

ANALYSIS OF SELECTED ISSUES RELATED TO FAMILY LAW

5.0. INTRODUCTION

SIS claims that women have been facing problems with the implementation of certain new Islamic Family Laws that were enforced in the Shariah court of Malaysia in 1987. Thus, the group suggests substantial legal and procedural reforms which they believe can provide women their rights accordingly.¹

This chapter will begin with SIS' views on the status of women and their rights. This analysis is essential in obtaining a better understanding of the issues that will be later brought forward as it is frequently highlighted by SIS in the discussions of their problem solving.

Following that, a few issues that are claimed by SIS as discrimination against Muslim women will be discussed and their suggested solutions will be reviewed. The researcher will look at how the group applies their methods in solving those problems.

After that, an analysis of SIS' commentary, recommendations and methods for solving the problems related to those selected issues will be done from an Islamic thought perspective.

Since among the matters SIS focuses on are those that are related to Islamic Family Law, a few issues connected to this field are chosen as the subject of analysis. The issues that will be analysed in this chapter are related to *talaq*, *ta'liq*, *khul'* and *fasakh*.

¹ Zainah and Shanon, *Sisters In Islam*, 2.

5.1.1. THE STATUS OF WOMEN AND THEIR RIGHTS ACCORDING TO THE UNDERSTANDING OF SIS

Among the objectives of SIS are to transform mentalities that look women as inferior to men and to advocate the women's rights framework in Islam.² SIS claims that the group was formed to study and understand the status of women in Islam in their aim to attain their rights as stipulated in Islam. SIS believes that in the current Muslim society, women are being oppressed by men where they are not being treated equally in certain aspects.³

The members of this organisation intend to reinterpret women's rights.⁴ Through the research they have conducted, the group found that the perception of women's inferiority to men has influenced the interpretations of the Qur'an. SIS puts the blame on those who are unable to comprehend the purpose behind the verses when they make discriminatory interpretations.⁵

Thus, SIS claims that they intend to comprehend the exact meaning of the Qur'an. SIS mentions that all Muslims are equal participants in every aspect of Islamic life regardless of their gender. Based on verses of the Qur'an (33:35–36, 9:71–72, 4:124, 3:195, 40:40,

² "Mission Statement and Objectives", *Sisters In Islam* website, November 17, 2014, www.sistersinislam.org.my/page.php?36.

³ Sisters in Islam, *Q&A booklet: Are Men and Women Equal Before Allah*, 1, *Sisters In Islam* website, February 13, 2015, http://www.sistersinislam.org.my/files/downloads/are_men_and_women_equal_before_allah.pdf.

⁴ Rebecca Foley, "Violence Against Women: the Challenges for Malaysian Women," in *Violence Against Women in Asian Societies*, ed. Lenore Manderson, and Linda Rae Bennett (London: Routledge, 2003), 136.

⁵ Sisters in Islam, *Q&A*, 1.

16:97), they believe that both genders have equal roles and responsibilities in their spiritual life and Islamic struggles.⁶

Allah s.w.t. says:

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

Al-Nisā' 4:34

Translation: Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.

According to SIS, the verse 4:34 states that: *“Men are qawwamuna over women (on the basis) of what Allah has [faddala] preferred some of them over others and (on the basis) of what they spend of their property (for the support of women)...”*. However, SIS mentions that the verse 4:34 has been repeatedly highlighted to wrongly oppress women under the claim that it is the teaching of Islam. According to SIS, the meaning of this verse has been misinterpreted as *“Men have authority over women”* and *“All men are superior to all women”*. They further point out that the oppression of Muslim women is due to the misinterpretation that women and men are not equal in Islam.⁷

According to SIS, verse 3:195 *“goes on to talk about women’s role alongside men in the Islamic struggle, including hijrah and jihad and the equal rewards that await both.”* SIS also mentions that verse 9:71 *“talks about women and men being each other’s ‘awliyya (protecting friends and guardians). And it also talks about the obligations of both women and men in Islam, such as enjoining what is just and forbidding what is evil and observing regular prayers, zakat and obedience to Allah swt and the Prophet saw.”*⁸

⁶ Ibid., 1-2.

⁷ Ibid., 3-5.

⁸ Ibid., 6-7.

SIS concludes that men and women are created for the same purpose, namely to serve as caliphate. Therefore, they believe that “*since the equal status of women and men in spiritual matters is not only recognised but insisted upon in the Qur’an, what more the equal rights and obligations of women and men in temporal matters.*”⁹

5.1.2. AN ANALYSIS OF THE STATUS OF WOMEN AND THEIR RIGHTS BY SIS FROM AN ISLAMIC THOUGHT PERSPECTIVE

SIS claims its “*research has shown that oppressive interpretations of the Qur’an are influenced mostly by cultural practices and values which regard women as inferior and subordinate to men*”¹⁰, yet they fail to identify the Muslim scholars whom they assert to have made these oppressive interpretations. The group cannot claim that they have conducted the research without giving any evidence. This renders their accusations baseless and invalid. It is true that Islamic teachings do not oppress women. Thus, to accuse Muslim scholars of making oppressive interpretations and misinterpreting the revelation of Allah s.w.t. is unacceptable as these scholars are knowledgeable and experts in their field. It is highly unlikely for them to unanimously agree on matters that are contrary to the true teachings of Islam. The issue of priority and superiority between genders come from SIS’ misunderstanding and they should be aware that Muslim scholars do not say men and women are unequal as human beings. Gender does not differentiate one’s status to Allah s.w.t..

In this matter, SIS has to further comprehend the discussion at hand and avoid making pre-conclusive judgements. Muslim scholars do not mean that the status of men is superior to women or that women are of lesser value than men when they use the words ‘superior’, ‘excel’, ‘favour’, ‘better’, or other similar words, rather, what they mean to

⁹ *Ibid.*, 3

¹⁰ Sisters in Islam, *Q&A*, 1.

say is women deserve to be cared for and protected by men. That is the reason why after mentioning the qualities of men, the roles of men as protectors of women is subsequently highlighted. SIS cannot make conclusions merely by extracting certain sentences or incomplete parts of a topic. They must study and analyse the topic as a whole in order to understand it.

Naturally, the husband is fit to be a guardian and master of the household.¹¹ According to Dr. Azizah, the word “*faḍḍala*” means favour. In this context, it means that Allah s.w.t. bestows greater responsibility upon men. As an example, they are responsible in providing sustenance to their family.¹²

It cannot be denied that men and women are not equal in certain aspects. Both genders have their own unique qualities and one gender cannot be envious of the other over those qualities.¹³

Allah s.w.t. says in the Quran:

وَلَا تَتَمَنَّوْا مَا فَضَّلَ اللَّهُ بِهِ بَعْضَكُمْ عَلَى بَعْضٍ ۗ لِلرِّجَالِ نَصِيبٌ مِّمَّا كَسَبُوا ۗ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا كَسَبْنَ ۗ
وَاسْأَلُوا اللَّهَ مِنْ فَضْلِهِ ۗ إِنَّ اللَّهَ كَانَ بِكُلِّ شَيْءٍ عَلِيمًا

Al-Nisā’ 4: 32

Translation: And in no wise covet those things in which Allah Hath bestowed His gifts More freely on some of you than on others: To men is allotted what they earn, and to women what they earn: But ask Allah of His bounty. For Allah hath full knowledge of all things.

