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# Whose Islam is the Right Islam?

A study of the Debate About How Islamisation is Affecting Muslim  
Women in the Multicultural Society Malaysia with Focus on the Muslim  
Family Law

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# Abstract

The purpose of this thesis is to study the debate about how Islamisation is affecting Muslim women in a multicultural society such as Malaysia. This is done through a focus on the Muslim family law, a law that only applies for Muslims in Malaysia. Within the Muslim family law the focus is on the topics of divorce and polygamy and how different individuals in the debate want to emphasise women's position in the Muslim family law in the Malaysian society. The study is based on interviews from a fieldtrip to Malaysia in May 2002. The interviews are conducted with leading scholars, individuals from women's organisation, divorce cases, a politician, a judge and a lawyer. Understanding the complexities of implementing a law based on the *Qur'an* in a modern multicultural society is shown to be about understanding different interpretations and who is doing the interpretations of the Islamic texts that will be codified into law. To understand the debate it had to be put into a larger theoretical context. The theoretical debate about tensions between multiculturalism and feminism is used to understand the bigger differences between different approaches to women's position within the Islamisation process in Malaysia today. Understanding the debate about women and Islamisation in the multicultural society of Malaysia means touching upon issues such as modernisation of the nation-state, the patriarchy, identity, human rights as a universal concept and gender issues. By studying the debate about the Muslim family law it is shown that there are different opinions in the Malaysian context on how Islamisation should be used and understood. Some represent a modernising perspective with contextualised interpretations of the religion. They would argue that at the moment traditional interpretations are done by the patriarchy and it serves the patriarchy at the cost of women's rights. Others would favour more traditional interpretations of the texts saying we cannot do modern interpretations, since we have to stay accurate to what they believe are the true spirit of Islam and God's will. If we focus on the Muslim family law most of my respondents agree there is something wrong with how the law is working today. Some would blame the problems on the institutionalised patriarchy with its insensitive judges and slow and bad administration while other would believe the women themselves causing much of the problems by not being prepared for the court or holding low moral standards. I come to the conclusion that we have to look at the bigger political system with group rights and the constitution to understand how the Islamisation process affects women. The government implemented multicultural system with group rights and the oppositional favoured system with separation on the bases of religion are both causing a highly racist society. The losers in this political game of power and the system of multiculturalism with separation between religions and ethnical groups are the women. All the effects on women caused by the Islamisation process and the re-traditionalising of religion is bad enough, but I

argue it has been doubled by the multicultural system in Malaysia. What we need to do is to reconstruct identities and break the separation between the ethnical groups in Malaysia.

**Key words:** Islamisation, Malaysia, Muslim Women, Multiculturalism and Muslim Family Law

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# 1. Introduction

Even before the 11th of September 2001 there existed a discussion in the western world about Islam, Islamic values and what Islam really means and stands for. It was not uncommon that you would see Islam being described as undemocratic, against human rights and there was also emphasis on what could be described as the poor Muslim women. After the terrorist attacks on New York in September of 2001, Islam has in many places been associated with terrorism and undemocratic values. Most of the discussions have been associated with Islam in the Arabic states but the kidnapping of mainly American tourists by the Abu Sayyaf guerrilla in the Philippines and especially after the terrorist bombings on the island of Bali in Indonesia in October 2002; there has also been a rising interest in Islam in Southeast Asia. As a part of the bigger discussion about the terrorist attacks on the US, the following US bombings in Afghanistan and the Taliban regime, some debaters have chosen to put the emphasis on the women under the Taliban regime and women under Islamic rule in general. For me all this discussion about Islam as something evil has raised a lot of questions and even if I did not know much about Islam, I found it hard to believe that a religion could be something evil. Considering Islamic women I also found myself very much questioning if the Islamic religion really was a religion that discriminated against women or if the problem was something else. In many situations and discussions I found myself not being able to respond or not knowing how to defend that Muslim women were discriminated in some situations. From this fact that I felt I knew too little about Muslim women and Islamic values and from my interests in equality and gender issues I decided I wanted to do research on Muslim women in a predominant Islamic country. I wanted to know if they were really such helpless victims and how the discussion about women and their rights was conducted in a modern-day country dominated by Muslims.

I chose to do my field study about Malaysia because it is a country both interesting and somewhat special for more than one reason. Malaysia is not an Arabic country and has a different traditional background and culture. Even though Islam has grown stronger in Malaysia, and according to some this has meant more influences also from the Arabic culture, they are still seen by many, together with the other countries dominated by Muslims in Southeast Asia, as an interesting example of Islam outside the Arabic world. Malaysia is also interesting because it is a pretty modernised country outside the non-western world. Especially the capital, Kuala Lumpur, where I conducted my fieldwork appears as any other modernised big city in the world. Many Muslim women in Malaysia are living almost the same everyday life as women do in the western world. What makes it interesting to study Muslim women in Malaysia is the importance of ethnicity in the multicultural society of Malaysia. Being Malay you are automatically referred to as a Muslim. You cannot be Malay without

being Muslim, but you can of course be of another ethnicity and be a Muslim. I will go deeper into this ethnical division and how it is affecting both Malays and the people of other ethnicities in my background chapter. However I will already at this stage stress that I am doing a study of Muslims in Malaysia, and it will not be a comparative study between the Muslims and the people of other faiths. The background will only serve the purpose of understanding the bigger framework that the discussion about Muslim women in Malaysia is operating in.

## 1.1 Aim of the Thesis

My main research question deals with how Islamisation is affecting Muslim women in a multicultural society such as Malaysia. I will do my research focusing on the Muslim Family Law, a law that only applies to Muslims.

I will look at the complexities of implementing a law based on the *Qur'an* in a modern multicultural society. Dealing with the complexities means touching upon or going into detail about subjects such as human rights, modernisation, patriarchy and identity. The aim is to understand the contemporary debate about the Muslim family Law by interviewing leading people in the debate and ask them to think about, what are the problems? What causes these problems? And how can we solve them? I am focusing on the law because the Islamisation of law is a way to understand how women are affected by the Islamisation in a basic and practical way. By inviting people to talk about women and the Muslim family law you will also get a bigger understanding of the whole discussion about Islamisation affecting women and the issues related to that in Malaysia. Within the Muslim Family Law I will deal with the concept of marriage and divorce and by this I mean polygamy, women's right to divorce and right to compensation and maintenance in the divorce procedure. With polygamy my aim is not only to study the impact of the law and the problems women in polygamous marriages are faced with, but the whole idea of forbidding or allowing polygamy in Malaysia. The debate about the Muslim family law will be put into a bigger theoretical framework. This means analysing the debate and my interviewees in a discussion between universal and relativistic values, between a modern interpretation and a traditional interpretation of Islam. I want to show how the Muslim family law is affecting women and how the law affects the politics and administration of the Malaysian state. I will explain how we can look at discrimination and what I believe is the core problem for the discriminations women face in the era of Islamisation in Malaysia today. A background chapter will be presenting the law, the politics and the administration of Malaysia for everyone to understand how everything works when these things come up as arguments in the debate.

## 1.2 Method

This thesis is a result of a field trip to Malaysia in May and June 2002. It is a qualitative case study where I strive to gain a greater understanding of the debate about Muslim women in Malaysia. The material I gathered in Malaysia was mostly interviews. In this part of the essay I will discuss methodological problems. I will deal with issues of how I will use my material, problems of conducting interviews, where I see myself as a researcher and other methodological problems that I have been or might be facing as a researcher. The second part will deal more with the problems and advantages of using interviews as a method and more about my interview material in general.

### 1.2.1 Methodological discussion in general

What theory is and how you decide to use theory reflects your own values about and approach towards science. When we encounter a problem we all have different ways of looking at that particular problem. The technical aspect of research methods is that method is just the way or the technique we use to perform research. In reality research methods cannot be separated from the research issues. Methods are not just various techniques that we have to learn in order to conduct research. (May 1996) Most of the time you can see a connection between what kind of method a researcher uses and his theoretical background (Lundquist 1993 p. 96). Methods are not something neutral. Meta-theory consists of different parts, ontology and epistemology. I as a researcher believe in the relativistic ontology. This means that reality does not stand independent of the viewer. How the researcher experiences a problem is different from the way everyone else experiences the same problem and we do not all see the same when we take a look at something. Reality exists in the researchers head as a mental construction and because of this the concept of reality varies depending on who is studying it. (Lundquist 1993 p. 67-68) This approach is also related to the postmodernist approach that every person has his or her own unique way of studying a problem and that every studied situation is unique. The danger of becoming too relativistic is that everything will lose its value and by that become equally valued; e.g. democracy will be worth the same as fascism. I have also chosen to adopt the subjectivist epistemology, which means that I do not believe I can be objective towards what I am studying. With the subjective epistemology the researcher assumes that he cannot do research without putting his own values into the process. The researcher's own values are a part of him/her and refer to his/her own experiences. The focus is on what meaning we can give and how people interpret and understand the world around them. You cannot make a study of something without studying these interpretations. Because of this a study cannot be value free. (May 1996 p. 13)



I believe that the world is very relative depending on who is studying it and we must apply an understanding approach to the different views that each unique individual presents. At the same time we need to make our own judgments from the picture of the reality that we are seeing and from our values that we bring with us into the research process. If we are blindly guided by our relativism we might end up in a situation where everything is valued equally but as a subjective researcher I think we need to take the responsibility to be moral and ethical and still try not to lose the goal of equality.

One methodological problem that I faced when doing research in Malaysia was that I studied another culture and foremost another religion. I am a western researcher with western values and I cannot set aside those values when I am studying another country. I have to be aware that I come from another religion and another culture and it is impossible for me to study Islam and women in an objective way. A researcher cannot study another culture objectively and speak for other people about what other people want. (Flax 1995 p. 501) If I see women in Malaysia as a homogenous category I have turned them into objects. Still I have to try to dig into their way of seeing things and their own perception of how their religion should be valued. Sometimes white women from the western world make the mistake of thinking that they know everything about what women of other religious backgrounds really need and it is wrong for a western researcher to assume that there exists one way for women to think and that one way of thinking should be the only one put forward at the cost of other perceptions of reality (Jaggar 1998 p. 21-22). I cannot force my values onto someone else. I have to be aware that I can put too much of my own values into the research process, something that can prove a disadvantage for other cultural groups. I will, however, still see reality from my background and from my personal values but backgrounds still try to understand their picture of reality. It is important not to objectify women from other cultural or religious as weaker individuals but to see them as subjects in my research process. The absolutely worst thing that could happen is if the researcher ends up totally ethnocentric and only sees his or her own way of thinking as the only right way. During my field trip in Malaysia I was partly influenced by some more modernising approaches towards Islam and women. I decided that it was acceptable for me to put a negative value on some opinions. I cannot let Muslim women suffer because I do not want to put a negative value on any cultural system. During my stay I went from being very relativistic towards being somewhere in-between relativistic and universalistic.

### 1.2.2 Methodological Discussion about the Interview as a Method

My methodological approach made me use interviews as my method for the field trip and my thesis. The interview method is sometimes criticised for being unscientific, but as an answer to that criticism I would like to state that the advantage of using interviews as a method lies in the relationship between the

interviewer and the interviewee. This personal relationship becomes an advantage in the research process. I am using the interviews to gain a bigger understanding and to understand a phenomenon, not to generalize. I decided to do mostly semi-structured interviews. This way of conducting interviews has the advantage of giving the researcher something to lean on at the same time he or she is not bound to a fixed questionnaire. The method gives the researcher an opportunity to stop the person being interviewed if he or she drifts away too much from the subject. It also gives the opportunity to push the respondents for answers on the important questions. With this method you give the researcher an opportunity to ask follow up question if he or she feels that the respondent does not understand the question for if the researcher gets the feeling he or she does not want to answer an uncomfortable question. (About semi-structured interviews see May 1996 p. 111) The biggest problem with doing research like this is the knowledge of the researcher. To be able to take an active part and to act interested, the researcher has to know a lot about the research problem and everything surrounding it, so that he or she can go into a good dialogue with the interviewee. If the researcher acts uninterested and unfamiliar with the topic he will not gain the trust from the interviewee and the answers will not be valuable. Sometimes it is not preferable to use semi-structured interviews and its weaknesses are most obvious when it comes to interviewing people with personal experiences. It is hard to use standard question for these situations so sometimes it can be preferable to do unstructured, open-ended interviews. This method also has its disadvantages. The biggest problem is that you get so much information and everything might not be interesting.

What I have personally gained by using interviews is that it gave me the opportunity to go into discussion with the interviewees and to gain a deeper understanding of the problem and the debate and to get a balanced view on how Islamisation has affected women in Malaysia. The confrontation with people gave me the opportunity to ask questions I was wondering about instead of the questions someone else wanted to focus on as is the case when you only read other peoples material. Since I believe that I cannot conduct research without letting my own values and opinions reflect my results, I feel that the semi-structured interviews gave me an opportunity to be subjective as a researcher. As a researcher I got to take an active part in reality and the research process, and the work became an interaction between the studied phenomenon and myself. Especially feminists have pointed out the problematic situation of striving to find an intersubjective understanding between the researcher and the person being interviewed and at the same time try to make some distance in order to analyse the results in a fair way (May 1996 p. 155). For me it is a major problem not to get too emotionally involved. The results of my interviews will be reflecting my personal opinions and my subjectivity towards the issues but with the aim of not getting too ethnocentric. As long as I present the debate and clearly state what

my personal opinions are and what is the opinion of others I do not see a problem in this. To present a totally balanced view is impossible for me.

