Rights of A Muslim Woman before and During Marriage, and Upon Divorce as Conferred by the Islamic Family Law (Federal Territories Act) 1984, Malaysia

1. Noraini Binti Md Hashim, Asst. Prof. Dr., Civil And Islamic Family Law, International Islamic University Malaysia, Norainim@iium.Edu.My

Abstract

Islam has put much emphasis on the rights of woman and they are evidently been laid down in Al Quran (the Holy Book) and As Sunnah (the tradition of the Prophet Muhammad). Similarly in Malaysia where Islam is the religion of the Federation, the rights of Muslim woman are protected by virtue of Islamic Family Law Act and Enactments of each state. These Act and Enactments are the combination of the four school of thoughts' opinions but majority of the provisions are based on the Shafie school of thoughts as adopted by the Malay Muslims. However, the rights of a woman can only be protected by the law subjected to the conditions that her marriage is valid and registered. The rights start with the entitlement to the gifts exchanged in the case if there is breach of engagement, followed by the rights during marriage namely to have dower, marriage gift and maintenance. Next will be the rights upon divorce i.e. deferred dower and marriage gift, accommodation, maintenance during period of reconciliation, consolatory gift and matrimonial property. This article is qualitative in nature. Besides referring to Al Quran and As Sunnah, reference will also be made to the Islamic Family Law (Federal Territories Act), Malaysia, referred journal, articles and decided and undecided cases. It is hoped that this article will shed some light on the rights of Muslim woman in the context of before and during marriage and upon divorce as practiced in Malaysia.

Keywords: Muslim Woman’s rights, Malaysia, Islamic Family law of Malaysia, marriage, divorce
Background

Before the rise of Islam, the Arabs lived in a traditional, patriarchal (male-dominated) society. Man regarded woman as their property, to be married or divorced at will. No limitations on polygamy existed. Woman generally did not have a say in the choice of a husband. Once married, they lacked financial security, as the groom is to give dower directly to the bride’s male relatives.

With the coming of Islam, the status of woman improved considerably where a woman is a completely independent personality. In addition, the Holy book, al Qur’an and the traditions of Prophet Muhammad (peace be upon him), as-Sunnah stated that husbands must support their wives financially including maintenance, accommodation during marriage and for a certain period after a divorce. The woman also is entitled to the consolatory gift, matrimonial property, deferred dower (dower in debt) so on and so forth.

In Malaysia particularly for the Muslims, the issue of financial abuse particularly non-giving maintenance during marriage and failure to provide ancillary relief upon divorce are increasing particularly when most women are working nowadays. Therefore, relevant authorities in Malaysia need to work together to disseminate the knowledge to parties involved as to their rights.

Objectives/Research Questions

This article will shed some light on the rights of Muslim woman in the context of before and during marriage and upon divorce as practise in Malaysia.

Research Methodology

For the purpose of this paper, besides referring to the Holy book, Al Quran and the tradition/saying of Prophet Muhammad (peace be upon him), the Sunnah, reference will also be made to the Islamic Family Law (Federal Territories Act) 1984, referred journal, articles and decided and undecided cases.

Findings

Woman, under the Islamic law is regarded as the intellectual and spiritual equals of a man. The main distinction between them is in the physical realm based on the equitable principle of fair division of labour. It allots the more strenuous work to the man and
makes him responsible for the maintenance of the family. It allots the work of managing the home and the upbringing and training of children to the woman, work which has the greatest importance in the task of building a healthy and prosperous society. Because of this, the man carries the obligation to fulfill the rights of woman because the woman is under their responsibility and will be questioned in the Hereafter. This is clearly proven in the al Quran, surah An Nisa: 34:

“Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore, the righteous women are devoutly obedient and guard in their husband’s absence what God would have them guard.” (Quran 3:34, Abdullah Yusuf Ali)

It is to be noted that in Malaysia, nearly all the provisions under the Islamic Family Law Act and Enactments are enacted to protect the rights of women together with children in line with Islamic law as men are the protector of women.