Even though men are physically stronger than women, it does not mean that their status is higher than that of women. It is futile to fight for equal rights and responsibilities between men and women. Each gender has distinctive characteristics. Rights and duties are bestowed upon men and women based on these natural characteristics.¹⁴ None of the

¹¹ Maulana Wahiduddin Khan, *Woman in Islamic Shari’ah* (New Delhi: The Islamic Centre, 1995), 67-68.

¹² Azizah Mohammad (Assoc. Prof. Dr.), an interview with the researcher, April 16, 2014.

¹³ Maulana Wahiduddin Khan, *Woman in Islamic Shari’ah*, 69.

¹⁴ “Islam and Feminism”, *IslamOnline* website, February 13, 2015, <http://www.islamonline.com/news/articles/102/Islam-and-Feminism.html>.

Muslim scholars declare that men have a superior status over women due to their physical strength.

The following statement made by SIS which says “*since the equal status of women and men in spiritual matters is not only recognised but insisted upon in the Qur’an, what more the equal rights and obligations of women and men in temporal matters*”¹⁵ should be corrected. Since men and women are not equal biologically or psychologically, the rights of each gender are also different in certain aspects of life.¹⁶ However, the different roles and rights of men and women in specific areas of worldly affairs do not imply that they are unequal in terms of their status as a human being.

Another thing that should be clear here is how SIS defines gender equality and justice. Do they define “equality and justice” based on the Qur’an and *Sunnah*? Or do they define it merely based on the human mind, according to the understanding of the West? If they define it merely based on their minds or according to the understanding of the West, they will not be able to grasp the actual meaning of the words “justice and equality”. In fact, they will drift further from the truth in their struggle towards gender equality and justice.

In the Arabic language, there are several terms used for justice. The most common Arabic term that is used for justice is ‘*adaālah*¹⁷ or ‘*adl*. The term ‘*adālah* or ‘*adl* is

an abstract noun derived from the verb ‘*adala*, which means: first, to straighten or to sit straight, to amend or modify; second, to run away, depart or deflect from one (wrong) path to the other (right) one; third, to be equal or equivalent, to be equal or match, or to equalize; and fourth, to balance or counter-balance, to weigh, or to be in a state of equilibrium.¹⁸

¹⁵ Sisters in Islam, *Q&A*, 3.

¹⁶ B. Aisha Lemu, *The Ideal Muslim Wife*, (Minna, Niger State: Islamic Education Trust, First Published 1992), 2.

¹⁷ Faruqi, *Law Dictionary*, 3rd ed. (Beirut: Libraitie Du Liben, 1982), 397.

¹⁸ See Ibn Manzur, *Lisan al-‘Arab*, vol. 13, 457-458; al-Fayruzabadi, *al-Qamus al-Muhit*, vol. 1, 431; vol. 2, 415-416; vol. 4 (pt. 2), 6; al-Zabidi, *Taj al-‘Arus*, vol. 8, 9-10; and al-Maqqari, *Kitab al-Misbah al-Munir*, vol. 2, 541-542, passim pp. 689-690.

Technically,

‘adl may connote the following meanings: (i) To place things in their rightful places; (ii) to give people their rights and what they deserve; (iii) to be impartial in one’s judgments and decisions; (iv) to say the truth; (v) to be balanced in one’s views and judgements; (vi) to avoid biases and prejudice; (vii) and to avoid oppressing others.¹⁹

Besides the word ‘*adālah*, there are other words used for justice which includes: “*Qist, qasd, mizan, qistas, istiqamah, wasat, nasib and hissah.*”²⁰ The words “*jawr, zulm (wrongdoing), tughyan (tyranny), mayl (inclination) and inhiraf (deviation)*” are the antonyms of ‘*adl*.²¹

Justice is not merely achieved when both genders are able to demand and acquire equal quantities of items or equal rights in all aspects. We cannot say that men and women should be given the same rights in all aspects and situations.

That is the reason why there are Muslim feminists who demand the right to become the Imam and *khatib* for Friday prayer, and to be appointed as the highest leader (*khalīfah*) because they believe that if men are able to hold these roles, women also should be given the same rights.²²

However, from the Islamic thought perspective, in order for justice to be served, specific rights must be given to those who are worthy of it. Justice does not mean that

¹⁹ Munawar Haque et al., *Ethics and Fiqh for Everyday Life: An Islamic Perspective* (Kuala Lumpur: IIUM Press, International Islamic University Malaysia, 2010), 34.

²⁰ Majid Khadduri, *The Islamic Conception of Justice* (Baltimore and London: The Hopkins University Press, 1984), 6.

²¹ *Ibid.*

²² Khalif Muammar (Dr.), and Adibah Muhtar, “Wacana Kesetaraan Gender: Islamis vs Feminis Muslim” (Artikel, Seminar Per murnian Akidah 2009, Pejabat Mufti Wilayah Persekutuan, and Jabatan Agama Islam Wilayah Persekutuan, Masjid Wilayah Persekutuan Kuala Lumpur, August 20, 2009), 30.

every individual is given equal quantity of rights; rather justice is to place things in their rightful place by considering its suitability, ability, and *fiṭrah* to ensure that the appointed one has the ability to carry out the duty.²³

Based on this reason, Islam bestows certain tasks and rights to men, for example the duty of *naḥqah*, *jihād* and leading women. Although Islam accords these tasks to men, it is not a form of discrimination towards women. Many scholars in the West claim that this is discrimination between the two genders, however these claims are merely based on their own perspectives concerning material wealth, position and status.²⁴

The duty of childbearing is given exclusively to women due to their biological, physiological, mental and emotional qualities which are unique to this gender. It does not mean the status of women is beneath that of men. This duty is bestowed upon women because the qualities that are inherent among women such as devotion and patience are essential in raising children. If we look at it from this angle, we find that this task is given to women as an honour to them and not as discrimination. There is *ḥikmah* behind the difference of duties between men and women. Certain duties are given to women because of characteristics that belong to them and it is also the same with men. Cooperation between these two genders can help to establish balance and harmony within a family unit.²⁵

To appoint the man as a leader of the family and the woman as the one who manages the household does not put the woman in a lower position. The philosophy of leadership is not related to the position of men or women in society. Leadership is a responsibility that comes at a price and the duties that come with it will be questioned in the hereafter. According to Sayyid Quṭb, leadership is very important in a family,

²³ Yūsuf al-Qaraḍawī, *Min Fiqh al-Dawlah* (al-Qāhirah: Dār al-Shurūq, 1996), 162.

²⁴ Khalif and Adibah, "Wacana", 30.