### 1.3 Material Discussions and the Nature of my Interviews

I conducted about 15 interviews during my stay in Malaysia. I did 14 semi-structured interviews of different quality and length. These interviews were conducted with various important actors in the debate about Islam, gender, women's rights and the Muslim Family Law in Malaysia. Mostly I did interviews with NGOs and various women-group activists. Some of them were also politically active and all of them were in one way or another active in the political debate about Islam and women's rights. I also did interviews with leading scholars, mostly from a Law or an Islamic faculty, who were specialized in the *Shari'a*<sup>1</sup> courts and the Muslim Family Law. Some of them were also active in women's organisations or worked as experts on this subject with the government. Furthermore I did an interview with a lawyer, with a *shari'a* court judge and with a politician from the government. Unfortunately I did not get an interview with a woman from the oppositional PAS<sup>2</sup> party but some of the above mentioned interviewees clearly supported the PAS party and were also recommended by people who had good contacts with important persons in PAS. To get the more anthropological aspects of the problems I did a single unstructured interview and one unstructured group interview. At least three of the women involved in these interviews have been in the national newspapers in Malaysia more than once because of their problems with the system. The arrangements in Malaysia made it possible for me to interview all these leading women in the debate over these issues in Malaysia.

I chose to pick out most of the women organisations that I had heard of and that I knew somehow worked with my subject. I tried to find organisations that had different views of the problem. Most of the time the organisations had members who also were leading scholars on the subject and the organisations advised me to talk to these scholars. I chose to talk to a politician because I wanted to see how the political parties worked with the issues and I chose people practising law because I wanted their practical-experience view. I wanted the cases because they could give me a better understanding of how these problems appear in real life situations. Through all my interviews I never used an interpreter. I did all of my interviews in English. Once there was a lady who could not express herself very good in English but she understood my questions

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<sup>1</sup> I have here chosen to use the conventional spellings deriving from the simplified transliterations for terms of Arabic provenance that are widely recognised throughout the worldwide English-speaking community of Muslims and students of Islam (taken from "Shari'a Law and the Modern Nation-State. A Malaysian Symposium", 1994 by Sisters in Islam). The standard Malaysian form for this term is *Syariah*.

<sup>2</sup> Parti Islam SeMalaysia

posed in that language. She answered in Malay and I understood most of it and the things I did not understand was translated by one of the other persons in the room since it was during a group interview. I had a great advantage because of the fact that I understand the Malay language.

If my interviews are representative is always a hard question. I feel like I got most of the women's groups that are leading the debate about women's rights in Islam in Malaysia but these are the more progressive ones and I did not get as many from the more conservative ones. The debate is supposed to go on between the progressive women's groups and the men who set the religious agenda in Malaysia. In practise this is no real debate where the different parties discuss with each other since they stand so far apart. The debate is also going on between the different progressive women's groups and scholars and the women's groups and scholars that sympathize with the conservative male religious leaders even if they have some concerns for women. I did not have a chance to interview anyone from the conservative so-called *Ulama*<sup>3</sup>. However I got to interview two progressive men from the *Ulama*, the politician and the *shari'a* court judge. It is a weakness in my thesis that I have to use material about the conservative side of the *Ulama* from what other people have said about them and from written sources. My focus on the Muslim Family Law will be on the discussion between the people that have an interest in women and women's problems, even if they look totally different at what the problems are and how we can solve them, rather than people who ignore the existence of any problems in the first place. When I discuss the problems in a broader context I will try to understand the whole spectrum of opinions from progressive women to traditional men.

A problem with my interviews is that many of the people I interviewed were upper class, western educated women. But since I am looking at the intellectual and political contemporary debate in Malaysia and not the debate among ordinary people in the streets I feel this is something that is acceptable. It could however be seen as a problem that these women when they take part in the contemporary debate speak for all Muslim women in Malaysia. If I had chosen to understand the opinions of everyday women it would have led me to more problems. The ordinary people in the streets did not want to discuss it or lacked the knowledge about the problems. They often state that it's not for them to talk about and people in general are not accustomed to make their own interpretations of the religious texts and only accept what the religious leaders have interpreted for them. If I would have chosen to do interviews with ordinary people it would have needed a discussion about the religious education system in Malaysia, something that goes beyond my aim for this thesis even if it is a part in the bigger picture. Some could claim that the cases<sup>4</sup> I have interviewed are exceptional cases and not something that happens to all women who want to file for a divorce. I am not denying that there are women who go through easier

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<sup>3</sup> Religious leaders and/or scholars.

<sup>4</sup> The cases will be presented in an Appendix

divorces than in my cases. It might be true that at least two of the women I interviewed had been exceptionally brutally treated by their husbands. This is however not my point. I want to show that these problems are present in contemporary Malaysia and problems with getting a divorce are no exception, as we will see later.

## 1.4 Theoretical Background

The starting point for my analysis of the debate about Muslim women in Malaysia will be a theoretical discussion about multiculturalism. I will distinguish most of my discussion between universalism on the one hand and multiculturalism, as a part of a relativistic approach, on the other hand.

Universalism puts emphasis on freedom and rights for individuals and does not distinguish between people from different countries, cultures or religions. The human rights declaration represented by the United Nations is a much-desired document in universalism and one that should be applied for all people in the world. Scientifically, universalism derives from the liberal school of thought and its discussion about rights. Multiculturalism puts much more emphasis on groups and group rights rather than individuals. It can be seen as an approach to preserve different cultures or backgrounds rather than unifying all towards one set of values and principles. One of the most famous writers on multiculturalism is Will Kymlicka. He is arguing for collective rights, also known as group rights. He has his background in liberal theories about citizenship and it is from that point of view that he argues for collective rights for minorities. With these collective rights Kymlicka distinguishes between polyethnic rights, which is to give a cultural or religious groups economic support an legal protection for certain customs, rights to representation and self governing rights (Kymlicka 1998 p. 15). Kymlicka argues that these collective rights do not stand in any contrast to the integration of the minority groups in the bigger society (Kymlicka 1998 p. 17). The purpose of Kymlicka's collective rights is to preserve a culture and this should be done because an individual's culture is affecting how he or she is treated as persons and is therefore a very important part of our self-identity. Since Kymlicka belongs to the liberal school of thought and is approaching multiculturalism from a rights perspective he does not find it acceptable that the collective rights to preserve a culture will be discriminating for the individuals on the basis of gender, race or sexual preferences. The individuals in the group should be able to decide which parts of the culture that they want to practise and they should have the possibility to question the traditions of the culture. (Kymlicka 1998 p. 164) Even if Kymlicka speaks mostly in terms of collective rights for cultural groups he is also mentioning religious groups being qualified for group rights.

Multiculturalism has been criticised from a universalistic feminist perspective. Universal feminists, or what Voet calls humanist feminists, work for equality

between men and women at all levels and this will be accomplished through reducing the social inequalities. (Voet 1998 p. 27) They accept that we are all equal individuals and that we should therefore have equal rights. The biggest problem is not that women lack political rights but lack social and civil rights since these rights do not take the private sphere into consideration. (Voet 1998 p. 62-63) The universal feminists believe that there exists a kind of womanhood that equals all women in their identity as women. The most outspoken criticizer of multiculturalism from a universal feminist perspective in the western world is Susan Moller Okin. She criticizes multiculturalism by saying that the scholars representing multiculturalism have not considered women's situation when they created theories about collective rights because they do not put enough emphasis on the private sphere. According to Okin we have to consider the social roles that women have to take in different cultures (Okin 1998a p. 664). It is mostly women that suffer when a cultural tradition is upheld because of the different rules about marriage, divorce, custody and property that are attached to this tradition. Many of these cultural traditions are accomplished in the private sphere and hence not under any supervision from the state. (Okin 1998a p. 667) Okin means that it is men in the public sphere who define what a certain group's traditions are and what special collective rights they want to have. Okin argues that you cannot only listen to the group leaders but we have to consider the women too. (Okin 1999b p. 117) Often the discrimination towards women in the private sphere is seen as a family matter. The males in the group often justify the discrimination by saying, "this is our culture/religion", "we have to be true to our traditions" or "God made me do it". (Okin 1998a p. 665, 680) We have to re-evaluate human rights for women since crimes committed in the private sphere are not emphasised (Okin 1998b p. 35). Universalism points at the patriarch dominance in cultures and religions as the main problem. The powerful people in a group make the oppressed women accept their way of thinking without questioning. As I mentioned before universalists believe in the western defined human rights as a way to secure all individuals rights in the world. Feminists like Okin are convinced that the equality between men and women that we have accomplished in the western world would be the best also for other cultures. This statement also derives from the idea that oppression against women and inequality looks the same throughout the world.

The above feminist criticism to multiculturalism is written from a liberal perspective; Kymlicka and Okin have the same theoretical background. The tension between feminism and multiculturalism should not be present in an ideal situation. In a liberal and right influenced view on multiculturalism, both multiculturalism and feminism are allies in a struggle for more justice for women, cultures and religions (Kymlicka 1999 p. 34). Okin agrees to this when she says, "What we need to strive towards is a form of multiculturalism that gives the issues of gender and other intra group inequalities their due-that is to say, a multiculturalism that effectively treats all persons as each other's moral

equals.” (Okin 1999b p. 131) Feminists from other theoretical backgrounds have raised criticism towards Okin’s way of dealing with the problem of multiculturalism and inequality for women of other cultural or religious background. These feminists do not think that a specific idea of women-hood exists, which can be applicable for all women. The differences between different women and different cultures always have to be treated in its specific context and historical background. Race or class always affects inequality between the sexes. We have to emphasise the inequality that exists between different women from different classes or races. By focusing too much on the shared feeling of inequality for all women in the world the universalistic approach fails to identify the relation of dominance that exists between different women. (Flax 1995 p. 501ff) If we apply a universalistic idea of universal rights approach and do not consider race and class this means we lose the uniqueness for every individual woman and her special needs. Okin is getting a lot of criticism from the relativist feminists for being too focused on the western world as the ideal place for equality and the goal that other cultures should be aiming for. The universalistic approach creates a picture of the white western feminist as the true subject in history and stigmatises the third world woman as the weaker object (Flax 1995 p. 502). It is not only a question of western women representing the third world women. In many cases the third world woman is represented by another woman from the same country but with a totally different class background. In post-colonial countries a woman from the more exclusive upper classes and the ruling elite often speaks in favour of all women in that particular country. (Yuval-Davis 1997 p. 119-120)

The above discussion is mainly about studying other cultures or religions from a western perspective. The multicultural criticism towards universalism means that they compare the western culture with other cultures and draw conclusions that condemn minority cultures from a western point of view (Bhabha 1999 p. 80). Much of the criticism towards the liberal and the universalistic approach deals with how we should study other cultures. The discussion is also focused on minority groups or immigrants in a western context. “Unfortunately most writers on the topic still take western industrialized societies as the privileged point of entry to their discussion” (Hefner 2001 p. 3). I want to take the focus of the western context away from my discussion when I use these theories for my analysis. I want to take the universalism, multiculturalism or relativism discussion into the Malaysian context and see if we can find the same kind of discussion about multiculturalism and women’s right among debaters there. I have just outlined this theoretical discussion in my introduction chapter to get a background for my analysis of the debate. In my analysis more of the theoretical discussion about multiculturalism will be given in the discussion about Islamisation affecting Muslim women in Malaysia.

## 1.5 Limitations and Outline of the Paper

My study is limited to only deal with Muslims in Malaysia. Malaysia is a country where ethnicity and religion goes together. Different ethnical groups and religions have different rights and are treated differently. I will outline how the whole system works in my background to Malaysia and it is of great importance for my analysis that Muslims are treated differently. I will however distance myself from comparing how these rights for Muslims are favouring or not favouring them in relation to people of other ethnicities or religions. Instead this thesis will use how these rights are affecting the Muslim's themselves as a background to my discussion about women in Malaysia under Muslim Family Law.

In the next chapter I will start outlining all the background information that I find important to know before entering a discussion about Muslim women in Malaysia. It will be a description of how the multicultural society of Malaysia is built up and what the political climate in Malaysia looks like at present. I will also describe the Muslim family Law both how it has evolved in Malaysia and the specific characteristics of it that regulates divorce, polygamy, maintenance, compensation and matrimonial property. Chapter three will be the actual analysis of the debate about Muslim women in Malaysia with focus on the Muslim Family Law. In chapter four I will do a problematisation of the debate and give my comments on why I believe we have such a big problem in Malaysia with the issue of women's rights.



## 2. Background Information for my Analysis

Malaysia is a country with a mixed population and it has been praised for being a country where people from different ethnical groups live together happily. Of Malaysia's total population of around 20 million people a majority consists of the original population in the country or what is referred to as *Bumiputera*<sup>5</sup>. This category consists of the Malay population (49 %) and the non-Malay *Bumiputera* (8.8%), which contains of the different indigenous groups in eastern Malaysia and the indigenous people in western Malaysia, the *Orang Asli*<sup>6</sup>. The other two big groups in Malaysia are the Chinese (24.9%) and the Indians (7%). (Embong 2001 p. 59)<sup>7</sup> The Malay community is the most homogenous one of them all. They all speak Malay and are Muslims, the Chinese and the Indians on the other hand is divided internally by religion, culture and language (Crouch 1996 p. 14).

