Sci.Int.(Lahore),28(2),1753-1762,2016 ISSN 1013-5316;CODEN: SINTE 8

CODIFICATION OF ISLAMIC FAMILY LAW IN MALAYSIA: THE CONTENDING LEGAL INTRICACIES

***Yusuf Abdul Azeez[i], Luqman Zakariyah[ii], Syahirah Abdul Shukor[1] Ahmad Zaki Salleh[1]**

Fakulti Syariah dan Undang-Undang, Universiti Sains Islam Malaysia[1]. Department of Fiqh and Usul-Fiqh, International Islamic University, Kuala Lumpur, Malaysia[2],

*Corresponding author's email: yusufaazeez@usim.edu.my,

Presented at Asia International conference–2015) held on 5th -6th December, 2015 at (UTM), Kuala Lumpur, Malaysia.

ABSTRACT: *The Predominance School of Law in Malaysia today is the Madhhab Shafi'i. However, several criticisms have been leveled against the exclusive reliance on this School of Law on the argument that it gives room for unnecessary restrictions of freedom, considers some tribes to be special and treats the females unfairly, especially in the matters of Islamic family laws related to polygamy, matrimonial property and divorce. The Religious Departments at various levels in Malaysia were also accused of ignoring this legal conundrum, like those inherited from the polygamous and divorce laws, which as perceived by many, could not only lead to exploitation of the women by irresponsible men but may also favours the husbands in matters of adjudication. This paper attempts to unveil the potential legal intricacies inherited from the Malaysian Family Law through a critical examination of the contending issues raised against it. Thus, such a kind of examination is not only expected to uncover the mix methods used in codifying these laws but, also, will appraise the extent of their compatibility or otherwise to the maqāsīd al-Sharīʿah (the objectives of Islamic Law) and the contemporary International Human Rights Law. In doing so, suggestion on how those laws could be improved upon in order to be in conformity with the objects of Islamic law and the human rights standard will be put forth*.

Key Words: Codification, Malaysia, Islamic Family law, *Shafi'i* School of Law, International Human Rights Law

INTRODUCTION: CODIFICATION OF LAW- MEANING AND CONNOTATION

Codification *(Taqnin)* of Islamic law means to officially codify and institute *fiqh* (juristic rules) in line with the pattern of modern statutory laws [45]. Codification of Islamic law can also be defined as a process by which the various rulings of the *Shari'ah* (*ahkām al-Shari'ah*) on a particular subject matter (property, torts, family law, etc.) are gathered and restated in a succinct manner for the purpose of forming a legal code that has full effect within a given political jurisdiction. The nature of the legal code is that it renders all other forms of law void and claims complete jurisdiction for itself [1]. Nevertheless, there were undeniably early attempts at providing compendia of law based on sound opinions of a given legal school (*madhhab*). It ranges from books of *ikhtilf al-fuqaha'*, like that of Ibn al-Mundhir (d. 931), to comparative compendium like the *Bidyat al-mujtahid* of Ibn Rushd (d. 1198), to state sponsored legal references like the seventeenth-century *Fatw lamgryah*. However, these efforts are more accurately called legal consolidation and not legal codification, the latter of which is largely an outgrowth of the colonial enterprise (India and the Malay world) as well as the push for modernization and legal reform (the Ottoman Empire and North Africa). The process of codification of Islamic law began in the first half of the nineteenth century and continued through the middle of the twentieth century, when many Muslim nation-states completed their process of legal codification and unified their judicial systems [45].

Numerous scholars who are proponents of codification of *Shari'ah* have placed emphasis on the considerable advantages of codifying Islamic law. These advantages are said to make it readily accessible to the mass of non-experts which it binds; paving the way for conducting the government according to the rule of law; making the law certain and guarding against arbitrary decision-making by judges; facilitating uniform application of the law in a given territory; and enhancing the sense of government by consent. In order to have this aim fulfilled, methods pursued in such a process of canonization of *fiqh* are of the utmost importance. As a case in point, al-Qaradawi brilliantly identifies some important methodology that highlights a just, progressive and equitable codification of Islamic *fiqh* as:

(1) Non-restriction to a particular school or to a specific opinion. This requires the adoption of a holistic approach to *fiqh* legacy from the whole legal corpus of *fiqh* and not *fiqh* of a particular jurist or certain school. In this process, it is pertinent to hold high, the objectives of the law in perspective, such as human wellbeing and progress that would meet the current need and condition of the Muslim communities.

(2) Bridging the gap between traditional views and contemporary trends and the needs of the society. This requires casting aside the outlandish interpretations and views that were contextual, historical and custom-based in favour of updated and reconstructed *fiqh*.

(3) Continuously revising the codified law against the backdrop of feedback about its implementation and changing needs and emerging concerns of the society [28].

A closer look at the above context raises the following question: to what extent does the modern state enacts Islamic legislation to conform to these noble ideals? Experience in both Malaysia and beyond fail to provide satisfactory answers to this question. This is borne by the fact that the codification of law as inferred from *Majallat al-Ahkam al-'Adliyyah*, otherwise known as the *Mejelle* (a complete non- bounded *madhhab* code of law) hardly reflects the above enlightened contents [5].

