

Gender Equality, Islam, and Law

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Abstract

'Gender equality' is not a new concept; in fact the approach had been advocated in Islam based on principles of equity and universal justice. Equality, or its Arabic equivalent musawah, was mentioned in the Qur'an and implemented by the Prophet Muhammad ﷺ. This principle emphasises the equal status between men and women, sourced from the Qur'an and the Prophetic Traditions as well as fulfilling the requirements of the Maqasid Syariah (Islamic Law's raison d'être). However, the concept of gender equality has now becoming more chic and trending on the international scene; a development parallel to the rise of the human rights discourse globally. In this context, the concept of gender equality was embedded as the foundation of policy and legal provisions including the Islamic Family Laws that have been promulgated in several Islamic Jurisdictions. In Malaysia, this principle also took center stage and became the focus in the provisions and implementations of Islamic Family Laws. Women groups and lobbyists are also actively promoting this principle, especially in demanding for comprehensive reforms in Islamic Family Laws. Nonetheless, this concept has often been misunderstood by the majority of society as a direct result of ignorance on how Islam perceives this concept. This present research aims at discussing the concept of gender equality from the Islamic perspective and its subsequent applicability within the framework of Islamic Family laws in Malaysia in light of the issue of polygamy.

Islam and Gender Equality

Gender equality is not a new concept, although secular societies have given the impression that the phrase has just been invented little less than a century ago. Despite the contemporary negative portrayals, Islam has advocated the concept since the revelation of the Qur'an, even

emphasizing it in its most important scripture—the Holy Qur’an. Some of the major evidences taken directly from the text are those verses (*ayahs*), which reference both men and women in an equitable light. For instance, the most famous of which is in Surah al-Ahzab:

Surely those who submit [to God], men and women, those who believe, men and women, those who obey, men and women, those who are truthful, men and women, those who are patient, men and women, those who are modest, men and women, those who are charitable, men and women, those who fast, men and women, those who guard their modesty, men and women, and those who remember their Creator, men and women—God has prepared for them forgiveness and great reward.⁴

This verse clearly states that people who are devout to Islam—regardless of gender—are given the same amount of forgiveness and reward; the fact that men and women are clearly distinguished in every part of this verse is a definite indication of this. It was as though The Creator wanted to make a point in mentioning both, so as to make sure that it was properly understood that women have a share in the same rewards as men. This is not surprising since prior to the advent of Islam, the pagan Arabs had treated their women as little less than property devoid of any rights, inheritance, or even the allowance to engage in civic duties—what now that they were being told that their women now had equal access to Divine guidance and rewards?

The Qur’an also mentions: “So He created him [man] and made him of two kinds, the male and the female” (Al-Qiyamah, 75:39) and “We have bestowed dignity on the progeny of Adam” (Al-Isra, 17:70). As for this “dignity”, Dr. Hashim Kamali points out that it is not exclusive to men:

The ‘progeny of Adam’ includes both men and women, who are equal in the way they are created and in their inherent dignity. The divine grace from which they emanated does not discriminate between the male and the female.⁵

This startling change in society is emphasised further in the following verses and Prophetic sayings:

A) In terms of moral practices:

“Whoever does good, whether male or female, and is a believer, We shall certainly make them live a good life, and We shall certainly give

them their reward for the best they have done”. (Surah al-Nahl, 16:97)

B) In terms of employment:

“Then their Lord accepted their prayer and answered them: Never will I suffer the work of any worker among you to be lost, whether male or female, the one of you being from the other”. (Surah al-Imran, 3:195)

This is further emphasised in another ayah of the Qur’an, Surah Al-Nisa’, 32: “For men is a share of what they have earned, and for women is a share of what they have earned”.

C) In terms of civic duty:

“And the believers, men and women, are protectors of one another. They enjoin good and forbid evil, and keep up the prayer and pay the zakah (charity tax)”. (Surah al-Tawbah, 9:71)

Both the genders are included here in regards to “enjoining good and forbidding evil”, which serves to exemplify both their participation in manners of governance and nation building—neither can be excluded at the expense of the other, and both have equal right to decision making and the vision and goals of the nations in which they live.

D) In terms of education:

“Seeking knowledge is compulsory for each and every Muslim (i.e. both male and female)”. (Ibn Majah #224 al-Baihaqi).