### 2.1 Historical and Political Background

Since Malaysia gained independence in 1957 the country has been ruled by a coalition between the Malay party UMNO (United Malays National Organisation), the Chinese party MCA (Malaysian Chinese Association) and the Indian party MIC (Malaysian Indian Congress). From the agreement in 1957 it was understood that the Malays, or UMNO, should be the ones taking care of the political power and the non-Malays', especially the Chinese', economic dominance should not be disturbed. The social tensions however grew stronger as it became more and more clear that the Malays predominantly were the ones kept in poverty. In 1969 the social and political tensions resulted in riots and killings. The Malay leaders were on the edge of losing their support from the Malay population and it was clear that the moderate politics were no longer enough to maintain support. To gain stability and political support from the Malay population the Malay politicians introduced the New Economic Policy (NEP). This new policy was introduced to reduce poverty and to minimize the correlation between ethnical background and type of employment. The policy is highly discriminating towards non-Malay population in favour of the Malay population. (Crouch 1996 p. 20, 24ff) To avoid new riots and discussion about some of the countries most controversial political issues it is also written into the constitution that people are not allowed to question, among other things, the Malay privileges, the status of Islam and the Sultans in Malaysia. (Crouch 1996 p. 82-83) Religion is an important part in the ethnic identity in Malaysia. All Malays are Muslims and if a Malay person tries to convert to another religion he or she is no longer considered Malay. The federal constitution defining a Malay

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<sup>5</sup> Lit. Sons/ Daughters of the soil.

<sup>6</sup> Lit. The original people.

<sup>7</sup> Ambdul Rahman Embong has taken his figures from "Malaysia 1999. *Mid-term Review of the seventh Malaysia Plan 1996-2000*. Kuala Lumpur: Percetakan Nasional Malaysia Berhad."

as “a person who professes the religion of Islam, habitually speaks the Malay language [and] conforms to Malay customs” (Federal Constitution, article 160(2) in Crouch 1996 p. 168). Since some people from the non-Malay ethnical groups also practise Islam more than half of the Malaysian population are Muslims. The Malaysia constitution guarantees freedom of religion, but since Islam is so closely connected to the ethnical group of Malays Islam has in practise been favoured over other religions. This political background with the special treatment of the Muslims is an important background for my thesis. It does affect the Muslim women in Malaysia directly and all the time because the whole political system works as a background to the other administrative procedures or changes that has occurred in Malaysia in the past 20 years. The debate about almost everything in contemporary Malaysian politics must be seen in light of the multicultural politics and the special treatment of the Malays.

Malaysia is a federation of 14 states. Nine of these states derive from the former sultanates of peninsular Malaysia and are still ruled by Sultans who are related to the former Sultans and their families. The central government in Malaysia holds much power but some of the power is also outsourced to the federal states and territories. Even if the Sultans at the moment primarily hold ceremonial obligations and work as a symbol of Malay dominance in the country they still have power because of their strong support in the constitution and their power over the administration of Islamic religion in their area. The administration of Muslim law is primarily a matter for the federal governments and the head of Muslim matters is the Sultan and for the states that do not have a sultan<sup>8</sup> the *Yang di Pertuan Agong*<sup>9</sup>, who is elected from one of the nine Sultans, is the leader. (About Sultans see for example Crouch 1996 p.142f) The division of power between the central government and the federal territories, with the Sultans as a part of that, have resulted in conflicts over power especially when it comes to the *shari'a* jurisdiction and enforcement of laws. How the law is administered, the *Shari'a* jurisdiction and enforcement of the law is naturally something that affects the debate about the Muslim family law in contemporary Malaysia.

## 2.2 The Islamisation Process

Throughout the world during an extended period of time there has been a growing awareness of Islam, not only in Malaysia. This can be referred to as an Islamisation process. You can talk about an Islamisation process both for the economy, the state and the society. “Islamisation of the state is normally viewed as entailing simply the changing of constitutions, laws, and in some cases of the structures of power. Islamisation of society usually refers to transformation of

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<sup>8</sup> The states of Penang, Malacca, Sabah, Sarawak and the federal territories of Kuala Lumpur and Labuan lack a Sultan.

<sup>9</sup> The federal constitutional King of Malaysia.

culture and in values, but merely at the ceremonial and ritual level.” (Syukri Salleh 1994 p. 108) Referring to these definitions of Islamisation Malaysia can be said to have undergone an Islamisation process over the past twenty-five years for the economy, state and society. In Malaysia the Islamisation process started for real in the 1970s. “The Islamic revivalism in Malaysia in the 70s and 80s saw a sudden growth of the *dakwah*<sup>10</sup> movements throughout the country” (Noor Aziah 1986 p. 18) Many of the poorer parts of the Malay population were attracted to the new Islamic revivalism. They became aware of the class-differences between them and the Malay elite who came to power under British rule. Many students also went to universities abroad in for example London or Cairo and were exposed to the Islamic revivalism abroad. When they returned home many of them became *dakwah* leaders and protested against the rich Malay elites’ secular lifestyle. (Ong 1995 p. 174-175) As a response to this growing emphasis on Islam in Malaysia you could see some special Islamic projects being established by the state. One of them was the establishment of the International Islamic University, another one was the establishment of an Islamic bank run in accordance with Islamic principles and the introduction of Islamic civilisation studies at all Universities in Malaysia. (Noor Aziah 1986 p. 49) The development of the Muslim Family Law can be seen as another outline of this process. This law was introduced in Malaysia in 1984. The above-mentioned projects can be referred to as the Islamisation of the state. One of the big starting points for the revivalism in Islam was the revolution in Iran. From this revolution came also a change in Islamisation of culture, which means more emphasis on living as a “true” Muslim with bigger emphasis on eating the right food, praying at certain times and being dressed in a proper manner. Some people would claim that a focus on the Arabic culture was mixed into this Islamisation of the culture (See for example Ong 1995). This Islamic revivalism became so strong that the presiding Malay government felt that they could not stand outside of it and resist it without losing power. They felt they had to respond and take part in this Islamisation process because it was seen as an Islamic challenge from the society manifested through the opposition, mainly the Islamic Party of Malaysia (PAS). (Muzaffar 1994b p.114) Many of the contemporary *ulama* (and especially the ones involved in the PAS party) hold the position that in Islam, state and religion cannot be separated; an Islamic state is the highest goal. The UMNO government wants religion to be a personal matter and Malaysia to still be a secular state but they cannot afford to go into conflict with the Islamic revivalism groups since it could mean dividing the Muslims, and hence the Malays and split the Malay votes away from its unity around UMNO. (Noor Aziah 1986 p. 43) “The prime minister, Dr. Mahathir Mohamed, is caught between meeting the demands of the Islamic groups and protecting the rights of his country’s non-Muslim population” (Noor Aziah 1986 p. vii). In Malaysia Islam very much becomes a high political

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<sup>10</sup> A generic term for any missionary activity, which recalls lapsed Muslims to the faith or makes new converts.

topic; the government have to keep the voters by using religion. Islamisation is also a quest for the Islamic ideal and part of a finding of an identity, highly associated with the postcolonial area. (Muzaffar 1994b p. 113)

These explanations to the Islamisation or the Islamic revivalism gives us some information that could be useful in understanding the contemporary debate about Muslim women in Malaysia today. By emphasising Islam there has also been a wish to go back to the origin of Islam and the seventh century Medina. This is one of the key topics for where we later will find the debate on how we can treat Islam in the 21-century. Can we modernise it or do we have to go back to the traditional roots and what are these traditional roots really about?

## 2.3 The Muslim Family Law in Malaysia

In Malaysia there are two systems for Family Law, one for the Muslims and one for the non-Muslims. The two systems are highly separated and an article in the constitution forbids the civil court to intervene in the jurisdiction of the *shari'a* courts or their decisions. The Muslim Family Law is administered and regulated by each of the fourteen states. In principle the Federal Muslim laws are almost the same but there are details that separates them.

The fact that the Muslim Family Law in Malaysia is based on the Shafie school of thought is important since the four different schools of thought<sup>11</sup> differs in their concept of how the Muslim Family Law should be built up. I will outline a short background about what the Muslim Family Law in Malaysia contains in relation to what is of importance for my thesis. It is really hard to clearly state what the law says and what it really means because the law can be interpreted in so many ways. I will try to give a quite neutral background in this chapter though. The purpose of it is just to give the reader a short background before I start using the terms in my analysis. In the Muslim Family Law the marriage is a civil contract and it is based on offer and acceptance between the two parties. Muslims do not have the Christian concept of sacrament and the wedding does not have to be performed by a priest through a wedding ceremony. In Islam the emphasis is on the marriage contract rather than the ceremony. For a marriage contract to be valid there have to be two male witnesses. (Nik Noriani 1998 p.1-2, 24)

### 2.3.1 Polygamy in Muslim Family Law in Malaysia

What is causing the assumption that polygamy is allowed for Muslims is the outline in the Koran that says:

*If you fear that you shall not be able to deal justly with your orphans, marry women of your choice, two or three or four, but if you fear that you shall not be able to deal justly (with them) then only one /.../ that*

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<sup>11</sup> The four different schools of thought are Shafie, Hanafi, Maliki and Hanibal schools of thought.

*will be more suitable to prevent you from doing injustice.* (Surah an-Nisa 4:3 as cited in Nik Noriani 1998 p. 32)

Later on it is stated:

*You are never able to be fair and just as between women, even if it is your ardent desire.* (Surah an-Nisa 4:129 as cited in Nik Noriani 1998 p. 32)

If you want to understand the debate about polygamy in Malaysia you have to be aware of this verse from the Koran. The whole debate takes its origin in how this verse should be interpreted. As we will later see there are questions about conceptualising the verse, about what justice means and which parts of the verse that is most important. The practise of polygamy by the prophet, or the Sunnah, is also of importance.

When a man wants to take a second, third or fourth wife in Malaysia he has to go to court to get permission. In most of the federal states in Malaysia the court will look at four conditions that have to be fulfilled in order to get permission. The marriage has to be just and necessary, the husband has to have financial means to support more than one wife, he have to be able to treat the different wives equally and not to cause harm to the existing wife. The federal states of Kelantan, Terengganu and Perak have different regulations for permission that are less strict. (Nik Noriani 2000 p. 68-69) When the husband goes to court to ask for permission the court will send a letter to inform the first wife or the existing wives that their husband is trying to get another wife. If she does not approve she can gather a defence. This is how it should work; in reality different problems with the administration, interpretation and respect for the law occur.

It is also worth noting for the understanding of polygamy in Malaysia that most common practise of polygamy is that the different wives are living in separate houses with their children and the husband should be altering and dividing the weekdays equally between the different wives.

### 2.3.2. The Right to Divorce in Muslim Family Law in Malaysia

The Shari 'a law provides the possibility to dissolve the marriage in four ways. It can be done through *talaq* (repudiation by the husband), *khul'* (redemption by the wife), *ta'liq* (delegated repudiation by the wife as stipulated in the marriage contract) and *fasakh* (judicial dissolution of marriage). In most of the cases divorces are settled by *talaq*. This is a right of the husband that means he pronounces the word *talaq* three times and by that divorces the wife. I Malaysia today this pronouncing of the word should be taking place in court so the marriage divorce will be properly registered but it has also been allowed for the

husband to pronounce the words at home and then go to court and register the divorce and pay a small fine for committing an administrative offence. For women it is somewhat more difficult to get a divorce. They cannot just pronounce the words to the husband and then get the divorce but the Muslim Family Law gives women rights to initiate a divorce. The *khul'* divorce is a possibility for the wife to give her husband something for her freedom (Nik Noriani 1998 p. 64). It is originally supposed to mean that she should give back what is given to her in the beginning of the marriage but it is often implemented to mean more than that. The original intention is that women should be able to file for a divorce even if they do not have any valid grounds for it. The *ta'liq* divorce is probably the most common and is seen as the easiest way for women to get a divorce in Malaysia. *Ta'liq* is the word for the marriage contract. "The basis for this type of divorce is the stipulation agreed upon by the husband, that the wife would be entitled to a divorce under certain circumstances e.g. upon the husband's breach of a condition agreed upon by the parties in the marriage contract" (Nik Noriani 1998 p. 73). If the husband in some way breaks what is stated on the backside of the marriage contract the wife is entitled to a divorce. Usually it is stated that if the husband abandons his wife for four months and fails to maintain her during that period it is a reason for divorce. In Islam it is a husband's duty to maintain his wife. The *fasakh* divorce can be based on so many grounds. It is suppose to be a case were the husband cannot fulfil his matrimonial obligations as for example if he has been mentally ill for a period of two years or if he is suffering for a venereal disease in communicable form (Ariffin 1992 p. 161). Cruelty, for example domestic violence, is another valid ground. On both *ta'liq* and *fasakh* the wife have to bring in witnesses and proof to support her point.

### 2.3.3 Maintenance, Compensation and Division of Property in Muslim Family Law in Malaysia

During the whole marriage it is a husbands duty to maintain his wife but after a divorce that obligation disappears and the former husband is only forced to maintain his children. During the first three months after the divorce, or if the woman is pregnant until the baby is born, the woman is nevertheless entitled to be maintained by the man if she applies for it (Nik Noriani 2000 p. 108-109). The wife loses the right to maintenance if she is considered *nusyuz* (or failed to obey the lawful wishes of her husband). This could mean that she leaves her husband's home against his will and move to another place or if she refuses to move to another place with her husband. (Nik Noriani 1993 p. 14-15) Even if the husband has no obligation to maintain the wife after their marriage he still has to maintain his children. The law imposes a man to pay accommodation, clothing, food, medical attention and education for his children (Nik Noriani 1993 p. 16).

