communities of Lebanon. There are eighteen religious communities that have different types of personal status laws. In many communities, women and men are not guaranteed the equal right to divorce and inherit. Despite the differences between the personal status laws of each community, almost all of the laws consider a man to be the "head of the household."

Legal discrimination against women, whether through criminal law or Personal Status codes, undermines their equal participation in society, including their ability to equally take part in the democratic process.

While Lebanon's electoral law does not contain gender-based discriminatory provisions, it constitutes a serious obstacle for women's success in politics.

The Law allows for political coalitions, which can lead to a monopoly in Parliament. In such a case, a block of parliamentary seats is held by a group of political candidates that allied with each other preceding the elections. In most cases, the purpose of forming a coalition is to strengthen the political position of one's party and candidacy and to block others from easily entering the political sphere as an elected politician. As the political leaders of the past decades have been past military leaders; newcomers, especially women, must grapple with the great challenge of breaking through the wall of exclusivity created by powerful party coalitions.

The electoral law does not contain regulations concerning media coverage of electoral campaigns and candidates during an election period. Since Lebanon's media is controlled by a select group of political leaders, female political

candidates are unable to receive decent media coverage, if they are not endorsed by an established male leader in society. There are many prominent and influential women in the media, but they do not thoroughly cover women's political hardships. The political coverage by women in media is similar to the coverage provided by their male colleagues; therefore, the minimal involvement of women in politics, as voters and candidates for office, is not tackled sufficiently by news outlets.

The electoral process requires a large financial investment due to the personal costs of participation, and the administrative costs of election day proceedings. Women have less financial capacity due to gender-based discrimination in hiring practices, workplace environments, and compensation schemes. Thus, female political candidates are financially disadvantaged, which decreases their likelihood of sustaining their candidacy through the campaign period.

In addition, political parties generally do not prohibit women's participation and membership. However, aspiring female politicians are confronted with the same obstacles, whether seeking a leadership role within a party or vying for public office.

Societal Challenges Preventing Women from More Actively Participating in the Political Process

In addition to the afore-mentioned legal difficulties, women are confronted with economical and cultural discrimination, and the patriarchal mentality of society.

Contrary to common beliefs, social barriers that inhibit women's equal participation in government are not determined by a woman's religious affiliation as much as they are determined by the community in which she lives; her social status, level of education, and level of subservience to the men in her family. Therefore, while some religious communities espouse very conservative views about women's participation in public life, other aspects of a woman's social environment are undeniably more influential in determining her ability to play an active role in society.

a) Economic challenges

Lebanese women actively seek employment opportunities and are increasingly present in the workforce because of their high educational achievement, the high cost of living, the high levels of economic immigration, and widowhood. Women's financial independence is essential for their emancipation; however, their heightened participation in the workforce has not lead to an increase in their involvement in political life.

To better understand the factors that impact women's involvement in the workforce, one must address the problems women face in the workplace. First, men rarely participate in housework or childcare, as they do not consider "it...a man's job." Thus, a woman, who works outside the home, must also take care of her children and the household, which doesn't provide her with much time to become involved in politics. In addition, women are usually underpaid, compared

to men who complete the same job and bear the same responsibilities; consequently, a job does not necessarily lead a woman to her financial independence. Women face discrimination in the workplace that often inhibits them from occupying executive level jobs, except in family businesses. The lack of women in executive jobs does not reflect the potential of Lebanese women; especially when one considers that fifty percent of college graduates are women. The social, economic and political barriers inhibit women from holding executive positions in their professional lives create self-confidence problems that impact their involvement in politics.

The difficulties women face in the job market are often discouraging and impact their attempt to actively participate in the public sphere.

b) Cultural and educational challenges

Lebanon has been exposed to the developed world through global methods of communication, such as the Internet, and the transnational movement of people. For example, Lebanese immigrants return home with new ideas and ways of living. However, the cultural and educational settings in which women live have not substantially evolved since the war. This is especially the case in rural areas, which make up the majority of Lebanese territory.

In addition, texts books, advertisements and other forms of academic scholarship and media contribute to maintaining stereotypical gender roles. The stereotypical depiction of women deprecates their image, as a woman is rarely represented as an active responsible person in the workplace or in other areas of public life.

Moreover, although Lebanese women are considered to be among the most modern and educated women in the Middle East, the majority of rural Lebanese women do not realize the better living situation of their sisters in urban centers. The distinction between rural and urban women exemplifies how one's location influences the problems with which she is directly challenged; although some problems affect all Lebanese women, others may be particular to a certain group of women. For instance, while some women are requesting the right to transfer their citizenship to their children, this right, if granted, would deeply harm women in certain communities. In some communities, women are forced into early marriages for various reasons. For example, early marriages occur for various reasons: to allow a father to be discharged from a debt owed to a future son-in-law; to assist a man's first and aging wife in return for a sum of money to be paid to the bride's father; and to provide additional children to a groom, who wants to father more children in order to increase his economic prosperity by requiring his children to work. As long as justice systems fail to protect women from this form of abuse, granting women the right to transfer their citizenship will only provide an additional reason for men to abuse women.

The cultural and educational environment in Lebanon, coupled with women's different living conditions, influence women's acceptance of their role in politics, their awareness of priority women's rights issues, and their level of empowerment to address their concerns.

c) Societal challenges due to the patriarchal system

Male leaders control the Lebanese social system, which is made up of clan groups that wield power over all aspects of society. The political system is a part of this social structure, where clans control or exert great influence over political parties. In Lebanon, politics is a family business that is controlled by the family patriarch. For example, if a member of a "non-political"

family imposes himself upon a political family, claiming that leadership should be taken away from traditional families, he soon considers the seat he occupies to be a family legacy. This mentality also applies to the leaders of most political parties in Lebanon. As a woman is never the head of her family in a patriarchal society, unless she is widowed and the family leadership position is uncontested, women struggle with being accepted as political leaders in society.

For women to be able to break through the patriarchal system and be a part of the political arena, they need courage, determination and opportunities.

- Courage and determination are needed because when women become actively involved in politics they oppose the system. Therefore, they are perceived as revolutionary and as wanting to overthrow an established order, which is male supremacy. They are also pejoratively accused of “wearing pants,” because they choose to relinquish the traditional female gender role. Women, who choose to challenge patriarchy and involve themselves in politics, will face social disapproval, even by other women.
- Women should wait for strategic opportunities to whittle away at the wall of male exclusivity; otherwise, their courage and determination will not be sufficient to guarantee their success in becoming active in Lebanon’s political scene. Indeed, women who have managed to enter politics were able to do so either through the support of a powerful man, whom they represented or the absence of their family patriarch due to death or imprisonment. Consequently, women have been elected to fill men’s seats to replace male political leaders and not because the public believes in the political potential of women approves their democratic performances.

Although some female politicians are extremely active, their constituencies would never have elected them, if prominent male figures did not support their candidacy. Thus, female politicians would never have had the chance to prove their potential and the Lebanese parliament would not have benefited from some of its most active members.

Major improvements are needed to ensure that women do not depend upon men as intermediary actors to assist them in attaining public office. Raising awareness at the grassroots level is of the utmost importance. Lebanese women must understand the importance of their role in supporting female candidates’ political aspirations. By assisting female candidates to attain public office, women’s issues are more likely to be prioritized on the national agenda.

Lebanon’s National and Regional Political Environment

The problems confronted by women vying to enter the public sphere are of great importance because of the political environment in Lebanon and the Middle East. After Lebanon’s civil war, the country has been determining its national identity, torn by the different trends of Arab countries and the Western world. In this search to affirm a Lebanese identity, women’s rights issues were not a priority, even for women themselves.

Women's disinterest in substantively addressing their concerns was evidenced by their lack of perseverance in implementing the resolutions from the Fourth World Conference on Women in Beijing. Ms. Laurie King Irani, one of the speakers at a conference held on October 2nd and 3rd, 2001, stated, "after the Beijing conference, the Lebanese national delegation simply dissolved, and scant official attention was paid to implementing the Platform for Action in any sustained or coordinated manner."³

In a recent article concerning women in Lebanese politics, Mr. Don Duncan interviewed a young Lebanese woman, who stated that although she would "love to have the same rights as men[,]... for [her] it's not [her] goal." She does not "see [herself] as being a woman in political terms. Now [she is] fighting for a country that is still at war and that hasn't really emerged from the war[,] so before being a woman or a man, we[Lebanese people] must focus on survival as a community."⁴ Mr. Duncan noted that "getting involved in politics means learning to play by its sectarian rules and that means community, religion and culture comes first, before all other concerns."⁵

Women's disinterest in their own situation is perceived by some to be understandable in a region, and especially in a country, torn by a fundamental political crisis. When the existence of a country is at stake, lobbying for one's civil rights, based on an individual's claim to citizenship and the right to state protection of basic human liberties, is in many cases impossible. Despite political instability, however, Lebanese women deserve to exercise their civil rights, including the right to be equal to men before the law and live a life free from all forms of gender-based discrimination. Lebanese people cannot wait for all the problems of their country to be solved before considering the fundamental rights of half the population.

Minimal Steps to be Taken to Increase Women's Participation in Government and Politics

Although Lebanese women are as capable of holding a leadership role in their country as men, their equal presence in politics will not occur without drastic changes to the social system and the culture and mentality it espouses. The government bears a shared responsibility with political parties and women's organizations to initiate these changes. Addressing women's political participation at the grassroots level and engaging every citizen, regardless of age, gender, and ideology, from both rural and urban communities, is crucial to initiate change.

At present, however, Lebanon's government and political parties are inactive, failing to enact measures to enhance women's participation in the democratic process. This position could be defendable in light of the fundamental political problems confronted by successive

³ LAURIE KING-IRANI, *From program to practice: towards women's meaningful and effective political participation in Jordan and Lebanon*, Readings for the Middle East Network, at a conference organized by Dr. Haleh Esfandiari, Director of the Middle East at the Woodrow Wilson International Center for Scholars, on October 2 and 3, 2001.

⁴ DON DUNCAN, *Women lose out in Lebanon politics, The group that lost the most in Lebanon recent election was women*, The Media Line News Agency, Issue: (1281), Volume 16 , From 30 July 2009 to 2 August 2009, (Wednesday September 09, 2009.)

⁵ ID.

governments in a country shattered by years of war and the lack of effort by Lebanese women to lobby for their rights. Furthermore, women's organizations, that were previously very active lobbyists, are less active now, due to the recent political instability in the country. According to Saadeh and Obeid, "if Lebanese [people] were to become more open about women's right[s] it should start with the Lebanese women themselves. If they are not aware of the details on[of] this issue than how can there be a change?"⁶ Therefore, women's organizations and women at the grassroots level must be engaged in the political movement to address women's inequality in order to initiate change. This paper suggests the following steps to improve the participation of Lebanese women in the public sphere, despite national political instability:

- The government should be aware that women's issues are a priority both in times of peace and conflict. This awareness is essential to initiate the necessary changes that will enhance women's participation in politics; critical changes include, establishing a Ministry of Women's Issues and a unit dealing with domestic violence within the Public Security Ministry.
- Government organizations and women's associations should engage in a permanent dialogue and work in collaboration to promote and monitor the implementation of the necessary changes in laws and institutions.
- The Criminal Code should be amended to abolish all articles that differentiate an individual's rights based on gender, and establish severe measures to prevent crimes of honor and domestic violence. The government should also enact measures to protect women from early, unwanted marriages by requiring, for instance, a judge's consent for marriages that involve minors. These measures should be implemented as soon as possible to liberate women from the threat of gender-based violence; failure to enact such measures will inhibit women from freely exercising their democratic rights.
- Women's political participation should be promoted through rules and regulations. As a first step, a quota should be created for female members in Parliament. Political parties should also adopt a quota for women's participation in their executive committees. Said quota should not be lower than the one established by the government for female Members of Parliament in its electoral law. Quotas are controversial and, in many ways, demeaning for women. However, they are necessary to change the public mentality, which will lead to women's representation in public office.
- The electoral law should limit the campaign budget of political candidates. Thus, capable women will not be prohibited from participating in electoral politics due to personal financial constraints. The law should also contain provisions that ensure equal media coverage for all political candidates during the campaign period preceding elections.
- The role of women's organizations in Lebanon should be enhanced to enable them to effectively support the government's implementation of these recommendations. Women's groups should organize in cooperation and/or collaboration with one another to support aspiring and elected female politicians and ensure that they are known in every community. By presenting a united front in support of female politicians, women's organizations strengthen their candidacy.

⁶ See RootSpaceOnline, *supra* note 1.

- The presence of women in the job market and workforce will increase women's financial independence. In order for this to occur, many measures should be taken, such as, the promulgation and implementation of severe laws against discrimination in workplaces, providing work opportunities that generate income for women (whether outside or inside their homes), ensuring female businesses and businesses employing women can access credit facilities, and providing adequate training for women wishing to enter the workforce and low cost day care centers.
- Public education campaigns should be established to raise awareness about women's issues. Campaigns should include seminars in public places, such as universities and schools, and different media components, including public advertisements and talk shows. These campaigns should aim to raise women's awareness of their rights and freedoms, and the importance of their role in decision-making processes, whether at home or in the political arena. They should also aim to change the traditional image of women through eliminating gender-based discrimination from textbooks and advertisements, introducing the concept of women in charge and capable of making independent decisions in school programs, and valorizing women's role within and outside of their homes, as homemakers, breadwinners, and child caregivers.
- Women should be trained how to identify and communicate their political needs and expectations. A woman should be able to request information about a potential political candidate's campaign platform. She may choose to elect him/her, provided that the platform addresses the critical issues she cares about. She may also hold the elected member accountable for his/her performance in parliament on the basis of whether she/he upholds the principals of his/her platform.
- Women in the media should actively lobby on behalf of women's issues and raise awareness by tackling these issues in articles, and television and radio shows.

Conclusion

Improving women's involvement in the public sphere should be inextricably linked to the improvement of Lebanon's political life. The Lebanese Government and women's organizations should actively collaborate on methods to improve women's involvement in politics, while reaching out to women at the grassroots level to address all levels of their marginalization.

Leila Baishina, Ph.D.¹

Political Role of Women in a Predominantly Muslim World Experience of Kazakhstan

Participation of people in the political life serves as means of expression and achievement of their interests. In an opinion of M. Каазе, "... Political participation is understood as any activity which is voluntary carried out by citizens with the purpose to influence decision-making at various levels of political system; participation in the political life is understood, first of all, as the realized purposeful activity."

Down to 50th of XX century, political participation was described in sociology and political science mainly as participation in elections and the government. Now political participation is considered by the overwhelming majority of political scientists of various disciplines to be a broader concept. It is defined as the involvement of members of a society in politics through adopting existing political attitudes and engaging with structures of authority.

Political participation depends on a political order. In a democratic society, this participation is generally a free initiative that is effective in resolving infringements on the essential interests of citizens. For them, it is a tool for achieving their purposes, realizing their needs for self-expression and self-affirmation, and demonstrating their active citizenship. The democratic state allows for free participation by rule of law and process, the distribution of community resources such as public capital, free access to education, government transparency in much of its decision-making, and protecting the freedom of the press and other forms of mass media.

To allow for the free and fair political participation of citizens, great importance is placed on objective conditions such as arrangement of political forces, political culture of a society, subjective attitudes of citizens about the political system, motives for their participating in politics, the levels of human capital, and how political forces recognize the value and needs of its citizenry. These and other factors influence a political community.

Political participation is expressed in two basic forms: direct (direct) and mediated (representative). Direct participation takes place within the limits of small political communities where the mass of people makes decisions at assemblies by majority vote.

The large amount of empirical research done in the various countries, show that women in comparison to men are less politically active. However the influence of gender on an individual's level of political participation can be an essential factor. In societies, where a traditional patriarchal social order prevails, participation of women in politics is considerably lower. Similarly, this occurs in societies that suffer from insufficient levels of social and economic development. In such societies the gap between men's and women's opportunities

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for participating in political life and acquiring knowledge and skills are great. In any society there is a certain notion about the "natural" role of woman. Less modern societies are inclined to create a social role for women which estranges them from government processes and decreases their opportunities to participate in politics. Research shows that, even after a woman's education level is considered, the difference in participation still remains. Increasing the level of education attained by women does not erase the gap in participation because the population has accepted a social order, which clearly outlines the political activities of women.

The role of leaders in public opinion is considered primarily a man's role because most societies are androcentric. State institutions that facilitate political participation frequently have a "man's" orientation. This is especially salient in "patriarchal" societies and groups where the distribution of social roles in public and private spaces is gendered and women are expected to simply follow the preferences of men. In societies where there are low standards of living, participating in political life is extremely difficult, particularly for women, where women as a rule, have no time for this participation. The traditional distribution of economic and social roles within families forces women to devote the majority of their time to routine housework and childcare.

Forms of social interaction within the limits of acceptable "female" roles are strictly fixed by the local normative attitude and alienate women from complex forms of political activity. This raises, for women, the price of political participation.

Kazakhstan achievements in the sphere of gender equality are a matter of great pride. Since the 1995 Beijing World Conference on Women, this aspect of development has been one of the key issue areas of the Kazakh government.

In Kazakhstan a special commission engaged in women and family issues was created. The plan on improving the position of women in Kazakhstan has since developed. The commission's special mechanisms will strengthen the role of women in the social and political life of the country.

In Kazakhstan the share of women working in public service is fifty eight percent. This was reported by Ms. Abdikalikova, Minister of Labor and Social Protection of Population of the Republic of Kazakhstan (RK), at the General Assembly of the International Conference of Asian Political Parties. More than 150 non-governmental organizations (NGOs) function in the country. Special measures are taken to ensure the equal rights of women, particularly in the sphere of education. The government makes every effort to educate women about their rights. Strategies to achieve gender equality for 2005-2015 were developed in the country.

Together with the leading political party, Nur Otan, the special commission has created a personnel reserve from among the most prepared women for promotion to official state and political business.

Each year the number of women working in Kazakhstan's government bodies is growing. "So, the quantity of women in Mazhilis (the Lower Chamber) of Parliament in the RK has increased in comparison with the last convocation. Now seventeen percent of deputies are women. In the central agencies today on minister, two chairmen of an agency, five vice-ministers, and four authorized secretaries of the ministries are women," noted Ms. Abdihalikova.

According to the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), special measures are taken to eradicate violence against women. In Kazakhstan's law-enforcement bodies, there are special divisions on violence against women. Kazakhstan has signed and ratified CEDAW and the Optional Protocol to the Convention. Despite the significant achievements in this area, there are problems that have yet to be addressed. Critical problems include: i) discrimination against women in the workplace; ii) insufficient representation in selective government bodies; and iii) alarmingly high maternal death rates, especially in rural areas.

Kazakhstan, akin to other countries of the post Soviet space, has a number of gender-based problems; in particular, women's access to government, decision-making bodies, and gender inequalities relating to the economic rights of women. How are problems of gender inequalities solved in Kazakhstan? In 2005, a one year project on "Human rights and the role of the woman in a society" was launched. The European Initiative for Democracy and Human Rights sponsored the project. The main feature of the project was training group facilitation techniques to a small group of 20 volunteers. This group of volunteers then transferred its knowledge to six hundred secondary participants. The purpose of the project was to motivate young women in Almaty and other cities of Kazakhstan to actively participate in public life, discuss questions about a citizen's civic duty and the rights of women. Another project, "The Role of the woman in Kazakhstan's society" lasted two and a half years. The same technique was used in this project as in the 2005 project. In 2006 there were 640 project participants, and in 2007 – there were 738. Kazakhstan women operate cautiously amongst strong male players. But it is a matter of time. Gradually their steps will be more confident and their speech assertive and straightforward.

The Challenges to Women's Political Activities in Kazakhstan

Kazakhstan's ratification of the major Conventions and Declarations of the United Nations and other international organizations on the rights of women should promote the realization of women's political, economic, social and cultural rights. Kazakhstan's international commitments to gender equality are a step in overcoming the country's latent and open gender-based discrimination. The Vienna Declaration and Programme of Action accepted on June 25th, 1993, during the World Conference on Human Rights, considered the rights of women and girls to be an integral and inseparable part of human rights.

Kazakhstan ratified the Optional Protocol to CEDAW on July 4, 2001. Under the Optional Protocol, the Kazakh state is held more accountable and asked to report to the Committee on the Elimination of Discrimination Against Women, if the Committee receives reliable information testifying to serious or regular human rights infringements by the State.

The 1995 Constitution of the Republic of Kazakhstan prioritizes the international contracts ratified by the Republic before its laws. Such international agreements are applied directly, except for cases when applying the international contracts requires drafting enabling laws. However the necessary steps are still taken to adjust national legislation to align with the international treaties, including those concerning the political rights of women.

The CEDAW Convention, article 7 demands that politically active state-participants take all corresponding measures, including legislative, to ensure the comprehensive development and progress of women's rights issues. These international agreements fix the rights of women to be equal to the rights of men, allowing women: to vote in all elections and public referenda; to be selected to all public offices; to participate in a formulation and realization of government policy; to carry out all the state functions at all levels of the government; and to take part in NGO activities and civic associations, which deal with problems of public and political life in Kazakhstan.

Over one hundred and fifty female NGOs in Kazakhstan assist in the protection of the political rights of women. NGO leaders and participants are active in public policy, realizing their political rights as citizens to elect representatives and be elected to government bodies and institutions and to participate in referendums (Constitution of RK, article 33, p. 2). For example, in 1998 the NGOs selected a female block, for the purpose of increasing women's political representation, supporting election campaigns of women-candidates, and distributing legal knowledge concerning the electoral process.

The project "Knowledge of the rights of women," developed by The Organization for Security and Co-operation in Europe (OSCE) and The Office for Democratic Institutions and Human Rights (ODIHR), has greatly contributed to the political education of the Kazakh people. Not all Kazakh women are prepared to work towards the realization of their political rights such as freedom of associations, assemblies, meetings and demonstrations, the right to select and be selected to work in state offices, and to have access to public services. Thus, the work of female NGOs to better inform this policy area is greatly needed. In this direction, female NGOs in collaboration with political parties will also necessitate a republican network of independent observers.

The electoral behavior of women in Kazakhstan can be subdivided as follows. The first group takes a politically-conformist position. This electorate is interested in a candidate's political platform. The main thing for them is the candidate's personal qualities. The second group is politically well focused. For them, the platform for which they vote is of crucial importance. The third group shows indifference to a candidate's political position. Their choice is defined by his or her popular image. The fourth group symbolically does not participate in voting, and consider the results of elections to be already predetermined.

For example, a NGO representing seventy-eight thousand voters of the town Taldy-Korgan has invited the Center of Support of Women, 1500 persons, to participate in a sociological research project entitled, "My Suffrage." Research results have shown the following: twenty-eight percent of study participants do not know features of Kazakhstan's electoral system, thirty-five percent are not familiar with the form for filling of the bulletin, and forty-six percent do not indicate any interest in electoral politics owing to the absence of public information about candidates. In free and fair elections thirty-four percent of respondents do not trust the results. From a study of 142 women in March 2001 in Almaty and its surrounding area, sixty-two percent of respondents noted that there were infringements upon their political rights, including the right to fair elections. The high prevalence of such infringements has led many women to political apathy. As a result a significant number of women were ignored in the 2003 September elections by local authorities.

The political parties of Kazakhstan articulate unique approaches to promoting the political activities of women. For example, the Political Program of the Civil Party of Kazakhstan claims that it pays the most attention to increasing women's role and place in society and supporting strict observance to the principle of sex equality. The Civil Party demands that the government carry out strong demographic policies such as: increasing the birth rate, supporting large families, and decreasing maternal and infant mortality rates. In light of the increasing rate of urbanization and social and economic modernization, the Party suggests the State reconsiders its definition of large families and public forms of support for them. In a modern state, a family with three children should be considered a large family in order to create a positive demographic balance.

Nothing was spoken about sex equality in the platform of former Republican Peoples Party of Kazakhstan. The "Social Policy" section proclaimed that all measures will be taken to restore an appropriate population level by increasing population growth rates. Women will be voluntarily emancipated from excessive heavy work, and return to the woman's historical sphere of childcare and household work. Family-household attitudes will be revived on the basis of national traditions.

A pre-election platform of the former "National Unity of Kazakhstan" union specified that women as well as aged people and youth are more than twice as likely to suffer from pressures associated with economic and social problems. Many social problems in our society have created a heavy burden for women. There is wide spread discrimination of women in the family, society and state. A real way to influence policy is to question the broad engagement of women and youth in power structures. It is necessary to recognize the political slogans that held the empty promise for community conditions of a former mode. A woman is called upon to not only to deal with problems within the family, but also to choose a sphere of activity. Today, women do not fully participate in or accept state decisions. It is necessary to make state institutions recognize the problems of women by encouraging women to become ministers, leading politicians, and heads of state.

The former liberal movement of Kazakhstan emphasized the need to expand opportunities for women to participate in political life and to take managerial positions in all levels of society in public and private sectors. The law opposed infringements of the rights of women to associate, be hired, and have access to professional opportunities and promotions based on their child bearing and child rearing roles.

Significant attention is given to the improvement of women's position in the Communist Party of Kazakhstan's platform. Section IV, "Forms and methods of activity of the Communist Party of Kazakhstan," states that the Party "actively contains to support female organizations and counts on their support in struggle for social justice."

The democratic party of Kazakhstan, Ak Zhol, considers the development of communication strategies and cooperation with other public associations to be important.

The term "mainstreaming" precisely illustrates the desire of female NGOs to become a real and influential force in the political life of Kazakhstan. They aspire to balance development with the wish to participate more actively in national and world policy and to participate in negotiations.