Likewise to the above mentioned privileges for both genders, each must have equal access to education in Islam. Many historical examples of women scholars—including the archetype, the wife of the Prophet ﷺ and “Mother of the Believers, Aisha binti Abu Bakr (ra)—prove that Islam not only encourages education for women, but mandates it as well.

However, despite these very explicit verses of the Qur’an detailing the equitability between genders, many are shocked and marvel at the treatment of women in the Muslim world, whom appear to be little less than second class citizens.

The most recent international legislation in regards to gender equality is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) adopted in 1979 and is now considered equivalent to a bill of human rights exclusively for women. This convention has been ratified by 189 states, with few giving

reservations to some of the article therein. The first of these articles opens with a clarification on what constitutes as “discrimination”:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁶

For further clarification, any nation state that has reservation with one of the more specific articles in the CEDAW, such as Article 5(a) which declares that states shall “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea...on stereotyped roles for men and women”, are not allowed to articulate any alternatives to these articles despite their female population’s choices based on their own systems of religious or cultural values, as per Article 28. The standard set of values are thus determined exclusively by the parties that created the Convention to begin with, and those nation states, cultures, or religions—and the women who support them—have little to no say to the contrary.

Academics such as Javid Rehman have argued that the Shariah has been insensitive towards women’s rights; referencing the act of polygamy as being one of his primary evidences.⁷ Michele Brandt and Jeffrey Kaplan concur with the above, claiming that it is unfair that only men are allowed the option of marrying more than one partner.⁸ Their concerns draw heavily from how they define ‘equality’, which appears to be little more than a synonym for ‘sameness’. However, whether such an interpretation can be taken as a standard is questionable. As Anne F. Bayefsky has noted—writing in the *Human Rights Journal*—regarding the concept of equal treatment and non-discrimination in international law, ‘equality’ and ‘sameness’ can be two different things:

- 1) Not all differences in treatment are discriminatory or equality does not mean identical treatment;
- 2) a distinction is discriminatory if it (a) has no objective and reasonable justification, or pursues no legitimate aim, (b) if there is not reasonable relationship of proportionality between the aim and the means employed to attain it;

- 3) the legitimacy of the aim and the reasonableness of the relationship between the aim and the means employed to attain it, will be harder to establish (at least) for distinction based on race (including colour, national or ethnic origin), sex and religion.⁹

For Bayefsky then, equality is defined more by equitability rather than sameness. For instance, such discriminatory acts that may fulfill the objective of having “reasonable justification” and “proportionality” are gender segregated toilets, gyms, sports, and even physical performance tests for the military, all of which are considered justified under the personal preferences and physical differences between the genders. However, as noted in Bayefsky’s third qualifier, acceptable discrimination may be more difficult to establish based on non-pragmatic grounds, such as religious ideology. As such, Islamic ethical standards would appear to fall within the same category. However, it is clear that such standards cannot simply be judged based on the “equality = sameness” argument, and must be examined in light of the values intrinsic to the cultures being assessed for unjustified discriminatory behaviors. If polygamy is truly wrong, it must be so on the basis that it prevents equitable treatment between genders, rather than merely disallowing one gender to participate in the practice.

Those critics who do not adopt the ‘sameness’ argument may point to other evidences that seem to support the unequitable treatment of women as being foundational to Islam. One of the more famous verses cited in the Qur’an is in Surah al-Baqara, verse 228: “...women have rights similar to those that men have over them, in a just manner, and men are a degree above them”.

At face value, this verse is sufficient evidence to show that men are to be *generally* treated higher than women, however, the interpretation of this verse has been disputed since the beginning of Islamic civilization. Indeed the passage in question does say that men are above women; but in what sense? While it is certainly the case that the Qur’an is granting a higher position to men, it is only suggesting this in a limited context in that they have more responsibility in the *affairs of women’s maintenance*. The verse is specific here about marriage and as such is not a universal declaration in all matters.

While in another verse of the Qur’an that supports the above notion is Surah An-Nisa, 34: “Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means”. Given this, the former verse needs to be read carefully and in accordance with a holistic approach of

Qur'anic injunctions. When read out of this context, it can literally mean anything to anyone.