MALAY EFFORTS ON CODIFICATION OF ISLAMIC FAMILY LAW

It must be asserted from the onset that the Malaysian Muslims are of the Sunni sect. The Sunni sect comprises of four main schools of jurisprudence *(madhahib)*: the *Hanafi*,

1754 ISSN 1013-5316;CODEN: SINTE 8 Sci.Int.(Lahore),28(2),1753-1762,2016

Shafii, Maliki, and the *Hanbali*. Among these, the Malaysians largely refer to the *Shafi'i* School of jurisprudence. However, where the interpretation is not made specific in respect to any matter, the parties can rely on any of the laws of Islam provided for in any of the recognized *Sunni* schools of law [34].

The Muslim law, as practiced in Malaysia and with regard to personal matters, is bespoken by the Malay customs, as this is clearly evident from the marriage ceremonies and practices in the country. The Peninsula Malaysia or West Malaysia has eleven states with a constitutional monarchy in eight of those states. The monarch traditionally is the head of his state and thus the custodian of the religious traditions in his state. Therefore, there are different enactments for the administration of Islamic Law in each state. These enactments made provision for the establishment of the Islamic religious councils known as *"Majlis Agama Islam"* of the state including their duties and powers. The state enactments also provide for the establishment of the *Shari'ah* Courts or *Qadi* Courts to administer the *Shari'ah* laws known as *Hukum Syariah*. For example, the Selangor State Administration of Islamic Law Enactment 1989, under section 45(2)(b) provides that, the *Shari'ah* High Court shall in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which matters relate to:

(i) betrothal, marriage, divorce, nullification of marriage *(faskh),* or judicial separation *(firaq);*

(ii) any disposition of, or claim to, property arising out of any of the matters set out in paragraph (i);

(iii) the maintenance of dependents, legitimacy, or guardianship *(hadanah),* or custody of infants;

(iv) the division of, or claims to *harta sepencarian* (matrimonial property); etc. [39-40].

MUSLIM MARRIAGE IN MALAYSIA

Although the main precepts of Islamic Family law as found to be applicable in all the states in Malaysia are almost the same. However, there are minor differences in the interpretations and applications of these laws from one state to another. This has led to some litigants to go on law-shopping by moving from one state to another when the consents required for them to tie another marriage were not forthcoming. They also move to where the interpretation given to the minimum age for marriage suits their desires because a Muslim by law, is entitled to marry up to four wives provided he is able to treat each of them equally. In an attempt to codify and enforce a uniform legislation for the Muslims, the Islamic Family Law Act 303 was introduced in 1984 [45]. Most of the states, in view of their prerogative power in legal jurisdiction, agreed to enact a uniform code, however, with very minor differences. It covered areas like marriage, registration of marriage, dissolution of marriage, maintenance, guardianship and custody, as well as other miscellaneous matters. The Islamic Family Law in the Federal Territory came into force in April 1987. The main features with regard to marriages under the Act 303 are: The criteria to decide whether a person is a Muslim is by general appearance and observation, and not by inquiry into his faith, beliefs, conduct, behavior, character, acts, or omissions (IFLA, Section 5). A marriage is to be solemnized by a *wali* (guardian) as provided in the *Hukum Syariah* (IFLA, Section 7.1). This has to be registered (IFLA, Section 25), and with the issuance of a certificate known as the *ta'liq* (IFLA, Section 26). No marriage shall be solemnized or registered where the man is below eighteen years and the girl is below the age of sixteen, except with the permission of the *Syar'iah* judge in writing and in certain circumstances (IFLA, Section 8). The prohibited aspects of consanguinity are ascendants, descendants, siblings, in laws, step relations, and fosterage. The Act further states in section 10 that: No Muslim shall marry a non-Muslim. No woman shall, during the subsistence of her marriage to a man, marry any other man (IFLA, Section 14.1). Both parties must be consented to a marriage, and in the case of a woman, her *wali* or guardian must have consented as well. In the absence of a *wali*, the *Shari'ah* judge as the appointed *wali Raja*, may grant such a consent. No man shall during the subsistence of a marriage, except with the prior permission in writing of the *Shari'ah* Judge, contract another marriage (IFLA, Section 13.b). The *Shari'ah* judge will only grant such permission after a hearing (in camera) to verify that the polygamous marriage proposed is just and necessary, and by giving regard to such circumstances as: sterility, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, and insanity on the part of the existing wife or wives; and to affirm that the applicant has the means to support all his wives and dependents, and accord them equal treatment as required by *Hukum Syaria'h* so that the proposed marriage would not cause *darar shar'i* (physical, mental, and material harm) to the existing wives, and that the proposed marriage would not lower the standard of living of the existing wives and dependents [44].

RECENT CHANGES IN THE LEGISLATION OF ISLAMIC FAMILY LAW IN MALAYSIA

Attempt would be made in this section to examine some of the recent changes that have been made on the administration of the Muslim family law in Malaysia, especially on the Muslim laws relating to polygamy, divorce, arbitration in family disputes and other related matters. Islamic law is the law in vogue in the states of Malaya (Laton v. Ramah [1926] 6 F.M.S.L.R. 128, C.A), because the Federal Constitution provides that Muslim law and, personal and family law of persons professing the Islamic religion are exclusive matters of the State, the concern of the state government and the legislative house (Federal Constitution Malaysia, 9th Schedule List II). Each of the states of Malaysia has its own enactment or ordinance relating to the administration of Islamic Law, even though some exchange of opinions and views have taken place in the Conference of Rulers and the meetings of the heads of the religious departments held under the auspices of the Conference of Rulers. In general the states have the prerogative authority to administer the Islamic Law [3]. A lot of efforts have been made to enact the Islamic Law since 1952, but the attempt to follow uniform model of legislation

