



## ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES

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### Law: Articulation of Islamic and non-Islamic Societies: Southeast Asia

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By Mark Cammack

Measured by conventional status indicators, the social and legal standing of Southeast Asian women in the pre-Islamic era was relatively strong (Tiwon 2003). Most importantly for present purposes, the predominant family structure in the region is based on bilateral descent and inheritance, though Southeast Asia also includes the world's largest matrilineal group. Women have also always been active in the region's mainly agricultural economy. Because Southeast Asian women have enjoyed relatively high social status as compared to other predominantly Muslim regions, a persistent theme in the history of Islamic law in Southeast Asia has been the tension between the distinctly patrilineal and patriarchal Sunnī legal doctrines and Southeast Asian social patterns and cultural norms. Opponents of recent Islamization efforts have pointed to the enduring social and cultural differences between the Arab society in which standard Sunnī legal doctrine developed and Southeast Asia as an argument against contemporary campaigns for broader enforcement of conventional understandings of Islamic law.

In addition to Indonesia and Malaysia, the Philippines, Singapore, and Brunei Darussalam also enforce Islamic legal doctrines, but the discussion here focuses on selected aspects of the two countries with the largest Muslim populations.

#### Indonesia

Belief in one God is a foundational principle of Indonesia's state ideology, but there is no official state religion, and Indonesian law guarantees a limited freedom of religion. Efforts to implement a constitutional obligation to enforce Islamic law have been repeatedly abandoned for lack of support. A national system of Islamic courts exercises jurisdiction over Muslim marriage, inheritance, and charitable foundations.

In 1974 Indonesia enacted a National Marriage Law. The act and other important family and gender initiatives in the last decades of the twentieth century reflect the conservative gender policies of the New Order government of President Suharto, which ruled the country from the mid 1960s to the late 1990s. The Suharto government's family policy idealized female domesticity and small, stable families as the foundation of a stable and ordered nation. This policy was promoted through, among other means, a variety of governmental and quasi governmental organizations that emphasized the role of women as wives and homemakers whose function is to promote the careers of their husbands.

Although the National Marriage Act prescribes a single set of rules applicable to Indonesians of all religions, Islamic marriage doctrine is made applicable to marriages of Muslims through a provision stating that a marriage is “valid when carried out according to the religious law of the parties.” The Marriage Act requires that marriage be based on the consent of the parties, and establishes minimum marriage ages of 19 years for males and 16 years for females. The minimum age rules were designed to reduce the practice, common among many communities, of parentally arranged marriages of very young couples. Although failure to comply with statutory age requirements does not necessarily invalidate the marriage, the frequency of arranged and underage marriage is declining.

The Marriage Act states that marriage is “in principle monogamous,” but authorizes Muslim men to marry as many as four wives. The act establishes a number of conditions that must be satisfied by a husband desiring polygamy, including the permission of his existing wife or wives, and requires approval from the Islamic court.

A principal purpose of the Marriage Act was to reduce the frequency of divorce. The statute prescribes different divorce procedures for Muslim men and Muslim women. The procedure applicable to men involves a repudiation ( ṭalāq ) pronounced in the presence of the Islamic court. Women are required to present witnesses and prove statutory grounds for divorce. As interpreted by the courts, however, men are now also required to prove the same grounds for divorce as the wife before they will be permitted to utter the repudiation. These rules have not eliminated the practice of unilateral arbitrary repudiation, which remains common. Moreover, divorces initiated by wives often take longer to process than ṭalāq divorces.

The Marriage Act incorporates customary property doctrines as the marital property regime for Indonesian Muslims. Upon dissolution of the marriage each spouse retains ownership of separate property acquired prior to the marriage or obtained by gift or inheritance. Property accumulated during the marriage through the combined effort of the spouses is owned by the spouses jointly. Although not treated in the Marriage Act, the subsequent Kompilasi Hukum Islam (Compilation of Islamic Law) implemented in 1991 by presidential edict declares an equal division of marital property upon dissolution of the marriage by death or divorce.

As of 2003 Indonesian inheritance law had not been codified, but is treated in the Compilation. A government-backed proposal to equalize the shares of male and female children was dropped during the drafting process because of objections from the Muslim establishment, and the final version of the Compilation preserves the traditional rule granting sons a share equal to two daughters. One potentially significant innovation provides that children of predeceased heirs succeed to the share of the inheritance that would have passed to the predeceased heir had she or he survived.

Women have full political rights, and there are no formal barriers to women owning property or participating in the economy. The law requires that 30 percent of candidates nominated by political parties for the national legislature be women, though there is no mechanism for enforcing this requirement. While Indonesian women occupy important positions in both the private sector and public life, representation of women in the highest levels of business and government is low. In 2001 Megawati Sukarnoputri, a Muslim woman, became the country's fifth president despite pronouncements by several political parties and prominent political leaders that Islam does not permit a woman to serve as head of state. A substantial minority of Islamic court judges are women.

### Malaysia

Indonesia and Malaysia share much in common, but while Indonesia is nearly 90 percent Muslim, Malaysia includes large non-Muslim Chinese and South Asian minorities resulting in a significantly more religiously plural society. Malay ethnicity is regarded as virtually synonymous with being Muslim, and Islamic law has been one of the means by which Malays have expressed their identity and asserted their claim to political dominance.