Other verses are also very specific when it comes to men and women. One verse that is often quoted to make women insignificant in legal matters is Surah al-Baqara, 282:

When you enter into transactions involving a debt for a fixed period [in the future], reduce it to writing. And let a scribe write it down between you in fairness...And bring two witnesses from among your men. Should there not be two men, then a man and two women of the women you choose to be witnesses; if the one of the two errs, the one may remind the other.

This verse has been used repeatedly to suggest that the testimony of one woman is not equal to one man, however, it is very specific in regards to why two women are being chosen; it is obvious that this has to do with business transactions, for which women at that time were less known for being experts on since they did not involve themselves in business as much as men. The verse in question is only in regards to one event and is contextual to the way society is run or how it normatively functions in business affairs. As such, it cannot be used as an evidence that a woman's testimony is less than a man's or that women are somehow generally deficient in giving testimony. For instance, the second righteous caliph (successor to the Prophet صلى الله عليه وسلم), Umar bin Khattab (ra), appointed a woman to manage the affairs of the market in Medina—the holiest city in Islam next to Mecca—where the Prophet صلى الله عليه وسلم lived and was buried. If this was a universal injunction, than Umar (ra) would not have been allowed to do this, much less would the woman in question be taken seriously as a manager over business practices.

Given the above, when verses of Qur'an are taken within the context that they were revealed, alongside the historical practices of the early Muslim community—who are taken as the standard of religious behavior and interpretation for contemporary Muslims—it is evident that Islam does not classify one gender as generally 'better' than another, but takes into consideration very specific socio-economic conditions which affect both men and women. Under ideal conditions, men and women are assigned to roles which help foster a balanced community model and societal progress. When exceptions to the rule are present, such as in the case of Umar's (ra) female assistant in the market place, then those exceptions are granted without concern of the indi-

viduals gender.

Likewise, in the case of polygamy, the conditions to be met are that a man must be in a financially capable position and be equitable to each one of his partners in every aspect of life, be it financially, spiritually, emotionally, and even intimacy. Given that women are not ideally supposed to fit this role, they are excluded from the allowance of polygamy all-together as they must also be accustomed to taking care of children and cannot possibly be caretakers in other ways (such as having more than one husband to support); this would shake the entire fabric of society otherwise while being a much added burden to the mother. However, the allowance for men is limited to the prior noted qualifications, and if he cannot meet even one of those equity-standards then he is not allowed to marry more than one wife at a time; securing not only the stability and balance of the family unit, but protecting women from being exploited or neglected. As such, polygamy is more a responsibility than a privilege which few men can consider much less meet the conditions for.

Despite this, polygamy has been misused to suit the corrupted desires of men—particularly in Islam—which may have triggered much of the misunderstanding and opposition to this practice in Muslim majority countries. However, these mispractices have not been ignored by the very countries in which they are performed. Malaysia serves as an excellent example of the attempt to implement the equitable treatment of women in the wider social context of Muslim identity and values within its borders—especially in regards to the controversial issue of polygamy.

Malaysian Islamic Family Law

According to major historical records, early Malay society accepted polygamy as a normal societal practice just as many other countries had for thousands of years. This is further evidenced when polygamy is seen as one of the forms of traditional marriage recognized by the Hindu scripture, namely the *Manu Samhita*. This is due to the fact that Hinduism had its roots in the Malay Peninsula before the advent of Islam in the fourteenth century.¹⁰ Therefore, it is not unusual that polygamy was practiced by Malay society long before the arrival of Islam, as Hindu beliefs, administration, and culture were widely practiced.

After the coming of Islam to Malaysia, Hinduism was gradually replaced, drastically affecting Malay society.¹¹ The Malay way of life was transformed from beliefs in Hinduism and Animism to a life based

on the teachings of Islam, which affected all aspects of life including culture, literature, faith, politics, customs, ceremonies, arts, and law.¹² However, this transformation did not have much effect on the practice of polygamy given that Islam also permits polygamy.