Sci.Int.(Lahore),28(2),1753-1762,2016 ISSN 1013-5316;CODEN: SINTE 8

came into being in 1959 where the amendments in the administration of Islamic law were designed to control the power to exercise divorce and polygamy. In general the attempt to codify the Islamic Law or to effect legislative changes in the Islamic Law took place in Sarawak [38]. It would, therefore, be pertinent at this junction to highlight some of the enactments dealing with the administration of Islamic Law in Malaysia, and they are as follow:

(a) The Administration of Muslim Law Enactment 1952 of Selangor, No. 3 of 1952 (amended by Enactments 4 of 1960, 7 of 1961 and 8 of 1962).
(b) The Administration of Islamic Law Enactment 1955 of Terengganu, No. 4 of 1955(amended by Enactment No. 2 of 1964).
(c) The Administration of the Law of the Religion of Islam Enactment 1956 of Pahang, No.5 of 1956 (amended by Enactments 2 of 1960, 14 of 1960 and 12 of 1963).
(d) The Administration of Muslim Law Enactment 1959 of Malacca (No. 1 of 1959).
(e) The Administration of Muslim Law Enactment 1959 of Penang (No. 3 of 1959).
(f) The Administration of Muslim Law Enactment 1960 of Negeri Sembilan (No. 15 of 1960).
(g) The Administration of Muslim Law Enactment 1962 of Kedah, No. 9 of 1962 (amended by Enactments No. I of 1963 and 8 of 1965).
(h) The Administration of Muslim Law Enactment 1963 of Perlis (No. 3 of 1964).
(i) The Administration of Muslim Law Enactment, 1963 of Perak (No. 11 of 1965).
(j) The *Shari'ah* Court and Muslim Matrimonial Cases Enactment 1966 and, the Council of Religion and Malay Custom Enactment 1966 of Kelantan.
(k) The Muslim Marriage Enactment of Johor, Enactment No. 17 (amended by Enactments No. 11 of 1935 and 2 of 1950).
(l) The Muslims Ordinance of Sabah, Cap. 83 (amended by Ordinance No. 12 of 1961).
(m) The Muslim Marriage Ordinance of Sarawak (Cap. 75 of the Revised Laws, 1946) and the *Undang-Undang Mahkamah Melayu*, Sarawak of 1959 [38].

REGISTRATION OF MUSLIM MARRIAGE

There has been statutory provision for the registration of Muslim marriage and divorce in Penang and Melacca since 1880 (Mohamedan Marriage Ordinance No.5 of 1880), Perak since 1885 (Registration of Muhammadan Marriages and Divorces Enactment, 1885, Selangor, Pahang and Negeri Sembilan since 1900 (Muhammadan Marriage and Divorce Registration Enactment, 1900, Johor since 1914 (Muhammadan Marriage Enactment No. 15 of 1914), Kelantan since 1916 (Kelantan Notice No. 18 of 1916), Kedah since 1926 (Kedah Syariah Courts Enactment 9 of 1337), Terengganu and Perlis since 1929 (Terengganu Courts Enactment No. 4 of 1340), Sarawak since 1946 (Mohammadan Marriage Ordinance No. 8 of 1946) and Sabah since 1953 (Muslims Ordinance No. 7 of 1953). These provisions dealt only with the registration of Muslim marriages and divorces and not purported to affect the law relating to the legitimacy of marriages. Marriages were normally solemnised by the ruler or the *Qadi* with the consent of the *wali* (guardian for marriage) or, where there is no natural *wali* or where such *wali* objected to the marriage. There was no minimum age for marrying off a minor (the girls who have not attained the age of puberty). They could only be given in marriage by their father or their grandfather. The father or grandfather could give a virgin girl in marriage even without her consent [7]. As the administration of the Islamic Family Law is found to be floppy, the issues of run-away marriages were very common. For example, a man may take a girl away from her parents in Johor and marry her in Singapore without the consent of her parents. However, in the recent years, the consent of the parties has always been obtained before a marriage is solemnised. In Kelantan and Terengganu for example, it was expressly enacted in 1953 and 1955 respectively that a marriage is void unless both parties to the marriage have consented thereto (The re-enacted Kelantan *Shari'ah* Courts and Muslim Matrimonial Cases Enactment 1966, s. 63). A similar provision which was enacted in Pahang in 1956 expressly stated that this does not apply to where the marriage is by the *wali mujbir*; the father or grandfather who has the power of compulsion [29]. As could be found in many of the states in Malaysia, the registration or non-registration of a marriage does not affect its validity. The provisions for the application to be made on prescribed forms have been followed in Selangor in 1962, in Negeri Sembilan in 1963 and in Perlis in 1963 [24-31-39]. The attempt to control the practice of polygamy has been put into consideration in Malaysia, especially in Selangor and Negeri Sembilan, where it is required for a man who is already married to declare in the application form that he has done so, and this, as well, is also subjected to further inquiries [24-39]. In Sarawak the *Undang-Undang Mahkamah Melayu*, Sarawak, provides that a person is permitted to marry more than one wife if he is able to affirm that he is capable of providing the sustenance and maintenance required for having more than one wife. For example, he may give evidence showing that he has ample property or that he has enough salary that could cater for them [38].