²⁵ *Ibid.*

organization or institution. It can help a family to develop and succeed in this life and the hereafter. There is no power and responsibility without leadership.²⁶

According to Islam, the husband is responsible in ensuring that his family performs all the injunctions that Allah s.w.t. has decreed and that they avoid what is prohibited. Whereas the wife is responsible to obey her husband as long as it is not against what Allah s.w.t. has willed.²⁷ The leadership of men should be based on love and cooperation.²⁸⁴⁷⁹ It is a responsibility that bears a great burden on one who holds it. The concept of leadership in Islam is different to the Western perspective. This is because the West separates power and morality in its concept of leadership.²⁹

It does not mean that men and women are not equal to one other in any aspect. On one hand, men and women are both humans, thus there is the possibility of equality between these two genders in some aspects. On the other hand, they are dissimilar in terms of their natural differences, thus equality between these two genders is impossible in certain aspects. Even though they are different in certain aspects, they are complementary to one another.³⁰

If it is impossible to have complete equality among individuals of the same gender due to natural differences and qualities, then it is inevitably impossible to have complete equality between different genders.³¹

²⁶ Sayyid Quṭb, *Fī Zilāl al-Qur'ān* (al-Qāhirah: Dār al-Shurūq, 1997), 5: 649-652.

²⁷ Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* (Kuala Lumpur: A.S. Noordeen, 2002), 130; 'Abd al-Karīm Zaydān, *Uṣūl al-Da'wah* (Bayrūt: Mu'assasat al-Risālah, 2000), 126.

²⁸ Abdur Rahman I. Doi, *Shari'ah*, 131.

²⁹ Khalif, and Adibah, "Wacana", 32.

³⁰ Abdul-Rahman Al-Sheha (Dr.), *Women in Islam & Refutation of Some Common Misconceptions*, translated by Abu Salman Deya ud-Deen Eberle, ed. Abu Ayoub Jeromē Boulter, and Abdurrahman Murad (Riyadh: Abdurrahmaan al-Sheha, t.t.), 28.

³¹ *Ibid.*, 29.

There are many examples that are brought up by our Muslim scholars based on the Qur'an and *Sunnah* regarding equality between men and women. The following are among those examples that show Islam treats both genders equally:³²

i. Both genders are equal from the point of humanity. It is very clear that men and women are created from one single source. It shows that both genders are equal in terms of humanity and they complement one another.

Allah s.w.t. says:

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً ۗ

Al-Nisā' 4: 1

Translation: O mankind! reverence your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (like seeds) countless men and women;

ii. Both sexes also have to perform equal religious duties and rituals. For example, both men and women are required to perform prayer, give *zakāh*, fast and carry out the pilgrimage (*hajj*).

Allah s.w.t. says:

وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ ۗ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ

الزَّكَاةَ وَيُطِيعُونَ اللَّهَ وَرَسُولَهُ ۗ

Al-Tawbah 9:71

Translation: The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practise regular charity, and obey Allah and His Messenger.

³² *Ibid.*, 26-34

iii. There is no difference of rewards for obedience or punishment for disobedience between men and women in this world and the Hereafter.

Allah s.w.t. says:

مَنْ عَمِلَ صَالِحًا مِّنْ ذَكَرٍ أَوْ أُنْثَىٰ وَهُوَ مُؤْمِنٌ فَلَنُحْيِيَنَّهٗ حَيَاةً طَيِّبَةً وَلَنَجْزِيَنَّهُمْ أَجْرَهُمْ بِأَحْسَنِ مَا كَانُوا يَعْمَلُونَ

Al-Nahl 16: 97

Translation: Whoever works righteousness, man or woman, and has Faith, verily, to him will We give a new Life, a life that is good and pure and We will bestow on such their reward according to the best of their actions.

iv. Both males and females have similar moral duties and are eligible to similar general rights in guarding chastity, integrity, personal honour and respect.

v. There is no prevention of both sexes to be involved in financial dealings and property ownership. This means that women are also allowed to own, buy, sell and undertake any financial transaction.

vi. Islam teaches that a man who seeks to inculcate good character should treat women fairly. He cannot oppress or persecute women.

The Prophet s.a.w said:

أَكْمَلُ الْمُؤْمِنِينَ إِيمَانًا أَحْسَنُهُمْ خُلُقًا، وَخَيْرُكُمْ خَيْرُكُمْ لِنِسَائِهِمْ.

Translation: The most complete of the believers in faith, is the one with the best character among them. And the best of you are those who are best to their women.³³

³³ Narrated by al-Tirmidhi, Abwāb Kitāb al-Riḍā‘, Bāb Ma Jā’ fi Ḥaqq al-Mar’ah ‘alā Zawjihā, number of Hadith 1162, Hadith Ḥasan ṣaḥīḥ.

vii. Both genders have equal rights in obtaining education and cultivation of skills.

viii. Both sexes have equal duty and responsibility to ensure the wellbeing of their society to the best of their capability. Both should together carry out their tasks to enjoin good and forbid evil.

ix. Both genders are required to pay obligatory charity (*zakāh*) according to the determined ratio. Besides that, men and women also have set and determined rights to receive their fair share of wealth.

Allah s.w.t. says:

لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ ۗ نَصِيبًا مَّفْرُوضًا

Al-Nisā 4: 7

Translation: From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,-a determinate share.

These are among the examples that show Islam treats women as equals to men. These teachings were brought by our Muslims scholars. So how can this group accuse that some interpretations of men discriminate women?

Hence, SIS must refer to the Qur'an and *Sunnah* in understanding the concept of "equality and justice". Besides that, they must also refer to other sources of Islam, including the writings of early great Muslim scholars. They must not merely understand the terms based on their own opinion and logic because the human mind is restricted. Furthermore, they must discuss equality and justice by referring to Islamic sources before accusing others as bias.

From the Islamic point of view, in order to exercise justice, rights should be given to the rightful person. It is injustice to give equal roles and rights to women and men in all temporal matters or worldly life. The physical and biological differences between men

and women lead to the differences of certain rights bestowed upon each gender. Justice does not mean that each gender should get the same rights in all aspects. In order to achieve justice, Islam gives rights to the rightful people according to their physical and biological capability.

According to Dr. Azizah, the roles between men and women are divided based on nature and not culture.³⁴ As stated by the Prophet s.a.w.:

كُلُّ مَوْلُودٍ يُوَلَّدُ عَلَى الْفِطْرَةِ، فَأَبَوَاهُ يُهَوِّدَانِهِ وَيُنَصِّرَانِهِ، كَمَا تَنَاتُجُ الْإِبِلُ مِنَ بَيْمَةِ جَمْعَاءَ، هَلْ تُحْسُ
مِنْ جَدْعَاءَ؟

Translation: Every child is born on Islam, but his parents make him a Jew and a Christian, just as a beast is born whole. Do you find some among them (born) maimed? ³⁵

There are verses in the Qur'an and sayings of the Prophet s.a.w. with regards to the rights of women. SIS has to refer to these main sources in order to further understand women's rights in Islam. The group cannot merely make their own judgments to determine those rights.