The Muslim Family law gives a divorced wife the right to apply for compensation or *mutaah* (consolatory gift) from the husband after the marriage (Nik Noriani 1998 p. 116). This right gives the woman a sum of money from the husband in compensation for the divorce. The division of property, or the *harta sepencarian*, is a concept based mainly on the Malay customs but supported by and written into the Islamic family Law. The general rule of division is that the wife is entitled to one-half of the property if she has directly contributed to the achievement of the property, which means she has worked and gained an income for the family or she has in some way paid for the property, if she just contributed to the property indirectly, i.e. taking care of the household and the children when her husband was at work, she is entitled to one-third of the property (Nik Noriani 1998 p. 132). Both parties can claim a division of property if they decide to divorce each other or if one of the parties dies. A wife can also claim division of property when a husband is taking another wife even if he is not divorcing her.

It is very difficult to give a good background to what the law really is about especially since the interpretation of the law and the codification of the Koran and the Sunnah are different between the people I have interviewed. There is a law but as with all other laws in the world it has to be interpreted to mean something in the law practise. When it comes to the Muslim family Law it is also the codification of what God really wants and means. In the explanation of the law that I have done in this chapter I am aware that I have used many references to a person that clearly takes side in the debate about how the law should be codified and interpreted. I have tried to use references to her where she refers to sections in the law and not so much when she makes her own interpretations. This background should however not be seen as the true answer to what the Muslim family Law objectively is about in Malaysia.

### 3. The Muslim Family Law: What are the Issues at Stake?

The debate about women in Muslim Family Law in Malaysia is a very complex one. In this analytical chapter I will try to analyse the debate from the answers I have got from my interviews and from that raise the discussion to a more theoretical level. I will start by exploring the issues at a broad theoretical level. Later on I will sort the different opinions out by going into detail on the Muslim Family Law and what the debaters have told me about polygamy, right to divorce and financial problems after divorce for Muslim women in Malaysia. After the in-depth analysis I will try to draw a broader conclusion to see what it really is that separates these people theoretically and practically in their context.

#### 3.1 The Muslim Family Law Debate in a Broad Context

The debate about the Muslim Family Law is to a large extent a debate about human, especially women's, rights. Understanding women's rights in a Muslim country is a matter of understanding the broader context of religion, the differences between interpretations and who is doing the interpretations. Doing interpretations is a question of "who speaks in favour of whom?" and that involves questions of gender bias, patriarchy and the politics of gender and identity. "The patriarchal notions of gender relations in contemporary Malaysia, as in most other Muslim countries, are intertwined with the politics of Islamisation, nationalism, state-building, and the rejuvenation of 'Asian values' and culture" (Othman 1998 p. 176). The Islamisation process has put much more focus on Islam. In most of the western world the modernisation process has gone hand in hand with a secularisation of the nation-state. Malaysia is an example of the opposite; that the modernisation of the nation-state does not have to mean lessening of religious authority (Othman 1997 p. 4). Islam is and should for most of my respondents keep on being an important part of their lives. None of my respondents would blame Islam per se for the problems women are facing in Malaysia today. They would however differ in their opinions about how much influence the religion should have and most important in what way and what interpretation of it. Islam is an important part of people's identity. Islamisation should not only be seen as a bad phenomenon. Strengthening the Islamic values is important for the Muslim populations identity, the question is how this Islamic values are interpreted.

It is easy to assume that multiculturalism and feminism are both good. Emphasising equality and preserving people's cultural roots could not be a problem or could it? As I outlined in my theoretical introduction chapter there can be a tension between feminism and multiculturalism if a culture or religion goes too far in its practise of preserving a traditional culture. This tension



between feminism and multiculturalism is exactly what Susan Moller Okin strives to show in her works<sup>12</sup>. She has been criticised for suffering from a stereotypical view of “the other”, a criticism that claims she treats women from other cultures and countries as poor victims. Whether Okin has the intention or not of treating women from other cultures or religions as an object I would certainly work against the stereotyping of Muslim women as repressed and passive without initiative. The stereotype of the third world women as victims is not valid for the Malaysian context. Women are playing an active part in the Islamisation process and the debate considering it. If we try to disregard that Okin is speaking from a western perspective we can still see that she draws the same conclusions as the progressive women in Malaysia about the danger for women when a culture or religion over-emphasises traditional values. At the same time as they do draw similar conclusions the Malaysian Muslim women would be very critical to many parts of her statements as for example her way of claiming that Islam, as well as Judaism and Christianity, are in their origin speaking for a justification of the control and subordination of women. (See Okin 1999 p. 13-14) Okin would blame the religion and cultures for having values that can be picked up by men and used against women. The progressive women in Malaysia would instead claim it is a miss-interpretation of religion. Okin does, however, favour the task by Muslims to reinterpret Islamic jurisprudence (Okin 1999b p. 122). This tension between multiculturalism and feminism is enlightened in the Malaysian context. By focusing on human rights and equality values the progressive women in Malaysia try to find another way to solve the problems than Okin does when she assumes secularisation to be the answer. In Malaysia some women have started to challenge what Islamisation is and what it should contain of. “You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions” (Pollitt 1999 p. 27).

The debate about the Muslim Family Law is only a part of a bigger context of women’s rights in Islam. “Defining Muslim women’s rights and freedom is a task that occurs not in isolation but on this complex cultural and political battleground, in the midst of acute polemical contests over Islamisation, modernisation, and cultural relativism.” (Othman 1998 p. 176) The major issue when you try to understand the universalism and relativism debate in a non-western context is the concept of human rights as universal for all people in the world or distinctively western and not universal. Dealing with this it is easy to create a dichotomy between east and west and between western defined human rights and cultural grounded human rights. It is not my intention to do so. I do not believe in a dichotomy of the world. Especially with globalisation everything is influenced by everything and cannot be divided only into two. What is original or traditional on the one hand and modern on the other cannot be separated.

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<sup>12</sup> See for example, “Is multiculturalism Bad for women?” 1999.

In Malaysia the progressive women's movement would favour human rights as a universal concept by stating "the idea of human rights is too insistent to have been the intellectual discovery of only one of the many historic communities or civilisations of humankind" (Othman 1997 p. 3). They would argue that there are other people who would claim that Islam is responding to human rights standards but they do it from a wrong perspective. "They go on to advocate various accommodationist or compromise positions asserting that Islam does accept human rights—so long as the necessary Islamic rules and concepts are integrated in those rights in order to bring them in conformity with Islamic standards (usually and in particular conformity with the rules of *shari'a*)" (Othman 1997 p. 6). But if you take a closer look at this view you would find that they in fact are quite reluctant to rights and impose reservations to it. The reservations to rights and freedom would especially affect women and non-Muslims. (Othman 1997 p. 6) The progressive women movement in Malaysia would instead favour an approach to human rights that could be described as a sociological modernism. The criticism that the progressive women pose on freedom and rights for women and non-Muslims appears to be the same kind of criticism that Okin puts against Kymlicka's multicultural system, i.e. the men are the ones creating the rules for a group and their rights and this is affecting especially the women in the group. The human rights, and especially women's rights, have to be created in close relation to the reinterpretation of the Islamic texts and codification of laws to favour rights of women. The way to reinterpret and codify Islamic texts in order to understand their relation to universal human rights should be, "to cite sources in the *Qur'an* and *Sunnah* which are inconsistent with universal human rights and explain them in historical context, while citing those sources which are supportive of human rights as the basis of the legally applicable principles and rules of Islamic law today" (An-Na'im 1990 in Othman 1997 p. 8). This perspective is in accordance with Okin's claim for universal human rights but a criticism of her secularisation and non-emphasising of religions. It is instead a way to understand human rights as An-Na'im represents when he claims, "my frame of reference is the system of international human rights standards, rather than the cultural norms of the majority, as reflected in its conceptual and legal order, social and political institutions, and public discourses" (An-Na'im 1999 p. 60). The key issue is however the interpretation that needs to be done in order to understand that universal human, and especially women's rights are to be found in the Islamic texts. "The common assertion of Muslim modernist scholars is that Islam is a liberating religion that uplifted the status of women and gave them rights 1400 years ago (Othman 1997 p. 29).

The idea of a modern interpretation and codification of the Islamic texts are somehow the crucial point for the debate about Islam and every issue attached to it in Malaysia today. This is a result of the Islamisation movement in the modernising country of Malaysia. The women progressive movements are

mostly concerned about the women when the texts are interpreted by traditionalists and codified into modern state laws. They would argue it affects them socially, personally and gives women and non-Muslims a status as unequal citizens of the state. For them equality between men and women is an Islamic concept. The modernising women would like to see an enlightened and egalitarian view of gender relations as the bases for the interpretations and codifications. (Othman 1997 p.12,13,15) What they believe they need to do is “to find liberation, truth and justice from within their religion” (Anwar 2001 p. 227). With their modernising approach comes and understanding that, “Cultures are permanently changing and developing, and there is no reason to “freeze” a culture in order to preserve it” (Tamir 1999 p. 52). This is a result of the globalisation process in the world today. In my opinion it is impossible to try to preserve a culture since nothing can stand independent of influences from the outside in today’s societies. Close to this modernisation of the nation-state debate we have the issue of colonialism that often comes up. Many Muslims choose to blame colonialism for every problem that is present in modernising the nation-state. For the ones favouring modernisation in Malaysia today they believe it is an important debate but they would not like to put the debate over if colonialism should be blamed for the history of centuries of stagnation in the centre of attention. The important thing is that we need to focus on a modernisation of the nation-state from this moment on in our own way and not to copy others way of doing things. Instead we should look out for is a new kind of colonisation coming from a traditional Islamic thinking influenced by Arabic culture. (Othman 1997 p. 18)

The Islamisation movement in Malaysia today is strongly influenced by traditionalism. How you see the problem is correlated with how you want to approach modernisation. For the modernists the way would be, “to do what the west itself have done, but in a better and in one’s own way: that is, to embrace modernity, but to find an authentically Muslim way of doing so, consistent with the progressive, rational, morally egalitarian, emancipatory, and democratic spirit of the *Qur’an* itself” (Othman 1994 p 148). According to the modernists the other, and more traditional way of dealing with modernisation, is to return to the early years of the prophet Mohammed’s leadership in Medina and to see that as the ideal society and situation. From this ideal society the present laws, institutions and practises of Islam should be taken. (Othman 1994 p. 148) “For them the interpretations and practise of those early generations of Muslims are binding for all time” (Othman 1997 p. 37). When creating law from a traditional approach it is done just by copying down what has been said by the previous *Ulama* by the present day *Ulama* who are often very conservative. By doing this you do not write any modern values into the process. The present day *Ulama* has got much influence in Malaysia today. It is because they are seen by most Muslims as the protectors of the Islamic tradition, i.e. the protector’s of the word of God and the way of the prophet. (Muzaffar 1994a p. 23) The modern

approach would instead be a question of opening the *ijtihad* (independent reasoning or jurisprudential interpretations of the religious texts) in Malaysia. For the ones favouring a traditional approach *ijtihad* was something that was closed several hundred years ago and cannot be opened again in today's society. "*Ijtihad* is about studying and this is what the judges and the Islamic party politicians need to do. We have to settle our problems based on guidance, not to rely on what has been said or ruled by the previous intellectuals or *Ulama* but the judges in Malaysia today are not brave enough to perform *ijtihad*." (Interviewee 1) Kymlicka would be positive to this possibility for members of a group to question the traditions, interpretations and codifications of a culture or religion. By giving all members a right to question the traditions and not to take part in all expressions of a culture he believes he has made a good ground for a fair multiculturalism. The problem is if this questioning and independent valuing of not taking part in all of the expressions really works. Are women allowed to question and to go their own way? In Malaysia challenging interpretations often mean you risk being referred to as a bad Muslim and you can even be accused of being an apostasy, especially if you are a woman. The traditionalists would claim that new interpretations and performing *ijtihad* in our times is a matter of questioning Islam and we cannot question what God has decided for us to follow. What is important is that the women believe they are in fact not challenging Islam but as one of my interviewees expressed it, "What is ideal in the Koran is one thing but what is codified and interpreted is totally different and when we are challenging this we are said to do injustice to Islam but that is not what we are doing; we are just challenging men's interpretation of the word of God (Interviewee 14). As we can see the women are not allowed to question how the religion is practised and to choose how she is going to perform it herself. This is the same as Okin was arguing could happen. Men in the public are the ones defining the rights of a religion or culture at the expenses of women's rights. In traditional interpretations women become bearers of the true and pure religion. The women would find themselves equal before God but unequal before men. According to the modernists who want to reinterpret the Islamic texts this is not because God or the Koran is unfair to women in any way but basically the men are the problem. "Equality between men and women is an Islamic concept, not just a western idea" (Othman 1997 p. 15). The power structures with men at all the leading positions in the Islamic society and especially among the religious leaders is the root of the problems. As long as men can sit and decide what interpretations and codifications that should be used women's rights will not be emphasised. The traditional thinking is instead, according to the modernist women's groups, favouring the male population in the country since it can make them continue having more than one wife and treat their women in a bad manner. At the moment there exists an idea in Malaysia that men are superior to women but that idea needs to be eradicated (Interviewee 2). The problem is not the religion per se but it is about men, patriarchy and

power (Interviewee 3). This is the same as Okin points at when she claims that a dominating patriarchy in religious and cultural groups is the main problem. It is defined as a universal patriarchy over the world. From my point of view they do certainly believe in a shared womanhood and a shared feeling of inequality and do not reflect so much on differences between women. For example there is no question about that women are always abused in polygamous marriages because of power relations. A relativist feminist criticism to this would be that there exists no such thing as a women-hood. All women are unique and have special needs. For example the class dimension has to be emphasised and especially the different dominances that could be occurring between women in a society. You could claim that the problem in many third world countries is that we have an upper class highly educated elite of women speaking in favour of all the women in the country and this is actually often the case in Malaysia. The women in the debate are speaking from their experience in meeting other women and the problems they have come across when studying discrimination against Muslim women in Malaysia. They certainly have a lot of material to lean upon when they argue for women's rights. But we can never be sure that for example the law amendments they are arguing for is the only way to understand the problem. Since every woman and her situation is unique we can never be sure we have covered all aspects of a problem when we speak in favour of all women in a country. But we do also have to be aware that we cannot have one law applying for every individual or special situation. In the matter of discrimination against Muslim women in Malaysia we have to choose what would cause least harm to the women, amending in favour of the discrimination cases or amending in favour of the women favoured by the law?