In Sabah, the Marriage Ordinance 1959 provides that where any marriage is solemnised or contracted it shall be the duty of the person or persons solemnising such a marriage and the witnesses to ascertain and record that both parties to such marriage have freely expressed their consent to the marriage. The Marriage Ordinance 1959 also provides that, notwithstanding, any written law or custom of any marriage between persons who in the case of a man is under the age of sixteen years or in the case of a woman who is under the age of fourteen years shall be void. In Perak the Administration of Muslim Law Enactment, 1965, contains an interesting provision, in the sense that where a *wali* of a woman to be contracted in marriage withhold his consent to a marriage without any reasonable cause, the marriage may be solemnised by the Chief *Qadi* or court of a *Qadi*, provided the girl has attained the age of eighteen years or more [4].

1756 ISSN 1013-5316;CODEN: SINTE 8 Sci.Int.(Lahore),28(2),1753-1762,2016

DIVORCE AND DISSOLUTION OF MARRIAGE

Most of the Islamic family laws provided in some states in Malaysia are clear enough on the issue of the marriage of the widows, including that of a situation where a woman has been irrevocably divorced by three *talaq*. In such a kind of a case, the woman will not be married to her previous husband unless she has been lawfully married to another person and such marriage shall have been consummated and later lawfully dissolved prior to that marriage to be contracted with her previous husband. In Perlis, however, it is provided that a *Qadi* may annul the marriage if he is satisfied that there has been collusion between the person from whom the woman is divorced with three *talaq* and the other person to whom she supposed to have been married to after the three *talaq* by the previous husband [7]. Similar administrative reforms have also been effected in several states in Malaysia. In Selangor (1962) and Negeri Sembilan (1963) for example, it was enacted that any person who wishes to obtain a divorce must apply through the prescribed application form to the Court of a *Qadi* of that locality. The *Qadi* will then call for the attention of both parties in order to inquire into the matter; and only after the inquiry will the divorce be registered and become effective. In Selangor it is expressly provided that no divorce may take place unless it is done before a *Qadi* and no divorce or pronouncement of divorce will be effective unless the wife agrees to the divorce and the *Qadi* has approved it [24-40]. In Perlis it is enacted in 1963 that on an application by a husband for permission to divorce his wife, the *Qadi* shall for the purpose of effecting a peaceful reconciliation between them make such inquiries with respect to the applicant and his wife as he may deem it fit, and he may not grant any permission for divorce unless he is convinced that no reconciliation is imminent. Where it is evident that no reconciliation is possible the party applying for divorce shall complete the prescribed form. The rights of each party shall be agreed to in the presence of the Registrar and the issues regarding maintenance and the division of the property shall be settled before the divorce is granted [31]. Also recently in Perak, it is enacted that a husband who so desires to divorce his wife must submit an application to the Registrar. Upon receipt of the application, the Registrar shall for the purpose of effecting a peaceful reconciliation between the parties make inquiries with respect to the applicant and his wife as he may deem it fit. If he sees that no reconciliation is possible, then the Registrar shall file the divorce in accordance with the way and manner by which the parties to divorce have agreed to share their properties. The certificate of divorce will be issued, only, after the expiry of the period of *iddah*, i.e. the waiting period for a divorced woman [30]. Sarawak, on the other hand, has a robust provision in its *Undang-Undang Mahkamah Melayu*. For example, if a man insists on divorcing his wife where it is not demonstrated that the wife is at fault, the court will give him a period of fifteen days within which to reconsider the matter. If at the end of such a period the man still insist to divorce his wife, the court will allow the divorce on payment of a fine, and on the basis of the following: (a) after the settlement of the outstanding claims for maintenance and debts, and after the division of the property that may have been jointly acquired by the parties involved [38].

The *Qadi* Courts in the states of Malaya have power to order for divorce and the payment of the *maskahwin (mahr)* where it is discovered that the husband still owes the wife. The essence of this payment is to afford the wife the opportunity to have enough amount of money for her upkeep during the period of her *iddah* [7]. Though the normal amount of *maskahwin* in Malaysia is very small, the Qadi may also demand from the husband to pay *mut'ah* (compensation) to a wife who is divorced by her husband without any justification. Even though, this amount is small, it can only be applicable in a situation where the property held by the woman is considered to be very small. Hence, there should have been no need for it, if not for the fact that the Malay custom is basically matriarchal. In a situation where it is the husband who moves to live in his wife's family house, as it is usually the case in *adat perpateh* areas of Negeri Sembilan and *Naning* in Malacca, the obtainable regulation is that if there is a divorce, the respective properties of the husband and the wife are expected to be returned to each of them, while the jointly acquired property is to be divided *(chari bahagi)* between them. In the other states in Malaya, like the states of Borneo for example, the custom for the division of the jointly acquired property takes the form of *harta sapencharian*; It is a situation where both the husband and the wife, for example have worked together on a rice field, then the jointly acquired property will be divided equally between them during divorce. However, if the husband is the sole bread winner and the wife only does the domestic duties, the regulation is that the husband will take the two-third of the jointly owned property and the wife will take the rest one-third [12-26-27].

On the other hand, a divorced woman, normally, is entitled to maintenance during the period of *iddah*. However, if the divorce takes place through the pronouncement of three *talaq*, by which it automatically becomes irrevocable, the divorced wife is not entitled to any maintenance unless otherwise she is pregnant [7]. A more condign provision is found in the Perlis Administration of Muslim Law Enactment 1963, which provides that a woman who is divorced, may, by application to the court, obtains an order against her husband for the payment of such amount of money in accordance with the provision of the Muslim law for her maintenance during the period of her *iddah* [31]. In addition to that, a woman who is divorced may, by application to the court, obtains an order against her former husband for a certain amount of money as a maintenance that is payable to her every month as long as she remains unmarried or not found of any misconduct. It is the duty of the Qadi, before making such a kind of order, to satisfy that the woman has been divorced without any good cause or reason [31].