According to Dr. Sofiyah, there are particular issues clearly explained in the al-Qur'an that are beyond the capability of the human mind to even conceive. The matter relating to *maḥram* is an example. The Qur'an clearly mentions this matter. At the same time, there are also matters that the human mind can conceive.³⁶ However, this does not mean that the comprehension of these issues can be practiced liberally without any limitations. The human mind must be guided by the Qur'an and Hadith. The most

³⁴ Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

³⁵ Narrated by Abū Dawūd, Kitāb al-Sunnah, Bāb fī Dharāriyy al-Mushrikīn, number of hadith 4714, ṣaḥīḥ (al-Albānī).

³⁶ Safiyah Shams al-Din (Assistant Professor, Dr.), Department of Qur'an and Sunnah Studies, Kuliyyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia, in an interview with the writer, September 4, 2014.

important thing in the process of explaining these matters is to ensure that they do not contradict with the Quran and Hadith.

SIS cannot merely use their own opinions to determine the rights of men and women. They have to refer these matters to the Qur'an and *Sunnah*.

Dr. Azizah states that it is the responsibility of the husband to provide sustenance as revealed in surah al-Nisā' 4:34. In addition to this, Allah s.w.t. says:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ

Al-Baqārah: 2: 233

Translation: Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period].

Thus, the women is given the responsibility to breastfeed her baby, while the men provides sustenance for the family. The sustenance or maintenance to feed the mother is to the extent where the husband is completely responsible. To attain marital happiness, one must put in their sincere efforts to maintain a harmonious and successful marriage. It is not necessarily a duty or responsibility, rather an act for Allah.³⁷

The husband is the leader of the family.³⁸ (Refer to *sūrah Al-Nisā'* 4:34 and *sūrah Al-Baqarāh* 2:228) The group has to understand that there is nobody among the Muslim scholars who say that women are inferior to men because of this. This leadership of men over women does not indicate any kind of inequality or dictatorship, but it is identified as a responsibility.

If the husband is a leader, a wife should recognize his leadership because “*a ship with two captains will never reach its destination.*”³⁹

Therefore, the wife has the responsibility of running the household and

³⁷ Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

³⁸ B. Aisha Lemu, *The Ideal Muslim Wife*, 16.

³⁹ *Ibid.*, 17.

raising the children.⁴⁰ It is very clear here that this is the role of the wife.

A wife running the household and a husband working outside the home are equally significant roles. Therefore, running the household cannot be considered inferior to working outside of the home because Islam honours both efforts. Hence there is no question of having superiority or inferiority among men and women in this matter.⁴¹

There are people who believe that different actions should receive different rewards. However, they should understand that there are also different actions that obtain equal rewards in Islam.

Husbands and wives are a part of one another and this is a basic principle that determines their rights and duties.⁴²

Allah s.w.t. says:

هُنَّ لِيَاسٍ لَّكُمْ وَأَنْتُمْ لِيَاسٍ لَهُنَّ ۗ

Al-Baqārah 2:187

Translation: They are clothing for you and you are clothing for them.

Muslim scholars did not limit the task of women to only be mothers. In other words, they also mentioned that Muslim women can involve themselves in other fields. It is true that Muslim women and men have equal responsibilities in certain aspects of life, for instance, the responsibility of enjoining right and forbidding evil. (Refer Sūrah Al-Tawbah 9:71].

However, it is not true to say that Muslim women and men have the same responsibilities in all aspects of life because there are some roles which are fit for only one gender.

⁴⁰ *Ibid.* 19.

⁴¹ Maulana Wahiduddin Khan, *Woman*, 59-60.

⁴² Maulana Wahiduddin Khan, *Woman*, 124.

Therefore, giving the same rights and obligations to women and men in all aspects of life will be unfair as certain roles are not suitable for a particular gender. Even though there are roles of men that women do not have, these differences are not a form of discrimination.⁴³ Men have unique characteristics that are necessary for being a leader and sustaining the family, while the women have unique characteristics that are necessary for maintaining the home and rearing the children.⁴⁴ As leaders, men are not considered to have a higher status over women in terms of human value, while as wives and mothers; women are not considered inferior to men. In fact, their respective roles and rights are suited according to their unique characteristics and both are of equal status.

The issue that is being raised by SIS regarding “men hav[ing] authority over women” is a misunderstanding. None of the Muslim scholars have said that men have absolute authority over women. “The man or husband as the leader in a family” does not mean that the man can do anything he wants to his wife. It must be understood here that giving men the right as a leader in a family does not mean that he has absolute authority, and it also does not mean that the wife does not have any right as a member of that family. SIS cannot deny the importance of authority in any institution because without authority, who would take the role as a leader? Who would take orders from the leader? From a small unit such as a family institution to a large unit such as a country, each institution, regardless of its size must have an authority or a leader. However, a leader is also bound by rules and regulations. He would not have absolute authority.

The issue of “men hav[ing] authority over women” should be viewed from the positive angle it has on women. The role as a leader in a family gives the husband authority over his family members including his wife to ensure their wellbeing, but with

⁴³ *Ibid.*, 125.

⁴⁴ *Ibid.*, 129.

the condition that the authority that is exercised is guided by the al-Qur'an and Sunnah, and he is must not misuse it over them.

The women's task of bringing up children is essential and is within their nature to be the carer of the family. Thus, society must not look down upon the role of the caregiver or the domestic wife.⁴⁵

Men and women have been created by Allah s.w.t. to complete one another.⁴⁶ The woman's responsibilities of childbearing, breastfeeding and looking after her children are the responsibilities which require mental, physical and psychological strength and endurance. Whereas the man is the sustainer and protector in helping the wife accomplish her duties as a mother. Both duties of men and women are equally important. Men and women are assigned duties according to their natural characteristics.

Both men and women are obligated to seek knowledge, and if the husband is unable to provide a source of knowledge to his wife, the husband has no right to stop her from seeking it. If a woman wishes to go to congregational prayers at a mosque, the husband also has no right to stop her. In addition to this, women are allowed to participate in other fields such as giving first aid and nursing services to an army. These are among the examples of women's rights.

Muslim scholars have never said that childbearing is the only task that woman are permitted to do. In fact, there are many other tasks that women can partake in society as long as it does not contradict with the teachings of Islam. The mother's role in childbearing and raising children and the father's role as the sustainer and protector of the family are very important. To build a healthy family institution, the wife/mother and husband/father should play their respective roles properly as both tasks are crucial and

⁴⁵ "Some Misconceptions about Women in Islam", *Islamhouse.com* website, February 14, 2015, <http://islamhouse.com/ar/articles/53056/>.

⁴⁶ B. Aisha Lemu, *The Ideal Muslim Wife*, 21.

significant. Both tasks complement one another. The problem arises when those who have been influenced by Western ideologies claim that these different roles are a form of gender discrimination. These people assume the role of childbearing and raising children as inferior.

However, from the Islamic perspective, these tasks are among the most important and difficult tasks. Therefore, bestowing women with the task of childbearing and raising children is an honour and their tasks are not limited to these alone. Their roles are also important in other aspects of life which go well with their nature and do not contradict to Islamic teachings.

Based on the above discussion, the explanation given by Muslim scholars with regards to the roles and right of women in Islam is indeed beautiful. It further defies the accusation made by SIS that the interpretations made by male Muslim scholars are biased against women.