The traditionalism, that some would refer to as fundamentalism, should be linked to the crisis of modernity. The crisis of modernity is a loss in belief of the western modern values of enlightenment, rationalism and progress. Going back to the traditional values becomes a security for people and gives them stability and an identity. (Yuval-Davis 1997 p. 62) The traditionalists do often claim the universal human rights to be a result of these modern values that they do not believe in. The universal human rights are in fact not universal but a western idea. Instead they would like to evaluate other concepts of human rights that derive from other historical and cultural backgrounds. In a worst case scenario the rhetoric of western human rights could become a continuity of western hegemony. It is important to state that you do not have to be a fundamentalist or a traditionalist to believe that the universal human rights is not the right way to go. It could also present a relativistic approach where you would like to have differentiated human rights for different cultures or religions. This could be explained as a form of multiculturalism with differentiated rights as the ones Kymlicka is arguing for. If we go back to traditionalism it is often combined with another view of women's role in the society. "The control of women and the patriarchal family are usually central to fundamental

constructions of social order” (Yuval-Davis 1997 p. 62). But there are many women in Malaysia who would favour a traditionalist interpretation of the texts; how can that be if it is all described as discriminating to women? For the women representing this view it is often a matter of emphasising family values. Western feminism does not have the same goals and is not relevant and exportable to other cultural or religious traditions (Al-Farüqi 1994 p. 28). It is a different way of interpreting women’s role in society from the *Qur’an* than the progressive women use. It is a claim that Islamic feminism needs to be built on a dual sex society rather than a unisex one, as they would claim the western, or American, feminism is built on. In the western world women strive not to emphasise differences between women and men and this creates a society where women must turn into men to be accepted and the male role is the most respected. They would instead claim that the *Qur’an* imposes a division of labour between men and women where men should take the economic responsibility and women the responsibility for the children. (Al-Farüqi 1994 p. 38f) Al-Farüqi would through her understanding of the *Qur’an* claim “the fifth characteristic of *Qur’anic* society is that it is patriarchal. Contrary to the goals of the Women’s Liberation movement, the *Qur’an* calls for a society which assigns the ultimate leadership and decision-making role in the family to men” (1994 p. 43). Women that favour a traditional interpretation do it because they believe it is the true Islam and the true interpretation of the religious texts. Discrimination towards women seen from a liberating and human right’s point of view is not discriminating and needs to be accepted because God has stated it and therefore it should be accepted. We cannot question God and his will.

## 4. Analysing the Issues in the Muslim Family Law

When we go down to analysing the Muslim family law in detail we will discover it is the same kind of arguments that are used as I have already presented. We are going to see how the Islamisation is working in practise and how the Islamisation has gone hand in hand with the strong patriarchy. Dealing with this part we have to remember that I am covering the views of my interviewees. That means we will not get to know what the real traditional Islamic male leaders believe. When I conducted my interviews my way to understand the debate was through asking questions about what my respondents saw as the problem, what the reasons for the problems was and how the problems could be solved. From the answers I could distinct different approaches to the topics.

### 4.1 The Debate about Polygamy

Most of the people I have interviewed agree that there are problems with polygamy for Muslim women in Malaysia. They agree that there is a lot of abuse going on towards women but they make different analyses of the situation and from their analyses of the abuse they draw different conclusions to if polygamy in Malaysia should be banned or not. On the one hand we have the women, individuals and groups, who feel the only right thing would be to ban polygamy because it is abusive, discriminating and goes against human rights. However, most of the women's rights groups do not dare or do not feel that the climate in Malaysia is ready for an open discussion about banning polygamy. The ones that really want to ban it do not say it straight out in public but you can get the impression that this is probably their goal. One of the interviewees said, "No matter how we look at it, you can say it is a privilege and it is a earned right but if you look at the definitions of discrimination, of course it is discrimination. The question is why have the women's movement not dealt with it and I think it is because of the larger political context, some things you are not ready to change or do not have the courage to do, you feel you cannot go there." (Interviewee 3) Instead of saying out loud that it should be banned they are trying to work within the system and make it very difficult for men to take a second, third or fourth wife. They are trying to create a debate and by that they are hoping that people will understand and eventually be able to take up the debate about that polygamy should be illegitimate. Until then polygamy should be seen as "a woman's privilege rather than a men's right and it should be implemented restrictive not permissive" (Interviewee 2). One of the first things they try to do is to work with the understanding interpretations of the law and the codifications from where the law comes. The whole idea of Islam needs to be challenged in order to capture the debate about polygamy. The major problem that the ones not favouring polygamy see is the fact that people believe this is Islam. "There has been a

misunderstanding among Muslims in Malaysia today that polygamy is something sacred for Islam but it is not. It was something that was used almost universally in the pre-Islamic times, in most societies in one form or another” (Interviewee 2). According to the people I have talked to they say if we want to understand why polygamy in Malaysia is wrong we have to contextualise the problem and understand the way Islamic jurisprudence has come up. Under the making of the Koran in seventh century Medina the Arabic world was involved in a war and a lot of men were not at home or killed so there was many widows and orphans. As a response to that they let the men who were still around marry more than one wife.

There are so many ways that you can understand it. People who read the verse and interpret just read the part saying ‘you can marry one, two, three or four’ and do not care about the rest of the verse that talks about the welfare of the orphans. It is the same problem if you want to follow the way of the prophet. Many chose to see that he married more than one wife but in fact he stayed monogamous for 25 years and then when he married other women it was elderly women, sickly women and widowed women. Today in Malaysia it is interpreted as if you were allowed to marry more than one wife and the focus is not on women in need but to find a new young woman for your own pleasure. “It is like people pick up the bits that they want. And who is it that pick up the bits that they want? A lot of the decision makers are men. And the men are the ones in power to interpret. (Interviewee 4)

Again the concern that Okin was emphasising is viewed. The patriarchy is the problem because they are the ones interpreting what is the true spirit of Islam without letting the women question it. ”It is unfortunate that people chose to understand it in its most conservative form” (Interviewee 4).

Attached to this is the whole issue of talking about polygamy and other issues relating to Islam in Malaysia. First of all you are not allowed to question the status of Islam in Malaysia something that could make everything that deals with Islam sensitive to talk about. Furthermore, if you go out and say you do not believe in polygamy some people would go so far as to brand you as an apostasy. “In this country it is like people should not be allowed to think” (interviewee 4). “People are also anxious to talk about banning of polygamy since they believe it is something that makes the Muslims unique and sets them apart from others. It is totally absurd because polygamy is nothing unique to Islam”. (Interviewee 2) This is a way to question what the true interpretation of Islam really is and in a perfect multicultural society individuals should be allowed to do that. In Malaysia individuals do not have that possibility without being branded as apostasies. Another problem with talking about the use of polygamy is that “The women are suffering from the problem of private and public voice, which means what you believe in private you will not say in public” (Interviewee 4). Many



women are operating from a guilt framework. One of the interviewees expressed a frustration over talking to these women.

“They see the injustice but at the end of it all they will say this injustice is justified because God said so. They believe it is their lot in life and that it is their husband’s right. They are not using a logical framework anymore. And the system endorses it so why would a woman not endorse it in her head. She sees everyone else endorse it; the religion endorses it, God endorses it, the Kadis are endorsing it, the fellows who are running the marriage courses are telling you it is okay and your husband is telling you that if do not agree to it you are an apostasy or I will pronounce the *talaq* three times and you will be divorced and out on your bum. So if a woman says she is happy with polygamy or not is irrelevant because a choice made within a limited parameter is not a choice. “(interviewee 4)

Discrimination in the private sphere is often seen as a family matter. Like Okin they would believe that human rights have to be re-evaluated since crimes committed in the private sphere are not emphasised.

The other side of the debate is the ones that are certain that polygamy should not be banned. They believe in polygamy as an Islamic principle, there has to be a reason for that it is mentioned in the Koran. They cannot ban polygamy because it is something present in Islamic law and we cannot do anything that is against Islam. Many of them agree that polygamy is often abusive towards women but it is not because of the Islamic principles or the law but because of the implementation of it. They would say that in the past polygamy was not restricted at all but today we have a law where you have to live up to four conditions to be able to conduct a polygamous marriage. If we live up to those conditions, and especially if we emphasise the need for it, there is no problem with polygamy. We should have a security in the law and not a total ban. Polygamy should be allowed strictly to those who are in need of it. “The need often refers to the non-ability to perform conjugal relations” (Interviewee 5). For example it is better to allow polygamy than to let men go out and have mistresses, as the men in the Chinese or Indian communities are accused of having. Mistresses would lead to illegitimate children, something they do not see themselves as ready to accept (Interviewee 6). Many of them say it should be practised very restrictively. In some cases there is a real need for polygamy. There are genuine cases where polygamy is needed and even initiated by the first wife. This can be when the first wife does not have the ability to bear children. Then she might ask her husband to take another wife to be able to get a child that she is related to through her husband in a stronger sense than if it was an adopted child (Interviewee 7). In other cases the first wife has been paralysed and asks her husband to take a second wife who could take care of the first wife (Interviewee 8). A response to this from the ones who want to ban polygamy would be that this might be a good idea for the first wife because she is the one that the husband loves but the second one coming in to the marriage just as a

ways for the first wife to get a child or to take care of the her would be abused. The allowing of polygamy as a special right for Muslims and the idea that men have to prove certain points in order to get a polygamous marriage is from my point of view clearly relativistic. It does not treat all individuals universal by banning it but it looks at the conditions and treats all individuals as special cases and looks at their special needs.

One of the women who were favouring polygamy in a strict manner was also worried about the neglect of the social aspects of religion in the developed country of Malaysia. She pointed out that morality and law go together in Islam and that the moral side of it often was neglected. A result of this could be seen in the increasing divorce rates and family problems. Malaysia suffers from problems with enforcement of maintenance for example and the reason for this is that men do not understand that every time they fail to provide maintenance for the children it is a sin. (Interviewee 5) The ones that do not want to ban polygamy express a more traditional view to the problem. They emphasise the tradition of religion and family values as something important in Malaysia today.

As mentioned before almost all people I interviewed are women and involved in women's issues and problem relating to the Muslim Family Law. Naturally they are aware of the problems and the abuse and because of this they see the importance in implementing the law properly. There exists however people that do not see the need for such a strict law and feel polygamy should be up to the husband to decide and not the court. None of the ones I interviewed expressed that they would want to let polygamy totally free for husbands to decide but some chose to see polygamy as something beautiful in its principles. With this view comes a belief that there are wise men who would know how to administer a polygamous marriage in a true and fair way to make everyone happy; a man who would equally love all wives and who would alternate between the different households in a fair manner (Interviewee 9). I see this as linked to the understanding of polygamy as liberating for women. It is liberating in the sense that it empowers her will because she gets to take part in the decision of her husband should marry another or not (Al-'Aqqad in Yazbeck-Haddad 1998p. 13). Some people have even argued that polygamy is something for advanced societies and it will increase in other societies as they modernise (Al-Whaid in Yazbeck-Haddad 1998 p. 13). One of the women interviewed said, "For those who cannot afford it we do not let them practise polygamy but those who can afford it and manage to do it justice; go ahead" (Interviewee 10). By this statement she is presenting a view where an equal and fair amount of money and time spend between the wives is the only important thing. That the husband should have a clear need and a clear ground for getting permitted to have another wife does not seem so important. This is a call not for a universal banning of it based on discrimination by the patriarchy or a relativist evaluation of a women's special needs and situation but a standpoint that polygamy is not discriminating and that it can be accepted only on the basis of the husband doing material

justice. It does not dig into the deeper understanding of women's roles in the private sphere and the discrimination she can be put up against socially and not only economically. It comes from the traditional understandings of polygamy as something that has been going on for centuries not only in the Islamic world. "Bin al-Sharif affirms that polygamy is the law of nature and shall persist until the end of the world; in forbidding polygamy, Christianity has 'led to three dangerous plagues: prostitution, old maids, and illegitimate children'" (Yazbeck-Haddad 1998 p. 13).