It is usual in the case of Muslim marriages in Malaysia to have a condition or *ta'liq* at the time of the marriage. This kind of *ta'liq* gives the wife the right to obtain a divorce if the condition attached to it is breached. In some states in Malaya,

Sci.Int.(Lahore),28(2),1753-1762,2016 ISSN 1013-5316;CODEN: SINTE 8

this *ta'liq* is compulsory while it is only encouraged in other states [25-26]. The condition which is usually attached to it is that if the husband fails to provide maintenance for the wife or leaves her for a continuous period of four months or more, she can then complain to the *Qadi* or the *Shariah* Court. If she is able to prove her case, she will then be divorced through the pronouncement of one *talaq*. A wife can also apply to the *Qadi* for divorce in a situation where the husband does not agree to divorce her. In this case, arbitrators representing the husband and the wife will be appointed not only to deliberate on the matter but also to seek for reconciliation between the parties concerned. If that is not possible, a divorce by *talaq* or a divorce of *khulu'* may be effected through the payment of compensation by the wife [26]. In some states, however, the minority views like that of *Shafi'i* and the *Maliki* are adopted, that which allow the arbitrators to effect a divorce without the consent of the parties [7]. Under the *Shafi'i* law, the wife may apply to the *Qadi* or *Shari'ah* Court for *faskh* (dissolution) of marriage if the husband is found to be impotent or insane or in a situation where the husband is found to be insolvent and is unable to provide for the upkeep of the wife. It is, however, provided that a married woman may obtain a divorce by *faskh* on any one or more of the following:

(a) that the husband has neglected or failed to provide for her maintenance for a period of three months;
(b) that the husband has been sentenced to imprisonment for a period of three or more years, and that such a sentence is authoritatively ratified;
(c) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of one year;
(d) that the husband was impotent at the time of the marriage and continues to be so;
(e) that the husband is insane or is suffering from certain chronic disease, the cure of which may take long time before it heals or impossible to be healed, and which is such that makes continuance of the marriage relationship injurious to her;
(f) that the husband treats her with cruelty, that is to say that he:
(i) habitually assaults her or makes her life miserable by cruel conduct even if such conduct does not lead to physical injury;
(ii) associates with women of bad repute or leaves an iniquitous life;
(iii) attempts to force her to lead an immoral life;
(iv) obstructs her in the observance of her religious duties and practices;
(v) lives and cohabits with another woman who is not his wife; or
(vi) he has more than one wife, and he does not treat her equitably in accordance with the requirements of the Muslim law [41].

CUSTODY AND GUARDIANSHIP OF A CHILD

The Muslim family law related to the maintenance of wives and children is followed in the states of Malaya, but approval for the maintenance of illegitimate child may be obtained only in the civil courts. The law relating to the custody and guardianship of children is established on the English law pattern. However, in some of the states of Malaya and Sabah, the law tends to give the husband the right to custody and guardianship. In Sarawak and some other states for example, the legislation puts the welfare of the child under the consideration of the courts [35].

The Muslim law relating to testate and intestate succession applies throughout the states of Malaya. It however, excludes non-Muslims from sharing in the property of a deceased Muslim [18]. This is in accordance with the modification introduced through the consideration of the Malay custom. The modification clearly shows that the *adat perpateh* areas of Negeri Sembilan and Malacca vested all the ancestral property on the female members of the family, while the jointly acquired property goes to the survivor on the death of either of the spouses [24]. This provision clearly negates the one provided by some states in Malaya and Borneo, which gives the widow a share-part of the jointly acquired property on the death of the husband. Muslim law is also applicable on intestacy of a deceased Muslim in Sabah and Sarawak. However, in Sarawak special provision is made to preserve the property of a Muslim convert for the benefit of the beneficiaries who are non-Muslim [36]. Also in Sarawak, the Muslim wills ordinance provides for the making of wills by Muslims. Such wills have to be witnessed and attested to by two native chiefs and one senior government official. These witnesses are empowered to give their advice should there be need for the modification of the will to be made, and this has to be done with the consent of the testator so as to ensure that a fair provision is made for the wives and the children [37]. In the case of Sabah, the wills ordinance provides that nothing in the ordinance shall affect the validity of any will made by a Muslim according to Islamic law [27], as amended by the Wills Amendment Ordinance, 1961).

ISSUES OF CONTENTION

In this section, attempt would be made to take a look at some of the issues adjudged by some legal experts and women activists to be the bone of contention in the Muslim family law that is being applied in Malaysia. These issues require that the experts in the field of law need not only to reflect on it when there is any dispute related to it, but also to work towards the provision of solution that will quench it when a hell is raised out of it. Among these issues are as amply specified below:

Codification and enactment of Islamic laws

The Malaysian legal system, as found to be in operation at the present moment was incongruent with core epistemological assumptions of *uṣūl al-fiqh*. The term 'Anglo-Muslim' law characterized this peculiar mix of legal traditions. The law was 'Anglo' in the sense that the concepts, categories, and modes of analysis follow the English common law system,