In addition to this, the Muslim scholars also stress on the rights of women as human beings, feminine beings, mothers, daughters, wives and as members of the society. As a human being, Islam considers woman and man as equal in terms of their value and position. Islam also protects the woman's femininity, for example only women can wear gold and pure silk. Women are protected and given sustenance by her guardian whether it is her father, husband, son or brother. As a mother, everybody is obligated to treat her kindly. A daughter or a son is a gift from Allah without any discrimination. The woman also has the right as a wife: she is given dowry, sustenance, and to be treated honourably. Besides that, the woman also has a right as a member of the society, for example both men and women are responsible in enjoining right and forbidding evil. These are among the teachings with regards to the rights of women as taught by the male Muslim scholars based on the Qur'an and *Sunnah*. The male Muslim scholars highlights that the rights of women are not only as mothers, but even more. How can SIS accuse some of these male

Muslim scholars for discriminating women in their interpretations? They cannot judge them based on isolated cases, or in other words, they cannot make generalisations.

As a conclusion, there are rights that are given to men and women equally. However, there are also rights in certain aspects that are specific to one gender. It is not valid to say that justice can only be achieved if both genders are given equal rights in all aspects of life. As an example, Islam gives the role of sustainers to men because they are naturally physically stronger than women thus have the capability to carry out this role. If the role of sustainer is given to women, this would be a form of injustice as the woman is naturally physically weaker. In addition to this, SIS cannot make accusations against Muslim scholars without bringing forward any evidence. These Muslim scholars are people of knowledge. They are pious people and have a deep understanding of Islam.

The group has to refer to the Qur'an and Hadith in their efforts to recover and understand women's rights in Islam. They have to apply the proper method of *tafsīr* in understanding the Qur'an in order to obtain the accurate meanings. They must also refer to Hadith in their discussion of women's rights. Whenever they want to give any opinion, they have to ensure that their human minds are guided by the Quran and Hadith. The human logic is important but it must be based on the Quran and Hadith and parallel with Islamic teachings. We are prohibited from following *ahl al-hawā* or expressing opinions on religious matters based on our minds alone. The role of the human mind is not to determine what is good and bad or right and wrong, but rather, to understand and implement the rulings of Allah s.w.t. Most High, as contained in the Shariah. Therefore, in whatever that is said about Islam, the Qur'an, and *Sunnah* must be referred to.

5.2. ISSUES ANALYSIS RELATED TO FAMILY LAW

Among the matters SIS focuses on are those that are related to Islamic Family Law. This topic explains several issues raised by SIS relating to *ṭalāq*, *fasakh*, *khul'* and *ta'liq*. SIS' comments and recommendations related to these issues will be discussed, and their methods of problem solving will be analysed from an Islamic thought perspective

The group suggests that some of the existing Shariah laws in Malaysia should be reformed as they believe the practices are based on historical interpretations of Islam that date back to the seventh and eighth centuries. According to SIS, the realities of women today is not accounted for, thus it is necessary to review some of the existing Shariah laws in Malaysia for a reformation that meets the needs of present day women. At the same time, SIS has also asked Muslims in Malaysia to question the exercise of power at national and international levels in order to reduce gender disparities in the community.⁴⁷

⁴⁷ Farish A. Noor, "Reformist Muslim Thinkers", 222.

5.2.1. PROBLEM SOLVING OF SIS REGARDING ISSUES RELATED TO ṬALĀQ: AN ANALYSIS FROM AN ISLAMIC THOUGHT PERSPECTIVE

Literally, *ṭalāq* means “taking off any tie or restraint” and “in law it signifies the dissolution of marriage.”⁴⁸

In Shariah, repudiation is defined as “the dissolution of a valid marriage contract forthwith or at a later date by the husband, his agent or his wife duly authorized by him to do so, using the word *talaq*, a derivative or a synonym thereof.”⁴⁹

In Malaysia, the Act and the enactment of Islamic Family Law provides stipulations of divorce among married Muslim couples. Section 47 is the provision for divorce through *ṭalāq* or by order, while section 48 is the provision of arbitration by *ḥakam*.⁵⁰

In this sub topic, the comments, recommendations, and solutions provided by SIS regarding the issue of *ṭalāq* from section 47, and arbitration by *ḥakam* from section 48 will be reviewed. Their comments and problem solving methods from an Islamic thought perspective will then be analyzed.

SIS has submitted several recommendations for the amendment of section 47 and 48. They claim that their recommendations are aimed to help with the implementation of the provisions and avoid unnecessary delays and unwarranted incidents. SIS believes these kinds of problems bring unavoidable hardship and injustice to the parties involved specifically the wives and children.

⁴⁸ Syed Khalid Rashid, *Muslim Law* (Lucknow: Eastern Book Company, 1979), 89.

⁴⁹ Jamal J. Nasir, Nasir, Jamal J. (Jamal Jamil), ed., *The Islamic Law of Personal Status* (London: Brill Archive, 1990), 113-114.

⁵⁰ “The author is unknown”, *Laws of Malaysia, Act 303, Islamic Family Law (Federal Territories) Act 1984, Incorporating All Amendments up to 1 January 2006* (Malaysia: The Commissioner of Law Revision, 2006), 30-34, November 7, 2014, <http://www.agc.gov.my/Akta/Vol.%207/Act%20303.pdf>.

5.2.1.1. The Issue of the Court's Technical Problems with Regards to *Talāq*

SIS has highlighted the impact of existing provisions from section 47 and 48 as follows:⁵¹

(i) The wife has to go through several stages and a conciliatory committee as well as *hakam* if the husband does not agree to divorce her;

(ii) Subsection (4):⁵² can add to the delay of the removal of a *hakam* and the appointment of another;

(iii) Subsection (5):⁵³ to obtain full power from their principal can burden the *hakam*; and

(iv) Subsection (6):⁵⁴ there are multiple procedures to go through before the stage that allows the court to appoint another *hakam* to give them the power to order a divorce. According to SIS, the husband does not have to go through such stages even if his wife does not agree with the divorce. However such procedures are put in place when the situation is the other way around.

SIS claims that in the case of *talāq* through mutual consent, the wife is told to be patient through counselling and is not given a complete explanation of the rights of both

⁵¹ “Memorandum Perbandingan Rang Undang-Undang Keluarga Islam Dengan Akta Undang-Undang Keluarga Islam 1984 (Januari 2002)”, *Sisters In Islam* website, October 22, 2014, <http://www.sistersinislam.org.my/news.php?item.29.8>.

⁵² Section 48, Subsection (4): If the Hakam are unable to agree, or if the Court is not satisfied with their conduct of the arbitration, the Court may remove them and appoint other Hakam in their place.