To make these wishes a reality, political, legislative, administrative, economic, organizational, and social measures will be developed to achieve policies that ensure the right to equal opportunities for women and men.

The equal rights and opportunities of female NGO's is understood to be guaranteed by the Kazakh State and protected by the Constitution of the Republic of Kazakhstan and other acts. These documents require women and men to have equal political, civil, economic, social, and cultural rights. For example, the female selective block considers that all political strategy and programs should be reviewed for gender discrimination and also that equal rights assume also the equal responsibility of every person irrespective of sex to abide by the law.

Including the majority of women in Kazakhstan's political process is complicated by the prevalent stereotype that policy-work is basically a male-only business. This point of view is repeatedly shown and in the language of the law. For example, the Feministic League of Almaty's examination of some statutory acts influencing an electoral system revealed plenty of linguistic sexisms, pushing voters to choose in favor of male candidates. With such sexist clauses about the electoral system in the Constitution, it is no wonder women's participation is poor. Furthermore, the grammatical style used in the text of some documents of the district commissions concerns exclusively men.

In a 2003 study, women considered the principal causes interfering with their broad participation in political life to be the: i) absence of long-standing traditions of women's political participation; ii) non admission or replacement of women from supervising and prestigious public posts; ii) passivity of many women - who have been accustomed to waiting for an invitation to become a politician; iv) insufficient knowledge of political and public processes; v) difficulties in overlapping such work with family duties; and vi) fear of condemnation from family and societies.

For the growth of Kazakhstan women's political activity, it is necessary for them to overcome their lack of professional preparation and absence of or insufficient financial support, and the influence of orthodox structures and authorities on their political activities. In order to promote women in authoritative positions, a donor network needs to be created, which will enable more women to be elected to parliament and local authorities. Such a network will help female candidates build strong pre-election campaigns and mobilize voters - both women and men. In the United States of America, for example, Emily's List, which was enacted in 1985, has allowed many women to become senators, congresswomen and governors.

The reference to cultural rights as a result of the traditional Kazakhstan mentality, should not justify differences in opportunities for women and men in realizing their political rights. Patriarchal ideas resonate everywhere in Kazakhstan. For example, the vice-speaker of the State of Duma from the Liberal Democratic Party of Russia considers that "women want a good husband". The history of Kazakhstan's women's movement includes arguments against women's active participation in politics. Thus examples of Indira Gandhi and Margaret Thatcher and others are quite often treated as rare exceptions to the general rule about women's inability to be effective in politics. Expanding opportunities for women in political and public life is quite often considered by certain groups of people to be "letting out gin from a bottle." Quite often the passive behavior of women is construed as an advantage since it would not

interfere with men's political business. Arguments against the active participation of women in political life are standard.

Oft heard phrases subordinate women and include: "if women will interfere with policy who will cook food?;" "women are not active and not capable of political activity;" and "the women's movement consists of old maidens, widows, and childless women." It is possible to hear such advice as, "Kazakh woman in general should be silent!"

The absence or restriction of political and other rights for women in some states may be attributed to the religious and spiritual life in these countries. However, in these countries there is a process of involving women in public policy.

In Kazakhstan special measures must be directed at accelerating the full equality between men and women. Kazakhstan women in public positions of authority have more opportunities to participate in decisions about the most complicated state problems. For example, such female politicians as Z.Fedotova, S.Kadyrova, N.Kajupova, A.Samakova, G.Karagusova, Z.Battalova, V.Sukhorukova, A.Arystanbekova, T.Kvjatkovskaja and many others are widely known in Kazakhstan and abroad.

It is necessary to generate mechanisms to achieve gender equality in Kazakhstan's political life. One of the priorities of party policy should be to increase the number of female candidates represented in public office. For this purpose, it is necessary to create a quota for female involvement in executive and representative state bodies, and institutions of local governments. In elections, it is possible to create special districts where female candidates stand. The purpose would be for women to hold at least thirty percent of the national political posts. This system has been approved both by female NGOs, and international political bodies, including the Economic and Social Council of the United Nations. It has also been repeatedly referenced in the 1995 Beijing Platform for Action. The achievement of equality for women in political representation is important not only for the realization of their rights, but also for granting them an equal vote on development laws and policies. Such equal involvement of women in politics can encourage the promotion of women in other spheres of public life, for example the financial sector. In a society where gender stereotypes are reflected in the priorities of state policy, the countries of the Commonwealth of Independent States basically define men as strong. For example, only 167 deputies in Russia's State of Duma, where 226 votes in favor were necessary to pass legislation, supported the idea of a quota system for female representation in state offices.

The international community formulated fifteen indicators describing gender equality. The third group of indicators reflects women's participation in authority positions and their powers. These are positions in parliament, municipal offices, and administrative posts. Quotas can be considered a provisional measure for achieving an equal gender balance in society. Soft (recommendatory) and rigid (obligatory) quotas can be allocated. Quotas, accepted in a number of European countries, have led to the substantial growth of the number of women (up to forty percent) in decision-making posts. The efficacy of this social mechanism depends on the powers given to women and their professionalism. The formal quota of thirty percent-female participation in all state bodies existed in the Union of Soviet Socialist Republics (USSR). However, a woman's physical presence did not mean that she substantively participated in decision-making.

General Recommendation No 5 of CEDAW recommends the establishment of special quotas in State Constitutions or in one of the laws so that all the appointed state commissions, committees, and councils would not have less than forty percent of their representatives be of one gender. The Committee of the Elimination of Discrimination Against Women in its recommendations to Kazakhstan from January 26th, 2001, suggests the Kazakh Government takes steps to develop special measures in conformity with clause 4 (1) of the Convention and to track performance of these measures for increasing the quantity of women in bodies at all levels and in all spheres of government. The Government of the Republic of Kazakhstan repeatedly declared the need to increase representation of women at all levels of state decision-making. As of July 19, 1999, a Kazakh Governmental Order, about a national plan of action on improving the position of women in the Republic of Kazakhstan in the section "Women in structures of authority," addressed the issue of women's equal political participation. In 2000, the Order required research to be carried out about a quota for female participation in state agencies, and political parties.

The Kazakhstan electoral system does not yet provide the measures to induce political parties to attract women to run as electoral candidates for state posts. In the parliamentary elections of 1999, several parties' lists of electoral candidates consisted only of men. The Party of Revival was Kazakhstan's only party to put forward an equal number of female and male candidates. Another reason for the lack of female candidates is due to women's fewer financial resources. During the election campaign of 1999, there was an indication that modern and expensive pre-election technologies were used, but female candidates did not have the means to obtain them. As a result the number of women acting as deputies in Parliament has decreased.

Introducing a gender quota is necessary for fair and equal gender representation in political party structures. Currently, women make approximately forty-five percent of rank-and-file members of Kazakhstan parties. As of October 2003, there were a total of 866,324 members of various parties in the country. Among them, 388,004 are women and 478,320 men. These figures show that in Kazakhstan today it is necessary to consider the opinion of women during the formation of political parties. However the occurrence of female candidates on party lists does not mean political authority is redistributed to advantage of women. It is necessary to create a gender policy for parties about electoral candidate preferences to encourage them to include an equal distribution of men and women in electoral party lists. The leader of the female NGO, "The International Ecological Association of Women of the East," Ms. Ilieva, suggests, the promotion of candidates from political parties where both men and women can be present on the electoral list. Leaders of other female NGOs suggest no less than half of all constituencies can register only women or only men, so that following elections men and women hold varied political posts. It is necessary to develop and introduce legislative mechanisms about equal electoral candidate gender preferences to increase the promotion of women on decision-making levels, especially in spheres where women make up the majority of the labor force.

To address these questions in Kazakhstan, actions to ensure that political parties are operating in the interest of women were undertaken repeatedly. For example, in 1999, leaders of Kazakhstan's female public associations created a party, "the Political Alliance of the Female Organizations." In 2000, under the chairmanship of Raushan Sarsembaeva, it was renamed the Female Democratic Party. In 1995, the first female party leader was elected in Kazakhstan:

writer Altynshash Dzhaganova, of the Party of Revival of Kazakhstan. One of the overall objectives of this party was to actively include women in political life. However, these parties did not manage to pass the re-registration required by the Ministry of Justice of the RK.

If the law or other statutory acts directly or indirectly impinge upon one's political right because of gender, the person whose rights were limited should have an opportunity to campaign for the cancellation of the discriminatory statutory act. As of March 5th, 1997, the Concept of a state policy for the improvement of the position of women marked that the constitutional principle of equality between men and women is insufficiently supported by the current political system. It is necessary to also agree with the conclusions of the concept of gender policy in the Republic Kazakhstan, approved by a Governmental Order of the Republic on November 27th, 2003. The conclusions state that "it is necessary to make achievements in ensuring real gender equality in the country." The concept of legal policy in Kazakhstan as of September 20, 2002, takes into account the need to maintain the political culture of the population and work towards the perfection of selective legislation.

Discrimination of women in political life should be forbidden in some administrative acts, including, acts concerning an individual's eligibility to register for political parties. For example, the Republic of Kazakhstan's law about political parties, specifies that membership in political parties cannot be limited because of gender. Similarly, article 7 of the "Law of the Republic of Kazakhstan on political parties," passed on July 15th, 2002 states, "a political party is not supposed...to consider gender attributes." Thus the term "gender attributes" is used in Kazakhstan's legislation for the first time in the text of this law.

Female NGO's consider this law unreasonable and argue that it should be revoked, as the rights and freedoms of the person and the citizen can be limited only to protect constitutional order, public order, and the rights and freedom of the person, including the health and morals of the population (Article 39 of the Constitution of Kazakhstan). Restriction on the rights and freedoms of citizens on political grounds is not considered legitimate. Laws and other normative legal acts recognize the rights and freedoms of the person and the citizen to be enshrined by the Constitution. Those that do not are cancelled and not subject to application (Article 74 of the Constitution of Kazakhstan).

The use of the term "gender attributes" in a prohibitive context demands a serious legal substantiation. In the opinion of this paper, such interdiction contradicts the international obligations of the country and Constitution of Kazakhstan. The interdiction of the creation and financing of certain kinds of public associations is mentioned in the Constitution of Kazakhstan. But there is no provision that specifies mutual gender relations. In Kazakhstan, the political party activities of other states, religious-based parties, and the financing of Kazakh parties by foreign individuals, states and international organizations are not allowed. Any actions that may undermine Kazakh's interethnic agreement are unconstitutional.

Public associations of Kazakhstan should unite efforts to increase the participation of Kazakh women in political life. The coordination of female NGOs with others NGOs and trade unions to lobby more actively for the ratification by the Kazakh Parliament of the law "About the equal rights and opportunities of men and women in Kazakhstan" must be strengthened. Kazakh public associations must work together to engage in regular dialogue with state bodies about the political promotion of female leaders. The Kazakh government must work to provide by

means of the public, competent national courts and other official bodies, effective measures to protect the human rights of women against any act of discrimination, particularly in the sphere of women's political rights.

Ferdous Ara Begum¹

Ageing and the Discrimination Against Older Women's Human Rights: An Analysis from the Perspective of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

Introduction

Population ageing is a global phenomenon due to improvements in basic health care and living standards, and declining fertility rates. While both men and women face discrimination due to old age, women experience ageing, and thus discriminatory biases, differently. Gender relations impact the entire life cycle. From birth to old age, an individual's access to resources and opportunities and life choices are influenced by gender. Good health, economic security and adequate housing are essential requirements to age with dignity. Older women in both developed and developing countries face difficulties in equally accessing these basic standards of living.

The impact of gender inequalities on an individual's education and employment opportunities and access to health services increases over his or her lifetime. As a result, older women are more likely than older men to suffer because they are more susceptible to a life of poverty, where their basic needs are insufficiently met. Former UN Secretary General, Kofi Annan, stated in March 1999, during the International Year of Older Persons, "Women comprise the majority of older persons in all but a few countries. They are more likely than men to be poor in old age, and more likely to face discrimination."

The CEDAW Convention is a landmark tool for setting global standards of gender equality. The CEDAW Committee monitors and guides the domestic implementation of the Convention by the 186 states that have ratified and are thus parties to the Convention. This has significantly increased the responsibility of states to ensure and protect women's—including older women's—abilities to exercise their human rights.

The CEDAW Committee recognizes that age is a factor that impacts the multiple forms of discrimination against women. The Convention is an important tool for addressing the specific ways in which older women's human rights are deprived and violated.

In its forty-second session, the CEDAW Committees made a ground-breaking decision to adopt a general recommendation on the protection of older women's human rights. This general recommendation will explore the relationship between all the articles of the Convention and ageing.² It will provide a gendered analysis of older women's human rights and the multiple forms of discrimination they face as they age. The proposed general recommendation will also provide guidance to both State Parties and NGOs on the inclusion of older women's rights in their reporting.³

¹ Member, United Nations (UN) CEDAW Committee

² CEDAW/C/2009/II/WP.1/R (12 May 2009, pre-session working group for the 44th session)

³ CEDAW/C/2009/II/WP.1/R

The general recommendation on older women would enable the Committee to focus on a specific agenda, so that effective guidance and recommendations could be provided to State Parties. It would also give older women's rights greater visibility and make them a priority for State Parties, NGOs and the broader human rights network. The general recommendation on older women would contribute to the fulfillment of Secretary General Ban Ki Moon's call, on the International Day of Older Persons, October 1, 2008, "Let us redouble our efforts to realize the rights of older persons, and make the dream of a society for all ages a reality."

Demographic Ageing

The demographic study of ageing reveals that women are more likely to live longer and to live alone than men. Past Secretary General, Kofi Annan, stated at the 2002 Second World Assembly on Ageing in Madrid, "The world is undergoing an unprecedented demographic transformation. Between now and 2050, the number of older persons will rise from about 600 million to almost two billion. In less than 50 years from now, for the first time in history, the world will contain more people over sixty years old than under fifteen". In fact demographic ageing is happening faster than predicted.

Current UN figures estimate that in thirty-six years there will be more people over sixty than children under fifteen around the world. The same data set estimates the number of older people in 2050 will be over two billion, or twenty-two percent of the global population. This is an unprecedented doubling of the current eleven percent of the world's population that is over sixty.⁴ The majority of older persons, fifty-five percent, are women. As indicated by the UN Department of Economic and Social Affairs (DESA) statistics, eighty percent of men over sixty are married compared to only forty-eight percent of older women. There are eighty-two men for every hundred women at the age of sixty; there are only fifty-five for every hundred women at the age of eighty. Older women continue to outnumber older men.

Such unprecedented demographic trends have profound human rights implications and increase the urgency of using the CEDAW Convention as a tool to address the discrimination experienced by older women. At present there is no other legally binding international human rights instrument that specifically addresses this issue, as older women are often ignored in the local application of human rights law.

The CEDAW Convention and Older Women's Human Rights

The Convention on the Elimination of All Forms of Discrimination against Women is a living instrument mandated to eliminate all forms of discrimination against women throughout their lives. This mandate encompasses the full recognition and protection of older women's human rights. On February 1st, 2002, at the Second World Assembly on Ageing, held in Madrid, the

⁴ Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2008 Revision*, <http://esa.un.org/unpp>, Thursday, April 09, 2009; 5:06:41 AM.

CEDAW Committee adopted the statement, “special attention [should] be focused on the special needs of older women.” The Committee recommended that the physical, financial and emotional needs of older women be addressed, and older women’s access to health care improved. The Committee placed strong emphasis on the need for governments to collect and analyze statistical data disaggregated by sex and age. This will allow policy makers to more effectively assess the living conditions of, poverty amongst, and violence against older women. Policy-makers will thus be better equipped to implement gender sensitive policies with a life-cycle approach to older women’s economic and social well-being and empowerment.

The Committee has increasingly addressed in its concluding observations, including a list of issues and questions, as well as follow-up accountability mechanisms, the different forms of discrimination faced by older women in various countries. For example, in the Committee’s 2008 review of Japan’s compliance to the CEDAW Convention’s provisions, it mentioned in its concluding observations older women’s medical needs. A similar example, is the the Committee’s reference to the lack of identity documentation in its concluding observations for Mozambique’s 2007 review. In January 2010, at the forty-fifth CEDAW Session in Geneva, Committee members raised older women’s issues for all eight reporting countries.

The Committee was especially attentive to Malawi’s review; where discriminatory gender-based issues include witchcraft allegations, mob trials, and the killing of older widows in order to seize their property. In the case of the Netherlands, older women’s equal access to the health care system was an issue. However, despite the Committee’s concern for the situation of older women, their rights are not systematically addressed either in State reports or NGO shadow reports. In the majority of cases, older women and the discrimination they experience are invisible. For example, in Finland, an elderly woman was recently discovered in her apartment two and a half years after her death.⁵ To ensure older women’s enjoyment of their human rights and fundamental freedoms, State Parties are under the obligation to respect, protect, promote and fulfill these rights. The Convention focuses on discrimination, as women tend to suffer disproportionately from various forms of discrimination. Ageing makes this situation more complex. The Committee has expressed its concern about the lack of statistical data, disaggregated by age and sex, regarding abuse, neglect and violence against older women. There is also a need to better tabulate older women’s systematic vulnerabilities in respect to their financial, medical and housing needs, including their exclusion from national identification networks.

Older women must not be viewed as victims, but recognized for the positive economic and social contributions they have made throughout their lives, both to their families and to society. They must also be valued independently for their economic contributions. They must not be subjected to discrimination because of age and or gender. Older women’s needs vary according to their age and physical condition. Policy makers need to recognize this reality and take it into account.

⁵ Finnish CEDAW member, Niklaus Bruun, shared this information with the author.

Older Women and Discrimination

The rights of older women may be violated either on the individual level or on the institutional level. Various forms of discrimination lead to different types of rights violations. Discrimination against older women is often based on deep-rooted cultural and social bias. The impact of gender inequalities throughout a woman's life is reflected in old age, and often results in unfair resource allocation, maltreatment, abuse, gender based violence and the prevention of her easy access to basic services. Older women often face discrimination in the work place. Their ownership of, or access to land may be restricted due to discriminatory inheritance laws and practices. In many cases, they are marginalized and deprived of equally participating in the social, economic, cultural and political spheres of society.

Gender and age discrimination, accompanied by physical and emotional vulnerabilities, unsatisfactory arrangements for independent living and insufficient appreciation by members of one's family and or community, make the life of an older woman more difficult, and her rights more likely to be violated. As many women age and their independence declines, they become more vulnerable to abuse, exploitation and violence. Older women in prison, older sex workers and older disabled women face especially severe neglect and abuse as they age; they also face insecurities in respect to their financial, medical and other basic needs.

Negative stereotyping of older women, inadequate old age pensions and the impact of climate change, natural disasters and armed conflict are factors that lead to specific and contextual vulnerabilities. Older women often play a crucial role, as care-givers and parent substitutes, in families affected by economic migration or the HIV/AIDS pandemic. These important contributions often go unrecognized and are undervalued.

Older women, who are poor, disabled, belong to minorities, and or are touched by sexuality issues, often experience many forms of discrimination. Many older women face neglect, as they are considered no longer economically or reproductively useful, and a burden on their families. In addition, widowhood, divorce, lack of elderly care-givers, post-menopausal difficulties and the absence of geriatric medicine and health care contribute to the discrimination that prohibits older women from enjoying their human rights.

Ageing in Developed and Developing Countries

While both developed and developing countries grapple with the issue of population ageing, it is poised to become a particularly critical issue in developing countries. According to the UN Population Division, currently sixty-four percent of the world's older people live in less developed countries. By 2050, this figure will rise to 80 percent. Similarly by 2050, the proportion of older persons in less developed countries is expected to rise from nine to twenty percent, while the proportion of children will fall from thirty to twenty percent. The number of older women living in less developed regions will increase by 600 million between the years 2010 and 2050.

There are some major demographic differences between developed and developing countries. In developed countries there is a larger concentration of population in urban areas, whereas in developing countries a higher percentage of older persons live in rural areas, often in multi-generational households. Due to populations' different dynamics and socio-economic trends, policy actions will be different in developed and developing countries. Population ageing is poised to become a major issue in developing countries, as their populations rapidly age in the next forty years. This demographic shift presents major challenges to developing countries' allocation of public resources.⁶

Older Women's Rights as a Part of the International Human Rights Machinery

Age is rarely specified as a prohibited ground for discrimination under international human rights law. Incorporation of a gendered perspective in all policy actions about ageing, as well as the elimination of discrimination on the basis of age and gender is a great challenge in today's world. The UN's concerns on ageing were first recognized in the 1983 first World Assembly on Ageing in Vienna, where an International Plan of Action on Ageing was adopted. This plan outlined the rights of older persons. In 1991, the UN adopted a set of principles for older persons and marked the 1st of October, as the International Day for Older Persons to recognize older persons' contribution to development. The 2002 Second World Assembly on Ageing in Madrid, adopted the Madrid International Plan of Action on Ageing. The aim of this Plan was to put ageing in the mainstream of development processes and to promote and protect the human rights and fundamental freedoms of all older persons. Included in the Plan, is an older woman's right to development, so that she can equally and fully participate in the development process. Combating discrimination based on age and promoting the dignity of older persons are important goals of this Plan of Action.

The 1983 and 2002 Plans of Action on ageing are non-binding documents. Thus, governments are not legally bound to implement them or provide public resources to ensure the substantive realization of their provisions in domestic law. The 2002 Plan also lacks any mechanism for monitoring domestic implementation efforts, including the incorporation of a gender perspective in all policy actions on ageing.

However, the major United Nations treaty bodies, conferences and summits have set objectives and made commitments, which intend to improve the economic and social conditions of all human beings. The Convention on the Rights of Persons with Disabilities (2008) protects the rights of older disabled people, including the right to social protection, and calls for the provision of age sensitive responses. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (1990) outlines that State Parties must not discriminate against migrant workers or their family members on account of age. The Committee on Economic, Social and Cultural Rights (General Comment 6) states that State Parties should pay particular attention to older women, who are often in critical situations without the entitlement to an old age or widow's pension. The Protocol to the African Charter

⁶ Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2008 Revision*, <http://esa.un.org/unpp>, Thursday, April 09, 2009; 5:06:41 AM

on Human and Peoples Rights on the Rights of Women in Africa (2003), the Beijing Declaration and Platform for Action (1995), and the Programme of Action of the International Conference on Population and Development (1995), explicitly prohibit discrimination against older women based on age and outline older women's rights to freedom from violence and to be treated with dignity.

Older Women in Different Regions of the World: Examples of Good Practices

Asia

In South Asian countries older people are most likely to live with members of their extended families, such as, their sons, daughters and/or grandchildren. Despite the strains of migration and urbanization on traditional support systems, the societal expectation is that a family will take care of its older members.

In many rural areas a large proportion of older people live in multigenerational households with inadequate facilities. In many cases they are treated as a burden to their families and suffer from abuse and neglect. Reports commonly include accusations of abuse in long-term care facilities from family members or caregivers. In most cases state support and national legal systems fail to sufficiently protect older people.

Women over sixty are most likely to be widowed in Northern Africa and Central Asia. According to a 1991 census, about ten percent of women in India are widows, compared to only three percent of men. Widowhood, alongside poverty, illiteracy, childlessness, social isolation and displacement, put older women at risk of physical, sexual and or verbal abuse and neglect.

The Government of Bangladesh adopted a new social protection mechanism, "the old age allowance," to benefit poor older persons. This program has successfully improved the economic conditions of older women. Similarly, the distribution of voter identification cards for all adults, including older men and women, has improved an individual's sense of security in old age. Because of the closed social system, family ties and respect for older people, elder abuse is not a major issue in Bangladesh. For example, both family and widow's pensions are available in the public sector.

In some countries, including Bangladesh, the retirement age in the public sector is fifty-seven years. This age is not appropriate when considering the average person's life expectancy. The retirement age should not be less than sixty-five years of age in order to create opportunities for older people. An older retirement age will enable individuals over sixty years of age to utilize their productive years to benefit society and establish a positive image for themselves in their country.

At present China has 143 million people over sixty years of age, which could rise to about fifteen percent of the population by 2030 and twenty-three percent by 2050. China's strict population policy, aimed at maintaining the population at 1.3 billion people, bars urban couples from having more than one child. This has disproportionately increased the proportion of elderly people in the country. Chinese demographers predict that the burden of the aging population will have a negative impact on national health and pension budgets, if the government fails to prepare for changing demographic dynamics by adequate budget allocations.

The China National Committee on ageing has taken several positive measures to address these challenges. The Committee is offering tax breaks to investors, who support public and private enterprises that will be directly impacted by population ageing, such as hospitals, and elderly home facilities. Increasingly, Chinese entrepreneurs are investing money, manpower and imagination into developing products for senior citizens.

For example, Jialantu, a company based in the southern Chinese city of Shenzhen, has developed a mobile phone especially for elderly people. Online shopping services for elderly people, who need home delivery, are a fast-growing business. Quite a large number of elderly Chinese people regularly exercise in community recreational areas. One will commonly see elderly people exercising in parks in the mornings. Such behavior is indicative of their attitude towards age, health and hygiene. In China most of the elderly people live with family. Due to the one child policy, if the sole young person in a family moves away for employment opportunities, elderly family members will be left to live alone. This is now one of the greatest challenges facing elderly people in China.

In the Royal Government of Bhutan's 2008-2013 National Plan of Action for Gender, ageing and mental health issues were included as priority areas due to the rapidly ageing population. Bhutan's changing population dynamics require urgent action: to estimate and project changing trends in older people's physical and mental health, and need for elderly care facilities.

