

A Review of Discrimination Against Women in Shariah Courts

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Abstract

Criticism of Shariah courts is no longer regarded as a new issue. Given that the majority of clients in the Shariah Courts are women, causes the issue of discrimination affecting women in the administration of the Shariah Court itself. This study will identify some critical issues regarding gender bias which occurred in the Shariah Court. The method used in this research is the study of literature by examine several mediums such as the Quran, books, Enactment Act, newspapers, and web sites of certain organizations related to the issue of gender bias. The study found that women-related issues that arise in the Shariah Court is not true and sometimes is seen as a bit excessive while the allocated Shariah Court jurisdiction was doing its best. However, as a professional body, the Shariah Court should accept criticism from the positive side and to strive harder towards improving a better system administration.

Keyword: Discrimination against women; criticism of shariah courts; women rights in Shariah courts

Abstrak

Kritikan terhadap mahkamah Shariah bukanlah suatu isu baharu. Memandangkan majoriti pelanggan utama Mahkamah Shariah terdiri daripada wanita, maka timbul isu diskriminasi yang melibatkan wanita dalam pentadbiran Mahkamah Shariah itu sendiri. Kajian ini akan mengenal pasti beberapa isu kritikan tentang diskriminasi terhadap wanita yang berlaku kepada Mahkamah Shariah. Kaedah yang digunakan dalam kajian ini adalah kajian kepustakaan dengan meneliti beberapa medium seperti Al Quran, buku, Akta dan Enakmen, surat khabar, dan laman web organisasi tertentu berkaitan isu bias gender ini. Hasil kajian mendapati bahawa isu yang timbul berkaitan wanita di Mahkamah Shariah tidak benar dan adakalanya dilihat agak berlebihan sedangkan Mahkamah Shariah atas bidang kuasa yang diperuntukkan ke atasnya telah berusaha sebaik mungkin. Namun sebagai badan profesional, Mahkamah Shariah perlu menerima kritikan tersebut dari sudut positif dan perlu berusaha lebih gigih ke arah penambahbaikan sistem pentadbiran yang lebih baik

Kata kunci: diskriminasi terhadap wanita, kritikan terhadap mahkamah shariah dan hak wanita di mahkamah Shariah

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1.0 INTRODUCTION

Shariah Court is the mandated regulatory authority of Islamic law in Malaysia. Shariah Court took the first step in ensuring that deficiencies in the administration are corrected. However, there are still some issues that arise involving women in Shariah Court. One of the major issue is the discrimination against women in Shariah Courts. Furthermore, the majority of applicants in Shariah Courts are women (Maznah Mohamad, 2000). In this subject, the question of equality, status, and recognition between men and women is often asked. Although the United Nations has put forward a charter of women's rights, there are still countries that do not accept such clauses as it went against the teachings of Islam and the constitution of the country (NoorAziah Mohd Awal, 2006).

The Malaysian Constitution states that each and every one of us is equal under the law and entitled to legal rights. (article 3 (1)). This statement shows that the law does not discriminate between status, position and gender between men and women. Thus, according to the context of the law in Malaysia, it is not forbidden upon women to make an application or claim. Women could also be a party defendant in a case. Furthermore, women in Malaysia could be a witness or give evidence for a claim, she could also be a judge. However, to be a judge for the Shariah Court has not been expanded, as it needed to be viewed by the Shafie sect. (Siti Zalikha:2000)

Islam clearly has given special rights to women. Islam has never discriminate against women, on the contrary, it puts women in a good position and in accordance with nature, economic necessity and the female psychology itself. Islam also has raised the status of women from discrimination due to ignorance. Al Quran also demonstrated that the fault is not placed on the shoulders of women like for instance, the exclusion of Adam and Eve from paradise:

فَأَزَلَّهُمَا الشَّيْطَانُ عَنْهَا فَأَخْرَجَهُمَا مِمَّا كَانَا فِيهِ

... Then Satan make them slip from the (Garden) and get them out of the state (of felicity) in which they had been.