⁵³ Section 48, Subsection (5): The Hakam shall endeavour to obtain from their respective principals full authority, and may, if their authority extends so far, pronounce one talaq before the Court if so permitted by the Court, and in that event the Court shall record that pronouncement of one talaq, and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

⁵⁴ Section 48, Subsection (6): If the Hakam are of the opinion that the parties should be divorced but are unable for any reason to order a divorce, the Court shall appoint other Hakam and shall confer on them authority to order a divorce and shall, if they do so, record the order and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.³⁴ Laws of Malaysia ACT 303.

husband and wife with regards to divorce. According to SIS, this counselling process is irrelevant because it is much in favour of the husband.⁵⁵

SIS highlights that there are cases where the court does not take into consideration the women's issues, for example, one case states that a wife was forced under duress to agree to a condition where financial claims were dropped as imposed by the husband. SIS claims that the court takes no interest to intervene in order to safeguard the welfare and rights of the wife. Rather, SIS says that the court insists the husband and wife to discuss and convene outside of the court before the trial commences. SIS highlights that this is cumbersome to the wife, especially to those who do not know their rights in divorce.⁵⁶

SIS also claims that a divorce is difficult when the woman requests for it, but it comes easily for when it requested by the man. According to SIS, even when all circumstances show that the marriage cannot be saved and enough witnesses testified to support the divorce, the court would take unnecessary steps in extending the divorce procedure if the husband is not agreeable to it.⁵⁷

Analysis:

The above issues highlighted by SIS are references to technical problems. If the claims of SIS are true, the court or the relevant authorities should take action to solve the problems that are faced by women in the process of divorce especially for those whose husbands are not agreeable to it. A proper study should also be conducted to investigate the claims made with regards to inequality faced by women in counselling and divorce procedures.

⁵⁵ "Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah", *Sisters In Islam* website, October 23, 2014, <http://www.sistersinislam.org.my/news.php?item.1066.8>.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

Besides that, SIS must also take into consideration of the fact that Islam does not encourage arbitrary divorce. Therefore, any blame on the court in this matter is unjust as the decision-making process is a time consuming affair due to the numerous considerations that must be accounted for. However, the court must also be aware of the claims made against them in handling divorce cases. The court must take the necessary steps to further improve their efficiency as unnecessary delay and lengthened periods of divorce procedures will burden both the husband and the wife.

When any form of reconciliation cannot be achieved between the husband and the wife, the last option is divorce.⁵⁸ If the court proceedings consume extended lengths of time in solving the problems of a divorce as claimed by SIS, the positive angle is possibly due to the court having the opinion that the marriage can still be saved. Thus, the court proceedings require more time to prevent unnecessary divorce.

However, the negative side of this issue is that it will burden the parties involved.

Recommended solution by SIS:

SIS offers their solutions to overcome the problem of what they claim as unreasonable lengths of time and unnecessary delay. The group recommends that the various levels of the committee and *hakam* should be consolidated into one group that has the authority to grant the divorce. SIS also suggests that the full power of *hakam* should be standardised when it is appointed.⁵⁹

⁵⁸ Al-Tuwaijiry , Muhammad bin Ibrahim, *The Book of Nikah* (Riyadh: Cooperative Office for Call & Guidance, 2000), 24;

Muhammad Saed Abdul-Rahman, *Islam: Questions and Answers - Jurisprudence and Islamic Rulings*, Part 5, (London: MSA Publication Limited, 2007), 28-29.

⁵⁹ “Memorandum Perbandingan Rang Undang-Undang Keluarga Islam Dengan Akta Undang-Undang Keluarga Islam 1984 (Januari 2002)”, *Sisters In Islam* website, October 22, 2014, <http://www.sistersinislam.org.my/news.php?item.29.8>.

Analysis:

According to Dr. Raihanah, the above recommendation has been brought up by various parties, and not just by SIS. If the claim that there are unnecessary hurdles in obtaining the approval for a divorce is true, then this is an implementation issue. It does not only happen in the Shariah court, but it is also apparent in the civil court.⁶⁰

Dr. Azizah agrees with the suggestion of SIS that various stages of the committee and *hakam* should be consolidated into one group of *hakam*. She also agrees that many steps to the procedure will further extend the length of the divorce proceeding. However, the court has already stipulated that the time frame for any divorce case must not exceed one year.⁶¹

Recommended solution by SIS:

Another solution that is offered by SIS is that the provisions in subsection (4), (5) and (6) should be replaced with the provision that gives full power to the *hakam* initially appointed. SIS recommends that the *hakam* that is appointed by the court should have full power, including the power to grant the divorce if they are of the opinion that the divorce is necessary and both parties are unable to reconcile within six months of its appointment.⁶²

Analysis:

According to Dr. Raihanah, this suggestion will shorten the length of the divorce procedure as the counselling committee will only stretch it longer, and most of the women

⁶⁰ Raihanah Binti Haji Abdullah, (Associate Professor Dr.), Department of Syariah and Law, Academy of Islamic Studies, Malaya University), in an interview with the writer, April 8, 2014.

⁶¹ Azizah Mohammad (Associate Professor Dr.), in an interview with the writer, April 16, 2014.

⁶² “Memorandum Perbandingan Rang Undang-Undang Keluarga Islam Dengan Akta Undang-Undang Keluarga Islam 1984 (Januari 2002)”, *Sisters In Islam* website, October 22, 2014, <http://www.sistersinislam.org.my/news.php?item.29.8>.

who go to court for divorce have actually already made their decision to divorce after much consideration and counselling sessions. Making the decision to enter court for a divorce is arguably not an easy task for any woman, and when they do, their decision of a divorce is usually final. Therefore this recommendation will shorten the divorce proceeding.⁶³

Whereas according to Dr. Azizah, conclusive research should be done before making any recommendation. Apparently, it looks easy, but the bureaucratic issues faced are unpredictable and unique to every situation.⁶⁴

Dr. Azizah mentions that in providing a suggestion, SIS should consider *maqāsid* Shariah. If the recommendation is in parallel with *maqāsid* Shariah, it should not be a problem.⁶⁵

As a conclusion, the problem solving offered by SIS on the court's technical problems can be considered as long as it does not contradict with Islamic teachings. Thus, any problem solving from their recommendations and solutions that contradict the Qur'an and Hadith must be rejected.

5.2.1.2. *Ṭalāq* at the Declaration of the Husband is Said to be Too Easy

According to SIS, the pronouncement of *ṭalāq* without the court's approval should not be recognised.⁶⁶ SIS mentions that there are many adverse effects relating to the case of immediate *ṭalāq* upon its declaration by the husband. According to SIS, the divorce is said to be too easy:⁶⁷

⁶³ Raihanah Binti Haji Abdullah, (Associate Professor Dr.), in an interview with the writer, April 8, 2014.

⁶⁴ Azizah Mohammad (Associate Professor Dr.), in an interview with the writer, April 16, 2014.

⁶⁵ *Ibid.*

⁶⁶ "Letter to the Editor: Rang Undang-undang Keluarga Islam: Ulasan dan Syor", *Sisters In Islam* website, February 13, 2015, <http://www.sistersinislam.org.my/news.php?item.978.42>.

⁶⁷ "Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah", *Sisters In Islam* website, October 23, 2014, <http://www.sistersinislam.org.my/news.php?item.1066.8>.

5.2.1.2.1. The Issue of *Ṭalāq* (Divorce) Without a Witness

SIS states that there is the case of *ṭalāq* where the husband divorces the wife without a witness.⁶⁸ In the opinion of SIS, divorce is too easily granted.