Africa

In Sub-Saharan Africa women traditionally enjoyed a high status in their later years, as healers or teachers of traditional skills. Research carried out by HelpAge International, however, reveals that in some regions of Mozambique, Tanzania, Ghana and Burkina Faso, older women are often subjected to accusations of witchcraft, which can result in psychological abuse, violence and in extreme cases, death. Research shows child mortality and morbidity, gender inequality, social exclusion of older women, and a lack of awareness of older people's rights to be the key underlying factors for witchcraft accusations.

United Kingdom

In the UK, research shows that older women are considerably poorer than older men and the oldest women in society are the poorest. On average, a woman's income in retirement is only fifty-seven percent of a man's.

This gendered gap between women's and men's pension earnings in retirement has come about due to interrupted employment patterns, low paid work, lack of access to jobs with occupational pensions and rising divorce rates.

Due to continuous pressure from NGOs older women's health needs are included in the upcoming Equality Bill of UK.

USA, New York

In February 2010, New York City experienced its worst snow blizzard in a century. US media played a praiseworthy role protecting older people, who were trapped in their homes. For instance, the New York One (NY1) TV Channel broadcast appealed to the general public to help elderly neighbors, who were trapped in their homes and in need of food and medicine.

Some Terminology Used in this Draft

Who is old?

The United Nations defines older people as those people sixty years of age and older. People over eighty years of age are considered to be extremely old. The definition of old is not fixed however, and varies in different countries. In developing countries, typically characterized by large agro-based economies and a lack of formal social security systems, old age is not linked to retirement, but to the age at which an individual ceases to be able to provide for himself and survive independently.

Age discrimination

Refers to actions that are intended to deny and restrict opportunities to people because of their age. This is often associated with ageism. Ageism significantly affects many public and private spheres of society, including education, business, politics, law, popular media, home life and mental, emotional and physical health. Ageism impacts one's intergenerational relationships, political participation, and access to information, employment opportunities, financial services and health care.

Age and gender based discrimination

Refers to social mechanisms—law, policy, public attitudes – that deprive people from fully participating in social, economic, cultural and political affairs solely because of their age and gender.

Elder abuse

Refers to a single or repeated act, or lack of appropriate action, occurring within any relationship with an older person, where there is an expectation of trust, which causes harm or distress to the older person. There are different types of abuse, including emotional, physical, sexual and or financial.

Neglect

Refers to inaction, which deprives people of adequate food, clothing, comfort and/or medication. Elder neglect or abuse can occur in a private residence,, hospital or Nursing Home. People the elderly trust and know either intimately or as acquaintances – such as family members, friends, paid health workers or caregivers - are often those who inflict neglect and abuse.

Specific Areas of Concern in and Recommendations for the CEDAW Convention

Article 1, Article 2

State Parties should ensure the full realization of older women's human rights and fundamental freedoms, including the elimination of gender based discrimination. There are numerous examples of law and practices in different countries that discriminate against older women. For example, many older women, who live in rural areas and are a member of minority communities, do not have access to government-issued identification (ID) cards and old age

allowances. Identity documentation is required to have easy access to economic, social, political and civil entitlements. In Bolivia, for example, older women need to produce a birth certificate to obtain an identification card, which is required for a pension and health insurance. Yet, many older, rural women are unable to prove the date and or location of their birth because they were never issued an ID card. It is therefore imperative that states party to CEDAW review legislation and practices with a gender- and an age-based perspective.

The full advancement of women cannot be achieved without government acknowledgment of and commitment to a life cycle approach. This critical approach addresses how different stages of women's lives - infancy, childhood, adolescence, adulthood and old age - impact their enjoyment of and ability to exercise their human rights. The rights enshrined in the Convention are applicable at all stages of a women's life, but in many countries ageism and age discrimination continue to be tolerated and accepted at the individual, institutional and policy level. Very few countries have passed legislation prohibiting discrimination based on age and gender.

Governments should collect statistical data disaggregated by sex and age on the situation of older women. Data collection should focus on poverty, illiteracy, violence against older women, health, housing, older women as caregivers for young people affected by HIV/AIDS, older women living in areas of conflict, and older minority, migrant, rural, and disabled women.

In 2003, the CEDAW Committee raised concerns in its concluding observations of France about the consequences of discrimination throughout French women's lives, which leads to poverty in old age. The Committee recommended that the French government conduct research on older women's needs and develop and implement measures to address their needs.

Article 3, Article 4

Governments should adopt appropriate measures, including temporary special measures under Article 4(1) and General Recommendations 23 and 25, to eradicate illiteracy among older women, especially in rural areas and urban slums. In West Asia, for example, illiteracy is high among older women because they did not have access to education opportunities in their youth, as tradition dictated at that time.

State Parties should enact special measures to create opportunities for older women to equally participate, free from discrimination, in the decision making processes of a state's political, social, economic and cultural affairs. States party to CEDAW should adopt the United Nations Security Council Resolution 1325 on women, peace and security, as it applies to a state's domestic affairs. This Resolution benefits older women living under foreign occupation and or in armed conflict zones, refugee women and internally displaced older women.

State Parties should ensure that emergency responses, after natural disasters and in conflict zones, take into account the needs of older women. An emergency response should be designed to equally protect men and women and executed in a way that accounts for the specific needs of older people.

Article 5, Article 6

Negative stereotyping of older women and harmful traditional practices can manifest in various forms of elder abuse and violence. Anecdotal evidence suggests that older women are more

likely than older men to have their human rights violated because of violence and abuse. For example, many older widows in the rural areas of Malawi and Tanzania are subjected to witchcraft allegations and face the risk of death from lynching; in Botswana older widows have to wear ugly clothing to mourn their husbands' death. To eliminate negative stereotyping and public stigma against older women, governments should initiate nationwide reviews of the problems of neglect, abuse and violence against older women.

In order to come up with more effective prevention strategies, laws and policies to address the problems and underlying factors of neglect, abuse and violence against older women, State Parties need to use different forms of media to educate people.

Apart from legislative measures, governments should encourage the media to correct its negative stereotyping of older women as dependent, fragile and useless. The media should be encouraged to instead focus on older women's positive contributions to their families and society. According to Help Age International, older women in developing countries are often the primary family caregiver, allowing other family members to work in paid jobs. This scenario indicates older women's vital contribution to economic development, even though their family work is unpaid and they are not independent wage earners. Governments should initiate research and prevention programs that include advocacy initiatives and information for older women about their rights and the ways they can access essential public services.

In the 2000 concluding observations of Austria, the CEDAW Committee called for particular attention to be paid to the physical, emotional and financial abuse of older women. In 2008, the Committee voiced a concern about the vulnerable situation of certain groups of women in Tanzania, including older women. In particular, the Committee was concerned about the vulnerable social situations of women, who suffer from poverty, intimidation, isolation, abuse and fear of death because of witchcraft allegations against them.

Article 7, Article 8

Older women are often discriminated against in politics, unable to equally participate in politics and underrepresented in public office. For example, older women, who lack identification documents, are often unable to vote. In some countries older women may not be allowed to form or participate in associations or other non-government groups to campaign for their rights. Furthermore, mandatory retirement ages may differ for women and men. A policy that privileges men with an older retirement age, discriminates against older women, who may wish to represent their government at the international level. Age specific public policies could create opportunities for older women to fully and effectively participate in the political, economic and social spheres of their societies.

Article 9

Older women, who are refugees, stateless, internally displaced, asylum seekers and or migrant workers, often face discrimination, abuse and neglect. Older women affected by forced displacement or statelessness may suffer from post-traumatic stress syndrome, which may not be recognized or treated by health care providers. In such a situation, older women are most likely denied access to health care because they lack legal status and documentation in their country of asylum, and/or experience cultural and language barriers to accessing services.

Article 10

Illiteracy rates among older women are often high, especially in rural areas. High illiteracy levels increase the likelihood of age discrimination, as illiteracy seriously limits older women's access to information about their rights, including their right to equal participation in development and community activities. In 2003, about ninety-four percent of women over sixty in Mozambique were illiterate. According to 2001 census data, about eight out of every ten rural women in Bolivia did not read or write. Access to vocational adult education, and basic literacy, numeracy and life skills training for uneducated older women is very important to ensure that they have equal access to basic public services and are aware of their rights.

In its 2002 concluding observations of Romania, the CEDAW Committee expressed concern about older women's high illiteracy rates and called for government measures to address this issue.

Article 11

Older men are more likely than older women to be formally employed. Many older women face discrimination in the workplace. They are forced to work in low paid or part time jobs without income security. Retirement ages also may differ between men and women. Very few older women have access to pensions because of their absence in the labor market. When older women are the primary caregivers in their families, they suffer the financial penalty of low pensions or ineligibility to receive a pension. Older women, who work both in and outside the home, suffer from the physical, mental and emotional stress of balancing paid work and care-giving obligations. State Parties need to take appropriate measures to address these issues.

In 1998 the CEDAW Committee voiced its concern about the early retirement policies for women in the Czech Republic and Bulgaria. In 1999, the Committee called upon Spain to pay more attention to women's pensions. In 2001, the Committee highlighted the difference in retirement ages between women and men in Vietnam and the negative affects of such a policy on rural women's economic security. The Committee recommended that Vietnam review and change its legal provisions regarding retirement age, in order for both women and men to retire at the same age. The Committee also called on Iceland in 2002 to review its pension schemes for women.

Included in the Committee's 2000 concluding observations of Lithuania, was a concern about the high proportion of unemployed older women compared to unemployed older men.

Article 12

Free access to health care services is very important for older women in order for them to enjoy a satisfactory standard of mental and physical health. Postmenopausal difficulties and diseases, the neglect of elderly disabled people, and the absence of geriatric medicine require special attention. Older women face a higher risk of chronic illness and disability. They are also more likely to contract degenerative diseases, such as osteoporosis and cervical cancer. In many countries there are inadequate health care services for older persons. In particular, inadequate long-term care services remain a persistent concern in many countries. Adequate and affordable medical care for the elderly in rural areas is also of great concern.

Postmenopausal conditions and diseases tend to be neglected in research, academic studies, public policies and service provisions pay more attention to countries few health personnel are trained in geriatric medicine. Thus health care services often inadequately care for older women's physical, functional and mental health needs.

Many poor older women, without private health insurance or access to formal social security, are unable to afford health care. This particularly impacts older women in rural areas, who may be unable to afford the high transport costs to reach the nearest health care facility. The HIV/AIDS epidemic has had a significant impact on elderly women. In many cases older women have to act as full-time caregivers for relatives living with HIV or AIDS, often to the detriment to their own quality of life. In the case where older women have contracted AIDS, there is often nobody able to care for them. Furthermore, older women, whose children have died of AIDS, are often left destitute.

As stated in General Recommendation 24 of the CEDAW Committee, State Parties should adopt a comprehensive policy to protect the health needs of older women. Governments should provide free and appropriate health care to all older women. This should include the training of health personnel in geriatric illness, adequate services, such as palliative care facilities, and the sufficient supply of medicine to treat illnesses that are attributed to old age, including chronic illness and non-communicable diseases. Comprehensive policy that addresses these issues will ensure that older women die with dignity.

In Tanzania, older women may be prevented from accessing free health care facilities, as they lack the proper identification documents to prove eligibility and receive care. The cost of traveling long distances to health facilities is another issue. High levels of illiteracy disadvantage women. Furthermore, older women continue to be excluded from HIV/AIDS programs both as program facilitators and as program participants, who receive information about prevention and care. In the UK, shortfalls in the availability and quality of health care for older people particularly impact women. Women constitute the great majority of the older people, who use health care facilities.

In 2001 the CEDAW Committee voiced its concern regarding the marginalization of older women's access to adequate health insurance in the Netherlands. It also called for special attention to be paid to older women in "Daily Routine" programs.

Article 13

Poverty is disproportionately common among older women due to unequal access to credit and labor markets, unequal remuneration and unremunerated household work. Governments should provide special support systems and collateral-free micro credit as well as encourage micro entrepreneurship for older women. State Parties also need to create recreational facilities for older women. The feminization of poverty is very common among older women.

Older women may not be eligible to claim family benefits, if they are not the parent or legal guardian of children for whom they care. Micro credit and finance schemes usually have age limit restrictions or other criteria that prevent older women from accessing them. Many older women, who are house bound, are unable to participate in community, cultural and recreational activities. Such isolation experienced by house bound older women, negatively impacts their wellbeing.

Article 14

Special programs should be tailored to address the physical, mental, emotional, and health needs of older women in rural areas. Particular focus should be placed on meeting the needs of ethnic and disabled minority women. In rural areas older women are overwhelmingly tasked with caring for grandchildren and other young family dependents due to the migration patterns of young adults. Older women also have to do much care-giving in families affected by HIV/AIDS. The public cost of caring for older women needs to be universally recognized and acknowledged.

In many countries the majority of older women live in rural areas, where access to services is difficult due to their age and poverty. The denial of rural older women's rights to water, energy, food and housing is very common in many parts of the world. Lack of appropriate and or affordable transportation can prohibit older women from accessing social services and cultural community activities. Poor older women in rural areas are disproportionately affected by climate change and natural disasters. Climate change interventions must address the needs of older women and provide financial and material support to protect their human rights.

In the 2001 concluding observations of Lithuania's CEDAW review, the Committee raised concern over the lack of data on older rural women's income, access to health and cultural opportunities. This highlighted a call for gender sensitive programs that address the needs of older women.

Article 15, 16

In many countries, one's marital status - to be a widow, single, or divorced - profoundly changes an older woman's status in society. It can result in discrimination against her, both in law and practice, particularly in terms of property and inheritance rights. Women, who are members of a minority group, are more likely to suffer from property and inheritance issues. Under some statutory and customary laws, women do not have the right to inherit or administer marital property upon the death of their spouse. Older women are particularly vulnerable to property grabbing, where family members or others seize a women's property. Older wives are often neglected in polygamous marriages once they are considered to no longer have the capacity to reproduce or contribute to the family's financial security. Traditional cultural practices known as "widow inheritance," force widowed women to remarry. Remarriage often occurs without the widow's consent and to a relative of her deceased husband.

State Parties should revise discriminatory inheritance and property legislation to ensure that all older women, particularly widows, can inherit and do not have their property seized by others, including family members.

In Ethiopia evidence from a local welfare association shows that the majority of older people, mostly women, had been forced out of their homes and to relinquish their assets in the countryside. Older women are especially vulnerable, as the death of their husbands leaves them to protect their assets, right and entitlements by themselves. Violence that older women may suffer whilst their property is being seized is rarely reported to the authorities. Older women generally do not have any other alternative after the death of a spouse, but to leave for major urban centers to earn their living as beggars, living in graveyards, or to seek refuge in religious institutions.

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Challenges Facing Arab Women with a Special Focus on Family Laws

Introduction

During the last two decades, Arab women benefited from a noticeable progress in fields, considered to be uncontroversial, such as the health and education fields. But health and education have not advanced the status of women or redressed inequitable gender relations. Very little progress, if any, has been achieved in other fields, what gender specialists call “strategic interests.” These include political participation, freedom from gender-based violence, equal access to decent work and equal access to decision making positions.

There is a difference between the situation of women and the position of women. The situation of women refers to the immediate condition of women, whereas the position of women refers to the status of women in society and social hierarchies. This distinction can also be understood in terms of practical needs and strategic interests. The practical needs of women, akin to the situation of women, tend to be immediate, short term and relate to daily needs such as food and shelter; they do not alter traditional roles and relationships. Strategic interests, on the other hand, tend to address the disadvantaged position of women, their subordination and their vulnerability to poverty and violence. They are premised on women as agents of change, transforming relationships, empowering women and fostering genuine legal and cultural change.

The most deeply held beliefs and values of all societies are reflected in their organization of gender relationships. It is generally recognized that, to date, no country in the world has achieved total equality between men and women and inequality impacts all spheres of activity, whether political, economic or social. It is also evident that women have made less progress towards gender equality in the Arab region than in any other region. In many fields, the gender gap is the largest in the world. For example, the region has one of the highest rates of female illiteracy in the world, standing at about 50 percent as compared to about 30 percent for Arab males; the maternal mortality rate stands at 270 per 100,000 live births; HIV infection rates, which low overall, are higher among female adolescents; Arab women’s economic participation remains the lowest in the world, representing **42 percent of Arab men’s**; and women account for less than 10 percent of Arab parliamentarians compared to 90 percent of male parliamentarians, also the lowest in the world. In addition, personal status and family laws remain largely patriarchal, and the exercise and enjoyment of the entire body of human rights law remains curtailed for women (RBAS draft gender strategy 2008-2011). These disparities show that public and State patriarchy in the Arab region prefer to invest and rely on men instead of women. Thus, an examination of gender issues in a society provides an entry point for understanding the larger society. While it is true that some progress has been made in some

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parts of the region, much resistance remains to any attempts to liberate Arab women from the bondage of male supremacy.

This is still so in spite of the fact that, the past decade, a majority of Arab countries witnessed unprecedented reform of legislation that used to discriminate against women. Several Arab countries also legislated new laws that introduce positive discrimination/affirmative action to make up for the deprivation of gender equality. These laws include such measures as gender quotas in elected parliaments and local councils.

During the past few years, four more Arab countries ratified the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW): the United Arab Emirates, the Sultanate of Oman, Qatar and Palestine. Their ratification of CEDAW brings the region to full ratification of CEDAW except for Sudan and Somalia. Meanwhile, Libya and Tunisia joined the Optional Protocol of CEDAW while Morocco lifted all its reservations on CEDAW; Egypt, Algeria and Kuwait also lifted some of their reservations. Egypt, Morocco and Algeria changed their nationality laws to grant citizenship to the children of women married to foreigners. Kuwait changed its election law in 2005 to allow women to equally practice their full political rights. As a result, in 2009, four women were elected as members of the Kuwaiti parliament without relying on any quota system. In addition, both Syria and Jordan changed their national laws concerning women's mobility and residence rights.

Morocco totally changed its family laws and reversed the grounds on which the previous laws were based. Other Arab countries changed parts of their family laws by increasing the age of marriage for women or increasing the age of maternal custody in case of divorce. Some countries established family courts, alimony funds or insurance funds for divorced women and children; others allowed women with child custody to keep the residence or some gave women the right to divorce "El Khule."² But the main assumptions and conceptual justification of family laws in these countries rooted in patriarchy.

Some Arab countries enacted different types of gender quota as in Palestine, Egypt, Iraq and Morocco to increase the number of women in parliaments. In 2007, Jordan has also assigned twenty percent of seats for women in local elected councils.

As for gender based violence, some countries, such as Morocco, issued laws that criminalize sexual harassment. Jordan issued a law to protect women from family violence, while Egypt and sultanate Oman issued laws criminalizing female genital mutilation (FGM). Moreover some countries issued new laws to criminalize the human trafficking of women and girls including Algeria (2008), Jordan (2009), and United Arab Emirates (2009).

With regards to the penal code, in several countries of the region, women are susceptible to harsher penalties than men charged with the same crime, especially in cases of so-called moral crimes. Crimes committed in the name of honour still take place. Only one or two Arab countries have specific laws that criminalize domestic violence or sexual harassment. As a result, women are unprotected from violence and perpetrators can escape punishment easily. There is also social stigma associated with women victims instead of social disapproval of the

² The khule grants women the right to divorce irrespective of a husband's consent, providing that women forgo their financial rights.

perpetrators of domestic violence. Several of the penal codes in the Arab region help create an environment of impunity, in which crimes such as rape and honour killing are both socially and, to a degree, legally tolerated. Sometimes, the judiciary stands on the side of those who perpetrate such crimes by providing reduced penalties in cases where “honour” is a motive. In Jordan for example, article 98 mandates the reduction of the penalty against a person who commits a crime when in a state of extreme fury over an unlawful dangerous act committed by the victim. Lebanon, Syria, Egypt and Kuwait have similar articles in their penal codes.

Patriarchy establishes the value system that is associated with such crimes authorizing men’s control of family “honour” and “morals.” Men therefore control women’s bodies because a man’s “honour” depends on a woman’s sexuality and purity. Men thus have the right to punish women who tarnish their “honour.”

In spite of many efforts to redress gender discriminatory laws, the majority of Arab women still suffer from discriminatory family laws; if not in totality, then in part. Also, many women cannot enjoy their full rights as citizens because gender discriminatory nationality laws continue to exist in the majority of Arab countries. Arab women remain governed by discriminatory articles in the majority of Arab penal codes.

Thus, three areas of law – family law, the penal code and nationality law – reflect the effect of a strong patriarchal systems that strive to make Arab women subordinate to men.

The legal system in a majority of Arab States still remains contradictory because it guarantees women their rights in the public domain but resists guaranteeing women their rights in the private domain. Because the legal system is male dominated, it strives to support polygamy, protect a husband’s right to unilateral and inexplicable divorce, avoid the sharing of assets accumulated during marriage, maintain male guardianship of children and condone the exercise of domestic violence without punishment - all in the name of “protecting the family.” Patriarchy is also bolstered by religious interpretations that claim men provide for the family and therefore rightly require family obedience. For example, the “Qwama” concept is used to justify how men are breadwinners and women therefore obey them. Religious interpretation is most often used to legitimize gender discriminatory family laws in the Arab region.

In summary, while equal rights between male and female citizens might be guaranteed in one part of a state’s legal corpus, such as the Constitution and civil laws, the empowerment of male citizens and subordination of female citizens manifests in other parts of the state legislation, such as citizenship law, criminal law and family law. Gendered family laws thus have a strong impact on citizenship because they organize the personal legal status of citizens in ways that give men and women different legal authority and thereby unequal legal status as citizens of the state.

Family laws in Arab countries reflect the centrality of the kinship structure and the state measures that aim at facilitating the preservation of religious identities.

Family Laws in Arab Countries

The position of men and women in Arab countries is defined by a multitude of customs and traditions. These customs and traditions order and give value to family and society and are heavily influenced by interpretations of Islam and by Christianity. In general, Arab society is patriarchal and the family, rather than the individual, is considered the main social unit responsible for the protection, welfare and livelihood of individuals. Society in general sees reproduction as the primary role of women: that includes raising children, and taking care of the household and all family members, such as the elderly and sick. Men are regarded as the sole breadwinners and heads of the family. Either through cultural tradition or by law, they have authority over what women can do, and how they behave both inside and outside the home.

Private patriarchy, in the domestic sphere, and public patriarchy, in the public sphere, challenge Arab women's progress. State control partnered with increasing public influence over religious institutions and an absence of strong women's movements, results in a widespread legitimization of controlling women's voice. Women are perceived to constitute a "moral" threat to the social order. Civil societies' and women's rights activists' advocacy and action plans to liberate women from patriarchy proves to be a challenging task in view of the present social and political climate. The traditional forces in Arab societies call for retaining "authentic" cultural and family values.

Patriarchy strongly opposes the promotion of strategic gender interests that require fundamental legal and cultural reform. Women activism is now caught between paradigms: religious traditions on one hand, and modernization on the other. Women are continually challenged to negotiate their position between two modes of patriarchy, private patriarchy - the authority of men over women in family and personal matters - and public patriarchy - as manifested through the state and the religious establishment. In many cases, public patriarchy coexists and reinforces private patriarchy by maintaining and perpetuating laws that empower patriarchy, such as family law, citizenship law and the criminal law.

Patriarchy persists in the Arab region due to kinship values, where priority, privilege and the protection of women are bestowed upon men. These values hinder Arab women's advancement and perpetuate women's subordination by men.

In addition, patriarchy, conservative religious interpretation and stereotypes build strong psychological barriers among Arab populations with regard to women's participation in the public sphere.

For many religious institutions, the role of women is symbolic of the struggle between Arab and Western values. These institutions criticize civil society organizations and even governments for supporting women's rights, accusing them of having sold out to the West. They also accuse these entities of not supporting a return to "traditional Islamic views" of women based on conservative interpretations of Islam.

For example, religious clergy recently approached the President of Egypt, asking him to reject any attempt by women's groups or the government to reform family law, because it is the only existing law that is based on Islamic "Sharia." In Kuwait, after four women were elected to

parliament, traditional forces demanded that they be veiled if they wanted to keep their seats in the Kuwaiti parliament.

There is a need to discuss and debate cultural aspects that hinder the empowerment of women and resist moves toward gender equality. It is also important to research and uncover the relationship between the patriarchal system in the public sphere and the one in the private sphere. Determining how to get women from all different walks of life engaged in such dialogue is a challenge.

Family law is considered to be a gendered legal corpus. Influenced by Islamic and Christian religious laws and jurisprudence, family law incorporates patriarchal notions of the differences between men and women. It is worth noting that the Constitutions of a majority of Arab states guarantee equal rights to both men and women. Some laws reflect gender equality allowing women to enjoy civil rights on an equal footing with men. For example, in trade laws, women have the same right to act as economically independent subjects as men while in some citizenship laws, women and men have the same rights with regard to political participation.

Constitutional and civil rights however, are, in practice, hampered by three laws that contain gender bias: citizenship law, criminal law and family law. In many Arab states, a woman cannot pass citizenship to her children if married to a non-national, but a man married to a non-national can. In criminal law, there are only mild jail sentences for 'honour killings' and the penal code often includes articles to decrease sentences for honour killings. Other laws governing adultery and prostitution are also gender discriminatory. In family law, the principle of male guardianship still exists. In several Arab countries, a woman is required to have a male guardian when contracting her marriage (her father, brother or another male kin). In Saudi Arabia, a wife may only travel if her husband consents. In Egypt, a woman teacher cannot work outside the country without the approval of a man relative. For a majority of Muslim citizens, family law grants a husband the right to four wives, unilateral divorce and repudiation. Conversely, a wife must raise a case in court if she desires a divorce. In several Arab countries, the legal age for marriage is not the same for men and women. With regard to divorce, a woman maintains child custody only until a son and a daughter reach a certain age. Family law does not guarantee divorced mothers a share in the marital home after this legal custody period. Moreover, the patrilineal family is empowered to take charge of the financial rights of children if the father is dead, even though the mother may have custody rights to the upbringing of her children. Finally, the testimony of a woman only counts as half that of a man's.