(Al Baqarah 2:36)

In fact, Islam has wisely arranged the rights of women in family affairs which gave women the right balance of responsibilities. Allah says:

...And the wives have the same rights as obligations incurred by them (the husband) in a proper way (and not prohibited by Islam

(Al Baqarah 2:228)

Therefore, the question of discrimination against women in shariah court is not true and it does not exist. Nevertheless, this theory is not implemented well in the Shariah Court. Therefore, any deficiency in implementation would give a negative reflection to the society. This paper will explain about several issue on discrimination against women which hopefully will be beneficial to the Shariah Court and the community at large.

■2.0 ISSUES DURING COURT ADMINISTRATIONS

Shariah Court faced a number of issues involving the administration. Maznah Mohamad stated that the administrative system in the Shariah Court is not “women friendly” and bias to the poor. She also added that the administration of the Shariah Court inefficiency has negative effects to the major clients for women of Shariah Court (Maznah Mohamad, 2000).

A study carried out by a non-governmental women's organizations called Sisters in Islam found that most women who deals with Syariah court proceedings are found frustrated with the process of justice in Courts. (Sisters in Islam: 1999) The hearing process took a long time to be resolved and the delayed dates are unfounded. Women who dealt with court holds the view that the frequent delay of cases actually a waste of time. These women are left frustrated as the holds and delays in resolving cases caused them to feel depressed, angry, emotional and frustrated. Worse still, when the moratorium costs is borne by them in their efforts to get their own rights or the rights of their children such as child alimony (Maznah Mohamad: 2000) Suspension or the delayed of this kind can affect the course of justice.

This situation shows that the Shariah Court oppresses women and for those who are poor. This should be evaluated as a call for improvements to a better administration system, not to mention the increasing number of divorce cases in Malaysia (Harian Metro, 2014). This situation inadvertently gave immense pressure to the Shariah courts, not to mention the postponement of cases which are increasing per year (JAKESS, 2012). If we were to look at the issue of delaying cases in this administration, it is not a new issue, where 29% delayed cases in Shariah Courts were reported from 1997 to 1999 (Berita Harian, 2002). This situation inadvertently pressurize the Shariah Courts for better implementation. Because of such factor, rises the issue of gender bias in Shariah Courts whereas the Shariah Court tries it utmost best to serve based on its provisions that have been outlined.

To find a solution for the above statement, the author interviewed two shariah judges in Petaling shariah court (MRSPJ1 & MRSPJ2) about the discrimination against women involving the issue of delayed cases. First judges strongly denied about this issue and further issued a statement as below:

I do not agree with the statement. It's like this, from the applications perspective, many women are making an application to the dissolution of marriage, like divorce per say. There's no doubt for that, but that does not mean that the large number application shows that women are discriminated or persecuted, but yeah, when there are a lot of people dealing with us, different kind of situations will arise, there'd be all kind of problems and the problem in dealing with women will arise.. It's like in the market, there'd be a lot of women however there's no talk about discrimination in that area... Regardless of that, the law gives a lot of opportunities to women rather than men because they now that a lot of their clients are women. So they spend a lot of time in making the court “women-friendly”. In regard to the talk of women's case settled belatedly while the men's case settled faster, it's actually pretty much the same. It's just that in some cases, for men there are case where it could be settled without the presence of his wife, while for women who applies for dissolution it couldn't be solved without the presence of her husband. So when she applies, and her husband didn't come, the case would be delayed. Of course cases like this would take a while. People would see like there's a discrimination but in reality it's not the same in comparison to men. The men would come to ask for the dissolution of their marriage and he could still dissolve their marriage even without the presence of his wife. That's the difference.

(Personal Communication MRSPJ1, July 27, 2014)

Based on the statement above, most of the claims and application in court are done by women. But it does not mean that there is a discrimination against women in the Syariah Court. As you may recall, the authority to divorce is in the hands of the husband, as in the application of registration for divorces outside the court under the provisions of section 57 of the Islamic Family Law Enactment 2003 if the present to confirm the pronouncement of the husband, or women as the applicant was present with her husband then the case is certainly not going to take a long time compared to the case without the presence of her husband. The starting point is the cooperation between the parties and other relevant factors, Judging by this, it is a misclaim to say that there's a discrimination in Shariah Courts. This statement is further reinforced by the statement below:

I do agree with what Tuan said however, I do not agree with the statement regarding women's discrimination. For cases where it couldn't be solved it looks like there's a discrimination against women, but in reality there are other factors that needs to be considered, like the absence of the husband in court, the knowledge of the husband and wife, the electing of lawyers. But yeah, when people asks for divorce they want it to be settled as soon as possible.