According to some of the progressive women I have interviewed it is interesting how low some people will take the debate just in order to justify polygamy in Malaysia. One way to claim that polygamy should be allowed has been to publish demographic fictions that there are 14 women to every man in Malaysia (Sisters in Islam and Association of Women Lawyers). Incest has been another of the arguments used to justify polygamy. "The level of incest in this country is unbelievable /.../ and it is predominantly in Malay communities but nobody wants to say it. It is stated in an unreleased research project done by the police." (Interviewee 4). The argument being used by some male religious leaders is that if we make polygamy easier incest will not happen. In practise this means that men would choose their own children instead of all the wives they could have had. It becomes a very patriarchal system were men can defend themselves by saying; "men cannot control themselves and the devil made me do it". According to the women men would use almost any argument just to keep polygamy allowed in Malaysia. It becomes a way of defending it as if it was in men's nature to not be able to control their sexuality. Some of my interviewees showed that they did not believe in the explanation for nature or even class when we discussed why men wanted to be polygamous. When I was asking my respondents if they thought this was a class-based problem many of them answered that they did not know because they did not have any statistics but many of them still had an opinion about it. From a modernising western perspective you could assume that polygamy would be for uneducated people or for the religious leaders and the Muslim fanatics but this does not seem to be the case in Malaysia. "In my cases it is quite a variation from the higher class to the lower class. It cuts through all levels of society" (Interviewee 11). Even the educated men with a good modern business work would in many cases favour polygamy and would in fact love it because they could meet the condition of affording it (Interviewee 4). Modernising men and becoming more westernised would not stop this problem. "Not unless you unsexify power. They would have to be out of their mind to give up that power" (Interviewee 4). Another woman says, "There is no difference between rich or poor. I believe polygamy happens because of power relations. So men have the power and women are weaker." (Interviewee 12) Both with the discussion about incest and if class or education matters for polygamy it should be analysed from the point of view of power relations and learnt behaviour for masculinity and femininity. The progressive

women would claim this is the problem with the Muslim family Law in Malaysia today. The patriarchy and men's way of acting is a taught behaviour and not a natural one. Among many other people in Malaysia there exists an idea that men will always want more than one wife and that this lies in his nature. "Men are men and just human beings and if they want something they do not care about regulations" (Interviewee 1). It is an idea that is related to the idea that men cannot control themselves and that there is nothing to do about it. One man for example said, "It lies in a man's nature to marry a new wife directly after an existing wife has died" (Interviewee 8). Polygamy needs to be justified because men will want that extra woman around and we need the law to cope with that (Interviewee 6). By saying that it is in a man's nature to be polygamous they are also the ones supporting the idea that polygamy should not be banned because there is no use; men will try to have other women - for example mistresses - anyway. The ones that want to forbid polygamy are even harder on men but they do not believe it is natural. According to one of my interviewees the problem with polygamy is "male chauvinist pigs who feel it is their right to have more than one wife and who uses religion for justification to support that right" (Interviewee 14). Polygamy in Malaysia is something that men understand from very early in their lives that they are allowed to marry up to four wives so it is quite hard to change their mindsets and that they are not allowed (Interviewee 7). The progressive women would believe that men have to understand that it is not his right without restrictions and that we need a male responsibility. Banning polygamy is one way for men to understand that monogamy is preferable and the wish of the society. Men can change if we try to change them. "The judges need to be trained and educated because they are biased and they believe it is a man's right to have four wives and because of that they do not implement the law properly. Men and women in general need to be educated so that men learn to stay monogamous and women should understand they do not need to be the fourth wife. (Interviewee 14)"

When it comes to administration, implementation and enforcement of the law all my interviewees pretty much agree that there are big problems for women in Malaysia today. They emphasise the law that should protect women and the restrictions and conditions in the law. Polygamy is not supposed to happen if men do not follow the regulations, but in Malaysia men still manage to go around the law. With administrative problems comes the problem of different laws in different states. A man can get a decision that he is not entitled to take a second wife from the court in one state and then just travel to another federal territory and try there. It is often dependent on the judge whether to allow a polygamous marriage or not. An effort has been made to unify the law all over the country but since the Sultans in Islamic matters controls most of the states they are afraid to lose power and they will not agree to give away the decision to the central government for a unified law. (Interviewee 5) This is however not the biggest problem with administration and implementation. A man who got a negative decision from the court in his state or who did not

even bother to go to the court in his state because he knew he would not get permission has a loophole in the law that he can use. According to my interviewees this is very common. The man takes the woman he wants to marry across the boarder to Thailand, Indonesia, Cambodia or another country and marry her there. When they come back some of them decide to register the marriage in Malaysia and suddenly he has got two wives. It is not allowed to do this but it is only seen as an administrative offence. Upon registering the marriage in Malaysia you have to pay a fine. The reason why you are allowed to register it is because it is seen as a marriage and the fear of the couple committing adultery is bigger than the offence. Some men do not register the marriage; often because registering the marriage also means that the first wife will be informed that he has taken a second wife. He would tell the second wife that it is not necessary since they have their Islamic marriage certificate. However, not registering the marriage means that they are not officially married in Malaysia and their children will be considered illegitimate children. When the husband dies the wife cannot produce a valid marriage certificate and she cannot share his property or inherit anything from him (Interviewee 7) Different women have different ideas about how we should go about this problem with marriages conducted abroad. Some would claim that it is not a problem in a discriminating way but rather a problem that should be seen only as an administrative offence. Others would like to see the courts practising the possibility to imprison the men that has committed this offence. Some respond that impression men would only cause harm to both wives because the husband would most likely loose his job and he would have no one to support his families (Interviewee 8). As a response to that, the ones favouring imprisonment would say that it is not a good argument since it could be used for all other men sentenced to prison as well. Some even say, “A marriage conducted without permission from the court should be neglected and not recognised” (Interviewee 5).

Other administrative problems causing harm for women deals with the fact that the first wife should in many states be asked for her opinion when her husband is taking another wife, but this is not always done. If the husband has taken another wife abroad and registers the marriage in Malaysia the first wife should be informed via a letter but this is not always properly done by the court either. The result is that a wife can be married to a husband until his death without knowing about the other wife or wives.

According to one of my interviewees the second wife often did not know about the first wife or was only informed after she married the man (Interviewee 11). It is true that the courts do not call the second wife for her opinion or inform her about the existing wife. Most people would however not feel any pities over the second wife. Some people interviewed and in favour of polygamy just like to blame the second wife for the problems. “We cannot stop polygamy if they themselves head off and take another woman’s husband” (Interviewee 10). Many would say that if the husband runs away and conduct a marriage across the

border she has to understand that it is an administrative offence and that it is most probably because of a polygamous marriage. Sometimes the first wife suffers because he abandons her to live with the second wife. On other occasions the second wife becomes like a mistress and the husband only spends times with her on weekdays and the second wife and her children never get to spend time with him on holidays, because then he is always with the first wife and her family (Interviewee 6). Sometimes the second wife knows about the first wife but she still wants to marry him because they are in love. Even if the husband does not have the financial stability to support two families she could on some occasions say that she will support her family because she is a workingwoman. In Islam it is a husband's responsibility to maintain his family even if the wife is working so this should not be a condition to support the polygamous marriage but sometimes the judge values in that direction (Interviewee 6).

Enforcement is one of the major administrative problems. If a husband does not register a marriage conducted abroad or if he refuses to pay the fine there should be some sort of enforcement. One of the major enforcement problems is forcing the husband to pay his maintenance for his first wife whom he has often abandoned for living with his second wife. The division of property when a husband wants to take another wife is not properly legislated either. Some women married to a husband for 20 years have lost their property just in a minute when the property is transferred to the new wife (Interviewee 7). This needs to be settled before the court grants the permission to marry another wife.

## 4.2 The Debate about Divorce

The topic of divorce is another area where you can see how Islamisation influenced by traditional thinking has affected women in a negative manner. The debate about Muslim women's right to divorce in Malaysia is a matter of how modernised you would like the country to be and interpretations and codifications of law. Most of my interviewees agree that the Muslim Family Law gives women many opportunities to file for a divorce but the law is not always properly implemented according to some. Some women express that it is more difficult for women to get a divorce now than twenty years ago before the implementation of the Muslim Family Law in the beginning of the eighties. The law was, among other things, implemented to safeguard women and to prevent men from pronouncing the *talaq* outside of court. It has developed into a system where men can still do that and pay a small fine while women have to go to court and bring such heavy proof. (Interviewee 2) Some even say that the wife has to prove everything as if it was a criminal case and this is not fair (Interviewee 7). The other side of the debate looks at it more as if it was like a criminal case and says we have to bring heavy proof and witnesses otherwise we cannot be sure this is the right decision. If it were for example a matter of an abusive husband they would claim that women have to gather medical reports and police reports

and bring witnesses for example the neighbours. “Women cannot go to court based on only one hitting, we need to know it is a repeated abuse” (Interviewee 6). This opinion comes from the idea that divorce is not something encouraged and therefore you need witnesses and heavy proof. They would say you need a good reason for divorce and prove that there has been a breakdown of the marriage. The same kind of people would also emphasise family values and claim that the fact that women spend less time at home and more time at work causes these breakdowns in the marriages and the family structure (Interviewee 5). One of my interviewees had a lawyer that seemed to have the same kind of view about family values. After a divorce case that had been going on for over a year and a clear breakdown of the marriage caused by a mental abusive husband she still advised the client to go back to the husband (Aida Melly). A clear critic towards this view is of course that if a woman cannot present valid proof what is she going to do? Go back to the husband and let him hit her a couple of more times so that she can later present the valid proof? The ones that do not believe that the heavy burden of proof is right also claim that it is a matter of interpretation of the law and codification of the texts. For example the *fasakh* divorce should not only be understood as abuse or that the husband is not able to fulfil his marriage obligations just by not being able to produce children or being mentally ill. “There are many ways to not fulfil your marriage obligations. It could be that he is not a good father or simply that the woman is not in love with him anymore, that he is not the partner she needs in her life at the moment. But for the patriarchy the mental sickness and not be able to produce children is the only thing that they can read into it.” (Interviewee 4). Another one of my interviewees says that she has got a feeling that the judges, especially the older ones, go out of their way to preserve the marriage and the family values when a woman wants to file for a divorce but when a man wants a divorce that concern for family values is suddenly gone out the window (Interviewee 14).

Many of my interviewees witness on a lot of ignorance for women’s issues in court, that the judges and the court staff are not gender-sensitive and the system is gender biased. It is not only that but a lot of the courts are very slow proceeding and there are many postponements. Divorces can in the worst cases take years to settle. Many do not only experience problems with the judges and the staff at the court but a lot of people have complaints about the lawyers who keep on postponing cases and are accused of taking too much work without doing anything. One of the women I interviewed expressed it like this “My husband is allowed to keep on abusing me through the legal system” (Aida Melly). The law is not properly implemented and there is a huge discrepancy between the right’s women is given to divorce in the law and the way it is implemented. One interviewee told me that she had advised a woman whom the husband had abandoned for a long time to lie in court and say that she had found another man to marry. By saying that the court was willing to grant her the divorce quickly. My interviewee could not interpret that as anything else than a wish from the

judge to transfer this woman from one patriarchy to another and that the judge was not happy with a lot of single women walking around without a male to look after them. (Interviewee 4)

If the reasons to the problems described above are one side to look at it the other side is focusing on the women. They would like to blame the women themselves for causing the problems. They say that a lot of women in love overlook future problems and do not care about a good marriage contract and do not gather documents and witnesses. Only when they have problems they will try to find solutions (Interviewee 5). The burden of proof for an abuse case is on the women and if they hide and do not seek a doctor or tell anyone about the abuse the judge cannot trust them. Women are not prepared for the marriage breakdown yet and do not want to deal with their problem. (Interviewee 9) The interviewees also claimed that the reason for women not knowing their rights and the court procedures is because they are ignorant (Interviewee 5 and 8). One interviewee said, “Women today are educated and have access to Internet so they can find information; there is no excuse for not knowing. It all depends on if you want to know or not” (Interviewee 9). Others would claim the opposite saying that Muslim women themselves are the problem because they do not have an education and cannot get a higher knowledge in Islamic jurisprudence (Interviewee 10). Another one would claim that women probably know their rights through the newspapers etc but they do not know the court procedures (Interviewee 6). The women who blamed the problems on the implementation, administration and the patriarchy would also agree that there is a problem with women not knowing their rights and the procedures in court. The difference is that they would not blame the women. Instead they would say that women have less access to resources and information. “It is a man’s job in court to make her understand her rights and the procedures; not to send her home to read a few more verses” (Interviewee 4).

The discussion about women’s financial rights in a divorce is very similar to the discussion about women’s right to divorce. My interviewees, regardless of view on Islamisation, in many ways agree to the discrimination by insensitive judges with traditional values that women are put up to when it comes to money issues. Especially the women favouring polygamy and the ones that were relatively satisfied with women’s right to divorce were focusing the interview on the financial problems that women were put up against. This was partly because maintenance and property division will have an impact on the children. One of the progressive women saw it as discriminating that the maintenance was only for the children. The husband has no obligation to support his ex-wife and according to my interviewee this is because the system assumes that she is going to marry again or go back to live with her brother or father, i.e. another patriarchy is suppose to take over. (Interviewee 4) Single mothers have a hard time just surviving if they do not have a job. Even if they do work they do not get enough maintenance for the children. The judges are only thinking about



their own experience and just because he manages to support a family with a lot of children on a small sum per month all families cannot do that. “Judges need to take into consideration the living standard in the country at the moment and almost every household has got an air-conditioner and mobile phones” (Interviewee 9). It is not clear that the woman gets any maintenance at all, she has to apply for it. Some women have told me that they thought it was hard enough just to fight with the judges lacking gender sensitivity for getting the divorce and they thought fighting for maintenance would take another few months or years. The only thing they wanted was to get out of an abusive relationship and in fear of the husband they chose to give up maintenance (Interviewee 13). Another problem is that men do not want to pay maintenance so instead they charge the wife with *nusyuz* because if she is considered that, men do not have to pay her anything.