In contrast, contemporary Western legal systems do not distinguish between the public and private legal status of a citizen. Yet in most Arab legal systems, this distinction is central. An individual's rights and obligations in the public sphere are regulated by civil law, while a person's relationship within the family is regulated by personal status law, commonly known as family law.

In Bahrain, until 2009, a codified Personal Status (PSL) Law was nonexistent. A few years prior, the King initiated work to draft one, but there has been always a debate on whether to draft separate Sunni and Shiite PSL, or a unified PSL. The first part of the PSL in Bahrain for Sunnis was approved and there is still work on a second part for Shias. Until 2009, Bahraini activists generally promoted women's rights on a case-by-case basis. However, their petitioning often

prompted religious groups, who have the ability to mobilize greater numbers, to mount counter-demonstrations. With regard to Family and Personal Status Law, the Sunni version of the law passed, leaving behind a Shiite version and violating the country's Constitution with the exclusion of more than half of the population from the judicial process. This exclusion only deepens sectarian divisions in the country.

Passing a unified PSL in Bahrain is necessary, to reform the wide shortcomings, corruption and negligence in Sharia Courts, as well as the manipulative acts exercised by unqualified, incompetent and fanatical individuals. Although there were numerous calls to pass the law, the Authorities continue to delay the law based on the reservations of some religious groups in regards to the articulation, implementation and potential future amendments of the PSL. This is happening at the expense of all women, who continue to suffer from the absence of a unified PSL. It must be further mentioned that the authorities used the potential Family Law to exert pressure on religious groups and vice versa. The latest example of this was in February 2009, when an official resolution was issued to withdraw the draft law due to a controversy created by religious and social powers seeking political gains. The Royal Court was the key player in this manipulation of power, using its contacts with religious powers and the media to control public exposure of the subject whenever politically convenient.

Women's activists have had some success in lobbying the King of Bahrain for change; the King is sympathetic to the need for reform. In many Arab countries, the problem lies with parliament; it is difficult to get Parliament to legislate new laws, as parliamentarians are usually very conservative and members of powerful religious groups

However, some advances have been made before the new law came to existence. For example, housing regulations were amended, making it easier for divorced women to remain in the conjugal home. Women's groups won this change by lobbying the Ministry of Housing; there was no need for a parliamentary vote. Activists believe there is a long way to go, but things are progressing quickly and further reform is likely.

Morocco is the only Arab country that recently radically reformed its family law. In 1993, the *mudawana*, the family code drafted in 1957, only underwent minor reform. There was major resistance to change, but the 1993 reform demonstrated that the *mudawana* was not a fixed legal document; it could be amended. The *mudawana* assumed that women were subordinate to men and legislated double standards for men and women in marriage and divorce laws. Social change in Morocco left the *mudawana* looking increasingly outdated. Even though women's employment was increasing, there was no law related to women's income. Furthermore, the law did not address violence and harassment against women.

Moroccan civil society became increasingly organized—there were some 30,000 non-governmental organizations (NGOs) engaged in social issues related to women's rights. These organizations strove to raise awareness for women's rights issues. In the 2002 elections, thirty-five women entered the Moroccan parliament, assisted by a new quota system.

Following these elections, the King recognized that he had an opportunity to advance women's issues, a cause to which he was personally committed. In his capacity, as Commander of the Faithful, he announced a new family code and presented it to the Parliament. This code, which Parliament subsequently passed, is much more progressive than the old *mudawana*.

In support of the new family code, new family courts were established. Women were allowed to become family judges. Judiciary training was upgraded. Nevertheless, many challenges remain. Critics of the new family code continue to resist its implementation. Further reform requires both the state and civil society to be active in cementing the new family law through education, awareness raising and surveillance.

Since Jordanian Personal Status Law is not fully comprehensive, there have been cases when a judge, lacking a specific reference, had to refer to the *Hanafi madhhab* (school of religious law). In 2001, the government issued a new law, amending articles related to marriage, age, polygamy, and alimony. The law did not, however, deal with the issue of 'honour crimes,' as these crimes are only addressed by criminal law and criminal courts. Moreover, the law was considered temporary because Parliament was not in session at the time.

The differences in PSL from country to country can be partially explained by religious scholars' different interpretations of Sharia. Furthermore, many people mistake traditional values or customs for religion. In the Jordanian and Moroccan cases, fresh reviews of both religious and legal texts were crucial steps towards reform.

Opposition toward changes to family law takes different forms in different Arab states. In general, however, there is strong resistance to any reforms dealing with divorce, maintenance and terms of housing conditions. These are, of course, material issues related to the distribution of economic rights and finances; they reflect the distribution of power within the family as a social structure.

In several Arab countries, the debate on family law reform centers on whether there should be secularized family law, guaranteeing gender equality, or laws based on religious jurisprudence and interpretation, and providing greater justice for women. The resolution of this debate will depend on the strength of the religious establishment, political will and the acceptance of a secularized legal system by a majority of people.

Family Law in Egypt

In Egypt, cultural beliefs and traditions have always been important in shaping family law. The family code dates back to 1920 and is based on assumptions meant to keep the traditional patriarchal system intact. One such assumption is that husbands provide for their families and therefore, women are subordinate to their husbands and must obey them. The existing code gives men an unconditional right to divorce, while women must seek court approval. This approval is often only granted if a woman relinquishes all financial rights—including her dowry—or proves that her husband has been abusive—a difficult feat. This code continues to exist despite the changing social reality in Egypt. Now, many women work and contribute to the support of their households. In addition, women undertake the heavy unpaid family work, including childcare and care for elderly and sick family members. Such work is often unrecognized and undervalued. In general, family gender roles remain unchallenged. They are legally upheld and socially reinforced, preventing important social and cultural transformations from taking place.

All family legal matters in Egypt are governed by Shari'a law. Although some European laws supplement or replace some elements of the Shari'a in Egypt, family law remains largely unchanged. Since 1920, only minor modifications have been introduced to the Shari'a in the areas of marriage, divorce, and guardianship of children. Until 1955, religious courts were entrusted with cases of Personal Status Law; after 1955, such courts were banned and judges with law degrees replaced religious judges.

Calls for the reformation of Egyptian PSL date back to the days of feminist Egyptian leader Huda Shaarawi. Shaarawi called for several reforms of the PSL, including the raising of the age of marriage for girls and amendments to articles on divorce and alimony. As a result, an amended PSL was approved in 1929. The amended PSL included the right of an Egyptian woman to ask for divorce in cases of abuse.

The 1979 amendment of the family status law, which strengthened Muslim women's divorce rights and child custody rights, was repealed in 1985. The Supreme Constitutional Court ruled that the President's use of a presidential decree to implement the laws was unjustified. President Sadat's greatest confrontation with the Islamic movement occurred over the issue of the PSL. On the other hand, President Mubarak took the Islamists' antagonism to the reform law into consideration and pursued a middle course. He called on the People's Assembly (Egyptian Parliament) to draft a new law that respected the Shari'a. The law made two concessions to the 1979 position: 1) A woman whose husband took a second wife could not file for a divorce without first proving that the polygamous marriage inflicted harm and 2) a divorced woman with child custody could not retain her marital residence.

Egyptian Women's Movement Calls for Reform of Family Law³

With the cancelation of Law 44 in 1979, and the introduction of Law 100 in 1985, two main reforms empowering women were repealed. These reforms included: 1) the right of women to ask for divorce, in the case the husband taking a second wife, without first proving that the polygamous marriage caused harm; and 2) the right of a divorced woman to keep her marital house if she obtained child custody. As a result, Egyptian women activists from all walks of life and demographics came together to organize, raise awareness and lobby to regain the few reforms of 1979. Women activists held meetings in different places, including the offices of different NGOs, to discuss this issue. During a meeting between women activists and the wife of the President to organize an Egyptian delegation to the Fourth International Women's Conference in Beijing, one activist voiced her objections to Law 100 on behalf of the group.

As a result of these efforts to raise awareness about the need to reform the Egyptian PSL, membership of the Egyptian Women's Movement increased and several women were suggested to lead the movement. This marked the beginning of an emerging women's movement around the reform of the PSL in Egypt. Unfortunately, within approximately a year of this mobilization, the movement was aborted, as the police started to intimidate members of the movement and cancel their meetings.

³ This author is a member of the Egyptian Women's Movement

Nonetheless, several members of the movement continued to attempt to encourage reform of the PSL. A smaller group of women activists, in an attempt to urge women to defend their rights in marriage, started drafting a new marriage certificate in which women could define several conditions for the marriage. These conditions included: the right of a woman to authorize her own divorce, the right of a woman to continue her education, the right to travel abroad, the right to work and the right to divorce, if her husband takes another wife. This group published the new marriage certificate in a booklet; during the International Conference on Population and Development in Cairo in 1994, the new marriage certificate was widely discussed. The Minister of Justice backed this request from women activists and asked for the Mufti's approval.

Unfortunately, the religious establishment opposed the new marriage certificate. Moreover, many women from different social classes opposed the new marriage, claiming that conditions in the marriage contract will only decrease girls' marriage ability.

Finally, a new marriage certificate with a blank space to list conditions of marriage discreetly came into use. This blank space replaced the original suggestion of listing all the conditions in print for the wife to tick off. It was later proven that this blank space was seldom used to list any conditions.

Women activists worked with the government to change the procedural part of family law in order to facilitate litigation, especially for women. They believed that this was the only feasible option at that time, since any substantial reformation of family law was not possible, considering the traditional forces in the Egyptian parliament.

These women activists noted that, in case of divorce, wives and husbands had to file several suits concerning divorce, alimony, child custody, and marital residence. These lawsuits were usually filed in front of different courts and different judges. To overcome this hassle, women activists lobbied the wife of the President to champion the issuing of a new family court law that ensured wives and husbands filed their lawsuits in front of one court and one judge. In addition, they demanded that family courts provide social workers and psychologists to mediate between wives and husbands before their cases went to court. Accordingly, in 2000, the procedural law of the PSL was amended. It aimed to facilitate and expedite litigation in personal status disputes, particularly divorce. A major change included allowing women the right to a divorce irrespective of her husband's consent (*Khule*), if she forgoes her financial rights. Prior to this change, a woman could not divorce except in very exceptional cases and only after suffering in courts for many years until a judge approved her divorce. Many feminist and human rights groups, however, criticized the new law because a woman desiring a divorce had to forfeit her financial rights. However, article 17 was added to provide a wife in an Orfi marriage the right to divorce, something she did not enjoy prior to 2000.

The author of this text, in her capacity as the first Ombudsperson for Gender Equality in Egypt (2001-2005), managed to compile and analyze thousands of complaints by women who were subjected to gender discrimination, as a result of Personal Status Law. As Ombudsperson, she then collaborated with the Policies Committee of the ruling party, the National Democratic Party, to produce a vision paper of reforms for the PSL in its totality and suggested specific reforms based on real life cases and testimonies of women. She also met with the Grand Mufti of Egypt and with the Head of the Policies Committee of the party to present examples of the

sufferings of Egyptian women subjected to the Personal Status law. Unfortunately, the ruling party has yet to introduce any drafts of a new family law to Parliament.

In 2008, a coalition of women's NGOs formed to work on reforming family law in its totality. This coalition came to the conclusion that any partial change in family law will not solve the problem. There was enough evidence to illustrate that Egyptian women still suffer, if they are divorced or seeking divorce, in spite of the partial changes to family law and in spite of the enactment of changes to procedural law.

The coalition looks forward to the issuance of an Egyptian family law that adapts to the progressive and changing functions and roles of family members; such a law would produce a state of security and stability to all family members both in marriage and upon its dissolution. The coalition asked that the law focus on principles of citizenship and human rights inspired by enlightened visions and by the reality that both Islam and Christianity, as heavenly religions, call for justice and equality. A new law should also be guided by the experiences, works and successes of the other Arab and Muslim countries.

The coalition also noted that Christians in Egypt, who constitute over ten percent of the population, suffer from the accumulation of divorce claims and the difficulties surrounding divorce and remarriage. The 1938 Regulation enacted by the "Sect" Council contains a number of articles that consider women to be followers that, in return for financial support, should serve their husbands, raise the children and complete the housekeeping. The Church rejects divorce verdicts unrelated to adultery. A husband who changes his religion can marry another woman while keeping his Christian wife. At the same time however, the Church allows a woman whose husband deserts her for another religion the right to divorce and remarry. Therefore, a woman may be divorced in the eyes of the Church but, simultaneously, in the eyes of another religion, still be a wife of her first husband. Although a Christian husband may not divorce his wife by his will alone, he may convert to Islam Shari'a and gain the right to divorce his wife at his own discretion. In the case of conversion to Islam, the husband may resort to gaining the custody of young children, a matter that may not be in the best interest of the child, as outlined in the International Convention of the Rights of the Child.

The coalition concluded that a new family law should provide a legal framework for mutually supportive family relations and should guarantee the right of all family members. The law should be an essential tool for facilitating the peaceful and just resolution of family conflicts and the reestablishment of family peace. In an ever-changing social and economic environment, Personal status law must be in line with contemporary changes in the Egyptian family. These changes affect the roles and responsibilities of both husband and wife, both inside and outside of the family sphere. The coalition based its position on the fact that civil society is the fundamental mechanism that understands marginalized groups (they are in many ways interacting with their daily problems). Civil society is the network that strives to support concerned Egyptian institutions in the development of a new family law that could achieve equality, equity and stability for the Egyptian family and, therefore, the nation.

The coalition announced that active and concerned civil society organizations are well aware that societal support is necessary to enhance and strengthen the desire of change. Thus, the coalition's focus is to present and discuss their vision of family law reform to a wide range of groups of men and women, until a draft law reflecting the interests of the masses comes into

place. This could achieve social security for families and a basis for establishing economic and political security.

The coalition called for active participation in drafting a new family law, based on equality, non-discrimination, justice, equity, mutual respect, joint responsibility, the best interest of children (in cases of parental disputes) and the rights of all family members.

Conclusion

During the past decade, Egypt, as well as a number of Arab countries, witnessed legislative reform that benefited women. Some of the gender discriminatory legislation, such as citizenship law, the rape law, and the social security law, has been amended to grant women equal rights. Other laws, that granted women specific rights they never previously enjoyed, were also introduced, such as the "*Khule*" law and the family court law.

However, family law remains largely discriminatory against women. The present version is from 1920 and is based on assumptions that strive to maintain the patriarchal system. One of these assumptions is that husbands are the family providers, and wives, in return, must be obedient. The reality of today is, and has been for some time, very different. More women are working, generating income, and contributing to the maintenance of their households and their children. With the application of the present PSL, which is based on false assumptions, gender roles are not ideologically challenged inside the family. They are, on the contrary, legally and socially reproduced, thus stopping any important social and cultural transformations that might lead to gender equality.

Egyptian women are receiving conflicting messages about their legal rights within the family. Civil society organizations inform women that they are entitled to equal legal rights and therefore the existing gender discriminatory PSL must be changed. On the other hand, the religious institution informs women that they already have rights within the family and that they can enjoy these rights within the existing law. These are two contradictory messages with which Egyptian women grapple.

The religious institution in its attempt to maintain the present family law, advocates that women have rights inside the family. They inform women that they have the right to demand their husbands meet the financial needs of the household and allow them to keep their own income for their own personal use. Furthermore, women are instructed that they are entitled to take money from their husbands when they fulfill their maternal roles, such as when breastfeeding their children. The religious institution thus perpetuates gendered social roles, reducing women to sexual objects with only material needs.

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Moushira Khattab¹

My Journey Continues

Introduction

Having pursued a diplomatic career throughout my professional life, one may conclude my dreams and ambitions have been confined to diplomacy. The successful completion of my five-year term, as Egypt's first ambassador to the new democratic Republic of South Africa, under the leadership of the heroic and legendary Nelson Mandela, may have tempted me to broaden my professional dreams beyond that of state diplomat. However, while many would have considered my appointment in November 1999 to head of the National Council on Childhood and Motherhood (NCCM) as a promotion, I saw it as having to give up my professional dream. Nevertheless, I set out to grasp the intricate details of childhood and maternal issues, a task, which proved quite challenging. As a successful female Ambassador, I had attracted a fair share of media attention, something that only increased with my new position. I had to answer many questions related to the very high profile area about which I knew very little. The media attention, thus, increased the pressure I felt when confronted with learning about a broad policy area in a short period of time. I was determined not to fail. I read day and night; and, of course, I relied upon my strength of will and interest in the subject matter. Reflecting on the past ten years, I now recognize this great opportunity. I was able to apply the unique knowledge I had acquired over my professional life, working with people of different cultures and tackling some of Egypt's most controversial and pressing issues.

Women play a vital role in society. Women's contribution to society, however, greatly depends on how young girls are treated. In order to maximize the number of people who are able to enjoy and freely exercise their human rights, the NCCM focused its initial programs on the wellbeing of girls. The programs reflect a comprehensive rights-based and multidisciplinary approach. We focused on a core set of rights that ensure and protect a woman's and girl's ability to live free from discrimination or violence. The NCCM initiated three important and complimentary programs aimed at eliminating all forms of discrimination against the girl child; namely the Girls' Education Initiative, the elimination of Female Genital Mutilation (FGM) and child marriage.

NCCM engaged in community outreach campaigns to prepare the groundwork for the legislation by raising its awareness of the worth of the girl child. "The Year of the Girl Child" launched in 2001, in Egypt, promoted community consciousness-raising and instilled confidence in girls about their own self worth. Our national campaign targeted families with girls at risk. The campaign empowered families and girls by increasing their access to information on rights-based issues. Aware of their rights, families and girls were better able to

¹ Honorable Moushira Khattab is the Minister for Family and Population in Egypt

free themselves from oppressive environments and abandon harmful practices. Our educational materials strategically linked a girl's lack of education to early marriage and FGM.

Education is our ammunition in the fight to empower girls. It is a pre-requisite to accessing one's rights. The power of education enhances the likelihood of successfully eliminating all forms of violence and discrimination against women and girls in Egypt. Our objectives for the Girls Education Initiative (GEI) are to close the gender gap in basic education and ensure that all children are enrolled in and do not drop out of school.

The Girls Education Initiative is a rights-based intervention program aimed at empowering girls in marginalized communities. The program targets girls, who are deprived of education either because of limited accessibility or traditional values. The Initiative adopts a pedagogy based on the active learning approach. This enables learners to acquire basic life skills for active participation in all areas of a girl's life. The GEI schools focus on life-long self-learning, community participation, self-governance and democracy. The school day is flexible enough to accommodate a girl's responsibilities outside of school, including her family chores.

To ensure the right of the girl to quality education, the program encompasses five sub programs: i) consolidation of information systems, ii) advocacy and community mobilization, iii) expansion of girl-friendly schools, iv) poverty alleviation, and v) monitoring and evaluation.

The GEI achievements to date are unprecedented in Egypt. For example, NCCM has established a database, which provides quantitative and qualitative data about the gender gap, such as the name and address of girls, who currently do not go to school and live at the hamlet level of the seven-targeted governorates. At present 1120 schools are successfully operating with over 32000 students enrolled. More than 2,000 female facilitators have been recruited and trained. This Initiative has created approximately 4,000 job opportunities in Egypt. A geographic information system (GIS) is in place, six educational manuals have been completed, and at the end of the Initiative's second phase, the United Nations International Children's Emergency Funds documented its success (UNICEF). UNICEF referred to Egypt's GEI Initiative, as a flag ship initiative at the regional level. "These are special schools, for very special women," stated Ronald Sultana who documented the work.

Thanks to the vision and efforts of NCCM, education is a legal right in Egypt today;² for example, a child deprived of education is considered by law to be a child at risk and in need of protection. To deprive a child of education is a punishable offence in Egypt. The State is now committed to providing financial assistance to poor children to allow them to access and continue their education. Another example of progress is the establishment of education guardianship, whereby a child's primary caregiver is granted the role of education guardian and charged by the state to ensure the child meets basic education standards. This provision was adopted despite strong resistance by the public.

As a child growing up in an average middle class white-collar family, I am proud to state that I never felt oppressed or discriminated against. I did experience some restrictions on my freedom, such as only being allowed to socialize with friends at school or at my house, never

² The National Council for Childhood and Motherhood; Egypt's highest national body in charge of ensuring the rights of mothers and children.

being allowed to go to places my parents didn't trust, and having to return home before sunset. While these family rules may have curbed my childhood freedoms, I never suffered any discrimination or felt less valued than my brothers. I was always treated as an equal. I came to know the true meaning of discrimination and marginalization when I started dealing with children across Egypt in my professional life. I witnessed firsthand how some children are denied their basic human rights. Girls, undoubtedly, made up the majority of this group. If I had to choose the most blood-curling form of discrimination against women and girls, it would be FGM.

The Fight Against Female Genital Mutilation

NCCM designed a socio-cultural approach to deal with FGM that requires a sensitive, innovative, and multi-disciplinary perspective. Our FGM Free Village Model strategy relies on the empowerment of girls and their families to make a well informed, sound choice about FGM. By responding to local inquiries and rumors surrounding the practice, we empowered the vulnerable and created a socio-cultural environment conducive to change. This encouraged families from different communities in Egypt to assert their voice and say "No...to FGM." The NCCM adopted a multidisciplinary approach that provides an integrated development package to families in 120 villages in governorates of Upper and Lower Egypt. NCCM designed innovative community service initiatives to distribute the development package. The success of this program relied upon a local community's consent and interest; thus, to capture interest and spur change, it was crucial for the local community to see our program as improving the quality of life for marginalized groups. We succeeded in involving local communities in Upper and Lower Egypt in a social movement that eventually swept the entire nation.

NCCM succeeded in increasing the anti-FGM movement's participant base to include Egyptians, who are not necessarily politically active or members of elite activist groups. Public media attention intensified due to the voices of young girls, mothers and fathers, who became role models for families who abandoned the practice. A 24 hour toll free child helpline was made available for families across Egypt. This one-on-one counseling service provided information about the detrimental impact of FGM. Public attention reached a peak in 2007 when Bodour, a girl in Minya, passed away from FGM. This instigated public anger and mobilized the call for accelerated political action to criminalize FGM. Bodour was not the first victim of FGM, yet she was the first girl to remain in the hearts and minds of young Egyptian girls. A young man calling the helpline from Cairo, states, "I will never let my wife or mother in law victimize my only daughter under the name of chastity ... today the law protects her ... we don't need another Bodour in our life to remind us that FGM is a crime."

Public anti-FGM declarations illustrate increased mobilization at the village level. The NCCM formed strong partnerships with national civil society entities. Involving the media created a momentum that placed FGM at the heart of the national agenda. Widespread publicity about FGM's detrimental affects also mobilized professional groups, including religious leaders, lawyers and doctors. In 2008 the anti-FGM movement triumphed when the Egyptian Parliament passed a bill that criminalized the practice. The offence carries a criminal sentence ranging from a fine of 5000 LE and/or a two year term of imprisonment. An enormous increase in public anti-FGM advocacy efforts and the criminalization of FGM effectively move the

practice from a social and traditional norm to a crime. "Doctors who practice FGM should be severely punished... Today there is a law so they cannot play ignorant and continue to kill our girls" stated a woman from Upper Egypt, whose words echo the sentiments of many Egyptians.

While many have applauded NCCM's tireless efforts in the area of FGM, I believe that the individuals worthy of applause are the men, women, and children, who have broken away from decades of tradition and declared war on FGM. Fifty-three village declarations and four years later, the sight of these champions declaring themselves FGM-free still brings me to tears. Although the program is ongoing in 120 villages, we succeeded in making the media an ally. The media has been a powerful ally, enabling us to communicate with the entire country.

The national anti-FGM program created a generational change in FGM prevalence rates among girls in schools aged ten to eighteen years. According to a 2008 national study undertaken by the World Health Organization and Egyptian Ministry of Health, the FGM prevalence rates in schools nation wide are 50.3 percent. The 2005 Demographic Health Survey indicates that prevalence rates among women aged fifteen to forty-nine years, who have never married, are over 90 percent. Such a stark difference between data sets indicates that FGM in Egypt is a rapidly shrinking phenomenon.

In the past few years, the battle against FGM coincided with increased national efforts to focus on the elimination of the remaining forms of discrimination against women and girls. Women succeeded in regaining their right to unilaterally choose to end their marriage (renunciation). They also achieved the right to transfer their nationality to their children. Previously, both rights only applied to men. Moreover, for the first time, women, who bear a child out of wedlock, may register their infant in the state birth registry. This policy change successfully ended another form of discrimination against women.

Combating Child Marriage

In 2008, we waged and won a battle on girls' rights in the Egyptian Parliament. The Parliament raised the minimum age of marriage for girls to eighteen, equal to that of boys, after a battle that initially seemed to be a mission impossible. Furthermore, due to daunting economic challenges facing Egyptian society, early marriage is often envisaged as an outlet for poor families to be released from the financial burden of a daughter. Girls in traditional communities were raised to become wives. Some families saw no need to send a girl to school. This leaves her with no choice in life, except to wait for the first suitor who will provide for her and relieve her father of her social and financial burden upon the family. Such double standards in some poor communities often deprive poor girls from the dream of a better future and intensify the discrimination and marginalization they experience. NCCM moved strategically and took a calculated risk of presenting child marriage as a form of violence and commercial exploitation of the girl child. We targeted marriages of young girls to non Egyptian men in some isolated villages. This evoked a public cry of national pride. Today the entire society is united against child marriage. We managed to generate widespread media support against child marriage. We created a public outcry that condemned public registrars, who violated the law by forging the age of the child bride to perform a marriage. In 2009, more than 9,300 cases were reported,

all of which were brought to the media's attention to deter any further violations. Many of the perpetrators have been brought to justice. Due to the justice system, powerful media and NCCM advocacy efforts, in a matter of a few months, the number of violations has dropped considerably.