(Personal Communication MRSPJ2, July 27, 2014)

Delayed cases in syariah court is not a process that is intentional but to appease religious and legal procedure itself. Postponement of a case from a date to a certain date is in fact an act which is authorized and provided for in the Act. For example, in Section 192 of the Act Syariah Court Civil Procedure (Federal Territories) Act 1998 which provides that (Abdul Hanif vs Rabiah:1996):

The hearing of an application may be adjourned from time to time, either broadly or to a particular date, whichever is appropriate. If the hearing is adjourned generally, the party making the application can restore it by giving two clear days before the date fixed for the hearing to all other parties to whom the application was submitted.

Based on this provisions, postponement of cases to another date in some circumstances is very beneficial and can give justice to the parties involved in the proceedings. For example, to obtain evidence from the parties involved or witnesses or to fulfill the judgment proceedings. However, as mentioned before, the postponement of cases that occurred, does not lie on the shoulders of the administration of the syariah court alone, the parties and sharie counsel also plays a big role in the smooth running of a proceeding case. As in the case of Abdul Hanif v Rabiah, the Honourable Justice Dato 'Sheikh Ghazali gave judgment of the court by saying:

This is a very sad case where the wife (hereinafter will be named as the respondent) tries to get a divorce from her husband (hereinafter will be named as the appellant), from February 1989 but unfortunately the case has been delayed from time to time and now even though it has been more than seven years later she still has not yet obtained the divorce.

In the judgment, the judge also mention there are some postponement during the divorce proceedings that happened at the Federal Territory Syariah Low Court which began its hearing call on the 22nd of August, 1989. Among the reasons for the postponement of this case as stated by the Honourable Judges are the unattendant of the disputant during the ongoing proceedings, Y.A.A judge stated:

Because of the absence of a party to the case or the absence of a Sharie lawyer as saying the talks have been made for reconciliation and the case began its hearing on February 2, 1991.

This case has shown that the postponement of is not only because of the parties absent during the case, but also because of the absence of Syariah lawyers who represents them in court. The period between the date of hearing and trial could take almost two years. This duration is unacceptable not to mention the fact that she applied for divorce on the grounds of molestation. Furthermore, through the judgment, the judge stated dates until the case is heard by Syariah Appeal Court.

After that the case begun its hearing from time to time until May 11, 1994 then the Judge of the Syariah Subordinate Court gave its decision to reject the claim of the respondents (wife). The respondents appealed to the Syariah High Court. The appeal was then heard on 21 November 1995 and the High Court judge gave its judgment of allowing the appeal. Appellant (husband) also appealed to the Sharia Court of Appeal and therefore took complete record of the appeal, the case was then heard only on June 18, 1996.

Finally, the Syariah Appeal Court in this case have agreed with the decision of the Syariah High Court which allowed the wife to dissolve the marriage and consequently rejected this appeal (husband). The Honourable Judge again mentions the absence of her husband during the appeal to be heard.

He also was not present when the case was heard on appeal in June 1995, although the Attorney Syarie try to defend by arguing that he was not informed of the hearing date.

It turns out that the delays due to the absence of the party in this case have led to the abuse for the wife not only emotionally but also in terms of time and financial .Regarding the administration issue in the Syariah Court which is considered as inefficient, there are several factors which should be considered such as the Syariah court case background, the scope and limitation of the Syariah Courts jurisdiction, facilities, scheme for the staff's services and much more. The role factor of the Syariah attorney, the involvements of the plaintiff and defendants are also factors that need to be considered to help ensure the smooth running of cases in the Syariah Court(Ahmad Hidayat Buang:2006) The following factors should be assessed and improved so that gender bias issue in the Syariah Court's administrative issues are addressed.