Discussions

Application of Islamic Family Law to Muslims in Malaysia

By the amendment of Article 121 (1A) of Federal Constitution, the civil courts no longer have jurisdiction in any matter within the jurisdiction of the Shariah Court. (Federal Constitution, as at 2010). In List II of 9th Schedule of Federal Constitution, it stated that the Islamic family law is included under the state list. (Federal Constitution, as at 2010). As a result, all matters pertaining family laws for non-Muslims are governed by their own statute namely the Law Reform (Marriage and Divorce) Act 1976 (LRA) and be heard at civil courts. On the other hand, all matters regarding the Islamic family laws for Muslims are governed by Islamic Family Laws Act and Enactments based on each states. For the purpose of this article, reference is being made to the Islamic Family Law, (Federal Territories Act) 1984 (Act 303) (herein after known as IFLA 1984) and be heard at Shariah courts.

Rights of Woman under IFLA 1984

The rights of woman under IFLA 1984 can be divided into three:
1. Before marriage/during engagement
2. During marriage
3. Upon divorce

**Before marriage/during betrothal**

The rights of woman during betrothal can be classified into:

i. Returning of gifts if there is breach of betrothal
ii. Payment of pemberian (marital gifts)

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**i. Returning of Gifts if there is Breach of Betrothal**

*Section 15 of IFLA 1984* stated that the party who breach the promise to marry shall be liable to return the betrothal gifts, if any or the value thereof and to pay whatever moneys have been expended in good faith by or for the other party in preparation for the marriage. *(Islamic Family Law, (Federal Territories Act) 1984)*

In the case of *(Aishah v Jamaluddin, 1978)*, the defendant breach of promise to marry with the Plaintiff. The court had ordered the Defendant to pay the compensation and the Plaintiff can keep the ring.

**ii. Payment of Marital Gifts**

In *Section 2 IFLA 1984*, marital gifts means gifts whether in the form of money or things given by a husband to a wife at the time of the marriage. *Section 21 (2) (d) IFLA 1984* provided that the court may record the value and other particulars of any marital gifts that shall be paid by the husband. *(Islamic Family Law, (Federal Territories Act) 1984)*

In the case of *(Aishah v Jamaluddin, 1978)*, because of the defendant breach the promise to marry, the court ordered him to pay RM800 as the compensation for the expenses of the wedding and RM25 for the dower.

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**During Marriage**

During marriage, the rights of woman under IFLA 1984 are:

i. Maintenance
ii. Husband to be just/fair if practise polygamy
i. Maintenance

Section 59 (1) of IFLA 1984 stated that the Court may order a man to pay maintenance to his wife subject to subsection (2) that she not be entitled to maintenance when she is disobedience (nusyuz) or unreasonably refuses to obey the lawful wishes or commands of her husband, without any valid reason according to Islamic law. (Islamic Family Law, (Federal Territories Act) 1984) Section 61 of IFLA 1984 provided that in determining the amount of any maintenance to be paid, the Court shall base its assessment primarily on the means and needs of the parties. (Islamic Family Law, (Federal Territories Act) 1984)

ii. Husband to be Just/Fair if Practise Polygamy

Section 23 (4) (b), (c) and (d) of IFLA 1984 stated that in order for the husband to practise polygamy, the applicant husband has such means as to enable him to support as required by Islamic law all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage, he would be able to accord equal treatment to all his wives and the proposed marriage would not cause darar syarie to the existing wife or wives. (Islamic Family Law, (Federal Territories Act) 1984)

Section 2 of IFLA 1984 provided that darar syarie’ means harm, according to what is normally recognized by Islamic law, affecting a wife in respect of religion, life, body, mind, moral or property. (Islamic Family Law, (Federal Territories Act) 1984)

On the other hand, Section 59 (2) of IFLA 1984 provided that subject to Islamic law and confirmation by the Court, a wife shall not be entitled to maintenance when she is disobedient. (Islamic Family Law, (Federal Territories Act) 1984)

However, in a case of practicing polygamy, the court must distinguish causing harm (darar syarie) and disobedient (nusyus). A wife is not considered as disobedient if she committed the acts under section 59 (2) of IFLA 1984 if her act is due to the injustice coming from her husband in polygamous marriage. (Islamic Family Law, (Federal Territories Act) 1984)

In consequence, she can claim for her right of maintenance as a wife because she is not considered disobedient. Therefore, if the husband fail to support his wives and treat
them equally and just, the wives can go to court and make an application for maintenance or divorce and their acts in disobeying their husband are not considered as disobedient.

In the case of *(Mohd Izudin bin Mohd Ilias v Rozeta bt Hasan 2013)*, the court allowed the plaintiff’s application to practise polygamy but with the condition that the husband must be just to his wives in matters such as food, shelter, clothing and the overnight rotation with wives.