The facts obtained from classical Malay texts have helped to ascertain that the practice of polygamy has existed for a long time since early Malay societies, especially among the upper class.¹³ The Malay Annals (MA)—also known as *Sejarah Melayu*—provides evidence in the form of anecdotes that several of the Malacca Sultanate men and dignitaries possessed more than one wife and even kept mistresses.¹⁴

Hukum Kanun Melaka (HKM), the first written legal document in existence of the Malaccan administration¹⁵ supports other historical documents on the existence of polygamy among the early Malays.¹⁶ HKM was based on the research of British administrators and it is believed to have begun during the Sultanate of Sultan Muhammad Shah (1424–1444), later completed during the Sultanate of Sultan Muzaffar Shah (1445–1458M).¹⁷

Provisions relating to family matters in the HKM consists of only five clauses. There were no provisions on matters related to women's rights in marriage and divorce such as, maintenance, *mut'ah* (gift), custody, and other related rights in polygamous contracts. There was also no provision on *khulu'* (the divorce right of women) in the HKM.¹⁸ Family matters that have been included as provisions in the HKM cover issues regarding the *wali* (guardian) who weds the bride, the *ijab* (offer) and *qabul* (acceptance), qualification of witnesses to the marriage, divorce, as well as the provisions on *khيار* (option of puberty) in marriage. The provisions also include the grounds for judicial dissolution and women who are eligible to marry.

In the eighteenth century, the British had signed several political treaties with the Malay rulers.¹⁹ The Malay rulers accepted the British as residents and their advisors, whereby Malay rulers would adhere to the former's instructions in all matters relating to the administration of the country except those relating to local customs and Islamic Law. Matters of Islamic law and custom pertained specifically to family, inheritance, and *waqf* (endowment). Other aspects of Islamic Law such as crime, procedures, contract, land, and evidence, followed the law practiced in India. Ahmad Ibrahim pointed out that in effect legislation was to replace the former Muslim laws by enactments based on the principles of English Law.²⁰ The British did not participate in the matters of the family institution as these involved the personal lives of the locals.²¹

There was no single provision specifically on polygamy in this period

that was implemented in the Straits Settlement and Federated Malay states.²² However, there were two regulations on polygamy that had been passed in Kelantan.²³ A notice No.14/1914, *Notis Fasal Melarangkan Orang-orang Islam Daripada Berbini Dua Tiga dan Seumpamanya* (Notice Clause Prohibiting Muslims to Marry Two, Three Wives or Equivalent)²⁴ had been passed in 1914.

In the wake of independence, separate legislation in every state dealing with the administration of Islamic Law was passed in the 1950s. Selangor (one of the states in Malaysia) was the first state to promulgate the Administration of Muslim Law Enactment of 1952 (No. 3 of 1952) and was followed by other states.²⁵ These laws combined several aspects of the administration of Islamic law into a single law. The law followed is primarily the classical ‘*Shafi’e*’ Law.²⁶

The Enactments consisted of provisions relating to the establishment of the Islamic Council, *Shariah* Court, the administration of mosques, provisions on marriage and divorce, and criminal offences. Where family law was concerned, there were thirty sections relating to marriage, divorce, maintenance of dependents, and matrimonial offences under the Selangor Administration of Muslim Law Enactment 1952 (No. 3 of 1952). This legislation is mainly provided for the application and administration of Muslim Law particularly for the registration of Muslim marriages and divorces.²⁷

However, a specific provision regarding polygamy was not provided in the Administration of the Islamic Law Enactment. The non-existent specific provision regarding procedures for the application for polygamy caused the application process to be enforced according to administrative procedures of each state. For the states of Perak, Selangor, Negeri Sembilan and Perlis, the application for polygamy was carried out using the same form as a normal marriage. The only exception was that the applicant was required to declare his marital status in accordance to Section 3(1) of the Selangor Marriage, Divorce and Reconciliation (*Ruju’*) Rules 1963 (No. 2 of 1963). The prospective husband must declare his current marital status before solemnizing a marriage by completing Form 1 set of the First Schedule.

It was not until the early 1980s that Malaysia began to amend and enforce specific laws relating to Islamic Family Law for the purpose of including more specific details and rearranging its content in a more orderly manner. By introducing a comprehensive Islamic Family Law in the early 1980s, the Islamic Family Law repealed all provisions on polygamy as well as other provisions relating to marriage and divorce as provided under previous legislations.²⁸

The enactment of the Islamic Family Law of the 1980s led to significant development in Muslim women's rights in terms of several aspects of marriage and divorce. For instance, it provided women with the right to claim maintenance and arrears, to dissolve marriage through *talaq* (divorce), to annulment of marriage through court decision (*fasakh*), the right to divorce with financial compensation (*khulu*), and to claim financial benefits after divorce. A close examination of the law also reveals that provisions related to polygamy under this particular legislation have been able to improve the situation of women significantly.