■3.0 ISSUES DURING TESTIMONY

One of the foundation that is emphasized in Islamic law is the equality of rights between men and women. The Islamic Shariah gave considerable amount of attention to rights for all sides. In many ways, Islam equate between men and women. For example, from the aspect of their position as members of society, their rights in the society including the fields of science, worship, social or even political (Jasim, layth Sains: 2003). In Islam, men and women are equal in terms of accountability. They are all equally responsible for the custody or care for self, family, community and country. Hence, men or women will be awarded the same lever or form of rewards equally between men and women. (Saqlain Masoodi:1999) .

However, men and women differs characteristically, psychologically and physically. This contrast is recognized by psychologist and psychiatrist even women themselves. Most women suffer from various syndromes that affect directly and indirectly on their character and psychiatric (Khan, shamsad M: 1993). Dr.G Saqlain Masoodi in his article examines at length about side effects from the perspective of scientific research and its impact on women and formulate testimony

It may tantamount to injustice to rely, in matters involving either fortune or life of a person, on the testimony of a physiologically and psychologically suffering woman

Few things can be discussed regarding this issue. Firstly, women's testimonial from the aspect of supporting evidence or nas. This brief discussion shows that there are different views with the absence of clear injunction to prohibit the testimony of women in some particular matter. The texts that refer to the question of women's testimony, as a whole is still common, and some can be disputed, and this leaves the mujtahid to make ijthad based on current developments and other factors. However, scholars have put conditions for witnesses so that the testimony of a person is admissible in court. Furthermore these conditions are not limited only to men. Whereby a woman will be considered as competent to be a witness if she fulfills the conditions below (Al Zuhaili, Wahbah: 1997)

- 1) Sanity
- 2) Puberty
- 3) Just
- 4) Good Memory
- 5) Good Reputation

Keep in mind that the issue of admissibility in the testimony of women in Islam is a matter for ijthad scholars and thus resulted in the differences of opinion (deviation) between clergies. What is certain is that there is no argument or a clear nas from the Quran or Hadith from the Prophet who rejected the testimony of women. Overall, Scholars agree that women can be witnessed (istisyhad) and to be a witness (isyhad) during cases of affairs of femininity such as births, determine virgin, defects in the member hard, lactation, menstruation and exhausted waiting period (Al Zuhaili, Wahbah: 1997) Cases regarding sales and transactions involving properties such as endowments, wills, grants etc. Scholars dispute regarding the involvement of women as witnesses. This dispute involves two key areas; The first relates to the question of Judiciary, like marriage (nikah), divorce (talaq), ruju ', consanguinity and the like. Second: Cases that include hudud offenses. The second, discusses the aspects of witnesses and testimonial. Failure to understand these two different functions would led to an increase in the question of a women's testimonial. From this aspect, the issue that arises is the number of female witnesses required. Requirement of two woman witnesses needed to be stressed more during testimony (two witnesses or tahammul al-Shahadah) Non-current testifying (Mashhad or no 'al-Shahadah) in court.

وَأَمْتَسْبِهُوْا شَيْدَيْتَيْنِ مِنْ رَجَالِكُمْ فَإِنْ لَمْ يَكُنَا رَجُلَيْنِ فَرَجُلٌ وَأَمْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنَ الشُّبُهَاءِ أَنْ تَصِلَ إِحْدَاهُمَا فَتُذَكَّرَ إِحْدَاهُمَا
الْأُخْرَى

...And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses, so that if one of the two erreth (through forgetfulness) the one of them will remind

(Al-Baqarah 2:282)

This verse is often used as an argument that the testimony of two women is equal to the witness of one man. Also it is said that this verse is about the sales or financial transactions that women typically are not accustomed to. That is why they are required to remind one another in the event that one of them forgets or did a mistake.(Abduh, Muhammad: 2002) The word "tadhilla" itself has many different interpretations and one of them is forget, distorted, wrong (wrong). This view is based upon the word "an" itself. "An" which means "if" is conditional pronouncement. Hence the need for a second female witness is not an absolute requirement. The second witness will only be necessary if the first female witness made a mistake or tried to deviate from the truth. Thus, the requirement for two witnesses are a much more cautious method(ihtiyat) however, it is not a definitive method (absolute rule) (Abduh, muhammad: 2002) This verse also invited to the question of jurisprudence, fiqh, namely

- i) The requirement for two witnesses is to decrease the percentages of mistakes should it happened in trial.
- ii) It is to help remind or rectify one another if either of them forgot or did a mistake.