**Rights of Woman upon Divorce**

Upon divorce, the wife is entitled to claim her rights such as:

1. Deferred dower
2. Deferred marital gifts
3. Accommodation
4. Maintenance during reconciliation period
5. Consolatory gift
6. Matrimonial property
7. Custody
8. Maintenance of children

**Deferred Dower**

Deferred dower can be defined as the obligatory marriage payment due under Islamic law by the husband to the wife at the time the marriage is solemnized, but acknowledged as a debt with or without security.

*Section 57 of IFLA 1984* provided that a married woman has right under Islamic law to her dower and wedding gifts or any part thereof on the dissolution of her marriage. *(Islamic Family Law, (Federal Territories Act) 1984)*

In *section 21 (2)(c) IFLA 1984* the court may record the value and other particulars of any part of the dower or wedding gifts or both that was promised but not paid at the time of the solemnization of the marriage, and the promised date of payment. *(Islamic Family Law, (Federal Territories Act) 1984)*

**Deferred Wedding Gifts**
Section 2 of IFLA 1984 defined wedding gifts as gifts whether in the form of money or things given by a husband to a wife at the time of the marriage. (Islamic Family Law, (Federal Territories Act) 1984)

Section 57 of IFLA 1984 provided that a married woman may have right under the Islamic law to her dower and wedding gifts or any part thereof on the dissolution of her marriage. (Islamic Family Law, (Federal Territories Act) 1984)

Section 21 (2) (c) of IFLA 1984 stated that the court may record the value and other particulars of any part of the dower or wedding gifts or both that was promised but not paid at the time of the solemnization of the marriage, and the promised date of payment. (Islamic Family Law, (Federal Territories Act) 1984)

Accommodation

Section 71 (1) IFLA provided that a divorced woman is entitled to stay in the home where she used to live when she was married, for so long as the husband is not able to get other suitable accommodation for her. (Islamic Family Law, (Federal Territories Act) 1984)

Section 71 (2) IFLA stated that the right to accommodation provided in subsection shall cease upon the period of reconciliation has expired or the period of guardianship of the children has expired or the woman has remarried or the woman has been guilty of open lewdness (faahisyah). (Islamic Family Law, (Federal Territories Act) 1984)

In the case of (Noor Bee v Ahmad Shanusi, 1982), according to Islamic law, the court held that the husband must pay the maintenance of wife during her 87 days of reconciliation period, in terms of daily food and accommodation because the divorce is revocable divorce and the wife is not disobedient.

Maintenance during Reconciliation Period (Iddah)

Section 59 (1) of IFLA 1984 provided that the court may order a man to pay maintenance to his former wife. (Islamic Family Law, (Federal Territories Act) 1984)

In determining the amount of any maintenance to be paid, the court shall base its assessment primarily on the means and needs of the parties as stated in Section 61 of IFLA 1984. (Islamic Family Law, (Federal Territories Act) 1984)
In addition, section 65 (1) of IFLA 1984 stated that the right of a divorced wife to receive maintenance from her former husband under any order of court shall cease on the expiry of the waiting period that is three months from the divorce. (Islamic Family Law, (Federal Territories Act) 1984)

In the case of (Noor Bee v Ahmad Shanusi, 1982), according to Islamic law, the court held that the husband must pay the maintenance of wife during her 87 days of iddah period in terms of daily food and accommodation because the talaq is talaq raj'i and the wife is not obedient.

Consolatory Gift (Muta’ah)
Section 2 of IFLA 1984 defined consolatory gift as reasonable gift according to Islamic law, given to a divorced wife. (Islamic Family Law, (Federal Territories Act) 1984) Section 56 of IFLA 1984 provided a woman who has been divorced without just cause by her husband may apply to the Court for a consolatory gift, as she has been divorced without just cause, and order the husband to pay such sum as may be fair and just according to Islamic law. (Islamic Family Law, (Federal Territories Act) 1984) The purpose of payment consolatory is to ease the feeling of wife who has been divorced without just cause.