Analysis:

Jumhūr fiqh scholars of the *Salaf* and *Khalaf* have conceded that *ṭalāq* is valid even if it is declared by the husband without any witnesses as *ṭalāq* is one of the rights of men. With regards to having a witness, there is no hadith of the Prophet or verbal records of the companions of the Prophet stating that having a witness is a requirement for the validation of a divorce.⁶⁹ Thus, the *ijmā'* of the Muslim scholars concludes that having witnesses is not a requirement of *ṭalāq*.⁷⁰

Ṭalāq without the requirement of having witnesses does not necessarily make divorce easier. As the right to the declaration of *ṭalāq* is given to men, there is not a compulsory need to obtain any witnesses. This coincides with the obligation of the husband to provide dowry upon marriage as well as sustenance in the form of *naḥqah* to the wife and the family during the entire course of the marriage. In addition to this, the husband must also continue to provide sustenance in the form of *naḥqah 'iddah* and *mut'ah* should the divorce be granted.

On the other hand, *Ahl al-Bayt Imāms* and *Shi'ah Imāmiyyah fiqh* scholars are of the opinion that *ṭalāq* is only valid if there are witnesses.⁷¹ Athā', Ibn Jurayj, and Ibn Sīrīn are among the scholars who also share this opinion.⁷²

⁶⁸ *Ibid.*

⁶⁹ Al-Sayyid Sābiq, *Fiqh al-Sunnah* (Bayrūt: Dār al-Kitāb al-'Arabī, 1985), 2: 257.

⁷⁰ Wahbah az-Zuhaili, Prof. Dr., *Fiqh Islam wa Adillatuhu: Al-Fiqh Al-Islāmī wa Adillatuh*, translated by Abdul ayyie al-Kattani (Jakarta: Gema Insani, 2011), 9: 409.

⁷¹ Muhammad Bagir, *Fiqh Praktis Ii* (t.t.p:PT Mizan Publika, t.t.), 188

⁷² Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 258.

5.2.1.2.2. The Issue of *Ṭalāq* (Divorce) without the Knowledge of the Wife

As claimed by SIS, there are also cases of *ṭalāq* that is declared without the knowledge of the wife. They further highlighted that this is an act of persecution towards the wife who is unbeknownst of the situation.⁷³

Analysis:

Ṭalāq is regarded as valid whether it is declared within or without the presence of the wife.⁷⁴ The declaration of *ṭalāq* by the husband in the presence of or within the knowledge of the wife is not a requirement of divorce. In other words, the divorce is still valid when the husband pronounces a divorce from his wife without her knowledge.⁷⁵

As an example, if a man declares, "I am divorcing my wife", the divorce is technically valid even if the wife is unbeknownst of it. After the period of three menstrual cycles from the declaration, the *'iddah* period would be considered complete, even if she were still unaware of the declared divorce.⁷⁶

5.2.1.2.3 The Issue of *Ṭalāq* through Text Messages

SIS highlights that the current practice in Malaysia is that the husband will be fined if he declares *ṭalāq* through a phone text message. Even so, the divorce is still considered valid.⁷⁷

Analysis:

⁷³ "Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah", *Sisters In Islam* website, October 23, 2014, <http://www.sistersinislam.org.my/news.php?item.1066.8>.

⁷⁴ Haron Din, Abu Hassan Din al-Hafiz, Ishak Din, *Dato' Dr. Haron Din Menjawab Persoalan Fikah Harian* (Kuala Lumpur: PTS Millennia Sdn. Bhd., 2007), 249.

⁷⁵ Muhammad Saed, *Islam: Questions and Answers* (London: MSA Publication Limited, 2007), 5:30.

⁷⁶ *Ibid.*

⁷⁷ "Best Practices on Muslim Family Law Issues", *Sisters In Islam* website, November 9, 2014, <http://www.sistersinislam.org.my/news.php?item.1050.8>.

Other than the form of a verbal declaration, *ṭalāq* can also be communicated through writing. A Muslim scholar of *fiqh* states that the proclamation of *ṭalāq* by the husband through writing is valid as long as its conditions are fulfilled.⁷⁸ According to *Jumhūr Fuqahā'*, the declaration of *ṭalāq* through a written statement is valid when the husband has the intention to divorce his wife.⁷⁹

As the proclamation of *ṭalāq* in writing is recognised and valid, an e-mail communication also falls under this category provided that it is verified by the husband that it was he, or a person he had specifically appointed, was the author of the said email containing the declaration. However, the commencement of the *ṭalāq* only begins upon the acknowledgement of the husband. The e-mail message is not considered valid without necessary proof.⁸⁰

In the case of the communication of *ṭalāq* through a phone text message, the same principles would apply. The *ṭalāq* is valid as long as the conditions are similar to that of the written statement and that the husband verifies that it was he, or his appointment that had written and sent the text.

5.2.1.2.4. The Issue of *Ṭalāq* with Regards to the Wife Who is Divorced from Her Husband Even When She is Not Agreeable to It

Such cases may occur where a husband requests to divorce the wife even when the wife has agreed to him practising polygamy and does not agree to a divorce.⁸¹

Analysis:

⁷⁸ Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 256-257.

⁷⁹ Wahbah az-Zuhaili, *Fiqh Islam*, 341.

⁸⁰ Muhammad Saed, *Islam: Questions and Answers*, 14-15.

⁸¹ "Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah", *Sisters In Islam* website, October 23, 2014, <http://www.sistersinislam.org.my/news.php?item.1066.8>.

In the case where the wife provides consent to her husband to practice polygamy and does not agree to the divorce, Dr. Azizah mentions that the husband must provide *mut'ah* as a form of compensation. *Mut'ah* is given to protect the welfare of the wife and is compulsory in Malaysia, unlike in other countries. The Shāfiī *madhhab* stipulates the *mut'ah* as compulsory, while it is not so in the Ḥanafī *madhhab*. Based on this, the court does look into the interest of the wife.⁸²

As Dr. Azizah further explains, the provisions of section 47 gives equal rights to both husband and wife to request for a divorce under a mutual agreement. In the case where the wife does not agree to a divorce requested by the husband, a divorce will not be granted by the court. Under such circumstances, the court will appoint the *hakam* or conciliatory committee. If the committee grants the divorce, it will be categorised as a divorce approved outside of the court.⁸³

Under section 56, Dr. Azizah stipulates that if the requested divorce is without a just cause, the husband must provide *mut'ah*. The wife can request for a higher price in *mut'ah* if the divorce is without a reasonable cause. However, the court will make a decision based on the husband's current solvency.⁸⁴

Based on the existing provisions outlined above, there are no gender discriminations of the court in a divorce case where the wife is not agreeable to it. In Malaysia, the Shariah court will not grant a divorce without a mutual agreement and would appoint the *hakam* or conciliatory committee (refer section 47). However, if the husband divorces his wife outside the decision of the court, he must recompense with *mut'ah* as a form of penalty.