The writer, agrees with the view that two female witnesses is not required if it was to testify or give testimony of Mashhad al-Shahadah in proving that a transaction has taken place and not under the context of the witness (istisyhad alShahadah). If it is under the context of (istisyhad al-Shahadah), the best method of proof "(Best Evidence Rule) should apply (Ibn Qayyim: 1995) For the sake of justice which is the major goal for the Islamic judicial system, it can be concluded that the evidence of women (bayyinah) can be accepted in all cases, including marriage, divorce, and hudud, qisas. What is important is that a case must be proved up to the level (standard) that is required for such cases and not solely depend on the method of proof (MLJ:2002). Based on the statement above, Islam had never rejected the testimony of women in the judicial system as well as the involvement of women in various fields in this millennium. Islam demands the participation of women in various sectors. Islam respects women's role as the gentle soul deemed to meet family needs more than men. Regarding the statement above, Islam rejects the testimony of women in serious crimes such as adultery and Qazaf which will greatly impact their dignity(Siti Zalikha, 2006. There is no discrimination against women in Shariah Courts, furthermore, Islam valued women greatly.

■4.0 THE WOMEN JUDICIAL APPOINTMENT ISSUE

New history have occurred in Malaysia, when federal territory Fatwa has gazetted the appointment of women as Sharie judges and has appointed several women as Shariah Judges. While there are some states that approved the appointment of a woman Judge, however the appointment took several years. This inadvertently raises the debate of cases that it can handle and case that it can't handle. Some states do not accept the appointment of women as Shariah Judge, this states took the opinion of the majority of scholars, which is the scholar of Shafie, Maliki and Hambali. They are of the opinion that being a men is one of the requirement of being a judge. It is not permissible to appoint a woman of being a judge (Mahmud Saedon, 1990)

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ

...Men are the protectors and maintainers of women, because Allah has preferred those guys (strength) than the other, and because men have spent (spend) a portion of their assets.

(An Nisa' 4:34)

Imam Abu Hanifah argues, women can be judges in cases where they could be a witness but, not in cases where they could not become a witness such as in the case of hudud and qisas. The sentence imposed by the appointed judge (woman) shall be valid and effective in cases other than cases of hudud and qisas if the sentence is consistent with the Book of Allah and the Sunnah of the Prophet. The argument of those who agree with the Hanafi school is based on the analogy where women could be a witness in several cases. So women should also be a judge in matters that required it to be a witness. Other contemporary scholars such as Dr. Yusuf Qardhawi also inewed the same way as Imam Abu Hanifah. (Mahmud Saedon: 1990).

Ibn Jarir al-Tabari require women to become judges in absolute terms. This means she can try all cases; hudud and qisas included. Tabari see the purpose of appointing judges is to administer justice which is absolute. Therefore the office of judge can only be given to anyone who is able to solve the dispute between the parties to which dispute. According to him, hadith that is narrated by Abu Bakrah which any people will not be successful if they are led by women's affairs is intended only for the post of head of state as determined by nas hadith itself and no scripture that associates women with staffing Hakim. Ibn Hazm also believes that women should be appointed as judge because a woman's femininity does not affect their ability to understand arguments and evidence and did not stop them from resolving disputes (Mamud Saedon, 1990).