Legalizing justice and equal treatment in polygamous practices was evident in modern Islamic Family Law in Malaysia. The reforms made polygamy conditional on obtaining a court order. The law has empowered the judicial authorities to refuse permission to the husband who fails to fulfil certain requirements. It is stipulated that an application for polygamy should fulfil at least five conditions:

1. the proposed marriage is just and necessary,
2. the applicant has the financial means to support his existing and future wives,
3. the consent of the existing wife or wives,
4. the applicant's ability to accord equal treatment to his wives as required by the Islamic law, and
5. that the proposed marriage does not cause *darar syarie* (harm under Shariah Law) to the existing wife or wives.

The law also stipulated that the proposed marriage does not directly or indirectly lower the standard of living of the existing wife and dependents.²⁹ The application for polygamy that fails to meet the above conditions will be refused. Before deciding that the proposed polygamous marriage can be considered just and necessary it must regard circumstances such as sterility or physical infirmity of the existing wife, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity.³⁰

The requirement for consulting the existing wife was also stipulated so that the husband's ability could be determined as to whether it fulfils the conditions.³¹ The requirement "just and necessary" meant that the husband who intends to contract polygamous marriage needs to show that such marriage is "necessary", and it is also "just" for him to do so. These two elements should be proved simultaneously to enable the husband to be considered as qualified to contract a polygamous

marriage. The objective of rendering the power to the Court to decide one's polygamous marriage is in effect to ensure that the husband is in a position to carry out his responsibilities and has sufficient means to support the existing and future wives and children. A polygamous marriage that is contracted without court permission is liable to a fine and/or imprisonment.

The question as to whether or not all the conditions mentioned above must be fulfilled in every application has been decided in the case of *Aishah vs Wan Mohd Yusof*, [1990] 3 MLJ 1x and [1991] JH VII, which came up to the Appeal Committee of *Shariah* Court, Selangor. The judge ruled that all five conditions mentioned under Sect. 23(4) of the Islamic Family Laws Enactment, Selangor carry the same importance and must be proven separately by the husband.³² The same judgement was ruled by the Second Hearing Committee Selangor in the case of *Rajamah vs Abd Wahab*, [1990] JH 171. Due to the husband's failure to fulfill all conditions and requirements in Sect. 23(4), the Court rejected the husband's application for polygamy. The fact of the matter is, the conditions set forth by the laws are not meant to forbid (*haram*) polygamy because to forbid it is against *Shariah* law. However, they are used as a mechanism to prevent men from abusing the necessity for polygamy as and when they like. A good example of this is found in the case of *Ruzaini vs Nurhafizah*, [2002] JH 79 which portrayed the fairness of the judge in handling polygamy application cases. Although the husband acquired consent from the wife to marry another, the Court did not approve the case because it had doubts as to the husband's capability to be fair to both wives and dependents.

Other privileges and powers were granted to wives after the reforms, manifesting themselves in the form of stipulations. Section 22 of Islamic Family Law (State of Selangor) Enactment 2003 provides that "(1) Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other *ta'liq* (stipulations) of the marriage in the Marriage Register".

Women should know their rights before they enter into marriage. They can impose certain conditions to secure themselves for the future and do not need to rely upon the statutory conditions as provided by the law.

The form of *ta'liq* prescribed by the law, for example in many states in Malaysia, is as followed:

I do solemnly declare when I leave my wife for four months Hijrah continuously or more voluntary or with force and I or my representative

do not give her maintenance such period whereas she is obedient to me or I cause hurt to her person, then she may make a complaint to the Shariah court, and if I am found by the Shariah court to be guilty, and she gives to the Shariah which she received on my behalf a sum of ten ringgit, then she is divorced by way of khulu`.

This standard *ta`liq* deals only on three aspects namely: if the husband leaves the wife for more than four months continuously; or if the husband neglects to provide maintenance to his wife; or if the husband hurts and abuses his wife. Other than these actions, a wife is not entitled for divorce through *ta`liq*. Although the pronouncement of *ta`liq* is voluntary under the *Hukum Syara'*, it has been a practice in every state in Malaysia where the husband is requested to pronounce the prescribed *ta`liq* upon marriage. In a situation where the husband violates the stated conditions, the wife has the right to claim talaq *ta`liq* (divorce by stipulations).