But ... Challenges Still Lie Ahead

We are proud of our achievements on three landmark issues. We started with community mobilization and awareness raising. Then we moved to legal reform. But this is only the beginning of harder work to come. Legal reform needs to be complimented by educational reform, appropriate financial resources and coordinated advocacy efforts. An impact assessment of legislation, before and after law enactment, is crucial. In the area of protection from sexual or commercial exploitation and trafficking in persons, monitoring of law enforcement is essential to consolidate data; individuals need to be encouraged to report FGM and systems to prosecute individuals, who engage in acts of violence against women and girls, must be improved. In order for laws to be successfully implemented, it is essential to assess impact, identify gender gaps and enable citizens to encourage further change. Our achievements are measured not only by our ability to introduce legal amendments that ensure and protect human rights principles, including equality; but also by our ability to bring about a change in the public perception of Egyptian women, as equal rights holders. Gender equality is crucial to achieving children's rights. Women's unequal access to citizenship rights affects children's access to rights. NCCM has embarked on a very long journey, adjusting to realities on the ground and new and emerging challenges. I have always been fortunate in that the President & First Lady of Egypt fervently support NCCM's causes—after all,, they are the individuals who chose me to lead NCCM when I least expected it. My appointment in March 2009, as Minister of State for Family & Population, was a huge vote of confidence in my abilities. Beyond my personal validation, my most recent appointment illustrates that the President & First Lady—who is the champion of women's and children's rights in Egypt—fully realize that despite our achievements, we have only just begun to tackle the issue of a human rights-based motherhood and childhood in Egypt. My appointment also signifies their realization that we need social empowerment to be able to make substantive change and work together with other relevant ministries to catalyze educational and other reforms to make Egypt's unwavering commitment to these issues public. The journey is half way through; its happy ending depends on the coordinated endeavors of many stakeholders. I am hopeful that the government's newly created Ministry will better enable us to orchestrate such a coordinated effort.

Siti Musdah Mulia¹, Ph.D.

Toward Just Marital Law: Empowering Indonesian Women

I. Introduction

It is no secret that religion and state conspire against women. The Islamic Code of Law and a number of studies on women and law in Indonesia show that women's position is marginalized and gender inequity is deeply entrenched in the country.² Gender inequity is a social problem that needs to be integrally addressed by analyzing the factors the factors that perpetuate it, including legal mechanisms that are often justified by religion.

An analysis of legal cases in Indonesia shows that gender inequity in the legal field is widespread in the content, culture and structure of the law. Regarding law structure, gender inequity is marked by low gender sensitivity among law enforcers, particularly prosecutors and judges. Existing legislation and laws, such as the Criminal Code, the Marital Law (*Undang-Undang Perkawinan No. 1 Tahun 1974*) and the Islamic Code of Law (*Kompilasi Hukum Islam Tahun 1991*), as applied have been found to affirm gender bias and patriarchal values.

The Islamic Code of Law confirms women's subordination; for example, it includes provisions that construe women to be sexual objects. The situation is exacerbated by the culture surrounding law enforcement. Legal culture continues to be influenced by patriarchal values, which strongly legitimize a narrow religious interpretation of law. Religion plays a great role in preserving patriarchal culture and gender equity because of the way in which it is narrowly interpreted and applied to the law by public political and religious officials.

Indonesian society is currently grappling with social problems that require marital law reform. Cases about exploitation and discrimination against women are rampant and deal with the issues of domestic violence, trafficking in women and children using the modus operandi of marriage, the mushrooming practice of "contract marriage," underage and unregistered marriages, and the widespread practice of prostitution.

This article intends to portray the magnitude of marital law reforms that are necessary, if Indonesia is to become a democratic, just and religious society that empowers women. The introduction outlines family law reforms in a number of Islamic countries, and subsequently details the efforts to reform Indonesian Marital Laws, including the 1974 National Marital Law,

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² See the research results of Tapi Omas Ihromi on *Women and National Law* (1997); Siti Musdah Mulia on *Women's Position in Marital Law and the Islamic Code of Law* (2001); and Sulistyo-wati Irianto on *Women among Various Legal Choices* (2003). More detailed analysis on the forms of gender inequity in Indonesia can be found in the *Facts, Data and Information on Gender Inequity in Indonesia*, Indonesian State Ministry of Women Empowerment, Jakarta, 2001, p. 71-93.

and the 1991 Islamic Code of Law.³ The last section will explain the 2004 Proposed Counter Legal Draft of Islamic Code of Law.⁴ This section focuses on the substantive change recommended by the legal draft, which is based on the basic principles of Islamic teachings and uphold human rights principles, such as justice and equality, particularly between men and women.

II. The Dynamics of Family Law Reform in a Number of Islamic Countries

Law is a set of normative rules regulating human behavior. It is not created, interpreted or applied in a vacuum, but evolves from people's awareness of society's regulation both of an individual and a collective group. The law changes to align with the values of a society, such as customs, traditions, and religion. Islamic law theory, *al-adat muhkamat*, allows for a community's tradition or custom to become law.⁵ Consequently, any legal outcome must be seen as a product of its time, inseparable from the multiplicity of influences that contributed to its formation. Law is a social, cultural and political construct, and thus it is contextual.

There have been efforts to reform family law, including marital law, in the history of Islam. It began in the early twentieth century in Turkey, with the issuance of the *Qanun Qarar al-Huquq al-'A'ilah al-'Usmaniyyah* or Ottoman Law of Family Rights in 1917.⁶ This family law was modified and introduced in Lebanon in 1919. It was implemented in Jordan before 1951 and in Syria before 1953. Egypt reformed its family law in 1920 and 1929, followed by a number of Islamic countries, including Tunisia, Syria, Jordan and Iraq. Up until 1996, only five Islamic countries in the Middle East had yet to renew its family law: The Emirate Arab Union, Saudi Arabia, Qatar, Bahrain and Oman.⁷

³The Family Law in Islamic literature always includes marital and inheritance law. The term family law refers to the phrase *Qanun al-Ahwal al-Syakhsiyah*, *Qanun al-Usrah*, *Ahkam al-Zawaj*, *Qanun Huquq al-'Ailah*, which has always been used in the discussion of Islamic Law on marriage and matters pertaining to inheritance.

⁴ The name Counter Legal Draft (CLD) was deliberately chosen to capture public attention. This draft, like the Islamic Code of Law (KHI), consists of three law formulas: Marital law, Inheritance law, and Religious donation law. CLD only revises certain KHI articles that are gender biased and patriarchal, and which fail to accommodate pluralistic and humanistic Islamic views. CLD is the result of research [SPECIFY WHO CONDUCTED THE RESEARCH] conducted from 2002 to 2004 and an analysis from the Islamic Law Reform Team. This Team was established by the Religious Affairs Ministry's Gender Mainstreaming Working Group (PUG), which was coordinated by the author. The members of the team were Marzuki Wahid, Lies Marcoes, Abdul Moqsith Ghazali, Mubarok, Anik Farida, Ahmad Suaedy, Marzani Anwar, Abdur Rahman, Shaleh Partaonan, and Asep. CLD was launched officially on Oct. 4, 2004, at the Aryaduta Hotel, Jakarta. Religious Affairs Minister, Prof. Dr. Said Agil Al-Munawar, stated in his opening speech at the event that the law reform alternative should be accepted critically [??] As in it should be accepted, but undergo critical scrutiny – or that it is critical for the law reform to pass? I am assuming you mean the latter, thus I would change it to "...be accepted and critically acclaimed". To find out the complete draft of CLD, see Siti Musdah Mulia (Ed.), *Islamic Law Reform: Counter Legal Draft of KHI*, PUG of Religious Affairs Ministry, Jakarta, 2004 (The draft is not yet published).

⁵ Jalaluddin Al-Suyuthi, *Al-Asybah wa Al-Nazhahir*, t.tp. t.th., p. 63.

⁶ For more comprehensive discussion, see Tahir Mahmood, *Family Law Reform in the Muslim World*, N.M. TRIPATHI PVT. LTD, Bombay, 1972, p. 49; and J.N.D. Anderson, *Law Reform in the Muslim World*, The Athlone Press, London, 1976, p. 2. Tahir Mahmood, *op.cit.*, p. 17.

⁷ Dawoud El. Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World*, Kluwer Law International, Boston, 1996, p.4-5.

The attempts to reform family law in the Islamic world within the modern period followed the emergence of Muslim intellectual reformers, such as Rifa'ah al-Tahtawi (1801-1874), Muhammad 'Abduh (1849-1905), Qasim Amin (1863-1908), Mustafa al-Maragi (1881-1945), Sayyid Ameer Ali (1849-1928), Tahir al-Haddad (1899-1935), and Fazlur Rahman (1919-1988). In Indonesia, Mukti Ali, Harun Nasution, Nurcholish Madjid, and Munawir Syadzali were prominent intellectual leaders. The latter was known for his strong effort to urge Muslim communities to do *ijtihad* honestly and bravely, particularly on matters related to inheritance law. He was a strong advocate for the need to change inheritance law to ensure the equitable distribution of inherited property amongst both male and female family members.⁸

III. The Purpose and Issues of Family Law Reform

A number of research studies conclude that there are three purposes of family law reform in Islamic countries. The first reason for reform is to unify law, as there are different schools of Islamic thought and different religions coexisting [that come into conflict over family law issues]. In Tunisia, the unification of marital law affects every citizen, regardless of his or her religion. Secondly, family law reform is necessary to increase the status of women. While the purpose of family law reform is not transparently stipulated in its content, family law reform in Islamic countries is a response to the public demand to improve the status and position of women. Marital Law in Egypt and Indonesia can be included in this category. Thirdly, family law reform is a response to the dynamic progress exemplified by other societies in our globalized world.

What are the issues of Indonesia's current family law that need reform? According to the research done by Tahir Mahmood, there are thirteen crucial issues that need to be addressed and reformed in family law: marriage definition, the minimum age requirement for marriage, the role of father or male relative legally responsible for the bride (*waliy*), marriage registration, financial capability in marriage, polygamy, household income, limitation of a husband's right to divorce, the rights and obligations of husbands and wives after divorce, pregnancy and its implications, parents' *ijbar* right, distribution and allocation of inheritance, will of *wajibah*, and issue of religious donation.⁹

Despite the issues Mahmood presents, the content of family law, particularly marital law, in many Islamic countries has yet to be changed significantly, especially regarding the rights and obligations of husband and wife. According to Anderson, a scholar who diligently observes the attempts of family law reform in various Islamic countries, this is due to the following reasons. First, Muslims in general see family law, particularly marital law, as an essence of *sharia*. Secondly, family law has always been considered the foundation of the Muslim community. Thirdly, family law is perceived to be a major guiding force for the majority of Muslims in the

⁸Munawir Syadzali, *Islamic Teachings Reactualization*, in Iqbal Abdurrauf Saimima (Ed.) *Polemics of Islamic Teachings Reactualization*, Pustaka Panjimas, Jakarta 1988, p. 1-11.

⁹Tahir Mahmood, *Personal Law in Islamic Countries (History, Text and Comparative Analysis)*, Academy of Law and Religion, New Delhi, 1987, p. 11-12.

world; and lastly, until now, family law has been the subject of heated debate between conservatives and moderates.¹⁰

Unsurprisingly, fervent opposition has always stalled the attempts to reform family law. In particular, groups that claim a supreme religious authority have formed an opposition bloc. Altering family law is considered to be an attempt to change the essence of religion. Thus, family law reform threatens the relevance of religious teachings. In the history of Islam, laws on finance and politics, for example, could easily be changed. Family law, however, is considered sacred and protected from any kind of alteration. Many Muslims believe that changing family law, especially marital law, equates to changing Islamic *sharia*. Defending marital law, no matter its irrelevancy, is most often interpreted as defending Islam. Attempts to reform family law, therefore, are viewed as acts of disobedience against Islam.

As a result, not all Islamic countries have reformed their family laws. Islamic countries fall into three categories, depending on whether and how they have reformed family law. First, there are countries, such as Saudi Arabia, which have never renewed their family law and draw directly from the classical Islamic jurisprudence books in their interpretation and application of family law. Secondly, some Islamic countries, including Turkey, have radically changed their family law and replaced it with European civilian law. Thirdly, Islamic countries, such as Egypt, Tunisia, Pakistan, Jordan, Syria and Iraq, try to modify their family law while still referring to the fundamental principles of *Al-Qur'an* and *Hadith*. Indonesia is not an Islamic country, but as a country with the largest Muslim population in the world, it falls into the third category.

IV. The Application of Family Law Reform in Several Islamic Countries

1) Law Reform in Tunisia

Family law reform in Tunisia, whose constitution is based on Islamic *sharia*, owes its origin to the commitment and support of President Habib Bourgiba. President Bourgiba advocated for women's rights and wanted to ensure Tunisians were able to exercise more rights than any other Arab country.

A few months after Tunisian independence in 1956, the government introduced the family law, *Majallah al-Ahwal al-Syakhsiyah* (Status Personal) No. 66/1956. Many observers considered the law to be very progressive in its interpretation of *sharia*, particularly in defending women's rights. Traditional groups understood the new law to conflict with or outright defy Islamic *sharia*. The law accommodated a number of social changes in the country. The content of *Majallah* includes marriage, divorce, and child custody provisions, which contrast the Islamic law stipulated in the classical jurisprudence books.

Later on, *Majallah* underwent several revisions in 1959, 1964, 1981 and 1993. The highlights of the Tunisian family law reform are the obligation to divorce in court and the prohibition of polygamy. These caused serious debates among *ulemas* (religious leaders), with the majority rejecting the changes. Nevertheless, the new laws uphold the principles of defending and

¹⁰ J.N.D. Anderson, *Law Reform in The Modern World*, Anthone Press, London, 1967, p. 1-2.

empowering women. The prohibition of polygamy is stipulated in Article 18: "Having more than one wife is prohibited. Anyone, who gets married before a previous marriage ends completely, will be sentenced to one year prison, or fined 240,000 malim, or both sentenced and fined."¹¹ There were at least two theological arguments behind the polygamy prohibition: i) slavery and polygamy were institutions in early Muslim societies, permitted only in the early development period of Islam; and ii) the requirement to be fair to one's wives could only be met by Prophet Muhammad.¹²

2) Law Reform in Turkey

The highlight of family law reform in Turkey was also the polygamy issue. Even before Tunisia, Turkey was the first Islamic country to ban polygamy by a Civil Law issued in 1926. The reform also included the rights and status of adopted children, stipulated in the Guardian and Adoption Law issued in 1958. The Law consists of three chapters and 60 articles on general custody, *kafalah*, and adopted children. Articles 9 to 16 state that any party who chooses to adopt a child has to be mature, already married, fully entitled to his/her civilian rights, physically and mentally fit, and financially capable and have good morals to meet the needs of adopted children. The minimum age difference between parents and an adopted child is fifteen years. An adopted child has the same rights and obligations as a biological child in the family.¹³

3) Law Reform in Syria

After independence in 1945, the Syrian government began to nationalize and reform the country's legal system. A number of laws were issued, like the trade law in 1949, the criminal code in 1950, and family law (*Qanun al-akhwal al-syakhsiyah*) in 1953. The family law was amended in 1975 to guarantee a greater number of women's rights.¹⁴ Family law reform in Syria encompassed a minimum age requirement for marriage, engagement procedures, polygamy, divorce, will and inheritance.

In Article 288, regarding inheritance, the law states that the remaining inherited wealth is returned to the heir of *zaw al-furud* aside from the husband and wife unless there is an *ashobah*. The remaining wealth could be returned to the husband and wife unless there are *zaw al-furud*, *ashobah*, and *zaw al-arham* heirs.¹⁵ Aside from inheritance, another highlight is the age requirement for marriage. One of the most progressive aspects of the Syrian family law is its section on age requirements for marriage. The reformed law not only requires a minimum age to get married, but also regulates the age difference between the bride and groom. If the age difference is too big, the court can prohibit a marriage from taking place.

Syrian law also ensures a woman's right to file for divorce, if her husband suffers from mental illness or an ailment that prohibits them from cohabitating, leaves or is jailed for more than three years, fails to financially provide for his family or commits violence. The Syrian family law reform legally enshrined many significant women's rights.

¹¹ Ibid., p. 156.

¹² Anderson, *op.cit*, p. 63.

¹³ Tahir Mahmood, *Op.Cit.*, p. 164

¹⁴ Don Peretz, *The Middle East Today*, Praeger, New York, 1983, p. 397.

¹⁵ Tahir Mahmood, *Op. Cit.*, p. 150.

4) Law Reform in Egypt

Family law reform in Egypt dates back to 1874, when the country was granted the independence to decide upon its legal content and administer its court system. According to reformers like Abduh, Rasyid Ridha, and Qasim Amin, the existing family law was based on principles from certain schools of thought. Such schools of thought were chosen by *takhyar* (a process), among many other ideological belief systems in society. Radical changes to the traditional family law (*fiqh*) were subsequently needed to meet people's demands.¹⁶

In 1920, radical family law reform took place in Egypt. It was amended in 1929, 1979 and 1985. The amendments strengthened such points as polygamy, *wasiyat wajibah*, inheritance, and child custody. For example, an amendment to the law specifies that polygamy is allowed only with the wife's consent. The amended law also threatens people who give false testimony to the civil registry officer about their marital status, wife's residence, their wives, or divorced wife. A negligent registry officer or a registry officer, who fails to carry out his/her job can receive a sentence of one month in jail, a maximum fine of twenty Egyptian pounds, and a maximum suspension of one year.¹⁷

Regarding the status of child custody, amendment No. 100/1985 Article 20 states that women have the right to foster boys until they are ten years of age and girls until they are twelve years of age. When the foster period ends, if the judge is convinced that the needs of the children are fulfilled, he or she may rule that the foster mother can act as guardian without payment until a foster son is fifteen years old and a foster daughter is married.

5) Law Reform in Jordan

Family law reform in Jordan has addressed social issues, such as age requirement for marriage, prenuptial agreements, interfaith marriage, marriage registration, divorce, and *wajibah* (will). The progressive provision on marriage registration stipulates in Article 17 of the 1976 law that the groom is obliged to present a *qadhi* or representative in the wedding ceremony.

An authorized official appointed by *qadhi* will register the marriage and issue the marriage certificate. If a marriage is not registered, all parties involved in the wedding ceremony, including the bride, groom, male and female family and friends, and witnesses, can be sentenced by the Jordanian Penal Code and fined over 100 *dinar*. Marriage registration is crucial in modern society, as it provides legal evidence for a husband, wife, and child to exercise their civil rights. Another progressive issue in Jordan family law is permission guidelines for marriage. If a woman is at least fifteen years of age and is willing to marry, but her guardian will not give permission and fails to specify a legitimate reason, she is able to legally pursue marriage without violating principles of *kafâ`ah*. She may be legally wed after a court grants permission.¹⁸

Family law reform in Jordan also regulates the age difference between bride and groom. The age difference may not exceed twenty years unless the court gives permission. The purpose of this provision is to protect citizens from blackmail and exploitation, as such

¹⁶ *Ibid.*, p. 48.

¹⁷ Dawoud El Alami, *Op. Cit.*, p. 58.

¹⁸ Tahir Mahmood, *Op.Cit.*, p. 78-79.

incidences often occur. This regulation needs to be considered in Indonesia because of the high number of cases that deal with trafficking in women and children with the modus operandi of marriage.

6) Law Reform in Iraq

Although family law reform in Iraq was initiated in 1947 by the issuance of *Qanun al-Ahwal al-Syakhsiyah*, it was not officially launched until 1959, was and later amended in 1963, 1978, and 1983. The new law deals with the status of a guardian (father or male relative) for female family members, the dowry and *wajibah* (will), and child custody (*hadhanah*). Regarding child custody, a woman has the special right to look after and educate her children during marriage and after divorce, unless she is violent, physically or mentally unfit, irresponsible, unable to protect her children or marries another man.¹⁹

The brief descriptions of family law reform in several Islamic countries illustrate that the form and content of marital law differ from one country to another. The differences may be due to various interpretations of and beliefs about the major sources in Islam concerning marriage and family.

However, there are three important conclusions to draw from Islamic family law reform movements. First, the effort to renew family law always faces opposition from traditional and radical Muslim groups. Secondly, the family law reform process in various Islamic countries always produces new legal provisions that differ from the provisions in classical books of Islamic jurisprudence. Thirdly, the common motivation for family law reform is to build a more fair and just society, improve the status and position of women and protect children.

V. Family Law Reform in Indonesia

While Indonesia has not formally declared itself an Islamic state, it has the largest Muslim population in the world. The attempts to reform family law started in the 1950s. On October 1, 1950, The Ministry of Religious Affairs established a team to study all the regulations on marriage and to draft a marriage bill that aligned with the popular socio-cultural and political attitudes of the era. However, in 1958, a year after the bill was introduced in the House of Representatives, the House was temporarily dismissed because of a Presidential Decree issued on July 5, 1959. The bill has yet to be reintroduced to the House.²⁰

There was another effort to renew Indonesia's family law in the 1960s, which resulted in the passing of Law No. 1/1974 on marriage. This was the first law in Indonesia to regulate marriage on a national scale. Prior to the passing of this law, marriage had been regulated through several laws: the custom law for general citizens, the Islamic law for Muslim citizens, the Christian Indonesian Marriage Ordinance for Christian citizens in Java Minahasa and Ambon, the Civil Law Code for citizens of European and Chinese descent, and the Interfaith Marriage Regulation for inter-religious marriages.²¹ The main purpose of the Marriage Law was to unify

¹⁹ *Ibid.*, p. 68-69.

²⁰ Khoiruddin Nasution, *The Status of Women in Southeast Asia*, INIS, Leiden-Jakarta, 2002, p. 51.

²¹ Wirjono Prodjodikoro, *Marital Law in Indonesia*, Vorkink Van Hoeve, Bandung. p. 77.

and standardize the nation's diverse marital regulations. Ideally, the Marriage Law should be regularly evaluated to ensure that it remains effective in regulating marriage practices. However, thirty-two years have passed since the Marriage Law was passed, and there has never been a real effort to evaluate the law as a living legal document and to examine how society responds to the law, and whether it is still relevant.

On June 10, 1991, President Soeharto issued the Islamic Code of Law (KHI) through Presidential Instruction No. 1/1991. Comprised of marriage, inheritance and religious donation regulations, the Code of Law is the official legal document for judges in religious courts across Indonesia.²² The Law consists of three books: Book I on marriage, Book II on inheritance, and Book III on religious donation. With 229 articles, the largest section - 170 articles - of the Code is on the marital law.

The Code of Law compiles all Islamic laws issued during the New Order regime. Its content is based on a number of Islamic jurisprudence books, mostly written in the Middle Ages. The Law was imposed upon religious courts, as the official legal guide in matters of marriage, inheritance and religious donations.²³ The Code of Law was the government's response to the "social unrest" surrounding different verdicts by religious courts on similar cases. The difference in case outcomes is a logical consequence of the judges' jurisprudential references. However, instead of perceiving the range of legal outcomes as a treasure of a vibrant justice system, the government responded by standardizing the law. The Code of Law allowed judges to more easily issue a verdict and other parties to more easily find the legal provisions referenced in a verdict. However, it restricted the creativity and *ijtihad* efforts in the legal field. Both the new challenges emerging within a dynamic society and the progress of science and technology raise dilemmas for judges.

From the perspective of gender equality and equity, a number of articles in the Code of Law marginalize women. The Law confirms the majoritarian view on Islamic jurisprudence, which considers women to be inferior to men in the matters of guardianship, a marriage witness, *nusyuz* (disobedience in marriage), polygamy and a husband's and wife's rights and obligations. Gender-based discrimination persists in Indonesian law, even though men and women play an equally critical role in establishing a family and, in the eyes of Allah, are equally appreciated for their hard work.

Meanwhile, data indicates that domestic violence cases are prevalent. Reports from the State Ministry of Women Empowerment in 2001 revealed that 11.4 percent of the total female population, approximately twenty-four million women, said they have experienced violence, mostly domestic. Examples of different forms of violence women experienced include torture, sexual assault, financially motivated violence, abuse, adultery, and polygamy. The data,

²² Indonesian Presidential Instruction No. 1/1981, *Islamic Code of Law in Indonesia*, Religious Court Guidance Directorate, Directorate General of Muslim Society Guidance and Haj Pilgrimage, Indonesian Ministry of Religious Affairs, Jakarta, 2002, p. 152.

²³ Indonesia has three types of courts. These include: 1) the District Court, which deals with general cases regardless of a citizen's religion; 2) Religious Courts, which handle marital cases, divorce, marriage reconciliation, religious donation, and other issues regarding the Indonesian Muslim Community; and 3) the Military court, which handles military cases. Since the legal reform in 1999, the three courts have gradually moved under the supervision of the Supreme Court. The Religious Court only came under supervision in 2004.

however, most likely downplays the prevalence of gender-based violence, as many women who undergo violence are reluctant to report their cases.