Except for the maintenance for the children the women are also entitled to compensation. The biggest problem that most of my interviewees agree to is that the sum paid in compensation is always very small and you only get a small proportion of what you ask for. Some would say that it should be seen as alimony paid by the husband in one sum or per month (Interviewee 4). Others suggest that the main criteria for deciding the amount of compensation should be husband’s income but the duration of the marriage should also be taken into consideration. If it has been a very long marriage and the wife has stayed home all the time doing all the housework she has contributed and put so much effort into it almost giving up her whole life just to make the household work. Because of this effort she should be compensated; without her doing the housework the husband would not have been able to work in the first place. (Interviewee 2) Some would say the same contribution should be counted when the property is divided. Women should be entitled to half of the property all the time because she has fixed everything at home and by that she has contributed to accumulation of money and property for the family (Interviewee 4). This is definitely not something implemented. The wife is entitled to one third of the property if it is the husband’s property and half of it if it is a joint property. However some are confused and still give women only one third even if it is a joint property (Interviewee 2). Enforcement of the law is a problem. Even if the court decides that a man should pay something or the property should be divided in a certain way it is not a guarantee that it will be done. Especially men often refuse to pay the maintenance for their children. If the husband is an employee with the government as the employer it can most of the time be solved and the money will automatically be drawn from his account every month. The problems are much bigger if he works in a private company and especially one led by non-Muslims. According to one of my interviewees they could just say, “I am not a Muslim so therefore it has no impact on me”(Interviewee 7). For all the financial matters involving women and divorce some claim you have to look at

the larger context of women and work. Women will often end up in the informal sector and that is a serious gender related problem (Interviewee 4).

The discussion about financial issues looks very much like the discussion about right to divorce. Some blame the women saying it is because they do not know how to apply for divorce and that they should be prepared for the court procedure. Other claims it is the system, the insensitive judges and the patriarchy that creates the problems. Women are often stuck in the private sphere and do not take part in the public sphere. A woman's contribution to the family does not count and a lot of what is going on in the private sphere is seen as family matters and should not be dealt with in public. This is exactly what Okin was aiming for when she stated that women are stuck in the private sphere and have to carry the traditional roles imposed by the male leader and that the abuses to women dealing with the private sphere is not recognised because it is seen as a family matter. We can also see that the multicultural society is causing hardship for women. The strong divide between the ethnical groups in Malaysia has caused the non-Muslim employers not to care about a court order pronounced by a *Shari'a* court for maintenance to be drawn from the husband's account.

## 5. Concluding the Debate about the Muslim Family Law

Through the debate about the Muslim Family Law it has also been possible to understand the respondents view on and the bigger debate about the whole system of how Islamisation effecting Malaysia and the multicultural political system of Malaysia. If we only focus on the law it is clear that most of my respondents believe there is something wrong with how the law is working for women in Malaysia today. But what are actually the issues at stake? The question that divides some of my respondents is “whose Islam is it that has been codified into law”? Some like to blame the problems with the Muslim family law on the women for not being prepared or holding low moral standards. Others would blame the institutionalised patriarchy with its insensitive judges and the administration by this patriarchy for causing the problems. Much is focused on the hegemonic interpretations done by male leaders. You have to understand the complexities of implementation and codifications into law and the issue of discussing matters of interpretation without being blamed as an apostasy. Further it is a matter of gender relations, gender related problems and different views on women’s role in society. All these complexities show that the debate is about understanding the modernisation of the nation-state in Malaysia. The debate is, however, not just a matter of an easy dichotomy between universalism and relativism/ multiculturalism, or between progressive women and fundamental men, as if the whole world was divided by two ways of looking at a problem. It is a complexity of opinions that intervene with each other. I would much rather see it as a scale where the debaters are put up in relation to each other based on how much they emphasise different issues. I have chosen to pick out three different kinds of opinions that I can discern from the debate. It shows different views on how we should understand Islamisation effecting Muslim women in Malaysia and how we should administrate the law.

I understand the progressive women in the Malaysian debate as people using a universal approach. The focus is on human rights. “Human beings have rights simply as human beings, regardless of differences of race, gender, religion and the like” (Othman 1996 p.11). They emphasise the presence of human rights in Islam and the religious texts. “All religions have values that correspond to each other and to humans rights. By this we can all say that injustice to women is wrong and polygamy is wrong ”(Interviewee 3). These women are however favouring contextual reinterpretation of the religious texts. But this favouring of letting all people do their own interpretations of the texts is only preformed for the goal of arguing for universal human rights. What they are using is a hermeneutical approach to the interpretations of the law. “Using this hermeneutical approach, we derived the values and principles that underlie the Qur’anic message. It is these values and principles that are universal and eternal and that serve as our guide, rather than the cultural and historical specificities of

seventh-century Arabia.” (Anwar 2002 p. 229) Some of them believe that the Islamisation has been mixed with influences of Arabic culture. Islam has been falsely interpreted as being a part of Arabic culture and when Islam starts to influence Malaysia some of the Arabic culture is also coming that way. The Arabic culture is seen as much more patriarchal than the traditional Malay culture and that is why this Arabisation is causing problems for Muslim women in Malaysia. In the western world there is a fear of criticising other cultures because this would make oneself an ethnocentric person with no understanding for other cultures way of thinking and acting. These women would instead claim that the human rights are universal and can be found in all religions and cultures and if a culture intervenes with women’s rights it can be criticised. “If a culture hurts people it should be criticised” (Interviewee 4). In the same way as they do not most of the time speak openly about banning polygamy some of them do not view their basic approach to the law either. Some of them would believe that in an ideal situation a unified family law for all people in Malaysia would be the best for women. This would be yet another step away from the multicultural society with differentiated rights and laws in Malaysia. One woman express it like this, “Both laws are aiming towards the same goal, which is justice, and when two systems are aiming for the same thing I do not see why we should have two systems for different people” (Interviewee 11). One says that a law that does justice is a Muslim law and it does not matter if you have the word Islamic before the law or not; the most important thing is that it deals with justice. If a Muslim law is about justice and solves problems everyone would like to come under that law. (Interviewee 14) At one occasion the women’s groups have cooperated for a unified law for Muslims and non-Muslims and that was in the case of the domestic violence act. In this particular matter the progressive women’s groups were very clear that the law had to be applied for all women. But the political climate in Malaysia made it very hard for the women to unify the religious groups and to work for one law. The fear from the politicians was that the law would not be in accordance with Islamic principles and that would be a problem for the Muslim women. The women’s groups claimed that it actually was in accordance with Islamic principles because it was a crime against women’s rights and that there existed a backup for this in the Islamic texts. They had to fight hard but eventually the law was implanted for both Muslim and non-Muslims. The problems in Malaysia are intensified because of the political system and the Islamisation process.

In the middle of the spectra I will recognise people like the progressive male *Ulama*, some scholars and some women activists who would favour almost the same approach to the problems as the progressive women do with a modern interpretation and codification of the texts. They are favouring a contextualising of the debate and a performance of *ijtihad* by the leading scholars, women’s groups and the judges and politicians. These are also people seeing the bad effects on women in the Islamisation process. They do however draw a different

conclusion that polygamy should for example not be banned because there are occasions when it is needed. The law of polygamy should be applied very restrictively and in accordance with the four principles that have been set up in the law. It is a relativist approach focusing on each individual case and the special needs for every woman. They would not reflect on polygamy as always discriminating but they are concerned about the discrimination against women in the way the law is implemented at the moment with a favour for traditional interpretations of the texts. Wanting to keep the law intact and looking at polygamy as a possibility in Islam shows a multicultural approach with emphasis on group rights. They are favouring the multicultural society for Malaysia and the special rights for the Malays and do want to continue keeping the religious groups separated with different laws. The different laws are a concern to emphasise the different traditional values for the religious groups just as Kymlicka had in mind.

One the other far end of the spectrum I would like to place traditionalism. These would be favouring a unified interpretation of the law based on old interpretations of the texts and it should not be reinterpreted and contextualised into another meaning in today's society. A clear distinction between the Muslims and the other ethnical groups should be kept. The law has to be based on God's intentions for society and they believe God understands polygamy to be good. We cannot question God's intentions and we have to be fair to him. The women in these groups would say most of the problems that are caused have to do with implementation or administration. On many occasions the women themselves create the problems by not knowing their rights and how to proceed in court. In my view they do not want to develop and contextualise the religion because it should be preserved as it is. Traditional family values are emphasised and they should be kept since we do not want the family values to disappear and cause even more hardship to women with high divorce rates etc as in the western world. The fact that Islam has grown stronger would be acceptable from an ideal multicultural point of view based on rights since in this system all members of a culture and religion would be able to question all the practises and traditions in that same culture or religion. This is however not the kind of multiculturalism they are favouring. The women, or any one else, are not allowed to question or reinterpret the traditions of the religion since the *ijtihad* should not be opened in modern times.

Here I have presented three different ways of approaching modernisation, Islamisation and its affects on Muslim women in Malaysia with a focus on the Muslim family law. There were few of my interviewees who focused the criticism towards the political system or the government. It could be because the special treatments for the Malays forbid people to question the special treatments in the constitution or because the interviews often became so focused on the family law. The constitution makes it a crime to question the political system, which makes it hard to study it as a single phenomenon in interviews. I

still believe the political system has got a big part in how Islamisation is affecting Muslim women in Malaysia. Studying the debate about Islamisation affecting Muslim women in the multicultural society Malaysia has made me draw some conclusion to what I believe is the major problem in Malaysia. This conclusion will be presented in my final chapter.

## 6. Conclusion: Why do we have these Problems?

In this chapter I will try to conclude it all by looking at what I would see as the crucial issues and problems in the Malaysian context over Islamisation affecting Muslim women's rights in Malaysia. Why do we actually have this debate, what do I see as the crucial problems in Malaysian society and why are we stuck in it and cannot move on?

The special rights for Malays have created a climate where Islam is protected because Malays are defined as Muslims. Islam is also protected by the power of the Sultans over religious matters in their states; something that is creating problem when one wants to unify the Muslim family law. At the same time a traditional Islamisation process has swept across the country led by the PAS-party. The government has to respond to this by also emphasising Islam in order to be able to stay in power. The problems emphasised by the debaters in this thesis has shown that the Islamisation process has created a climate in Malaysia where you are not able to question women's rights because this will make you be blamed as an apostasy, you cannot discuss the problem, there exists a fear of performing *ijtihad* and there is a strong separation between the different groups that is only growing stronger every day. There is a lack of critical thinking in Malaysia and no one should question anything when it comes to religion and especially not the hegemonic interpretations of the texts. A patriarchy plays an important part in this since they often are the ones keeping this system alive.

Politically in Malaysia we have a system where the PAS-party wants to create a multicultural society based on religion. For the PAS-party the goal is to create an Islamic state, one that would not affect non-Muslims but continue to keep them separated by among other things different family laws. The state and religion cannot be separated and that is why we have to create an Islamic state. The focus is on the collective, the group of Muslims and the Muslim society. The traditional PAS-party is favouring a differentiated citizenship based on religion. "The non-Muslims have to accept Islam's dominance or face persecution as enemies of Islam" (Hefner 2001 p. 32). The government on the other hand is favouring, and has implemented, a multicultural society based on ethnicity. These special rights for Malays are not allowed to be questioned either. The government is taking a multicultural standpoint by their differentiated citizenship and special rights for the Malays. They are in addition not favouring universal human rights. The Prime Minister Mahathir has talked a lot about an east-west dichotomy, that he wants to emphasise Asian values and that he believes human rights to be a western idea and a way to re-colonise the rest of the world. At the same time the government is favouring the progressive women's groups way of having a modernising approach towards Islam and the historical contextualising of the Islamic texts and they are against the traditional interpretations of the texts done by the opposing party of PAS. The government

would blame all the problems Muslim women are faced with on the federal constitution, the Sultans and the PAS party. But what about their own role in the problem for women and do they really stand that far apart from the opposition? In Malaysia we only come to a certain point and nobody wants to take responsibility for the problems caused to women in the Muslim family law at a higher level. To me everything is basically politics to keep in power or to gain power by blaming each other. The government is promoting a multicultural society with special rights for Malays, a system which is not questionable. At the same time the opposition is favouring a multicultural society with group rights for Muslims and superiority for Muslims over other religious groups. Ong argues that this is just different ways of a soft nationalism (or in Othman's words a postcolonial nationalism) (Ong in Othman 1998 p. 186).

In my opinion if we go down to the basics of it, the government has much more in common with the opposition than they have with the progressive, modernising women's groups. The leading UMNO and the PAS opposition, as well as other influential parts in Malaysian politics, have "all portrayed an extremely similar image of family and gender relations, women and the Muslim female identity" (Othman 1998 p. 186). Both parties help to create the woman as the possessors of the traditional values, be it cultural or religious. They are all part of the affects on women by Islamisation. Another similarity is that both the opposition and the government want to create an apartheid system where people should be divided into groups on the status of religion, ethnical background or culture. In the real world people can be a result of cross-ethnical marriages and respond to more than one cultural and ethnical background even if they belong to the same religion. People can also claim that the religion is not an important part in their lives. The multicultural system in Malaysia is only creating a division between cultures, races, ethnical groups and religions instead of creating a multicultural society in peace. Multiculturalism can be criticised for being racist in the "assumption that all members of a culture are equally committed to that culture. It tends to construct the members of minority collectives as basically homogenous, speaking with a unified cultural or racial voice." (Yuval-Davis 1997 p. 57) This is actually what has happened in Malaysia, as I have presented in my thesis, the groups tend to be viewed with a unified voice and often a voice represented by the patriarchy. For the Muslim women this identification with the group becomes even harder since the Islamisation process has created a climate where there is almost a strive to make women the bearers of what is understood as the true traditional spirit of Islam.