1758 ISSN 1013-5316;CODEN: SINTE 8 Sci.Int.(Lahore),28(2),1753-1762,2016

and it was 'Muslim' in the sense that it contained fragments of Islamic jurisprudence that were applied to Muslim subjects. As such, Anglo-Muslim law was an entirely different creature from classical Islamic law. In that wise, a classically-trained Islamic jurist would be at a complete loss with this Anglo-Muslim law, whereas, a common law lawyer with no knowledge of Islam would be perfectly comfortable [5]. Even-though, the passages from the *Qur'an* and *Sunnah* may be cited in court ruling to support particular decisions, but the mode of legal analysis is English common law and not that of *uṣūl al-fiqh*. Hooker argued that it is not fictional to suggest that the classical *Sharīʿah* is not the operative law and has not been available since the colonial period. Islamic law is really Anglo-Muslim law, that is, the law that the state makes applicable to Muslims [5]. For example, the ideas regarding gender justice in Malay society was as a result of the move by the *Azharites* (graduates of al-Azhar University, Cairo). The augmentation of education provided for women as well as the harmonization of the Malay intellectual's civilizational development and the Western ideals of civilization are among the factors which led them to make a move for these changes. Therefore, in order for their ideals to be in conformity with modern nation-state, the *fiqh* rules, duly inspired by the Western ideal of laws, were systematically codified and gradually drafted into a unified legal system [26].

Gender inequality

The dominance school of law in Malaysia is that of *Shafi'i*. The Malays accustomed, trained, taught and practiced the rulings of *Shafi'i* school of law from the early period of thirteenth century, i.e. from the period of the advent of Islam into Malaysia [7]. The deep influences of the *Shafi'i* school of law on the Malay society was established through the various codes implemented in Peninsular Malaysia [26]. Against this background, several criticisms were raised against the fashionable over-reliance on *Shafi'i* school of law, with the argument by some quarters that the rules provided by that school of law on Islamic family matters leads to gender inequality and injustice towards the females. Some of these examples, among others, are:

(i) Issues related to a forced marriage *(al-Zawaj al-ijbari)*. This had been a controversial issue among the Muslims, especially among the *sayyids* in Peninsular Malaysia. The *sayyids* alleged that they are descendants of Prophet Muhammad (P.B.U.H), and as such they claimed that they are much more honourable than other Muslims. Thus, men from *non-sayyid* descendants were considered not compatible with their daughters. Therefore, the practice of implementing a forced marriage on the *sayyids'* daughters to men who are non-*sayyids* were quite unacceptable to them. Their feat was justified on the bases of the power given by the established ordinances to the father and parental grandfather that they can marry off their daughters to whomever they like without their consent because they are classified as *wali mujbir* in accordance with the *Shafi'i* school of law [26-32].

(ii) The persistent conflicts arising between the guardians and the girls under their care. This is with regards to the issue of selecting their choice of future husbands sometimes lead them to resort to changing their *madhhab* from *Shafi'i* to *Hanafi* so that they can marry without the consent of their *wali* (legal guardian).

(iii) In promoting the rights of the women towards marriage, the codification of Islamic Law in Malaysia in 1980s was based on the method of *takhayyur* (adoption of opinion (s) of other school of law). Thus some women were able through this process to chose the opinion of *Hanafi* school of law which accorded them the right to marriage without the consent of their *wali mujbir,* who by the power vested in them used to force the virgin daughter or grand-daughter into the marriage they are not consented to [26-27].

Islamic Family Law

Two types of family laws are said to be in operation in Malaysia; one for the Muslims and the other one for the non-Muslims. The Law Reform (Marriage and Divorce) Act 1976, which was enforced throughout Malaysia from 1 March1982, governs the Chinese as well as the Hindus and other religions. Muslims, on the other hand, are governed by the Islamic Family Law system [32]. The *Shari'ah* and *fiqh* based laws of Malaysia include the matters specified in the State List of the federal constitution such as the matrimonial law, charitable endowments, bequests, inheritance, and offences that are not governed by federal law (these include matrimonial offences, *khalwat* (close proximity), and offences against the precept of Islam [46].

Several criticisms are, however, levelled against the current Islamic family law of Malaysia. For example, the current Islamic Family Law Act contains a large number of provisions that explicitly or implicitly discriminate against Muslim women. These, among others, are:

i. The minimum age of marriage for women is lower than that of the men.
ii. A woman, regardless of her age, can only marry with her guardian's consent, whereas a man does not need to get the consent of a guardian.
iii. A Muslim man can marry a non-Muslim woman but a Muslim woman cannot marry a non-Muslim man.
iv. A man may marry multiple wives (up to four), while a woman could only have a monogamous marriage.
v. A woman is supposed to obey her husband. Her failure to comply with the "lawful" wishes of her husband constitutes '*nushuz*' and which can lead her to lose the right to maintenance.
vi. A man may divorce his wife at will -outside the court system-, but a woman has to obtain a judicial divorce from the court on presentation of convincing evidence [25-26-34].

Custody and guardianship of children

The mother has the right to physical custody of her children only up to the age of seven for a male or nine for a female, after which the custody devolves to the father. The law specifies that a woman (not a man) may lose custody on several grounds like immorality for example. The law further

Sci.Int.(Lahore),28(2),1753-1762,2016 ISSN 1013-5316;CODEN: SINTE 8

states that the father shall be the first and primary natural guardian of the person and property of his minor child and upon his death, the guardianship devolves to other male counterpart from the father's side. This means that even when the woman has custody of the children, the father, as the lawful guardian, maintains control over the matters where the consent of the guardian is required (e.g., permission to obtain a passport, registration into or change of school, or to undergo surgery, decisions regarding the ownership and disposal of the child's property), whereas, there is no provision, in the existing law, for the father to lose the right to guardianship, even if he fails to provide for the adequate maintenance and upkeep of the child [46].