Nevertheless, there have been some breakthroughs in the Code of Law in terms of Islamic family law reform. They include marriage definition, marriage registration, age requirement for marriage, mutual consent from the bride and groom before marriage, and conditions (*taklik*) of divorce.²⁴ The Code of Law reform still significantly relies on the jurisprudence books. The definition of marriage in the books heavily focuses on biological needs, while the Code of Law emphasizes religious service and obligation. Jurisprudence books do not require a certain age for marriage, but the Law sets a minimum age of marriage to nineteen years of age for a groom and sixteen years of age for a bride. Marriage registration is strongly endorsed by the Code of Law. For administrative reason, however, jurisprudence books do not state anything about marriage registration. Islamic jurisprudence allows polygamy as long as the husband is fair; although, the definition of 'fair' is always based on men's perspective.

The Code of Law, however, adds that polygamy is allowed only with a wife's consent and the court's permission. Classical jurisprudence states that a wife's silence equates to her permission, but the Law clearly specifies that there should be written or verbal consent from the wife. Jurisprudence allows husbands to divorce their wife (or wives) anytime and anywhere. According to the Code of Law, however, divorce is only valid if settled in court. Islamic jurisprudence does not recognize divorce *taklik* (an oath from the husband not to make the wife suffer), while the Law requires it. In short, compared to the traditional jurisprudence, the Islamic Code of Law has reduced male domination and authority, enhanced the protection of the rights and status of women, and responded to some of society's demands. The law reform endorsed by the Code of Law is acceptable to the Indonesian Muslim community, which indicates that law reform will almost certainly occur.

VI. Marital Law Reform in Indonesia Through the Islamic Code of Law's Counter Legal Draft

In 2004, The Gender Mainstreaming Working Group Team (*Tim Pokja PUG*) established by The Ministry of Religious Affairs in 2001, launched the Counter Legal Draft of the Islamic Code of Law. The Counter Legal Draft is formulated through research and critical analysis of the Code of Law. The Draft formula is similar to the Law, which consists of marital law, inheritance law and religious donation law. It offers family law reform to the Indonesian Muslim community, particularly to amend the Code of Law and Marital Law.

The Draft formulates a new model of Islamic law and is structured on the principles of Islamic teachings, as stated in the *Al-Qur'an* and *Hadith*. The Draft respects and enshrines basic human rights; it ardently supports gender equality and equity in relations between men and women, and voices the more humanistic, pluralistic and democratic views of Islam.

²⁴ Ramlan Yusuf Rangkuti, *Islamic Law Reform in Indonesia*, PhD Dissertation at Syarif Hidayatullah State Islamic University, Jakarta, 2003 (it is yet published).

a. Counter Legal Draft Offers New Paradigm of Marriage

Adhering to Islamic teachings about marriage, the Counter Legal Draft of the Islamic Code of Law offers a new paradigm of marriage. First, marriage is defined as a serious pact (*mitsaaqan ghaliidzan*), agreed to knowingly to establish a family and based on the willingness and consensus of both parties. Second, the principle of marriage is monogamy (*tawahhud al-zawj*). Third, marriage is based on six major tenets: willingness (*al-taraadli*), egalitarianism (*al-musaawah*), equity (*al-'adaalah*), benefit (*al-mashlahat*), pluralism (*al-ta'addudiyah*), and democracy (*al-diimuqra-thiyyah*). Fourth, the purpose of marriage is to achieve a blissful (*sa'adah*) and prosperous (*sakinah*) family life built upon a foundation of affection (*mawaddah wa rahmah*), as well as to fulfill the biological needs of family members legally, safely, contentedly, and responsibly. These four paradigms are the fundamental marriage principles that underlay the Draft's provisions about guardianship, witnesses, registration, age requirements, dowries, interfaith marriages, polygamy, divorce and reconciliation, a transitional period for woman to remarry after divorce (*iddah*), *ihdad* (the mourning period), financial matters, disobedience (*nusyuz*), the position and status of a husband and wife, and the rights and obligations of a husband and wife.

Muslims believe Islam is the perfect religion because its teachings cover all aspects of life, including guidance in marriage. The purpose of this guidance is for physical and spiritual human contentment. Islamic teachings can be categorized into basic principles and non-basic principles. The former is believed to originate from God Almighty; thus, they are eternal, unconditional, absolute, and unchangeable. The basic principles are *Al-Qur'an* and *Hadith*. *Al-Qur'an* is the Commandment of Allah, written in original Arabic and conveyed to Prophet Muhammad. The translation of *Al-Qur'an* in to other languages, including Indonesian, is not the basic principle because it is a result of human efforts. The human interpretation and implementation of the basic principle in social life, akin to *Al-Qur'an* translations, are not the basic principle. The *Hadiths* included in the basic principles are believed to have originated from the Prophet.

Non-basic principle teachings result from the efforts (*ijtihad*) of *ulemas* since the period of the Prophet, including translation, interpretation, and other implementation strategies of the basic principles. Therefore, non-basic principles are relative, comparative, and able to change. Since the classical period of Islam, many of the non-basic principles can be found in Islamic books, particularly translation and jurisprudence books.

Islamic jurisprudence is the most implemented non-basic teaching in Muslim communities. It is based on the understandings of Islam drawn from *Al-Qur'an* and *Hadith*. While a brilliant product of human thoughts, there is no guarantee that the jurisprudence views are unflawed. One has to appreciate and honor the *ijtihad* of *ulemas*, yet one must also take into account that a product of *ijtihad* is influenced by the cultural and socio-historical context of a society. Therefore, an *ijtihad* decision is not eternal. The decision may apply to a certain period of time, but may not apply to other periods. Similarly, it may suit a society, but fail to suit another cultural community with different needs. This implies that one may accept a decision of *ijtihad*. But doing so should not prohibit one from being critical and unwilling to accept another decision that better suits and maximizes her own good.

Islamic teachings have two important dimensions: vertical and horizontal. The vertical aspect implies human's obligation to God (*hablun minallah*), while the horizontal aspect entails relations between human (*hablun min al-nas*). The horizontal aspect is crucial in Islam. *Al-Qur'an* and *Hadith* contain many humanitarian principles, such as human equality, regardless of one's gender, ethnicity, race, social status and religion (*al-Hujurat*, 49:13). However, the vertical aspect is more often highlighted in religious life than the humanitarian dimension. The vertical aspect receives less attention in daily life, including marriage. As a consequence, marital regulations in Islam tend to be very masculine and allow for violence against women to occur in marriage.

Many verses of the *Al-Qur'an* discuss marriage in detail. There are at least 104 verses that use the phrase *nakaha* (marriage), repeated twenty-three times throughout the text, or the word *zauwj* (spouse), repeated eighty times. To understand the real meaning of marriage in Islam and draw conclusions about the essence of the marriage verses, all the verses about marriage need to be compiled, sorted by theme and analyzed as a whole.

An analysis of all the verses on marriage point to five basic principles of marriage in Islam: monogamy,²⁵ love and affection, protection,²⁶ civilized and well-mannered conduct, both in sexual relations and everyday interactions,²⁷ and the freedom for men and women to find a spouse. These basic marriage principles, along with the aforementioned four paradigms, form the benchmarks of a critical analysis of the Code of Law.

Al-Qur'an (*al-Ahzab*, 7; *al-Nisa*, 21 and 154) describes the marriage contract as *mitsaqan ghalidzan*, or a sacred and serious pact between two equal parties (a man and woman) bound by love and affection. Each party is obliged to maintain the sanctity and commit to the perpetuity of the pact. *Al-Qur'an* also stresses the egalitarian relationship between a husband and wife in the verses of *al-Zariyat*, 49; *Fatir*, 11; *al-Naba*, 78; *al-Nisa*, 20; *Yasin*, 36; *al-Syura*, 11; *al-Zukhruf*, 12; *al-Baqarah*, 187; and *al-Najm*, 53. The emphasis on an egalitarian marriage is also found in a number of *Hadiths*. All of the verses on marriage in *Al-Qur'an* and the *Hadiths* strongly imply that marriage in Islam is similar to a contract or agreement,²⁸ initiated by *ijab* (offer) and *qabul* (approval).

b. The Factors that Led to the Formulation of Counter Legal Draft

There are at least six reasons for engaging in a critical analysis of the Islamic Code of Law, which led to the formulation of the Counter Legal Draft to support the 2001 national program issued by the state ministry of women empowerment to eliminate violence against women. Known as the Zero Tolerance Policy, the program affirms the government's commitment to eliminate all forms of violence against women.

The policy is based on Law No. 7/1984 on the ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and in response to the United Nations Declaration on the Elimination of Violence against Women (1994). One of the important points in Indonesia's national policy is the revision of the Islamic Code of Law to eliminate violence against women in the socio-cultural sphere. Why the Code of Law? Some

²⁵ *An-Nisa*, 4:3 and 129.

²⁶ *Al-Baqarah*, 2:187

²⁷ *An-Nisa*, 4: 19; *at-Taubah*, 9:24 ; and *al-Haj*, 22:13

²⁸ *Al-Nisa*, 4:21 and *Al-Baqarah*, 2:231

articles are considered to support violence against women, especially domestic violence. The national policy also states that the Ministry of Religious Affairs should be one of the institutions involved in the revision of the Code. As part of the commitment to improve women's value and dignity and to eliminate violence against women, the gender mainstreaming working group of the Ministry of Religious Affairs is completing critical analysis of the Code of Law.

Second, the Draft is a response to inconsistencies with the Code of Law, as a number of articles contradict several national laws, such as Law No. 7/1984 on the elimination of any form of discrimination against women, the 2000 Law on children's rights, Law No. 39/1999 on human rights, focusing particularly on women's protection and empowerment, Law No. 23/2004 on the elimination of domestic violence and the amendment to the 1945 Constitution. The Code of Law also contradicts Law No. 22/1999 on regional administration, which deals with people's participation in the decentralization process, regardless of their gender.

The Code of Law also conflicts with international policy that strongly supports women's empowerment, such as the CEDAW Convention and the Convention on the Elimination of All Forms of Racial Discrimination (1969). On the regional level, Islamic countries joined the Islamic Conference Organization that issued the Cairo Declaration (1990), which defends women's reproductive rights. The Child Rights Convention (1990), which was ratified by a Presidential Decree in 2000, clearly states that a person may be called a child until he or she is eighteen years of age. These conventions stress the importance of eliminating discrimination against race, nationality, gender, child status and religion.

Third, a critical analysis of the Code was initiated in part because of a suggestion by the Ministry of Religious Affairs, in particular the Directorate of Religious Court. In 2003, the Directorate of Religious Court proposed a bill on marriage to replace the marital law in the Code of Law. Aside from proposing a change to the legal status of martial regulations, from presidential instruction to law, the Directorate also suggested the addition of new articles that would institute sanctions for every violation, including jail sentences or fines for those who fail to register a marriage. The proposal is based on data that indicates forty-eight percent of marriages are not registered. This denies women and children many of their legal rights.

Fourth, the analysis is a response to the demand to formalize Islamic *sharia* in regions such as West Sumatra, South Sulawesi, Cianjur in West Java and Madura in East Java. These efforts to uphold *sharia* do not share a clear understanding of which *sharia* to implement. An alternative is the implementation of the Counter Legal Draft of the Code of Law, which pays more attention to essential values of Islam, such as equity and equality, and better accommodates local wisdom and values.

Fifth, the Draft is proposed as a response to the emergence of family law reform in Islamic countries, such as Tunisia, Jordan, Syria, Iraq and Egypt. These countries have repeatedly reformed family laws and provided methods to regular review them.

Sixth, the Draft in part reflects the results of a survey in West Sumatra, West Java, South Sulawesi, and West Nusa Tenggara. The survey shows that the respondents, which consisted of judges in the religious court, heads of religious affairs offices, and community religious leaders, demand changes to the Code of Law. The respondents argue that the Law has been imposed upon the public for fifteen years without having been critically evaluated. The survey

respondents also claim the Code of Law needs to be binding with legal codification, and to contain provisions that align with the needs of Indonesian Muslims.

All respondents agree on the following issues: to include marriage registration in the marriage principles, so marriage is void without it; to increase the minimum age requirement for a bride to nineteen years of age, the same age requirement as a groom; *nusyuz* (disobedience, usually exhibited by wives, especially with regard to granting conjugal rights) can be imposed both on a husband and wife; a wife should consent to reconciliation; and more specific regulation is needed on the rights and status of child born outside the wedlock.

Another issue that needs to be addressed is household income during the *iddah* (transitional) period after divorce. The Code of Law states that an ex-husband must financially provide for his ex-wife during the *iddah* period. In practice, however, a man never gives his money, if the wife does not file for divorce. The Law must stipulate that a husband is obliged to finance his wife during *iddah* period, whether she files for divorce or not. Judges cannot rule on a verdict until a wife's rights are legally secured. The same thing applies with *khulu'*, which should only be required if a wife wants a divorce for no apparent reason. *Khulu'* should be followed by a wife's obligation to pay *iwadh* to her husband.

The Draft was written in several stages. First, an analysis of the Code of Marital Law and KHI was conducted.²⁹ Second, the Gender Mainstreaming Working Group Team conducted a survey in five regions that wanted to formalize the Islamic *sharia*: Aceh, West Sumatra, South Sulawesi, West Nusa Tenggara and West Java. Third, the working group conducted a comparative analysis on family law in several Islamic countries, such as Tunisia, Jordan, Iraq, Syria and Egypt. Fourth, the working group conducted a critical analysis of the classical jurisprudence literature regarding marriage, inheritance, and religious donation. Fifth, the group compiled and drew conclusions from the research, transposing the conclusions into a legal format to attract public attention. Sixth, the group conducted five workshops to review the working draft, particularly the key theological, legal, sociological and political arguments.

The workshops involved a number of religious and legal experts, sociologists, political scientists, and feminists. Seventh, input from the workshops was incorporated into a revised draft. Eighth, the official Draft was launched to raise awareness and enlighten the public with the intent that they will support it and criticize the reform of the Code of Law. The Minister of Religious Affairs attended the launch as well as other public officials, female activists, legal practitioners and some *ulemas*. Ninth, the group revised several sensitive sections, particularly relating to prenuptial agreements. The prenuptial agreements had been highly misunderstood by the public as *mut'ah* marriage, a part of the divorce agreement (*taklik talak*) that is already recognized in the Code of Law. The team ultimately decided to eliminate the section from the

²⁹ There are eleven theses, nine dissertations and twenty-three articles, which discuss the Islamic Code of Law. Despite substantial research that contained progressive ideas on Islamic law and recommended family law reform, there has not been a significant response from the general society, *ulemas* and radical groups. The Ministry of Religious Affairs' Gender Mainstreaming Team opts for a Counter Legal Draft to attract public attention and a response from *ulemas* and Muslim scholars. The Draft has gained both supporters and opponents, but at least it opened the discourse to consider the dynamic and broad spectrum of Islamic thoughts, which up until then had stagnated or, in some cases, been considered closed to debate.

draft. After completing the drafting process, the working group stated that the Counter Legal Draft of the Code of Law was now in public domain and no longer authorized by the Ministry of Religious Affairs' Gender Mainstreaming Team.

VII. Contentious Issues in the Counter Legal Draft

The Counter Legal Draft reforms several articles in the Islamic Code of Law. The articles under scrutiny do not accommodate Islamic views that uphold humanity and democracy, as stipulated in the *Al-Qur'an* and *Hadith*, and contradict national and international rules and regulations.

The Draft identifies fourteen major issues in the marital law that need to be changed; these include: the definition of marriage, guardianship, marriage witnesses, a minimum age requirement for brides, dowries, marriage registration, *nusyuz*, the rights and obligations of a husband and wife, income earning, polygamy, interfaith marriage, *iddah* (transitional period), *ihdad* (mourning period), and the rights and status of children born out of wedlock. Meanwhile the Draft noted four crucial issues in Indonesia's Inheritance Law; these include: inheritance for non-Muslims, the share of inheritance bequeathed to a daughter, inheritance for children born out of wedlock, and *'aul* and *radd*. Other issues the Draft identifies relate to religious donations for non-Muslims and intellectual rights donations. Below is an outline of the contentious issues relating to Marital Law.

a. Definition of Marriage

Article 2 of the Islamic Code of Law stipulates that "*marriage according to Islamic law is a binding contract or mitsaqan ghalidzan [that] complies with the command of Allah, and performing it is an act of devotion.*" Although the current definition is more progressive than the one stipulated in classical jurisprudence, the Counter Legal Draft offers another definition: "*marriage is a binding contract (mitsaqan ghaliidzan) between a man and a woman, with full awareness, in order to establish a family and based on willingness and agreement of both parties.*" The Draft stresses that marriage is entered into with the full awareness of both a man and woman, and based on their willingness and mutual agreement.

The Gender Mainstreaming Team decided that the phrase "act of devotion" and "command of Allah" needed to be erased from the Code's marriage definition. The phrases have become distorted to the extent that not getting married is interpreted as a sin. As a result, many women get married to avoid the stigma, or to avoid another sin such as disobedience to one's parents. This public attitude has caused situations that jeopardize women's rights, such as forced marriage, the trafficking of women and children with modus operandi of marriage, polygamy, and unregistered marriage.

The concept of devotion is applied broadly in Islam; to every activity pursued with the intent to receive Allah's blessing. A daily meal is an act of devotion, if it is consumed with the intent to receive Allah's blessing. The intention and commitment of an individual, distinguishes an act of devotion from other acts. Thus, many verses in *Al-Qur'an* and *hadith* encourage Muslims to seek Allah's blessing in all that they do, including marriage. In other words, marriage is an act of

devotion only if it is entered into willingly, voluntarily and responsibly, not by force or because of lust.

Ulemas have dissenting opinions about whether marriage is an obligation. A small percentage of *ulemas* see marriage as an act of devotion, like the Zahiri school of thought. The Zahiri tradition strongly relies on textual meanings to substantiate their arguments. For example, *Al-Qur'an* (*al-Nisa*, 4:3) stipulates the command to get married (*fankihu*); to the Zahiri, *fankibu* implies that marriage is an obligation.

In Indonesian jurisprudence books,³⁰ instructions on when to enter into marriage are based on verses from *al-Zariyat* 49, *al-Nahl* 72, and *al-Ruum* 21, as well as from the Hadith, which advise young men to marry. The majority of noted *ulemas*, such as Imam Syafi'i, emphasize that marriage is not an act of devotion, but a part of *mu'amalah* (relationship between humans). Using *al-Nisa'*, 4:25, as a reference, Imam Syafi'i concludes that marriage is not an obligation, but instead a recommendation (*mandub*).³¹ He suggests that people, who can maintain their abstinence, should stay away from marriage.³² Jurisprudence books, both classical and contemporary, include provisions about marriage in the *mu'amalah* chapter, instead of the chapter about acts of devotion (*ibadah*). Marriage in Islam is a form of social contract administered by the *ijab* (offer) and the *qabul* (approval) in the marriage ceremony.

Many Muslims perceive marriage as a contract in terms of property rights. Thus, marriage implies ownership. This perception creates an unbalanced relationship for men and women. Many common phrases have developed in Indonesian society that reflect gender-based power imbalances; for example, a "husband marries," and a "wife is being married;" a husband covers the family expenses, where as a wife is financed; a husband reconciles, while a wife is reconciled with; a husband is polygamous, a wife lives in a polygamous household; a husband is the head of the family, and a wife a member of the family. These views reflect an unequal partnership between husband and wife in marriage, greatly reducing a woman's bargaining power in marriage.

Classical jurisprudence popularizes an image of women as sexual objects, and possessions to be enjoyed (*milk al-mut'ah*, or *milk al-budh'*). It has greatly influenced women's subordination in society; for example, classical jurisprudence has undermined the important issue of sexual rights. The *Hanafi* school of thought states that sex is only a men's right. Therefore, a husband may force his wife to fulfill his sexual needs.³³ This viewpoint clearly reduces women to mere physical and sexual objects.

³⁰ The reference to the Indonesian Islamic jurisprudence book assumes that Islamic principles of marriage in Indonesia refer to the book. Public views about the Indonesian Islamic jurisprudence book clearly refer to the Middle Ages' jurisprudence books, particularly the books by the *Syafi'iyyah* school of thought.

³¹ Literature about *Syafi'iyyah* mentions this, including Fakhruddin ar-Razi, *al-Ghaib Mafatih Translation*, Section 9, p. 140. Also see As-Sayyid Muhammad Syata' al-Dimyathi, *Kifayah al-Atqiyaa'*, p. 22.; Syihabuddin al-Ramli, *Nihayah al-Muhtaj*, Section 6, p. 183.

³² Abu Hasan al-Mawardi, *Ahkam al-Sulthaniyyah*, Dar al-Fikr, Beirut, T.Th., p. 5. Also see Ibn Taimiyah, *Al-Siyasah al-Syar'iyyah*, Kairo, Dar al-Kitab al-Gharbi, 1951, p. 22-25.

³³ Abdurrahman Al-Jaza'iri, *Al-Fikih ala Madzahib Al-Arba'ah*, Vol. IV, p. 4.

The essence of marriage is wonderfully described in the *Al-Qur'an* (*al-A'raf*, 7: 189); marriage is the process of returning to one's most authentic humanity, returning to *nafsin wahidah* (one's self). Allah deliberately uses *nafsin wahidah* to emphasize that marriage is essentially a reunification between man and woman.

Another verse (*al-Rum*, 30: 21) stresses the essential unification, *min anfusikun*, on the idealistic and practical level as peaceful and full of affection. Peace and affection will not exist when one party in marriage negates and subordinates the other. So it follows that there should be no domination in marriage; an individual exhibits ignorance about a spouse's rights in marriage, if he or she engages in behaviour that clearly dominates and subordinates a spouse. Removing domination from husband and wife relationships will create a civil, respectful and equal relationship full of affection and love (*mawaddah wa rahmah*).

The Counter Legal Draft considers marriage to be a right, not an obligation, with certain requirements exercised by both men and women. People have the right to enter into marriage or never marry. Choosing to marry and having a family and children are basic and fundamental rights. The Counter Legal Draft also reemphasizes marriage as social transaction or contract involving two equal parties: a man and a woman. The parties in marriage must be specified, as marriage has often been understood as a contract between the groom and the bride's father or guardian, instead of between a bride and groom. This specification may discourage women from shouldering more responsibilities in marriage because there legal rights are not necessarily guaranteed. The Draft's emphasis on the social contract is necessary to eliminate the incorrect perception of marriage, as an agreement where a man possesses a woman. Marriage should bind both parties to the legal imperatives agreed upon in the social contract.

b. The Guardian for Women in the Wedding Ceremony

Article 19 of the Islamic Code of Law stipulates, "*a guardian in a wedding ceremony is required to marry off the bride.*" The Counter Legal Draft, meanwhile, states, "*a guardian is required in a marriage ceremony only when the bride is under twenty-one years of age.*" The Draft does not rule out having a guardian. However, twenty-one years of age marks adulthood and the ability to legally decide for oneself. Eliminating the guardian requirement in a marriage ceremony is not new, as Abu Hanifah made a similar claim in the 9th century. A number of verses in *Al-Qur'an* and the *hadiths* clearly confirm the existence of women, as human beings equal in worth to men. There is no essential distinction between men and women in the verses of *Al-Qur'an* and the *hadiths* that obliges women to carry out specific religious teachings.

Islamic jurisprudence requires a bride to have a guardian accompany her in the marriage ceremony; the guardian must be a man, such as a bride's father, grandfather, brother, brother's son, and father's brothers. Women may not be guardians to a bride in marriage. This provision implies that men and women are God's creature, but they are valued and honored differently. Men are considered superior to women, and inversely women are subordinate to men. This discriminatory social construction is the problem.

Jurisprudence books in Indonesia³⁴ generally require a bride to have a guardian in her marriage ceremony.³⁵ The books refer to a number of *hadiths*, such as "laa nikaha illa bi waliyyin wa syahiday adlin, wa maa kaana min nikahin ghairi zaalik fahuwa batil" (a marriage is illegal without the presence of a guardian and two fair witnesses. Any marriage without the requirements is invalid).³⁶ Different apostles have recorded a number of *hadiths* with a similar meaning.

Ulemas have different opinions about the requirement of a guardian in a marriage ceremony. Malik and Syafi'i believe that a guardian is required and a marriage ceremony without the presence of a guardian is invalid. Abu Hanifah, Zafar, al-Sya'bi and al-Zuhri, however, state that a marriage is valid if a woman is married to a man who meets the requirements of marriage, even if she does so without her guardian's consent. Imam Dawud al-Zahiry, meanwhile, deems that a guardian is only required if the bride is single and not a widow.

The conflicting opinions among *ulemas* are due to different interpretations of the phrase - *la nikaha illa bi waliyyin...* (there is no wedding without a guardian) - found in *hadiths*. Some *ulemas* literally interpret is the phrase; thus, a wedding is "illegal" without a guardian, and a guardian is an essential requirement of marriage (*annaha min syurut al-shihhat la min syurut al-tamam*). However, other *ulemas*, consider a wedding ceremony without a guardian to be "imperfect," rather than "illegal." Abu Hanifah, for instance, states that a guardian is an addition to, not a requirement of, a marriage ceremony (*fa ka-annaha 'indahu min syurut al-tamam la min syurut al-shihhat*).³⁷ *Ulema* opinions that require a guardian in a marriage ceremony highlight the importance of positive family relationships. In Islam it is not appropriate for a daughter to freely befriend men.³⁸ Thus, parents, who know their children well, choose the best and most appropriate spouses for them.

The Counter Legal Draft seeks to end the debate about guardian requirements by requiring a guardian for a bride under twenty-one years of age. Individuals above twenty-one years of age are considered mature, independent, and able to make legal decisions. Guardians or parents can provide advice about marriage and prospective spouses, but they are not entitled to insist on or prohibit a marriage.