As it is difficult for the wife to obtain divorce on the ground of polygamy *per se*, by stipulating in the marriage contract where the wife has the right to obtain *ta`liq* divorce if the husband contracts another marriage, this is indeed a protective mechanism. The right for the wife to obtain *ta`liq* divorce is not an automatic divorce, but it represents an option of divorce given to the aggrieved wife who is unable to live in a polygamous marriage. Such a stipulation in the marriage contract does not prevent a husband from practicing polygamy; it merely provided rights to the wife to file for divorce if the husband chooses the practice. Undoubtedly, this stipulation does not go against Islamic teachings because it does not prevent something that is allowed in the *Shari`ah*, that is, polygamy. Therefore, a wife who decides to include this stipulation in the marriage contract must make sure that the wording for the stipulation with regards to polygamy does not actually preclude the husband from contracting another marriage.

In one case, *Mohd Razali Mat Saman vs Norshidah Nik Man*,³³ the respondent, who was the first wife of the appellant (husband), had said to the appellant words to the effect that “*If you set foot on the other land a divorce of three talaq would befall me—ta`liq*”. The “other land”, as understood by the appellant, was the house of the appellant’s second wife. The respondent acceded to the *ta`liq* and responded with the word “yes” twice, followed by “yes I accepted it”. During the trial, the appellant (husband) admitted that he had gone to his second’s wife house and stayed there overnight. The learned trial judge ruled that a divorce of three *talaq* had befallen the respondent. The husband

appealed and argued that he only acceded to the pronouncement of *ta'liq* in order to muffle the respondent who was then reprimanding him.

The Shariah High Court of Kelantan then held that the word “yes” uttered by the husband was an answer to the wife’s words of *ta'liq*. Since the husband had thereafter gone to his second wife’s house, the husband had violated the *ta'liq* and therefore no supporting witness evidence was required. The Shariah High Court of Kelantan then dismissed the appeal and the decision of the trial court that ruled the divorce of three *talaq* was affirmed.

From this example of *ta'liq*, it shows that the court will confirm the divorce of one *talaq* by way of *ta'liq* if the husband breaches the pronouncement of *ta'liq* made during the marriage.

Discussion

The above analysis helps to inform about the Islamic Family Law in regards to Muslim women, within the context of polygamous marriages—a hotly contested issue on the international stage. Rather than being a strict codified legal system, the Shariah also operates on some underlying assumptions and motivations, which help to guide lawyers and judges in its application based on various conditions, scenarios, and contexts. Given the limitations of this study, only one aspect of the Shariah was discussed: the need to be equitable.

To understand the nature of equitability, a brief survey of Islamic ethics and understanding regarding women was presented and then compared with the understanding of “equality” by certain academics and international law theorists. One of the most obvious differences between these concepts is that the former is more concerned with fairness and justice, and the latter assumes rather rigidly that fairness and justice are a product of the concept of ‘equality’, which they see as synonymous with ‘sameness’.

The latter interpretation was contextualized further by showing that such equality is not possible, even in light of recent United Nations initiatives, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and that even those nations attempting to implement ‘sameness’ among genders within their populations, do in fact discriminate on the basis of personal preferences for gender segregated spaces (gyms, restrooms, etc.) and for practical reasons related to the physiological differences that each gender possesses (maternity leave, sports competitions, military service etc.). Therefore these nations do in fact consider there to be differences in the

genders that motivates them to enact discriminatory legislation, but only considers their forms of discrimination as valid. This is evidenced further by Bayefsky's insistence that discriminatory behaviour based on any other value system outside of the practical grounds suggested in her criteria are "more difficult" to validate. This is further bolstered by the CEDAW's bold proclamation that "[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted".³⁴ What neither these academics nor conventions appear to be concerned with is *what value system that women adopt for themselves*. If women within certain countries believe for instance that polygamy should only be restricted to men, then what unjust forms of discrimination are being implemented in the value systems that these women wish to live by? As such, primary concern should revolve around how such practices can be implemented in an equitable manner, rather than an equal one. Although, in fairness, certain forms of equitability, rather than equality, have been implemented as of late by the U.N. Security Council in their more recent Resolution 1325 which encourages more women to sit at the negotiation table for conflict resolution so as to cease and prevent war in their respective regions. This is a most important step in the understanding that women play within nation building and societal progress.