Polygamy

The 1984 amendments on polygamy matters allows the husband to proceed on his application for polygamy without the permission of the court and without the consent of the first wife. However, these amendments, according to some women activists were regarded as retrogressive and contrary to the spirit of reformation of laws. They, therefore, mount pressures on government to revise the laws of polygamy on the following grounds:

i. It was reported that the Religious Departments in certain states ignored largely the restrictions and conditions contained in the existing enactments, and therefore, polygamy become easily adopted by any man.
ii. The Islamic Family Law was amended by removing the restriction on the registration of polygamous marriage without the court order. Moreover, it allowed the opportunity for registration even though it was contracted without the permission of the court, as long as it conforms to Islamic law [26].
iii. The amendment of 2000 introduces a new law regarding the division of matrimonial property (*harta sepencarian*) upon application either by the husband or the wife. It means that either of them could apply for the division of any assets acquired by them during the period of their marriage. This provision is, however, being criticized on the account that irresponsible husbands could abuse this provision for their advantage by using it to secure the welfare of the new woman instead of the previous woman. Thus, this provision enables the husband to claim the property which was given to his existing wife as matrimonial property, and this is viewed as a total unjust to the wife and the children who were with him when the property was acquired [25]."
iv. Another amendment that calls for observation in the conditions stipulated for polygamy is the changing of the word "just and necessary" to "just or necessary". This kind of a change allows the husband to easy access of proving his ability to contract a polygamous marriage. The former requirement needs the husband to prove the two elements "just" and "necessary" simultaneously. However, the word "just or necessary" meant that the husband will only need to show to the Court that the proposed marriage is "necessary" for him, and need not bother as to whether it is "just" or not for him to practice polygamy [14].

Divorce

The 1994 amendments on the rules related to divorce were also subjected to criticism on the account that it does nothing to change the existing law. The crux of reform in 1984 was to prevent the unilateral declarations of *talaq* by irresponsible husbands. The National Council for Women's Organizations, sisters in Islam, and the Association of Women Lawyers, in a joint memorandum submitted to the Government of Malaysia, are of the view that the amendment 1994 will encourage more men to divorce their wives outside the court and thus enable them to avoid their responsibilities toward their wives and children, because the survey conducted on the women crises in Penang reveals that the number of men who pronounce divorce outside the court is three times more than those who do it in court. The other issues of criticism raised on the laws of divorce in Malaysia are:

i. It is noticed that there are lots of cases where the husbands divorce the wife without her consent and their knowledge because of unrestricted rights of husbands to divorce the wives. Gordon stated thus: "A woman waiting in her *kampong* (village) for the return of her husband may well receive her certificate of divorce through the mail, with no reasons stated, no evidence, no procedure, no appeal" [3].
ii. In the 1950s, the divorce rate in some of the provinces in Peninsular Malaysia was probably among the highest in the world, and that at least one-third of the Malay marriages ended up in divorce [8].
iii. The amendment of divorce law in 2005 which granted the husbands the right to *faskh* was also criticised by women organisations because the husbands had already possessed the right of *talaq*. They argued that there is a tendency to adjudicate in favour of the husbands. However, due to the pressure mounted, the suggestion to retain the right of *faskh* only for the wife was accepted [44].
iv. Articles 47–55 make it simple and straightforward for a husband to divorce his wife (even if it is outside the court), while a woman is faced with lengthy court procedures to earn a divorce without her husband's consent [14-44].

CONCLUSION

In the foregoing analyses, attempts have been made to divulge the potential legal intricacies, as said to have been inherited from the Malaysian family law system through the critical examination of the contending issues related to the family matters, such as the Muslim marriage and its registration in court, gender inequality, divorce and marriage dissolution, custody and guardianship of a child, polygamy and divorce. Our analysis on the issues of contention shows that the subsequent amendments as launched by some states with regards to the Islamic family law introduced regressive provisions that made it more difficult for women to secure divorce, placed women in a weaker position in the division of matrimonial assets, and provided women with fewer rights in terms of child custody and maintenance, whereas no such conditions were stipulated for the men. All these provisions in the opinion of the writers contravene the provision of Act

8(1) of the Federal Constitution, which states that: 'All persons are equal before the law and entitled to the equal protection of the law. It is, therefore submitted that the legislative measure to re-codify Islamic Law in the Malaysian context have not been free of pitfalls. Hence, the need for the areas that are considered to have gender-bias feature to be amended or corrected in order to make them more robust, effective and responsive to the need of Muslim women in the twenty-first century, because if the purpose of codification is to regulate unsystematically applied law, it follows that the method of that codification must be based on sound and systematic process. It is, hereby suggested, in that wise, that the codification of Islamic law which started in Malaysia in 1880 must be categorically based on a sound and systematic procedure. The Criminal Procedure Act (1997) and the *Syariah* Civil Procedure Act (1997) must not be based on the framework of the civil courts in Malaysia. Instead, it should be solely based on the principles of the *Shari'ah*. The Department of *Shari'ah* Judiciary Malaysia (JKSM) must put in place, a strategic technical legal framework by which the learned judges of the *Shari'ah* Court and the lawyers must have to hone their expertise from time to time. It is also discovered that the family and marriage rules developed in the codified Islamic family law in Malaysia were man-made and with human interpretations, and as such beleaguered by shortcomings and thereby open the gate for unending criticisms from the legal experts and women activists. Therefore, these laws, in the opinion of the writers were never meant to be final and immutable. Indeed, some women believed that the certain provisions in the Islamic Family Law Act have closed off many of the legal entitlements that women could legitimately claim in classical Islamic jurisprudence. Hence, the more reason for why they understood these provisions as a betrayal to the core values of justice and equality in Islam. Hence, the call for the need to re-examine and reform the Muslim family law in Malaysia.