³⁴ It is deliberate to refer to Islamic jurisprudence books in Indonesia with the assumption that Islamic teachings in Indonesia based on the books. The books clearly refer to the books in middle ages, particularly those of Syafi'iyah school of thought. [THIS SAME ENDNOTE IS USED ON PG. 37, ENDNOTE 34. EITHER DELETE THIS ENDNOTE - OR ENDNOTE 34 - OR REPHRASE]

³⁵ The books include *The Complete Islamic Jurisprudence Studies*, by Drs. H. Moh. Rifa'i, published by Karya Toha Putra, Semarang, 1978, p. 453-512, and *Women Jurisprudence*, translated by Anshori Umar, Asy-Syifa, Semarang, 1986, p. 358-447. This book is translated from the Arabic book *Fiqh al-Mar'ah al-Muslimah* by Ibrahim Muhammad Al-Jamal published in Cairo in 1981.

³⁶ *Hadith* from Ibnu Hibban.

³⁷ For a detailed explanation on dissenting opinions between *ulemas*, see Ibnu Rusyd, *Bidayat al-Mujtahid*, p. 18. *Ulemas* who require a guardian in the marriage ceremony contradict Al-Qur'an (particularly, verses *al-Baqarah* (2): 221 and 232. Verse 232 clearly asks guardians not to prevent a woman, who has been divorced, to marry another man she considers suitable. The phrase "fa-la ta'dhuluhunna" refers to the authority of a guardian. Verse 221 prohibits a guardian from marrying off his son or daughter with 'infidels' unless the latter becomes faithful.

³⁸ Moh. Rifa'i, *The Complete Islamic Jurisprudence Study*, Toha Putra, Semarang, 1978, p. 460-461.

c. Witnesses in the Wedding Ceremony

Article 25 of the current Islamic Code of Law states, "*a person who is eligible to become a witness in the marriage ceremony is a Muslim man, who is fair, mature, mentally fit, and not deaf.*" The witness requirements discriminate against non-Muslims, women, and disabled people. Therefore, article 11 of the proposed Counter Legal Draft seeks to amend article 25; the amended article would read

(1) Women and men assume an equal position as witnesses of a wedding ceremony; (2) A marriage ceremony has to be witnessed by at least two women, two men or a woman and a man; (3) Those eligible to serve as a witness must be at least twenty-one years old, mentally fit, mature (rasyid or rasyiidah) and appointed by the mutual consent of the bride and groom.

The marriage ceremony requires a witness to ensure it takes place. A witness should be trusted by the bride and groom and present throughout the marriage process. In a modern society, witnesses are a part of a larger group of people that officiate a marriage; for example, officials from an authorized institution, such as a religious affairs office, must register a marriage.

The question remains: why does the Code of Law prohibit a woman from being a witness, while women play a major role throughout the marriage process in preparation for the marriage ceremony? Women also attend weddings with their male relatives. To prohibit women from serving as witnesses in marriage is discriminatory, from both a gender equity and human rights perspective.

In addition to women, non-Muslims and blind and deaf people are not allowed to serve as witnesses even though, *Al-Qur'an* condemns discriminatory acts. *Al-Qur'an* does not require a witness during a marriage ceremony, but instead requires a witness for a divorce agreement (*thalaq*) (see *al-Thalaq*, 2).

d. Age Requirements for Marriage

Article 15 of the current Islamic Code of Law states,

(1) for the benefit of a family and household, a marriage can only take place if the bride and groom meet the age requirements, nineteen years of age for the groom and sixteen years of age for the bride, outlined in article 7 of the Law No. 1/1974; (2) a couple under twenty-one years of age is required to obtain permission as stipulated in article 6 (2), (3), (4) and (5) of the Law No. 1/1974.

Meanwhile, article 7 of the proposed Counter Legal Draft amends the Code to state,

(1) both a bride and groom must be at least nineteen years of age to marry; (2) a bride and groom may make an independent decision to marry, as long as they are mentally fit, twenty-one years of age, and mature; (3) if a bride and groom do not meet the requirements stipulated in article 7(2), then a family member, relative or person, who acts on behalf of the family, is eligible to marry them.

Al-Qur'an and *Hadith* do not clearly stipulate the minimum age required to marry. Muslim societies tend to base age requirements for marriage on when a girl and boy reach puberty.

Unsurprisingly, there are many cases of under age marriage. Under age marriage is a form of child abuse and violates the rights of a child.

The prophet Muhammad was married when he was twenty-five years old, which can become a point of reference in combating child marriage. Article 15 in the Code of Law, which outlines a bride's age requirement in marriage to be younger than a groom's, reinforces women's subordination. The Code's age requirements for marriage violate Law No. 1/1979 on Child Welfare. Article 1(2) of this law states, "*a child is a person who is under twenty-one years old and has never married.*"

The bride's age requirement also violates the International Convention on the Rights of the Child ratified by Indonesia. The 2003 Law on Children Protection states that the minimum age requirement for marriage is eighteen years of age. Legalizing marriage for a sixteen year-old girl equates to legitimizing underage marriage and child exploitation.

The research conducted by the Center of Women Studies at the Jakarta State Islamic University in 2000 suggests on average that the ideal age for a woman to marry is 19.9 years of age and 23.4 years of age for a man. This indicates that nineteen years of age is the minimum age at which one is ready physically, economically, socially, mentally, spiritually, religiously and culturally for marriage. The Counter Draft, therefore, sets the minimum age requirement for men and women to get married to nineteen years of age. Thus, both the bride and groom have to at least graduate from high school before marriage. If a woman marries at an early age she increases her biological risks, such as damaging her reproductive organs. She is also subject to increased psychological stress, such as being overburdened by family responsibilities. Family life involves many responsibilities and a husband and wife should share the burden.

e. Dowry

Article 30 of the Islamic Code of Law stipulates, "*the groom is obliged to provide a dowry for the bride. The quantity, shape and type of dowry are agreed upon by both parties.*" Meanwhile, article 16 of the Counter Legal Draft stipulates, "*(1) both a bride and groom must provide a dowry for each other according to local custom; (2) The quantity, shape and type of dowry are agreed by both parties according to each other's financial condition.*"

Jurisprudence books state that a dowry is required in a marriage ceremony. The argumentation is based on *an-Nisa*, 4:4: *wa atu an-nisa'a sadukatihinna nihlatan*. However, this verse does not explicitly include the word dowry, but instead uses the term *sadukatihinna* or alms. In fact, the dowry tradition emerges from Prophet Muhammad's custom of giving a dowry or gift to his bride. This custom is recorded in several *hadiths*.³⁹

A dowry is generally understood to be a gift from the groom to the bride during the marriage ceremony. The form of dowry varies; for example, a dowry may be cash, gold, jewelry, prayer equipments, *the holy book Al-Qur'an*, and/or land. In Indonesia, the most common dowry is gold jewelry. Grooms in Middle Eastern Arabic societies usually bestow highly valuable dowries, such as furnished houses.

³⁹ *Hadiths* mentioning dowry include *hadith* of Anas r.a, recorded by Bukhari-Muslim; *hadith* of Abu Dawud from Uqbah ibn Amir; *hadith* of Tirmidzi from Abdillah ibn Umar; and *hadith* of Hakim from Sahal ibn Sa'id.

Islam considers a dowry to be a symbol of respect towards women. However, dowry was later misunderstood as a payment for a woman's body and sex; it denoted ownership. Once a man provides a dowry, he claims ownership over a woman's body and is entitled to have sex with her whenever he wants.

This common perception of a dowry is not baseless, but relates to the precedent of classical jurisprudence. Marriage in classical jurisprudence is always defined as "*akd li at-tamlik*" (contract of the ownership upon a woman's body). The issue of dowry has also been related to *dukhul* (sexual intercourse). When a couple is divorced before *dukhul*, then the husband has the right to have half of the dowry returned to him. If the divorce is after *dukhul*, then the husband relinquishes his right to have the dowry returned to him.

Although the word "dowry" cannot be found in the Al-Qur'an, there are several words with a similar meaning, such as *ujrah* (see *al-Nisa`*, 4:25), *shadaqah* (*al-Nisa`*, 4:4), and *faridhah* (*al-Baqarah*, 2: 236- 237). From these verses, one can conclude that a dowry is a gift from a husband to a wife during the marriage ceremony. It is a symbol of love, affection, and responsibility, as well as one's commitment to carry out the mandate of an Islamic marriage.

A number of *hadiths* describe Prophet Muhammad's dowry custom as follows

From Abdullah ibn Umar ibn Rabi`ah, from his father, states: Prophet Muhammad allows a man to marry a woman with a pair of sandals as dowry (Hadith of Turmuzi);
"from Sahal ibn Sa'id r.a., he said Prophet Muhammad once married off a man to a woman with a steel ring as a dowry. (Hadith of Hakim).

Another *hadith* states, "*from 'Uqbah ibn Amir, he said that Prophet Muhammad uttered that the best dowry was the easiest to obtain*" (Hadith of Abu Dawud). When the Prophet married Shafiyyah, he did not provide a dowry in the form of a material possession. Instead he freed her from slavery. The historical event is recorded in a *hadith* of Bukhari-Muslim, "*from Anas ra, from Prophet Muhammad: he had freed Shafiyyah and the freedom was the dowry.*"

These *hadiths* conclude that there is no strict rule on the form of a dowry, its shape or quantity. They specify that what should take precedence over the form of a dowry, is one's certainty that his/her dowry will not become a burden on his/her spouse. A dowry is a symbol of respect, love, affection, sincerity and responsibility. A dowry's value does not lie in its shape or price, but comes from the intention of the person who gives it and how she/he transforms this intention into good behavior in family life. Men should not monopolize the act of giving a dowry, as women may give a dowry as well. The ability for a bride and groom to give to each other is a wonderful thing.

f. Marriage Registration

Article 5 of the Code of Law states, "*in order to maintain public order, marriage among Muslims must be registered.*" Marriage registration is necessary to maintain social order; therefore, it is not considered to be a marriage requirement, but a public duty. Meanwhile, article 6 of the Counter Legal Draft stipulates, "*marriage is legal when it meets six requirements: a bride, a groom, ijab, qabul, a witness and registration.*" Article 12 of the Draft stresses, "*(1) all marriages must be registered; (2) the government is obliged to record the marriage(s) of every citizen.*

Compared to traditional Islamic jurisprudence on marriage registration, the Code of Law outlines in articles 5, 6 and 7, a more progressive position on the issue. The articles indicate the importance of marriage registration, but do not include it in the list of requirements for a legal marriage. In general, people still consider registration, since it is considered optional in classical jurisprudence, to be unnecessary if a marriage ceremony has met all the religious requirements. As a result, there are many cases of unregistered marriage in Indonesia.

The Counter Legal Draft makes registration a requirement for a legal marriage. The theological argument can be found in *al-Baqarah*, 2:282, which requires legal document in a debt transaction.⁴⁰ Marriage is an important transaction, far more important than other daily transactions in society. If mere debt agreements have to be recorded, then a marriage contract should most definitely be registered.

Another argument comes from the *hadith* that states, "...never do prostitution and never do unregistered marriage" (see the *Kitab al-Nikah*, *Sunan al-Tirmizi*, *Hadith* No. 1008; *Kitab al-Nikah Sunan al-Nasai* No. 3316-3317; *Kitab al-Nikah Sunan Ibn Majah*, *Hadith* No. 1886). There are also a number of *hadiths* that suggest a formal announcement of marriage should take place (see *as-Sarakhs*, *al-Mabsut*; V: 31; *Sunan at-Tirmidzi* No. 1009; *Sunan Ibn Majah* No. 1885; and *Musnad Ahmad* No. 15545); where as, other *hadiths* require a witness in a marriage ceremony to validate a marriage, as opposed to formal marriage registration. *Atsar* Umar ibn Khattab, however, does not recognize a marriage only attended by only one witness. Yet a government issued marriage certificate is legally binding and more powerful than eyewitness accounts, especially when a state institution issues a marriage certificate. Marriage registration will provide greater protection for the contracting parties, particularly for a woman and her children.

Unregistered marriage inflicts suffering upon a wife and her children. In an unregistered marriage, a woman is not a legitimate wife under the law because she does not have an authentic marriage certificate to prove her status. Therefore, she is not entitled to joint property rights, if she and her husband divorce. Similarly, if her husband dies or divorce occurs, she is unable to claim her inheritance during marriage. Apart from the legal complications, an unregistered marriage has a powerful social implication for women; society considers an unregistered married couple to be a *de facto* couple, and an unregistered wife to be her unregistered husband's mistress.

The Indonesian government deems the children of unregistered married couples to be illegitimate; their legal status on their birth certificates is, "children born out of wedlock." Children born to an unregistered married couple do not have a civil relationship with their mother and her family, or a legal relationship with their father (article 42 and 43 of the Marital Law). The status of these children's birth certificates creates unfortunate social and psychological impacts for them and their parents. Their unclear legal status jeopardizes their child rights, such as financial security, and inheritance.

⁴⁰ Q.S., *al-Baqarah*, 2:282

According to Abu Hasan al-Mawardi and Ibn Taimiyah,⁴¹ Islamic law obliges the state to protect its citizens from any form of exploitation and other treatment that inflicts suffering, by issuing regulations that will create peace and harmony. The government functions on two premises: *fi harasah al-din* (to protect religion) and *fi siyasah al-dunya`* (to arrange worldly order). In performing these two functions, citizens have a social obligation to obey the government, as long as it does not engage in immoral actions and disadvantage them. The government is allowed to issue regulations (*siyasah al-syar`iyah*), or a set of regulations to support the teachings of *Al-Qur'an* and *hadith*.

g. Nusyuz within Marriage

Article 84 (1) of the Code of Law outlines, “*a wife is considered nusyuz (disobedient) if she is unwilling to carry out obligations as [stipulated] in article 83 (1), unless she has a legitimate reason.*”

The Counter Legal Draft asserts that a husband can also be disobedient, as stated in the *Al-Qur'an*. Article 53 of the Draft stipulates,

(1) a husband or a wife is considered nusyuz if s/he is not performing his/her obligations or is violating another's human rights, as outlined in articles 50 and 51; (2) the settlement of nusyuz is resolved peacefully by family discussion; (3) when a peaceful settlement fails, the party who suffers can file a case in court; (4) when violence or torture occurs because of nusyuz, then the injured party can press criminal charges.

Nusyuz refers to an individual's disobedience and/or to an act that violates law. Generally, society considers *nusyuz* to be an act of disobedience committed by a wife against her husband, and not vice versa. *Nusyuz* can lead to domestic violence. As *nusyuz* is not imposed on a husband, it perpetuates a double standard. As men and women are both human, they are equally capable of committing *nusyuz*. *Al-Qur'an* clearly stipulates that *nusyuz* can apply to men as well as women (see *al-Nisa*, 4:128). The verse about *nusyuz* (*al-Nisa*, 4:34) was revealed in the context of Arab society where there were high levels of violence against women and the most common form of violence was beating. The revelation of the verse was thus aimed at prohibiting wife beating and any other form of domestic violence.

h. Rights and Obligations of a Husband and Wife

Article 79 of the Code of Law states,

(1) the husband is the head of the family and the wife is the homemaker; (2) the rights and role of a wife are equal to that of a husband's both in the domestic and public sphere; (3) each contracting party in marriage is entitled to make use of and abide by the legal system.

The content of Article 79 is inconsistent, since the rights and roles of a husband and wife cannot be equal, as stipulated in article 2, if the first article clearly states that a husband is the *head* of the family.

⁴¹ Abu Hasan al-Mawardi, *Ahkam al-Sulthaniyyah*, Dar al-Fikr, t.th, Beirut, p.5. Also see Ibn Taimiyah, *Al-Siyasah al-Syar`iyah*, Dar al-Kitab al-Gharbi, 1951, p. 22-25.

In response to this contradiction, the Counter Legal Draft states in article 49,

(1) the position, rights and obligations of a husband and wife are equal within the family and public society; (2) a husband and wife have the rights and obligation to establish a happy family founded on mawaddah, rahmah, and mashlahah.

Article 80 of the Code of Law stipulates the rights of a husband,

(1) a husband is the adviser of the wife and household, but important household matters are decided by both a husband and wife; (2) a husband is obliged to protect his wife and meet the household needs according to his ability; (3) a husband is obliged to provide a religious education for his wife and to provide her opportunities to accrue useful knowledge about religion, the state and nationhood.

Article 83 of the Law stipulates the rights of a wife as follows, *(1) the primary obligation of a wife is to serve her husband devotedly within the parameters permitted by Islamic Law; (2) a wife manages and arranges the daily needs of a household to the best of her ability."*

Regarding article 80 of the Code, the Counter Legal Draft outlines in article 51 a revised summary of the obligations of a husband and wife,

(1) to love, respect, honor, protect support, and accept the differences of one another; (2) to meet the needs of the family according to a wife and husband's respective abilities; (3) to manage the household based on a mutual agreement of shared work; (4) to provide the opportunities for one another to improve his or her potential; (5) to look after, take care of and educate the children.

These obligations apply to both contracting parties in marriage.

The phrase "head of family" in the Code of Islamic Law implies power and authority. A husband can become so powerful that he obligates his wife to do all the domestic chores and serve him devotedly. This perception contradicts the essence of Islamic teachings, as stipulated in the *Al-Qur'an*. In *al-Baqarah*, 2:187, Allah stresses the equal roles of a husband and wife (*hunna libasun lakum wa antum libasun lahunna*; a husband and wife should protect each other).

Families and households come in many forms and have different authority figures. Thus, positioning a husband as the head of a family discounts social reality and only accommodates one type of family, which consists of a father, a mother and children. Many women assume the principal position of authority within a family even though the law does not recognize them. For example, there are many single mother households and orphan families, where children are cared for either by their biological mother, an older sibling or other female family members. When families are confronted with external factors that draw men from their families, such as war, natural disasters, and economic migration, women are most often forced to be the head of family.

Indonesia is party to international conventions and has passed national legislation about human rights. These documents can serve as legal references in public deliberations to ensure that the positions of a husband and wife are egalitarian. Such documents include the Universal

Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Islamic Human Rights Convention, a constitutional amendment, the 1999-2004 State's Guidelines and article 51 of Law No. 39/1999.

Islam states that every human being has the potential to be a leader. Each and every person is asked to be responsible before Allah. A *hadith* states, “*every one of you is a leader and each of you will be asked about your leadership. A labourer is a leader for looking after his/her master's possession, and will be asked for his/her work*” (*Hadith of Bukhari Muslim*). This *hadith* implies that every individual, regardless of his or her gender, has an opportunity to be a leader. Leadership has to do with ability, self-confidence, independence, maturity, courage, sense of responsibility, and devotion to Allah.

i. The Financial Caretaker within a Marriage

Regarding a family's finances, the Code of Law outlines in article 80 (4) and (6),

(4) based on his income, the husband is responsible for: a) financial matters, kiswah and providing a residence for his wife, b) his immediate family's household, medical and childcare expenses, and c) his children's school tuition; (6) a wife can release her husband from the responsibilities outlined in (4) a and b.

The Counter Legal Draft states that income earning is a collective responsibility between a husband and wife. However, women's reproductive duties, including pregnancy, labor, breastfeeding and childcare, are considered to be unpaid work that is far more valuable than paid work. Therefore, wives who opt to perform reproductive duties might be released from the obligation to earn an income; such women must be duly appreciated and supported by their husbands, who are to provide their wives with nutritious food and medical treatment, according to their capabilities. Article 52 of the Draft stipulates,

(1) being pregnant, giving labor and breastfeeding are more valuable for wives than earning an income; (2) point (1) implies that a wife is entitled to a balanced reward for her domestic duties, based on the mutual agreement of both parties; (3) if a contracting party fails to uphold the agreement, the injured party may ask for a settlement in court.

The Draft states that there are no differences between a husband's and wife's ability to earn an income and meet family needs. A job that is suitable for a husband is also suitable for a wife, and vice versa. Domestic chores are not a woman's responsibility, but a family's responsibility. A wife may be involved in the public domain, as there is no law prohibiting women from having a career outside the home. For example, the prophet's wife Khadijah worked in the public domain to earn the family income.⁴²

j. Prohibition of Polygamy

Concerning polygamy, the Code of Law stipulates in article 55,

(1) if a man chooses to have more than one wife at a time, he is limited to four wives; (2) to have more than one wife, a husband must fulfill the primary condition to be fair and

⁴²Muhammad Abduh, *Tafsir al-Manar*, Vol. II, p. 375-78. Also see *Fatawa Mu'ashirah*, Section II, p. 106; Musthafa al-Maraghi, *Tafsir al-Maraghi*, Section II, p. 166.

equally treat every wife and the child; (3) failing to meet the condition stated in point (2) prohibits a man from having more than one wife.

Meanwhile, article 3 of the Counter Legal Draft strongly emphasizes the prohibition of polygamy; article 3 states, “(1) *the essence of marriage is monogamy (tawahhud al-zawj); (2) the failure of a husband to be monogamous in marriage makes the marriage invalid by law.*”

Thousands of years before Islam came to the Arab Peninsula, polygamy was a common practice in many parts of the world. There were no limits on the number of wives a man could have, nor were the principles of justice and morality established. Islam came to the Arab Peninsula and radically reformed the region by limiting the number of wives a man could have and requiring a husband to guarantee fair treatment to each wife. The American sociologist, Robert Bellah, notes this drastic measure. He calls Islam a modern religion during that period of time, stating, “it was too modern to succeed.”

The principle of justice is a part of the core of all Islamic teachings. Several reform movements around the world have made a strong commitment to eliminate polygamy because it violates the principle of justice. The desire to uphold Islamic justice forms the spirit of activist movements, which guide the reform of polygamy provisions in Islamic law. The strong restrictions on polygamy in Islam should be viewed as a noble intention by public officials to gradually eliminate the practice. For example, the tradition of alcohol consumption and slavery were deeply entrenched in Arab society. The law did not prohibit alcohol and slavery at once, but gradually, until society was ready to accept the law and abide by it.

Every verse of *Al-Qur'an* uses phrases that reflect the conditions in which they were revealed. However, the spirit of *Al-Qur'an* is not limited to a historical period. Verses on polygamy, slavery and the consumption of alcohol aim to illustrate to humans their dignity as creatures of God. Humans must respect and not discriminate against themselves and others. Humans must not engage in the self-destructive behaviour of alcohol consumption and harm others through polygamy and slavery.

The prophet Muhammad was raised and lived in a polygamous community, but he was monogamous. He married Siti Khadijah and lived happily with her for twenty-eight years until his loving wife passed away. The joy shared by Prophet Muhammed and Siti Khadijah inspires millions of couples. For example, many couples illustrate their reverence by saying a prayer to honour the Prophet and his wife in their marriage ceremonies. While there might have been social pressure for the Prophet to practice polygamy, he chose not to be polygamous. He was capable of being fair, since he was a prophet. He was a descendant of the *Quraisy* figure; a sympathetic, good looking, and respected figure in society, Prophet Muhammad was a charismatic religious leader with a wife, Khadijah, who was unable to give him a son. Nevertheless, he was undeterred.

For Prophet Muhammad, Khadijah was a sleeping companion, colleague, discussion partner, best friend and soul mate. The death of Khadijah was a painful ordeal for Muhammad. The year of her death was immortalized in the history of Islam, as “*amul azmi*” (the year of grief). For the rest of his life, Prophet Muhammad always mentioned the kindheartedness and compassion of Khadijah, the woman he truly loved. Three years after Khadijah passed away, Muhammad was responsible for developing the missionary strategy and force to go outside the Arab Peninsula

and to Yastrib. The society was divided into dozens of tribes. Thus, Muhammad used marriage as a strategic tool to build trust and channels of communication. Prophet Muhammad married several women during this era. This historical context is often missing in the analysis of polygamy.

Compared to traditional Islamic jurisprudence, the Code of Law is more progressive. This is due to the Code's stipulation that polygamy can only be legal if the court grants permission on a case-by-case basis. However, the court permits polygamy under certain conditions: 1) if a wife is unable to carry out her obligations; 2) if a wife is disabled or suffering from an incurable disease; and 3) if a wife cannot bear children. These conditions take the husband's perspective into account and fail to consider the interests of a wife. The wife on the other hand is not afforded similar rights in the event the husband is unable to carry out his obligations in the event that the husband is disabled and ailing or if the husband is infertile.

The Code's provisions that allow for polygamy go against Allah's guidance in *an-Nisa*, 4:19, "*and have a relationship with them (wives) appropriately...Then, if you don't like them, (be patient) because you may not like something, but Allah brings it for more goodness.*"

The only verse that has been the theological foundation of polygamy (*al-Nisa* 4:3) is not set in the context of marriage, but in the context of providing protection for an orphan. Therefore, in order to formulate a law from this Islamic teaching, it requires thematic interpretation (*tafsir al-ma'udhuiy*). However, the polygamy law cannot be based only on one verse (even this verse sounds more prohibiting than allowing of polygamy). The law takes into account all the verses that deal with marriage, which is one of the principles of providing an accurate interpretation of Islam.

k. Interfaith Marriage

The current Code of Islamic Law clearly prohibits marriage *between* different religions (see article 40). To respond to this prohibitive provision, the Proposed Counter Legal Draft stipulates in article 54,

(1) marriage between Muslims and non-Muslims is allowed; (2) marriage between Muslims and non-Muslims is based on the principle of respect and an individual's freedom to believe in and practice a religion of his or her choosing; and (3) before conducting an interfaith marriage ceremony, the government in partnership with the Religious Court is obliged to inform the couple about the risks of an interfaith marriage between a Muslim and non-Muslim.