In general, eventhough the Shafi sect is the dominant view in Malaysia, there is also the need to view other sect. Among them is the the payment of zakat fitrah by using money to replace rice as required Shafi sect. This happened after taking into account the situation and the passage of time (OK Rahmat: 1928) The appointment of sharie woman judges shows the shariah's court acceptance of views other than the shafie sect. Furthermore, the issue of discrimination against women in terms of appointing judges is not true at all

■5.0 ISSUES ON POLIGAMY

Provision polygamy is among the key issues by feminist groups as well as several other provisions which is said to favor the men. The provision intended refers to the amendment Bill Islamic Family Law (Federal Territories) Act 2005 purported discrimination against Muslim women in Malaysia. Some of the topics are the provisions of section 23 (3) & (4), that touches on the issue of polygamy and matter. Sisters in Islam has claimed that the amendment of section 23 (3) and 23 (4) to 'desirable or necessary' has granted indulgence to husband who wants to practice polygamy(Sister in Islam, 2005). This provision suggests that husbands who want to practice polygamy just proves one of necessity and propriety of polygamy The statement is inaccurate because the author felt that the section should be seen and studied as a whole. This is because the amendments 'necessary or desirable' only arises in a number of statement that is : sterility, physical infirmity, unfit in terms of physical or sexual intercourse, willfully refusing to comply with an order for recovery of sexual rights, or insanity on the part of the existing wife or wives (Sec.23 (4)(a) Islamic Family Law Act 2005).

But when examined as a whole it was not the amendment that discriminates against women because it is not against Islam. Furthermore, as a supporter of women's rights, Sisters in Islam should be fair and admit that the other man that would accept his co-wife was also a woman. Sisters in Islam should help provide understanding and support for women who have a co-wife on how to build a polygamous family organized the Prophet S.A.W. There is also the issue that polygamy is seen as an advantage or a privilege, this is a misrepresentation of polygamy. Polygamy existed long before the time of Prophet Muhammad, and was limited to only four wives. In the current era where women are more independent and have the opportunity to work, we need to examine the factors of polygamy and conditions that have been imposed on polygamy so it is not practiced arbitrarily. For a women, polygamy could cause delirium or rage against their husbands who wants to get married again. They would resist greatly against polygamy. However, what they truly doubt is the capability and the responsibility that the husband holds to act justly between the wives. As stated in Surah An-Nisa verse 3 which means:

And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice

According to Dr. Muhammad al-Bahi, polygamy is not a principle which must be implemented in Islamic sharia which would be a sin if it is not implemented. Polygamy is only a matter of must and a concession in an emergency. Obviously here, although the language implemented in the paragraph above shows command, it does not meas that it must be implemented. If we observe, it could lead to prohibition and unlawful if polygamous husbands are not able to be fair and resulted in the persecution of the wife he married (Al Bahi, Muhammad: 1988)

Presumption and discrimination in polygamy (Utusan Malaysia: 2001) refers to a statement from psychologists from University Putra Malaysia. He worked on a case where a wife came to complain regarding her husband marrying for the second time. The wife does not forbid her husband from marrying again, but she assumed the second wife as having low morals. In another case, a polygamous husbands

complained that when his wife knew of his secret marriage with another women, she threw a tantrum by throwing stuff in the house. From this cases, we can see that a wife even with good knowledge and understanding of religion they still have prejudice against polygamy. Polygamy is not a gift but a great responsibility if practiced. Someone who wants to polygamy, he should be in accordance with regulations prescribed by the legislation so that undesirable things do not happen.

6.0 CONCLUSION

Shariah Court tries it utmost best to serve regardless of gender, eventhough such cases like divorce are increasing. Basically discrimination against women does not exist at all in Islam. Just practically, there are some shortcomings in the administration of the Shariah Court that should be firmly noted because it involves the perception of Islam. Criticism of gender bias and discrimination of women in the Shariah Court is an untrue statement. The existence of the Shariah Court itself is to defend the rights of all men and women. Regarding the testimonial issue there are no restrictions on women. For example, in section 83 of the Shariah Court Evidence of Selangor 2003 where there is no limit for women's participation as a witness in the Shariah Court. The Shariah Court should always keep an open mind towards any proposed improvements in the administration of judicial system. Therefore, this study proposes to further analyze the issues that arises so that we could further improve our shariah courts administration.

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