The losers in this political game of power and the system of multiculturalism with separation between religions and ethnical groups are the women. All the effects on women caused by the Islamisation process and the re-traditionalising of religion is bad enough, but has in my opinion been doubled by the multicultural system in Malaysia. Separating women on ethnicity and religion is favouring the patriarchy because it will create a natural distance between women



of different ethnicities and faiths. By causing this natural distance they will be pretty sure that women of other faiths will in general not stand up for or argue for Muslim women's rights even if the most outspoken women's activists do it. If people of other faiths want to intervene in the discussion these people will be accused of not understanding the true spirit of Islam or insulting another person's religion. Because of the built up distance all women are not ready to cooperate on the matters of women's rights or do not care about women in other groups. Even if I do not believe in talking about a shared feeling of womanhood we cannot put people into categories either. We need to reconstruct people's identities and to understand that there is more to it than a fixed number of ethnicities and religions. Reconstructing the identities and splitting up the multicultural society and the division between ethnicities and religions will be a beginning of the breakdown of the patriarchy and the traditionalism. If we start by reconstructing identities we can continue with the reconstruction of interpretations and to deal with the hegemony of interpreting and codifying the religious texts. If we do not give religious background or ethnicity as much value I believe it will be easier to create an open society where people make their own interpretations and decisions about importance of religion and ethnicity in their lives. Religion will become an important part of a person's self-identity based on their own interpretations; today the religion is an important part of how other people will identify a person even if the person does not agree to the identification.

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## 8. List of Interviewees

**Interviewee number 1.** A male government politician from the UMNO party. Interview conducted 5<sup>th</sup> of June 2002.

**Interviewee number 2.** Female, Malay and Muslim member of one of the leading Women's organisations. Expert in Law. Interview conducted 16<sup>th</sup> of May 2002.

**Interviewee number 3.** Female, non-Muslim, activist in one of the leading women's organisations. Interview conducted 4<sup>th</sup> of June 2002.

**Interviewee number 4.** A female, Muslim women's activist in Malaysia. Interview conducted 15<sup>th</sup> of May 2002.

**Interviewee number 5.** A female, Malay, Muslim scholar at the International Islamic University, outside Kuala Lumpur. Interview conducted 7<sup>th</sup> of June 2002.

**Interviewee number 6.** A female, Malay, Muslim scholar at University Kebangsaan Malaysia, outside Kuala Lumpur. Interview conducted 3<sup>rd</sup> of June 2002.

**Interviewee number 7.** A female, Malay, Muslim scholar at University Malaya, Kuala Lumpur. Interview conducted 7<sup>th</sup> of June 2002.

**Interviewee number 8.** A male Shari'a court judge. Interview conducted 5<sup>th</sup> of June 2002.

**Interviewee number 9.** A female Malay and Muslim lawyer practising both Shari'a and civil law. Interview conducted 6<sup>th</sup> of June 2002.

**Interviewee number 10.** A female, Malay and Muslim scholar at the University Kebangsaan Malaysia, outside Kuala Lumpur. Interview conducted 4<sup>th</sup> of June 2002.

**Interviewee number 11.** A female, Muslim and Malay member and worker at one of the leading women's organisation. Educated in Law. Interview conducted 4<sup>th</sup> June 2002.

**Interviewee number 12.** A female, non-Malay and non-Muslim worker at one of the leading women's organisations. Interview conducted 5<sup>th</sup> of June 2002.

**Interviewee number 13.** A woman divorce case whom I met at a women's organisation. Interview conducted 21st of May 2002.

**Interviewee number 14.** A female, Muslim and Malay director at one of the leading women's organisations. Interview conducted on 30<sup>th</sup> of May 2002.

**Aida Melly.** Her case will be presented in the Appendix.

## A. Appendix- Real Life Stories of Divorce Cases

### The Aida Melly Case

This case is interesting because it shows more than one of the problems women can suffer from under the Muslims family law. But for most it is an example of delay in divorce cases. Aida Melly was married for eight years and has been trying to divorce her husband for seven years.

In 1995 Aida contacted a lawyer, paid her 5000 Ringgit and said she wanted to file for a divorce from her husband. The lawyer told her it had to be a *fasakh* divorce because she had not been away from her husband long enough to do a *ta'liq* divorce. Before the lawyer could file for a divorce the couple had to go through counselling session at the religious department for three months. During that counselling her husband filed for a *nusyuz case*, disobedience, through his first lawyer in the *Shari'a* subordinate court. His reason was that Aida refused to stay with him but chose to stay with her parents. At the first counselling session her husband spoke negatively about her. According to Aida you could see that the marriage was already broken down and that there should be a divorce. She also told the counsellor that he had abused her and that he had married another woman. The counsellor thought Aida should file for a *ta'liq* divorce but when she asked the lawyer about it she said no it is *fasakh*. For the two other counselling sessions her husband did not show up. In 1996 after the counselling session was finished Aida's lawyer filed for a *fasakh* divorce in the high court, it was done on the grounds that her husband had physically and mentally abused her. In 1996 her husband kidnapped their daughter for three days but she managed to get her back with help from her father. During most of 1996 Aida heard nothing from her lawyer and she had difficulties in contacting her. When she finally found her the lawyer had tried to change the divorce case to negotiations out of court and told the court to postpone the case until further notice without asking Aida about it. After that she did not hear anything from the lawyer again. Finally Aida went to see her lawyer to ask why there were no negotiations and why they could not change it to a *ta'liq* case finally. The lawyer responded by advising Aida to go back to her husband. In early 1997 Aida decided to discharge her lawyer because the lawyer did not serve her interests. The lawyer refused to send Aida the file if she did not pay her the bill she owed her for her services. Aida refused to do that since the lawyer had only advised her to go back to her husband. By this time Aida started to represent herself. In June 1997 Aida failed for divorce by *ta'liq* in subordinate court based on that her husband had not maintained her for the last one and a half years. The minute Aida walked into the court the *nusyuz case* from 1996 was thrown at her. The cases were heard together in the end of 1997. Aida presented all valid documents and evidences and four male witnesses. Her husband, who was represented by his second lawyer, did not bring any witnesses. The case was summoned in January

1998 and in March 1998 the court decision came. The subordinate court judge declared Aida to be divorced by *ta'liq* and was not *nusyuz*. Aida's case became news in the papers and her husband got angry. Because of that he filed a Notice of Appeal in high court against the decision made by the Subordinate court. In June her husband's lawyer requested for stay of execution of the *ta'liq* order in subordinate court based on the ground that he had already filed the Notice of Appeal in high court and in December the Subordinate court approved the husband's request. According to Aida her husband had no valid reason to ask for it and that he only did it to delay the case and in fact there existed no such thing as stay of execution. In January 1999 Aida filed a notice of appeal against the stay of execution of the *ta'liq* order in *Shari'a* high court. This was the first case in Malaysia. And in February she filed Petition of appeal against the stay of execution of the *ta'liq* order. By this time her husband had his third lawyer. The hearing of the case was postponed because the judge did not have time to read the file on that case and he also asked her husband to file his petition of appeal. One month later he had still not done that so the case could not go on. Instead the court ordered the husband to get his hearing notes and grounds of judgement from subordinate court. Aida's case against the stay of execution was dismissed, according to Aida because the judge did not want to hear it. Instead the judge wanted to hear her husband's case, in which Petition of Appeal had not been filed. Finally he did file the petition of appeal. It took Aida's husband one and a half years to do that from that he filed the notice of Appeal until he filed the petition of Appeal; the law says he should do it within 14 days. For half a year nothing happened because her husband refused to show up in court. During this time Aida wrote both to the prime minister and the King. The king tried to help Aida but was ignored based on the grounds that he should not interfere in the judiciary system. In April 2000 her case was finally heard. Aida was considered not *nusyuz* accruing to the judge. But the court officer informed Aida that there was one more Appeal against her for the *ta'liq* case. Her husband had filed it in March and Aida was not aware of it and did not receive any notice or summons. The *ta'liq* and *nusyuz* cases had not been heard together on the appeal even though both the cases have been heard together in subordinate court. This meant the Appeal for *ta'liq* had not yet been heard. The day after all the big newspapers had Aida as front-page news. A few days later her husband filed summons accusing Aida and the newspapers of contempt of court on the ground that there was an order from court which prohibited Aida from talking to the press.

By the time I spoke to Aida in May 2002, two years later, she had still not got her divorce. The newspaper case was dismissed for the newspapers but still going for Aida because she had no lawyer representing her as ordered by the court. The law gives individuals the freedom to represent themselves in court. One of the problems with the divorce case is that her husband refuses to take the summons from the court. Aida has met discrimination from the judges, gender insensitiveness from her lawyer and from the judges and the court staff. The



judges are not following the law and keep on letting her husband postpone the case. One of the problems is also that the law does not forbid you to appeal on the status of the marriage. During the seven years she has been trying to fight her husband and the court to get the divorce she has not met or spoken to her husband either then in court. Aida becomes a hanging case were she is not Mrs, not Miss nor yet Ms. So the fight has to go on. (From an interview done with Aida Melly on the 23<sup>rd</sup> of May 2002) More information and a video sequence with Aida Melly can be found on:

[www.pbs.org/wgbh/pages/frontline/shows/muslims/portraits/malaysia.html](http://www.pbs.org/wgbh/pages/frontline/shows/muslims/portraits/malaysia.html)

### The Siti Esah Case

This woman was faced the problem of being caught between *fasakh* and *ta'laq*. She is supposed to get a *fasakh* divorce because of the violence she had been put up against. In July 1996 Siti Esah was victim of an acid attack by her husband. She had all the valid documents and evidence but she still could not get the *fasakh* divorce. 1997 Siti Esah filed for a *fasakh* divorce in the court but she had lost her marriage certificate and the court did not want to register the case unless she found it. After this followed years of trying to get a new marriage certificate without success. During this time Siti Esah had to move around Malaysia to get away from her abusive husband who threatened to kill her. In March 1999 her husband was sentenced to jail for ten years because of the Acid attack. In October Siti Esah managed to get a new marriage certificate and went to prison to discuss with her husband if he would agree to divorce her. He did not agree. In December Siti Esah filed complain but she was advised to go to six counselling sessions first. Siti Esah objected and they agreed to conduct only one counselling session. In February 2000 Siti Esah filed for *fasakh* on the grounds that her husband had seriously injured her body. When she came to court the judges asked her to get a lawyer and if she did not she had to pay for all costs in bringing in witnesses etc herself. She felt confident in representing herself and refused. When she asked the registrar how she should be able to get her husband out of prison temporarily to get to court the registrar answered, "You have to find out yourself and I am not going to tell you". Siti Esah travelled to court many times to get her case mentioned. The court could not accept the civil courts decision that the husband had been sent to prison for abusing his wife as a simple reason to ground her a *fasakh* divorce. The judge wanted the husband to be present in court and refused to give her *fasakh* without the presence of him even if she had all the documentary evidence. In the end Siti Esah felt forced to get a lawyer. It lasted all the way up to June 2001 before both Siti Esah and her husband were present before the judge. The judge still refused to use his power to give Siti Esah her *fasakh* divorce but wanted her husband to pronounce the *talaq* voluntarily. He agreed to do that if she agreed to withdraw her claims for maintenance and compensation. Siti Esah was not given time to think about it

and in desperation she agreed to conditions. Her lawyer did also advise her to withdraw the claims if she wanted a quick divorce. Finally Siti Esah was divorced with one *talaq* by her husband and not through fasakh. (From an interview done with Siti Esah and some other cases on the 21<sup>st</sup> of May 2002)

## B. Appendix- Interview Guide

### Polygamy

1. What problems can you see in Malaysia for Muslim women with polygamy?
2. What do you see as the reason for these problems?
3. How can we prevent these problems? Legal reforms etc.
4. Why doesn't the court seem to take action against men who take a second wife and not registering it?
5. In your opinion should polygamy be allowed or forbidden in Malaysia? Why do you have this opinion, what is the reason for that opinion?

In accordance with this question I usually took up to discussion about what the Koran says about polygamy and that is *“If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four, but if you fear that you shall not be able to deal justly (with them) than only one...that will be more suitable to prevent you from doing injustice”*(Surah an-Nisa 4:3) and further *“You are never able to be fair and just between women, even if it is your ardent desire”* (Surah an-Nisa 4:129).

### Divorce

#### The Right to Divorce

1. What problems do you see Malaysian Muslim women facing when filing for a divorce?
2. Since the law is quit clear on women's rights to a divorce, what do you see as the reason to these problems?
3. Why do you think some courts doesn't seem to recognize women's reasons for divorce, for example abusive husbands as a good reason for a fasakh divorce?
4. What can we do to prevent these problems?
5. Should men and women have the same opportunity to divorce?
6. Do you feel that there are certain things that can make it easier for a woman to get a divorce such as social class, age, status of witnesses etc?

#### Comepensation/Mutaah and Maintenance and Harta Sepencarian (Matrimonial Property)

1. What problems can you see for Malaysian Muslim women with compensation and maintenance after a divorce?
2. Why do you think some women have to work so hard to get good compensation and maintenance after a divorce? Some even told me they felt they have to give it up to get a quick divorce from an abusive husband.

3. How do you feel this should be treated? Any suggestions for improvements?  
Based on what grounds?

#### Custody

1. What problems do you see Malaysian Muslim women facing?
2. If you see any problems what are the reason for these problems?
3. Suggestions for reforms or improvements?

#### Single-mother Issues (Single-Mothers from Divorce)

1. How do you look at this group of women? Do you see them facing any problems?
2. Are they helped and accepted by the state?
3. Do believe they face problems with their social status?
4. What can be done about this from the state or with the law?

#### Sum Up

Your over-all view of the Muslim family Law in Malaysia? Is it good or bad? Is it implemented correctly or not? Do we need to work on it and improve it or is it only the implementation that is wrong? Should there be one family law for all in Malaysia or separate ones as it is today?

I usually ended up by asking for material either from what the scholar had written about or from the organisation he or she was representing.