Matrimonial Property (Harta Sepencharian)
Section 2 of IFLA 1984 defined matrimonial property as property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Islamic law. (Islamic Family Law, (Federal Territories Act) 1984) Section 112 (1) (2) (3) (4) (5) IFLA provided that the Court may order the division between the parties of any assets by the ways namely:
(1) Any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. On this section, there are three situations. The Court shall incline towards equality of division to the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets.
(2) Any assets acquired during the marriage by the sole effort of one party to the marriage. The Court may divide the assets or the proceeds of sale in such proportions as
the Court thinks reasonable to the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

(3) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts. (Islamic Family Law, (Federal Territories Act) 1984)

In the case of (Hujah Lijah binti Jamal v Fatimah binti Mat Diah, 1950), the court held that the rule governing matrimonial property is not part of Islamic law, but a matter of Malay custom. But, after the amendment of the Federal Constitution, the insertion of Article 121 (1A), matter of matrimonial property can be heard in Shariah courts only.

In the case of (Wan Khairani bt Wan Mahmood v Ismail bin Mohamad, 2011) the court declared that the properties registered under the defendant's name were jointly acquired properties of the plaintiff and the defendant. In this case, the plaintiff had indirectly contributed to the needs of the family and the household. She had assisted the defendant by looking after the children and the household needs while the defendant was able to effectively focus on his business. As a result, the court orders for the division of the jointly acquired properties, with 1/3 to the plaintiff i.e. the wife.

**Custody of Children (Hadhanah)**

*Section 81 (1) of IFLA1984* stated the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution. (Islamic Family Law, (Federal Territories Act) 1984) The qualification of person that can carry on the task of custodian is prescribed in *section 82 of IFLA 1984* namely that:

1) She is a Muslim
2) She is of sound mind
3) She is of an age that qualifies her to bestow on the child the care, love, and affection that the child may need
4) She is of good conduct from the standpoint of Islamic morality; and
5) She lives in a place where the child may not undergo any risk morally or physically. (Islamic Family Law, (Federal Territories Act) 1984)

The disqualification of the right of custody of a woman is lost as stated in section 83 of IFLA 1984 are:

1. by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child but her right to custody will revert if the marriage is dissolved
2. by her gross and open immorality;
3. by her changing her residence so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birth-place;
4. by her abjuration of Islam;
5. By her neglect of or cruelty to the child. (Islamic Family Law, (Federal Territories Act) 1984)

As for the duration of custody it is clearly stated in section 84 of IFLA 1984 where the right of the custodian to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years, in the case of a female, but the Court may, upon application of the custodian, allow her to retain the custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female. (Islamic Family Law, (Federal Territories Act) 1984)

After termination of the right of the custodian, the custody devolves upon the father, and if the child has reached the age of discernment (ability to choose good and bad deed), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders.

**Maintenance of Children**

**Section 72 (1) of IFLA 1984** provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as are reasonable having regard to his means and station in life or by paying the cost thereof. (Islamic Family Law, (Federal Territories Act) 1984)
By virtue of section 73 (1) of IFLA 1984 the Court may at any time order a man to pay maintenance for the benefit of any child of his:

1) if he has refused or neglected to provide reasonably for his child;
2) if he has deserted his wife and the child is in her charge;
3) during the pendency of any matrimonial proceedings; or
4) When making or subsequent to the making of an order placing the child in the custody of any other person. (Islamic Family Law, (Federal Territories Act) 1984)

Section 79 of IFLA 1984 stated that the general rule the order for maintenance shall expire on the attainment by the child of the age of eighteen years, except in certain situations. (Islamic Family Law, (Federal Territories Act) 1984)

Conclusion

The government of Malaysia, Non Governmental Organizations (NGOs) and individuals must consistently carry out the task of disseminating information to the public particularly to women as to their rights before and during marriage and upon divorce so that they know that their right rights are actually preserved and protected by the law.

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Section 4 of IFLA 1984
Section 15 of IFLA 1984
Section 2 of IFLA 1984
Section 12 (2) (d) of IFLA 1984
Section 59 (1) (2) of IFLA 1984
Section 69 of IFLA 1984
Section 23 (4) (b) (c) (d) of IFLA 1984
Section 57 of IFLA 1984
Section 21 (2) (c) of IFLA 1984
Section 71 (1) (2) of IFLA 1984
Section 59 (1) of IFLA 1984
Section 61 of IFLA 1984
Section 65 (1) of IFLA 1984
Section 56 of IFLA 1984
Section 112 (2) (3) (4) (5) of IFLA 1984
Section 81 of IFLA 1984
Section 82 of IFLA 1984
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Section 84 of IFLA 1984
Section 72 (1) of IFLA 1984
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