Given this, Malaysian Islamic Family Law was analysed to see if it attempted to equitably manage the practice of polygamy and whether this falls within view of the Shariah. It was found that despite the many historical problems facing this legislation, many reforms were enacted to attempt to ensure that equitable practice was taking place under the worldview of Islam. As was found in the previous analysis, Malaysia has attempted since the 1980's to provide suitable limitations to polygamous practice so that it cannot be abused and women situated in these sorts of relationships are treated fairly and with justice. From the penalizing of the husband who contracts a marriage without meeting the necessary requirements, to the fail-safes instituted for women who suffer from its malpractice, Malaysia has been one of the Muslim-majority countries to attempt to remedy injustices among its female Muslim population.

Conclusion

This research analyses the concept of gender equality from the perspective of Islamic ethics and legislation, making a comparative analysis between international standards and the notion of 'equality'

versus 'equitability'. These findings present the differences between Islamic ethics and international standards by pointing out the latter's rigidity in matters of international practice, without giving due consideration to the choices of women themselves throughout the global community. As such, international standards of gender equality cannot be adopted for all nations or all women who view gender equality from the perspective of a differing value system not codified in contemporary international legislation.

A brief understanding of Malaysian Family Law in regards to the practice of polygamy gives a more detailed understanding of the concept of Islamic gender equality (equitability) in the context of the overriding objectives of Islamic Law (maqasid). Future research should attempt to understand the Islamic perspective and the constructs associated with it to develop a far more just and comprehensive international legislation on gender equality and discrimination.

Notes

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⁴ Al-Qur'an (33:35).

⁵ Kamali, Hashim. *Freedom, Equality, and Justice in Islam*. Pg. 62.

⁶ <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1>

⁷ Javaid Rehman, 2007, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq", *International Journal of Law, Policy and the Family*, vol: 21 (1), p. 114.

⁸ Michele Brandt and Jeffrey A. Kaplan, 1995, "The Tension Between Women's Rights and Religious Rights: Reservations To CEDAW by Egypt, Bangladesh and Tunisia", *Journal of Law and Religion*, v. 12 (1), p. 123.

⁹ Anne F. Bayefsky, 1990, "The Principle of Equality or Non-Discrimination in International Law", *Human Rights Law Journal*, vol: 11, No. 1–2, p. 34].

¹⁰ Winstedt, R. O., *Malaya and Its History*, 24.

¹¹ For details on this see Al-Attas, Syed Muhammad Naquib, "Preliminary Statement on a General Theory of the Islamization of the Malay Indonesian Archipelago" Paper presented at Persidangan Antarabangsa mengenai Tamadun Melayu, Kuala Lumpur on 11–13 November 1986 at 24; Hall, D.G.E., *A History of South-East Asia*, 3rd edition, MacMillan, 1968, 206.

¹² Ismail Hamid, *Masyarakat dan Budaya Melayu*, Dewan Bahasa dan Pustaka, 1988, 60.

¹³ For details on the discussion see Westermarck, E. A., *The History of Human*

Marriage, vol: III, MacMillan and Co. Ltd., 1925 at 42–43; Cairncross, John, *After Polygamy was made a Sin*, Routledge & Keagan Paul, 197, 59.

¹⁴ Zahir Ahmad and Norhayati Ab. Rahman, “Hak dan Kebebasan Wanita dalam Teks Sastera Melayu” Paper presented at Seminar Kesusasteraan dan Undang-undang, University of Malaya, Kuala Lumpur on 26th–27th July 2001 at 4–9; Full description of the lives of the Malay Rulers, see, Shellabear, W.G., *Sejarah Melayu*, Penerbit Fajar Bakti, 1977, 3.

¹⁵ It cannot be denied that there are other historical proofs of the existence of Islamic law such as engravings on criminal law on gravestones found in Terengganu in the 14th century. However, the engravings cannot be regarded as written document. For further details see Muhammad Yusuff Hashim, *Kesultanan Melayu Melaka: Kajian Beberapa Aspek Tentang Melaka pada abad ke-15 dan abad ke-16 dalam Sejarah Malaysia*, at 219 and also See Ryan, N.J., *The Cultural Heritage of Malaya*, Longman Malaysia, 1971, 15.