Malaysia also has a very different political structure from that in Indonesia. While Indonesia has until recently been highly centralized, Malaysia is a federally structured constitutional monarchy comprised of 13 states and 3 federal territories. The constitution declares Islam to be the state religion, but further states that all religions may be practiced in peace and harmony, and provides that discrimination on the basis of religion is forbidden. The ninth schedule to the constitution contains a list of matters reserved to the states, which includes the power to make laws on matters of Islam.

In the early 1980s the federal government enacted an Islamic Family Law Act for the country's three federal territories. The act was also intended to serve as a model to promote uniformity among the states. However, the family law of some states deviates from the federal model in several important respects.

The Federal Act and most states require the consent of the bride to marry and do not permit marriage by compulsion. However, the Family Law Enactment for Kelantan follows conventional Shāfi'ī doctrine in permitting the forced marriage of a virgin if the person who acts as her ritual marriage guardian ( walī ) is either her father or paternal grandfather ( walī mujbūr ).

In contrast to Malaysian civil marriage, Muslim marriages are regarded as polygamous in principle, even if the man has only one wife. The Federal Territories Act seeks to regulate the practice of polygamy to avoid injustice to women by imposing conditions to take a second wife. These conditions are not required in all states, and are not always strictly enforced. Some men have been able to evade compliance with legal restrictions on polygamy in their home states by contracting the marriage in another state where the rules are more lenient.

The Islamic Family Law Act seeks to limit arbitrary unilateral repudiations ( *ṭalāq* ) by requiring husbands to apply to the court for permission to pronounce the *ṭalāq* in court. Although extra-judicial repudiation is subject to punishment by fine and/or imprisonment not exceeding six months, imprisonment is rare. The law provides a number of avenues for wives to obtain a divorce, but legal proceedings for divorces initiated by women tend to be lengthier and more complex than requests by husbands for permission to pronounce the *ṭalāq* .

The law distinguishes between separate property and marital property ( *harta sepencarian* ). Upon dissolution of the marriage *harta sepencarian* is usually divided according to a ratio of two parts for the husband and one part for the wife. While the wife's contribution in maintaining the household is supposed to be considered in determining the division of the property, direct financial contributions are often given greater weight.

Upon divorce the mother takes custody of children who have not yet reached the age of discernment ( *mumaiyyiz* ). Children who have reached the age of discernment, considered to be between seven and nine years for boys and between nine and eleven years for girls, are allowed to choose which parent to follow. Based upon a disputed interpretation of a Prophetic dictum (*ḥadīth*), mothers can be deprived of custody upon remarriage, though the remarriage of the father does not affect his custody rights. The law requires the father to provide for the children financially.

Malaysian Islamic courts apply conventional *Sunnī* inheritance doctrines, including the rules that grant sons and male heirs a share equal to two females. In recent years the application of Islamic inheritance rules has been broadened, often to the detriment of women, by including, for example, lump sum provident fund pension benefits and insurance in the estate that is subject to inheritance, rather than assigning those assets to contractual beneficiaries. The practice found among some groups in southwestern areas of peninsular Malaysia of assigning control over inalienable clan properties according to female blood lines has been condemned as un-Islamic by some advocates for broad enforcement of *Sunnī* *fiqh* rules.

The constitution as implemented by federal statute grants states the power to enforce offenses against Islam subject to maximum penalties of fine not to exceed RM 5,000, three years imprisonment, or six strokes with a cane. The offenses falling within this jurisdiction include gambling, drinking intoxicating drinks, seclusion for an immoral purpose likely to lead to adultery or fornication, and disrespect of the fasting month. An effort to include domestic violence among the offenses punishable by the *Syariah* Courts was defeated. The possibility of state enforcement of dress regulations for women has been discussed, but as of 2003 no dress rules had been enacted.

In 1993 the state of Kelantan enacted a *ḥudūd* bill prescribing Islamic punishments (*ḥudūd*) for six offenses, including theft, highway robbery, unlawful sexual intercourse, slanderous accusation of unlawful intercourse that cannot be proven with four witnesses, wine drinking, and apostasy. The legislature for Trengganu passed a similar statute in 2002. The enactments have been criticized on a number of grounds, but two issues of particular concern to women are the rules disqualifying women from acting as witnesses in *ḥudūd* offenses, and the provision regarding unlawful intercourse ( *zinā* ). The enactments provide that an unmarried pregnant woman is presumed to be guilty of *zinā* unless she can prove to the contrary. This provision would have the implication of imposing on a pregnant rape victim the burden of proving rape , or facing punishment for committing *zinā* as well as for making an unlawful accusation of *zinā* ( *qadhf* ). Because the constitutional jurisdiction of the *Syariah* courts does not include general criminal matters, implementation of the *ḥudūd* law requires a constitutional amendment, which has not occurred.

Women have full political rights. While there are no legal impediments to women holding public office, representation of women in high public office is low, and leaders of the Pan-Malaysian Islamic Party (PAS) have voiced public opposition to women standing for public office. The head of state (Yang di-Pertuan Agong) is chosen from among the hereditary

sultans from the states, who by tradition must be male. Although not prohibited by law, there are no women in the Islamic judiciary.

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