REFERENCES

[1]. Elgawhary, T. A. (n.d.). Codification of Law. *The Oxford Encyclopedia of Islam.*

[2]. Government of Malaysia. (2007). *Federal Constitution of Malaysia*. The Commissioner of Law Revision, Malaysia.

[3]. Gordon, S. (1964). Marriage / Divorce in: The Eleven States of Malaya and Singapore," *Intisari*, Vol. 2, 1964.

[4]. Hooker, M. B. (1975). *Legal Pluralism*. Clarendon Press.

[5]. Hooker, M. B. (2002). Islamic Law in South-East Asia. *Vol, 4, Asian Law*.

[6]. http://www.sistersinislam. org.my/memo/08122005.htm as retrieved on 16 April 2008.

[7]. Ibrahim, A. (1965). *The Status of Muslim Women in the Family Law.* Singapore.

[8]. Jones, G. W. (1981). *Malay Marriage and Divorce in Peninsular Malaysia: Three Decades of Changes.*

[9]. Kedah Syariah Courts Enactment, 1337 (No. 9 of 1337).

[10]. Kelantan Council of Religion and, Malay Custom and Qadi Courts Enactment 1953.

[11]. Laton vs. Ramah (1926) 6 F.M.S.L.R. 128, C.A.

[12]. Laws of Sarawak. (1958). Vol. II.

[13]. Mohamedan Marriage Ordinance, 1880 (No. 5 of 1880).

[14]. Memorandum to *Ahli Dewan Negara* to review the Islamic Family Law (Federal Territories), (Amendment) Bill 2005.

[15]. Mohammadan Marriage Ordinance, 1946 (No. 8 of 1946).

[16]. Muhammadan Marriage and Divorce Registration Enactment, 1900.

[17]. Muhammadan Marriage Enactment, 1914 (No. 15 of 1914).

[18]. Muslim Family Law amended by Enactment No. 2 of 1964.

[19]. Muslim Family Law amended by Enactments 2 of 1960, 14 of 1960 and 12 of 1963.

[20]. Muslim Family Law amended by Enactments 4 of 1960, 7 of 1961 and 8 of 1962.

[21]. Muslim Family Law amended by Enactments No. 11 of 1935 and 2 of 1950.

[22]. Muslim Family Law amended by Enactments No. I of 1963 and 8 of 1965.

[23]. Muslim Family Law amended by Ordinance No. 12 of 1961.

[24]. Negeri Sembilan Marriage, Divorce and Reconciliation Rules 1963.

[25]. Nik Noriani, N.B. (2000). *Marriage and Divorce: Law Reform within Islamic Framework*. International Law Book Services.

[26]. Noor, Z. (n.d.). Gender Justice and Islamic Family Law Reform in Malaysia. *Kajian Malaysia, Jld. XXV, No. 2.*

[27]. North Borneo Wills Ordinance, s. 1 (2), as amended by the Wills (Amendment) Ordinance, 1961.

[28]. *Oxford Islamic Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t349/e0033. Accessed on 15 Sept., 2015.

[29]. Pahang Administration of the Law of the Religion of Islam Enactment 1956.

[30]. Perak Administration of Muslim Law Enactment 1965.

[31]. Perlis Administration of Muslim Law Enactment 1963.

[32]. Raihana, A. (2007). A Study of Islamic Family Law in Malaysia: A Select Bibliography, *International Journal of Legal Information*: Vol. 35: Issue. 3, Article 8.

[33]. Registration of Muhammadan Marriages and Divorces Enactment, 1885.

[34]. Salbiah A. (1992). *Muslim Personal Law: Women, Religion and Family Law*.

[35]. Sarawak Guardianship of Infants Ordinance (Cap. 93).

[36]. Sarawak Muslim Converts (Property) Ordinance (Cap. 95).

[37]. Sarawak Muslim Wills Ordinance (Cap. 96).

[38]. Sarawak *Undang-Undang Mahkamah Melayu*, 1959.

[39]. Selangor Administrative Rules issued by the Religious Department in 1962.

[40]. Selangor Rules relating to marriage, divorce and revocation of divorce, 1962.

Sci.Int.(Lahore),28(2),1753-1762,2016 ISSN 1013-5316;CODEN: SINTE 8

[41]. Selangor State Administration of Islamic Law Enactment 1989.
[42]. Singapore Administration of Muslim Law Act 1966.
[43]. Terengganu Administration of Islamic Law Enactment 1955.
[44]. Terengganu Courts Enactment, 1340 (No. 4 of 1340).
[45]. The Islamic Family Law Act (Federal Territories), 1984 (Amended in 2006).
[46]. Wahbah, Z. (1987). *Juhud Taqnin fiqh al-Islami*. Beirut: Mu'assasat al-Risalah.
[47]. Zainah, A., & Jana S. R. (n.d.) Justice and Equality in Muslim FamilyLaws:Challenges, Possibilities. Strategies for Reform', *Washington and Lee Law Review*: Volume 64, Issue 4, article 12.