¹⁶ For further details see Muhammad Yusuff Hashim, *Kesultanan Melayu Melaka: Kajian Beberapa Aspek Tentang Melaka pada abad ke-15 dan abad ke-16 dalam Sejarah Malaysia*, at 219 and also See Ryan, N.J., *The Cultural Heritage of Malaya*, Longman Malaysia, 1971, 15.

¹⁷ For details on the discussions and analyses of the HKM see Abu Hassan Sham, “Undang-undang Melayu Lama: Tumpuan Khas kepada Hukum Kanun Melaka dan Undang-undang yang di bawah Pengaruhnya” (M.A. dissertation, University of Malaya, 1972) at 45 and 141; Abu Hassan Sham & Mariyam Salim, *Sastera Undang-undang*, Dewan Bahasa dan Pustaka, 1995 at 8–20; Mohd Taib Osman, “Agama dan Kepercayaan Orang Melayu: Organisasi dan Struktur”, in Mohd Taib Osman (ed.), *Masyarakat Melayu: Struktur, Organisasi dan Manifestasi*, Dewan Bahasa dan Pustaka, 1989 at 146–203; Liaw Yock Fang, *Undang-undang Melaka (The Laws of Melaka)*, at 38; Mohamad Jajuli Abdul Rahman, *The Malay Law Text*, Dewan Bahasa dan Pustaka, 1995, 21.

¹⁸ Hassan Sham, “Kedudukan Lelaki dan Wanita dalam Hukum Kanun”, Mohamad Mokhtar Hassan et al. (eds.), *Kesusasteraan dan Undang-undang*, 117.

¹⁹ See Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, Dewan Bahasa dan Pustaka, 1992, 19.

²⁰ Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, Dewan Bahasa dan Pustaka, 1995 at 22–23; See also Abdul Monir Yaacob, “Shari`ah Courts in Malaysia: Past, Present and Future”, in Ahmad Ibrahim & Abdul Monir Yaacob (eds.), *The Administration of Islamic Law*, Institute of Islamic Understanding, Malaysia, 1997 at 131–142; Abdul Monir Yaacob, *An Introduction to Malaysian Law*, National University Malaysia Press, 1989 at 84–108.

²¹ For details on the reception of English Law in Malaysia see Hooker, M.B., *Islamic Law in South-East Asia*, at 95; Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, 20.

²² States that were under Straits Settlements were Penang, Malacca and Singapore while Federated Malay States are Selangor, Negeri Sembilan, Pahang and Perak. See Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, 10.

²³ Kelantan was one of the Unfederated Malay states. Other Unfederated Malay states are Perlis, Kedah, Johor and Terengganu. See Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, at 10 and Abdullah Alwi Hj Hassan, *The Administration of Islamic Law in Kelantan*, 31.

²⁴ From the office of the Kelantan Government 1914, Bil 259/1914, Kel 1049/1914. This notice was written in Jawi. This notice has been translated as *Notice No.14/1914 Regulating Mohammedan Double (Triple etc.) Marriage, Kel 1049/14*.

²⁵ Hooker, M.B., *Islamic Law in South-East Asia*, 144.

²⁶ Ahmad Ibrahim, *Family Law in Malaysia*, 10.

²⁷ Section 119–section 144 provides provisions on marriage, divorce and maintenance of dependants Section 155–section 149 was provisions on matrimonial offences.

²⁸ For example section 135 of Islamic Family Law (Federal territories) Act 1984 (Act 303) provides that “Parts VI,VII, sections 155, 156, 158, 159 and 160 and paragraph (n) of section 178 of the Administration Enactment are hereby repealed and shall, accordingly, cease to apply to the Federal Territory of Kuala Lumpur. Johore No.15/1986, Islamic Family Law Ordinance 13/1992 and Pahang Islamic Family Law Enactment 3/1987.

²⁹ Section 23, the Islamic Family Law Act (Federal Territories), 1984.

³⁰ Section 23 (4) (a), the Islamic Family Law Act (Federal Territories), 1984.

³¹ The provisions in Islamic Family Law Act (Federal Territories), 1984 were followed by other states in Malaysia, except in Kelantan, Terengganu and Perak.

³² Section 123, the Islamic Family Law Act (Federal Territories), 1984.

³³ (2004) *Criminal Law Journal* (Sya) 479.

³⁴ <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article28>.

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