In article 55, the Draft provides greater detail by outlining, "*(1) the children of an interfaith marriage, between a Muslim and non-Muslim, have the right to freely choose their religion; and (2) when children cannot choose their own religion, then their parent's will mutually agree upon a religion for them.*"

The Code of Islamic Law's provision that prohibits interfaith marriage represents the view of traditional Indonesian jurisprudence. For example, the book of *Fiqh Wanita* (Women Jurisprudence) forbids interfaith marriage. This book argues that a husband should lead his wife and a wife should obey her husband. As infidels may not exercise guardian rights or wield

power over a Muslim, this book prohibits interfaith marriage.⁴³ Similarly, *Ilmu Fiqih Islam Lengkap* (The Complete Islamic Jurisprudence Studies) is an Islamic jurisprudence book that prohibits interfaith marriage. *Ilmu Fiqih Islam Lengkap* prohibits interfaith marriage because all non-Muslim are considered infidels.⁴⁴

Meanwhile, the Counter Legal Draft does not prohibit interfaith marriage, as long as the purpose of the marriage aligns with its definition. For example, the Draft prohibits interfaith marriage if it is entered into with the aim of religious conversion or as a modus operandi of female trafficking. Thus, interfaith marriage can only be entered into after a court has examined the case and authorized the marriage.

The Draft refers to a number of views from *ulemas* that are rarely referred to in Indonesian jurisprudence books.⁴⁵ A thorough analysis of this issue indicates that conflicting opinions between *ulemas* are due to different interpretations of *Al-Qur'an*. In debates about interfaith marriage, three verses in *Al-Qur'an* are always referenced, *al-Maidah*, 5; *al-Baqarah*, 221; and *al-Mumtahanah*, 10.

Al-Qur'an categorizes non-Muslims by three groups. The first is the *ahl-kitab* group. This phrase has many literal and loose interpretations. Generally, this group refers to people who recognize the revelation books passed on by Allah to His prophets. Christians and Jews are included in this group.⁴⁶ Muslim men may marry women from the *ahl al-kitab* group, as clearly stipulated in *al-Ma'idah*, 5, in *Al-Qur'an*, "and you are allowed to marry women who maintain their honor, *mukminah* or *ahl al-kitab* before you."

The history of Islam includes apostles, who married *ahl al-kitab* women, such as Utsman ibn 'Affan, Thalhah bin Abdullah, Hudzaifah bin al-Yaman, and Sa'ad ibn Abi Waqash.⁴⁷ There is no verse in *Al-Qur'an* that prohibits Muslim women from marrying *ahl al-Kitab* men. In accordance with the principle of jurisprudence, '*adam al-dalil huwa al-dalil* (no reference indicates no constraints), Muslim women are allowed to marry *ahl al-Kitab* men.

The second group of non-Muslims described in *Al-Qur'an* is the *musyrik* group. *Musyrik* literally translates to the act of denying the existence of God, Prophets and the after life. According to Ahmad bin Hanbal, *musyrik* people in Arab societies are those who worship statues.⁴⁸ Therefore, any individual, regardless of his or her religion, who believes in and worships God before all else, cannot be categorized as *musyrik*. *Musyrik* is a categorization that is irrespective of religion, as one can be a Muslim, as well as a *musyrik*, if she denies the presence of Allah or believes in more than one God (*syirk*).⁴⁹

⁴³ Anshori Umar, *Fiqh Wanita (Women Fiqh)*, Semarang: Asy-Syifaa, 1981, p. 368.

⁴⁴ Moh. Rifa'i, *Op. Cit.*, p. 472-473

⁴⁵ For further discussion on interfaith marriage, see Siti Musdah Mulia, *Muslim Women Reformist: Women who Reforms Religiosity*, Mizan, Bandung, 2005, p. 52-80. See also Maria Ulfah Anshor (Ed.), *Reinterpretation of Interfaith Marriage*, KAPAL Perempuan, Jakarta, 2004.

⁴⁶ Some *ulemas* make a distinction between *ahl al-kitab* and *syubhah al-kitab*. *Ahl al-Kitab* consists of Christians and Jews, while *syubhah al-Kitab* people are followers of *Majusi* and *Wastani* religions.

⁴⁷ See Ibnu Katsir, *al-Qur'an al-'Adhim Exegeses*, Beirut: Dar al-Fikr, 1999, Section I, p. 297. Compare it with Fakhr al-Razi, *al-Fakhr al-Razi Interpretation*, Beirut: Dar al-Fikr, 1995, Section III, p. 63.

⁴⁸ Ibnu Katsir, *Tafsir al-Qur'an al-'Adhim*, hlm. 297.

⁴⁹ The *Al-Qur'an* states that Muslim, who are not willing to pay *tithe*, can be called *musyrik* as Allah says, "wa waylun li al-musyrikin alladzina la yu'tuna al-zakat". (Q.S. *al-Fushshilat* [41], 7).

Syirk refers to a personal understanding of faith and how it applies to one's self. Thus, it cannot be identified objectively. Devout men must not marry *musyrik* women because the Al-Qur'an states, "they will trick them to hell, while Allah invites people to heaven and gives mercy" (*al-Baqarah*, 221). According to this passage, Muslims cannot marry *musyrik* people. As well, Muslims are prohibited from marrying individuals, such as criminals, who may detrimentally influence a Muslim's religious beliefs and actions.

The third group of non-Muslims is *kafir*. Generally, the term *kafir* refers to non- Muslims. It is categorized as *kafir dzimmi*, *kafir harbi*, *kafir musta`min*, and *kafir mu'ahad*. Most classical *mufasir*(a person skilled in exegesis)prohibits marriage between Muslim and *kafir* people based on verse ten from *al-Mumtahanah*, "do not enter into the knot (marriage) with those *kafir* people". However a number of *ulemas* explain that the verse *al-Baqarah*, 221, has been *asakh* or abrogated by *al-Ma`idah*, 5.

In short, *ulemas* hold different views about interfaith marriages between Muslim and non-Muslim people. *Ulemas* may permit, completely prohibit or allow interfaith marriages under the condition that the non-Muslim person is from the *ahl kitab* group and female. Such contrasting views about interfaith marriage reflect different interpretations of the same verses in *Al-Qur'an*.

1. *Iddah (Transitional Period) in Marriage*

Article 153 of the Code of Islamic Law states, "a divorced wife has to undergo a transitional period or *iddah*, except for *qobla al dukhul* and when the marriage contract is broken for reasons other than the death of her husband." *Qobla al Dukhul* refers to a divorced wife, who never had sexual intercourse with her husband. This article implies that the *iddah* regulation in the Code of Law relates to sexual activities and pregnancy.

Islamic jurisprudence books in Indonesia consider *iddah* to be important for women because it allows them to confirm whether they are pregnant upon a husband's death or during a divorce settlement.⁵⁰ *Iddah* has a positive purpose, aside from the issues of sexuality and pregnancy. This custom considers the psychological condition of a woman, who has either lost or is newly divorced from her husband. It honours a woman's commitment to her children and former spouse's family and provides a transitional period, where a woman or a couple - in a divorce - can think, clearly and wisely, before they take their next steps in life.

In light of *iddah*'s positive aspects, article 88 of the Counter Legal Draft states,

(1) for a husband and wife, whose marriage contract is declared broken by the religious court, there is a transitional period or *iddah* imposed on them; (2) during the transitional period, an ex-husband or ex-wife are entitled to reconcile.

The Draft stresses that *iddah* applies to both a husband and wife. A husband must also observe the *iddah* period in accordance with local regulations while a wife's *iddah* period is stipulated in the Code of Law.

⁵⁰ Moh. Rifa'i, Op. Cit., p. 499.

Although there is no single text, which literally refers to a husband's *iddah*, the moral obligation of *iddah*, outlined in religious teachings, implies that it is imposed on both a husband and wife. Both parties must have empathy for, be tolerant of and act in solidarity with his/her children and the family of his/her former spouse.

m. Ihdad (Mourning Period) in Marriage

The Code of Islamic Law stipulates, "(1) a wife whose husband dies must undergo *ihdad* (mourning period) that follows the same guidelines as *iddah*, as a sign of grief and to avoid calumny; (2) a husband, whose wife dies, undergoes an appropriate mourning period." The Law indicates that *ihdad* is observed both by wives and husbands. Traditional jurisprudence stipulates that *ihdad* only applies to a wife, not a husband. Thus, the Law supports a progressive idea that has yet to be implemented in society due to the *ihdad* precedent.

To stress this point, article 112 of the Counter Legal Draft outlines, "a husband or wife, whose spouse dies, must observe *ihdad* (a mourning period) that follows the same guidelines as *iddah* (transitional period)." By imposing *ihdad* on a husband, the Draft undermines the common stereotype that a woman is compelled to observe *ihdad* to avoid calumny. Both husbands and wives are vulnerable to calumny, and women should not be targeted because of their gender. Traditional jurisprudence, which requires *ihdad* only of a wife, stigmatizes women, construing them as fragile, easily seduced and therefore best kept at home.

The Draft offers an Islamic view that is humanistic and egalitarian. Islam stresses that all humans are God's creatures. The only difference between a man and woman is the quality of their devotion. Both are obliged to take care of themselves to avoid calumny. Both must restrain their viewing of sexually provocative sights and sexual impulses to avoid sin. Both a man and woman must become the moral pillars of society to establish a good society (*baldatun thayyibah wa rabbun ghafur*). A number of Qur'anic verses explicitly stress the importance of an individual's ability to practice sexual restraint (*al Mukminun*, 23:5, *al-Nur*, 24:30-31, *al-Ahzab*, 33:35, *al-Ma`arij*, 70:29). *Ihdad* is highly encouraged for psychological reasons. The observance of *ihdad*, by the wives and husbands of the deceased, is seen as a demonstration of their grief and symbolize their solidarity with the deceased's family.

n. The Rights and Status of Children Born Out of Wedlock

The Islamic Code of Law states in article 100, ""children born out of wedlock may only have familial relationships with their mother and her family." Children born out of wedlock have a biological mother and father, who must bear equal responsibility. While the law should not force children out of wedlock to cultivate a relationship with one parent over another, similarly, it should not force a mother to carry the sole responsibility of raising a child.

Thus, the Counter Legal Draft outlines in article 47, "(1) the responsibility status of children born out of wedlock is equally shared by the biological mother and father; (2) any doubt about the biological parents of children born out of wedlock can be settled in the Religious Court." The purpose of article 47 is to assist children born out of wedlock in finding their biological fathers and to ensure their legal status is equal to the status of children born in wedlock.⁵¹ Islam explicitly indicates that children do not inherit the sins of their parents (*al-Fathir*, 18).

⁵¹ This proposal is in line with the International Convention of Children Rights and Indonesian National Law on Children Protection, Law No 23/2003.

Children born out of wedlock are entitled to exercise the rights of a child; they shall benefit from state recognition, and a parent's obligation to ensure that all of his/her children equally benefit from financial security and family inheritance. Children born out of wedlock shall also have the legal right to foster relationships with both their biological mothers and fathers. The government is obliged to facilitate the identification process of children's biological fathers in the case that a child's father is unidentified. There are many verses in *Al-Qur'an* and the *Hadiths*, which indicate that people should view and treat human beings according to their good deeds, as opposed to their parent's marital status (Q.S. *al-Hujurat*, 13).

VIII. Conclusion

Islamic Law, including marital law, is developed and reformed in line with the changing dynamics of Muslim societies. Islamic marital law, particularly in Indonesia, is an amalgamation of *ijtihad* results, which produce new *ijtihad* (*talfiq*), create administrative policy (*siyasah asy-syar'iyyah*), formulate additional guidelines (*takhayyur*), and reinterpret jurisprudence. The current *ijtihad* proves unsuitable for Indonesia's contemporary social conditions.

Family law reform in the form of the Proposed Counter Legal Draft seeks to provide a just and democratic marital law based on Islamic teachings that uphold humanitarian values. The purpose of the Draft is to provide guidelines for Indonesian marriages that are founded upon the tenets of love and affection (*mawaddah wa rahmah*), and encourage upright behavior of (*muasyarah bil ma'ruf*), and mutual respect and understanding between a husband and wife.

The Proposed Draft strives to eliminate gender-based domination, discrimination, exploitation and violence within marriage. It seeks to create a Muslim society where there is no forced, underage or unregistered marriage, irresponsible contract marriage or polygamy. As an alternative, which is based on research and analysis, the Draft is not final nor does it have to be accepted without objections. Instead, the Draft has to be understood as an *ijtihad* that promotes the Islamic teachings, which emphasize humanitarian values and champion the principles of love and respect.

The Draft reflects a public effort to seek solutions to a number of Indonesia's contemporary social problems. Lastly, the Draft aims at empowering women and providing full protection for women, as outlined in the *Al-Qur'an* and *Sunnah* and stipulated in the Constitution and other Indonesian law. With the Draft, the Indonesian Muslim community is better equipped to promote Islamic teachings that ensure and protect women's rights and are a blessing for the whole universe (*rahmatan li al-'alamin*). *In urîdu illa al-îshlâh mastatha'tu. Wa mâ tawfiqiy illâ billâh. Wa Allah a'lam bi as-shawab.*

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A Comparison of the Current Complications of Islamic Law & the Proposed Counter Legal Draft of the Compilation

The Important Issues in Marriage Law

Siti Musdah Mulia

No	Important Issues	The Current Complications of Islamic Law	The Proposed "Counter Legal Draft"
1	Definition of Marriage	<p style="text-align: center;"><u>Article 2</u></p> <p>(1). A powerful bond (<i>mitsaqan ghalidzan</i>), which aims to obey the orders of Allah and the implementation of <i>ibadah</i>.</p>	<p style="text-align: center;"><u>Article 2</u></p> <p>(1). A powerful bond (<i>mitsaqan ghalidzan</i>) between a man and a woman entered into for the purpose of creating a family and founded on the mutual understanding, assent and agreement of both parties.</p>
2	Guardian in marriage	<p style="text-align: center;"><u>Article 19</u></p> <p>(1). A guardian in marriage is an essential requisite, which must be complied to by the bride; where the guardian acts on her behalf and represents the best interests of the woman.</p>	<p style="text-align: center;"><u>Article 19</u></p> <p>(1). A marriage guardian is only needed when the bride is under twenty-one years of age.</p>
3	Witnesses in Marriage	<p style="text-align: center;"><u>Article 25</u></p> <p>(1). Those who can be appointed as witnesses of a marriage in the marriage contract are Muslim men, who are just, competent, of sound mind, and neither deaf nor dumb.</p>	<p style="text-align: center;"><u>Article 11</u></p> <p>(1). The positions of a woman and a man, as the acting witnesses of a marriage, are equal.</p> <p>(2). Marriage must be duly witnessed by at least two competent women, two competent men, or one competent man and one competent woman.</p> <p>(3). A person, who can act as a witness of a marriage, must comply with the following requisites: be at least twenty-one years of age, of sound mind, competent, and appointed by the mutual consent of both contracting parties.</p>

4	Age of Marriage	<p style="text-align: center;"><u>Article 15</u></p> <p>(1). For the well-being and health of the family and household, a marriage contract can only be entered into by individuals, who have reached the ages of consent stipulated in Article 7 of the 1974 Law Number 1: the bridegroom shall be at least nineteen years of age and the bride at least sixteen years of age.</p> <p>(2). The contracting parties, who are under twenty-one years of age, shall be granted permission to wed, as regulated in Article 6, verses (2), (3), (4), and (5) of the 1974 Law Number 1.</p>	<p style="text-align: center;"><u>Article 7</u></p> <p>(1). Both a man and woman can marry provided that they satisfy the following requisites: be at least twenty-one years of age, of sound mind, and competent.</p> <p>(2). The groom and bride, who do not comply with the aforementioned requisites, shall be united in marriage whether by <i>Wali Nasab</i> (a blood-related guardian) or <i>Wali Hakim</i>.</p>
5	<p>Customary Dowry (<i>Mahr</i>)</p> <p>A requirement of the Muslim marriage contract; a nuptial gift given to the bride by the groom.</p>	<p style="text-align: center;"><u>Article 30</u></p> <p>(1). The groom is obliged to pay a dowry to his bride in accordance with the amount, value, and type of gift agreed to by the contracting parties.</p>	<p style="text-align: center;"><u>Article 16</u></p> <p>(1). The groom and bride shall give each other a customary dowry in accordance with the prevailing local customs and traditions. A <i>mahr</i> is the symbol of love, affection, and responsibility.</p> <p>(2). A dowry's value and type are decided upon by the contracting parties, who account for their respective financial capabilities.</p>
6	Marriage Registration	<p style="text-align: center;"><u>Article 5, Verse 1</u></p> <p>(1). To ensure public order in Muslim society, every marriage shall be registered.</p>	<p style="text-align: center;"><u>Article 6</u></p> <p>(1). A legitimate marriage must:</p> <ul style="list-style-type: none"> a) be registered; b) be performed in the presence of both groom and bride; c) include the ceremonial offering (<i>ijab</i>) and acceptance (<i>qabul</i>); d) be duly witnessed by competent witness(es). <p style="text-align: center;"><u>Article 12</u></p> <p>(1). Every marriage shall be registered.</p> <p>(2). The government shall record every marriage contract, including those entered into by Indonesian citizens.</p>

7	Distruption of Marital-Harmony or <i>Nusyuz</i>	<p style="text-align: center;"><u>Article 84, Verse 1</u></p> <p>(1). A wife can be charged with <i>nusyuz</i>, if she fails to fulfil her matrimonial obligations and provide a justifiable reason, as stipulated in Article 83, Verse 1.</p>	<p style="text-align: center;"><u>Article 53</u></p> <p>(1). Both a husband and a wife may commit <i>nusyuz</i> (disobedience), if one does not fulfill his or her matrimonial obligations enumerated in Articles 50 and 51.</p> <p>(2). The settlement of <i>nusyuz</i> is settled through family deliberations.</p> <p>(3). In the event that deliberations do not lead to an amicable outcome, the injured party can claim a settlement in court.</p> <p>(4). If <i>nusyuz</i> results in violence or cruel treatment, the injured party can file a report to the police and take up the case in a criminal court.</p>
8	Rights and Obligations of a Spouse	<p style="text-align: center;"><u>Article 79</u></p> <p style="text-align: center;">The Position of Spouses</p> <p>(1). The husband is the head of the family, and the wife is the housewife.</p> <p>(2). The rights and role of a wife are equal to those of her husband, both in the home and public life.</p> <p>(3). Each party has the right to engage in political activities.</p>	<p style="text-align: center;"><u>Article 49</u></p> <p style="text-align: center;">The Position of Spouses</p> <p>(1). The role, rights, and obligations of a spouse are equal, both in the home and public life.</p> <p>(2). A spouse has a right and an obligation to establish a peaceful home life, founded on the concepts of <i>mawaddah</i> (affection), <i>rahmah</i> (blessing) and <i>maslahah</i> (harmony).</p> <p style="text-align: center;"><u>Article 50</u></p> <p>(1). Each spouse has the right:</p> <ul style="list-style-type: none"> (a). to engage in business activities; (b). to participate in legal activities; (c). to determine his or her role in society. <p>(2). Both husband and wife, once entered into a marriage contract, reserve the right:</p> <ul style="list-style-type: none"> (a). to determine his or her role in the family life; (b). to terminate his or her marriage contract;

	<p style="text-align: center;"><u>Article 80</u></p> <p style="text-align: center;">The Obligations of a Husband</p> <p>(1). A husband is the guide for his wife and family; he makes important family decisions in consultation with his wife.</p> <p>(2). A husband shall provide for and protect his wife and family, as he is physically, mentally, and financially able.</p> <p>(3). A husband shall provide a religious education for his wife and the opportunities for her to develop knowledge and skills, which are valuable for the nation and its religious life.</p> <p style="text-align: center;">The Obligations of a Wife</p> <p>(1). The main responsibility of a wife is to devote her life to upholding Islamic Law.</p> <p>(2). A wife organizes and manages the household to her best ability.</p>	<p>(c). to exercise autonomy over one's body by determining if and when one will have children;</p> <p>(d). to access to contraceptive methods;</p> <p>(e). and to decide the place of domicile.</p> <p style="text-align: center;"><u>Article 51</u></p> <p>(1). Each spouse, once entered into a marriage contract, is obliged to:</p> <p>(a). love, respect, appreciate, support, protect and embrace, irrespective of difference, his or her partner in marriage;</p> <p>(b). provide a comfortable home life, according to one's financial, physical and mental capacity;</p> <p>(c). mutually decide upon and participate in the management of household affairs;</p> <p>(d) develop one's self potential and allow a spouse to have equal access to opportunities to foster his or her potential;</p> <p>(e). provide for, raise, and educate his or her children.</p>
9	<p>Earning a Living</p> <p style="text-align: center;"><u>Article 80, Verses 4 and 6</u></p> <p>(1). As a husband is financially, physically, and mentally able, he is required to provide:</p> <p style="margin-left: 20px;">a). financial resources, clothes (<i>kiswah</i>), and a residence for his family;</p> <p style="margin-left: 20px;">b). access to medical care for his family and an education for his children.</p> <p>(2). A wife can relieve her husband of his obligations, as specified in verse 4, sections (a) and (b).</p>	<p style="text-align: center;"><u>Article 52</u></p> <p>(1). For a wife, pregnancy, child-birth, and breast-feeding are of greater importance than earning a living.</p> <p>(2). As a consequence of afore-mentioned verse (1), a wife is entitled to proportional compensation decided upon by both parties.</p> <p>(3). When a level of proportional compensation is not mutually decided upon nor dispensed, a contracting party has the right to file a settlement.</p>

10	Polygamy	<p style="text-align: center;"><u>Article 55</u></p> <p>(1). A man may have no more than four wives at the same time.</p> <p>(2). A man must be able to provide an equal standard of living and fairly treat every wife and child, if he is to have more than one wife.</p> <p>(3). In the event that a man does not meet the the afore-mentioned principals of equal and fair treatment, the husband is prohibited from having more than one wife.</p>	<p style="text-align: center;"><u>Article 3</u></p> <p>(1). The essence of marriage is monogamy (<i>tawahhud al-zawj</i>).</p> <p>(2). A marriage contract is void if both parties do not comply with the afore-mentioned principle.</p>
11	Inter-faith Marriages	<p style="text-align: center;"><u>Article 40</u></p> <p>(1). A Muslim man is prohibited from marrying a non-Muslim woman.</p> <p style="text-align: center;"><u>Article 44</u></p> <p>(1). A Muslim woman is prohibited from marrying a non-Muslim man.</p>	<p style="text-align: center;"><u>Article 54</u></p> <p>(1). An inter-faith marriage shall be understood and legally permitted, as a marriage between a Muslim and a non-Muslim person.</p> <p>(2). A marriage between a Muslim and a non-Muslim is founded on the principle of mutual respect for and appreciation of an individual's right to freedom of religion; where freedom of religion entails an individual's right to practice and believe in a religion of his or her choosing.</p> <p>(3). Before an inter-faith marriage is performed, a government representative shall provide an explanation of an individual's rights and freedoms and the government's inter-faith policies to the groom and bride.</p> <p style="text-align: center;"><u>Article 55</u></p> <p>(1). In an inter-faith marriage, both spouses must ensure and protect their children's right to religious freedom.</p> <p>(2). If the children of an inter-faith marriage are not able to determine their religious beliefs, the parents may mutually decide upon their children's religion.</p>

12	<i>Iddah</i> (Waiting-Period)	<p>Article 153</p> <p>(1). A widdowed wife is subject to a waiting period (<i>iddah</i>) after her marriage contract is terminated; <i>iddah</i> does not apply when:</p> <ul style="list-style-type: none"> a) a widowed wife engages in sexual intercourse; and b) a marriage contract is terminated for other reasons than a husband's death. 	<p>Article 88</p> <p>(1). Both a husband and a wife, whose marriage is terminated by the Religious Court, are subject to a transitional period (<i>iddah</i>).</p> <p>(2). During the transitional period, the ex-husband and ex-wife may reconcile.</p>
13	<i>Ihdad</i> (Mourning)	<p>Article 170</p> <p>(1). A wife, who survives her husband, is obliged to mourn during the transitional period, as a sign of respect and grief and to prevent <i>fitnah</i> (libel).</p> <p>(2). A husband, who survives his wife, is obliged to mourn in accordance with the common practice.</p>	<p>Article 112</p> <p>(1). A spouse, whose partner passes away, is obliged to mourn during the transitional period.</p>
14	Marriage Contract	<p>Article 45</p> <p>(1). When a man and woman enter into a marriage contract, it must be:</p> <ul style="list-style-type: none"> (a) in the form of <i>Taklik Talak</i>; or (b) a legal contract, which does not contradict Islamic Law. <p>Article 52</p> <p>(1). If a husband marries a second, third or fourth wife, he must propose where his future wife will reside, and how her expenses will be paid.</p>	<p>Article 21</p> <p>(1). Before marriage, a groom and bride can write their own marriage contract, which is legalized by the Officer of the Marriage Registry, on the condition that it does not contradict Islamic Law.</p> <p>Article 22</p> <p>(1). A marriage contract can include provisions about the distribution of family wealth, childcare and custody rights, and an individual's right to live a life free from violence.</p>
15	Children of extramarital relations	<p>Article 100</p> <p>(1). A child borne to a married person, is considered to be an extramarital child only if he or she is the biological child of a married woman.</p>	<p>Article 47</p> <p>(1). The status of an extramarital child is established by his or her blood shared with the mother, who has given birth, and the biological father.</p> <p>(2). When there is reasonable doubt about a child's biological parents, the child's status is determined by the Religious Courts</p>