⁸² Azizah Mohammad (Associate Professor Dr.), in an interview with the writer, April 16, 2014.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

Recommended solution by SIS:

SIS suggests a solution for the issues where they claim divorce is easily granted in favour of the husband. They recommend that a declaration of *ṭalāq* should only be recognised once it is approved by the court. According to SIS, this concept is consistent with a verse from the Qur'an in *Sūrah Al-Nis'ā* 4:35 where it outlines the procedures of having *ḥakam* and discourages arbitrary divorce.⁸⁵

Analysis:

It is important to understand the pillars of *ṭalāq* in the discussion of issues regarding *ṭalāq* without a witness; *ṭalāq* without the knowledge of the wife; *ṭalāq* declaration through text messages; and *ṭalāq* against the women's will.

According to the Ḥanafī school of thought, the pillar of *ṭalāq* is *lafẓ* or the pronouncement indicating the intention of *ṭalāq*.⁸⁶

Whereas according to the Mālikī school of thought, the pillars of *ṭalāq* are: 1) The *ahl* or the person who declares *ṭalāq* must be capable of declaring it; 2) *Qaṣd* or the words expressed clearly indicates the husband's resolve to dissolve the marriage even if unintentionally; 3) *Mahal* or the marriage itself; and 4) *Lafẓ* or the pronouncement of *ṭalāq* whether *ṣarḥ* or *kināyah*.⁸⁷

According to the Shāfi'ī and Ḥanbalī schools of thought, there are five pillars of *ṭalāq*: 1) *Al-Muṭalliq*, the man who declares *ṭalāq*; 2) *Al-Sīghah*, the words proclaiming *ṭalāq*; 3) *Maḥal*, the marriage; 4) *Al-Wilāyah*, guardianship; and 5) *Qaṣd*.⁸⁸

⁸⁵ "Letter to the Editor: Rang Undang-undang Keluarga Islam: Ulasan dan Syor", *Sisters In Islam* website, February 13, 2015, <http://www.sistersinislam.org.my/news.php?item.978.42>.⁵³⁷ Wahbah az-Zuhaili, *Fiqh Islam*, 322.

⁸⁶ Wahbah az-Zuhaili, *Fiqh Islam*, 322.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

The valid conditions of a husband who pronounces *ṭalāq* are: he is at the age of puberty, he declares at his own free will and was not forced into it.⁸⁹

While the valid conditions of the wife are: she is the legal wife of the husband proclaiming *ṭalāq*; and still under the care of the husband, which includes being within the period of *'iddah raj'ī*.⁹⁰

The valid conditions of the pronouncement of *ṭalāq* are: clear pronouncement (*ṣarīḥ*), indirect (*kinayāh*) or through an indication.⁹¹

*“Besides that, it is well known in shariah that divorce takes place when the words are uttered, written or indicated by a gesture that takes the place of speaking. This is something that is between the husband and his Lord if no one hears him say that.”*⁹²

The jurists concede that a divorce is valid when the words (either in Arabic or any other language that indicates the meaning of divorce) are uttered, written or indicated by a gesture that takes place of speaking.⁹³

The above pillars as outlined by the four Imams (Shāfi'ī, Mālikī, Ḥanbalī and Ḥanafī) do not mention the requirement of witnesses or having the wife be aware of the declaration. Thus, the divorce is valid according to these four imams as long as the communication used clearly indicates the husband's intent of a divorce. The conditions above also do not state a prerequisite of a mutual agreement between the husband and the wife. This means that *ṭalāq* is still viable once the husband proclaims it, even if it is against the will of the wife, without a witness or even without the wife's knowledge.

⁸⁹ Mohamad Rifai, (Dr.), *Ilmu Fiqih Islam Lengkap* (Singapore: Pustaka Nasional PTE LTD, 1988), 443.

⁹⁰ Mustafa Hj. Daud, *Perkahwinan menurut Islam* (Utusan Publications, 1991), 197.

⁹¹ Mohamad Rifai, *Ilmu Fiqih*, 443-444.

⁹² Muhammad Saed, *Islam: Questions and Answers*, 14-15.

⁹³ Wahbah az-Zuhaili, *Fiqih Islam*, 336.

This also includes *ṭalāq* communicated via a text message should it fulfil the conditions and is proven valid.

However, *Shī'ah Imāmiyyah fiqh* scholars disagree with the opinion of the imams mentioned above when it comes to matters pertaining to witnesses and divorce through SMS. *Shī'ah Imāmiyyah* scholars claim that witnesses are required for the declaration of *ṭalāq*.

In this issue, SIS does not really apply the principles of Qur'anic hermeneutics to solve the problem. Instead, they make recommendations and suggestions that they believe can give justice to the women involved. The group does not mention which Muslim scholar's opinions they refer to, nor do they refer to any evidence from the Qur'an and Hadith when commenting on these issues.

However, in their recommendation regarding these issues, SIS has mentioned Sūrah Al-Nisā' 4:35. The group recommends that the declaration of *ṭalāq* should only be recognised once it is approved by the court. According to SIS, this concept is consistent with verse 35 of Sūrah Al-Nisā', which outlines the procedures of appointing a *ḥakam* and discourages arbitrary divorce.

Allah s.w.t. says:

وَأِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

اللَّهُ كَانَ عَلِيمًا حَكِيمًا

Al-Nisā' 4:35

Translation: If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things.

According to Dr. Azizah, verse 2:229 must be taken into consideration, particularly the meaning of “*al- ṭalāq marratayn*”. Dr. Azizah claims that there is no mention that the declaration of divorce must take place within the court. While in verse

4:35, the *ḥakam* should be appointed, but only before a divorce is declared and not after it. A married couple can appoint a *ḥakam* to help them reconcile their differences in their resolve to avoid a divorce. However, in verse 2:229, *ṭalāq* can still ensue (when the husband declares *ṭalāq* upon his wife).⁹⁴

Dr. Azizah further highlights another aspect that must be looked into, which is the responsibility of the husband to not declare a divorce arbitrarily. If the law requires the couple to undergo a court proceeding before a divorce is granted, the husband may declare *ṭalāq* more than once and this may further complicate the matter. Therefore, the validation of *ṭalāq* without the court's approval is a precautionary measure. During the reign of 'Umar al-Khaṭṭāb, if a man declares *ṭalāq* three consecutive times, the divorce will be valid as the third *ṭalāq*. This law was put in place to mitigate the issue of men declaring *ṭalāq* arbitrarily. Dr. Azizah stresses that Allah gives the right of the declaration of *ṭalāq* to the husband; therefore he must be cautious and vigilant in exercising this right. In addition to this, the practice of other Muslim societies must also be reviewed and looked into.⁹⁵

Dr. Azizah questions whether the recommendation made by SIS is pervasive in other Muslim countries. The fatwas must be taken into consideration and till today the literal meanings of the verses indicate divorce as a matter that should not be taken lightly by the husband. In addition to this, both the Qur'an and Hadith do not mention that a court proceeding is required for a divorce. However, the responsible authorities must monitor cases where *ṭalāq* is proclaimed outside of court. If the pronouncement of *ṭalāq* is not valid outside of court, there is a concern that *ṭalāq* will be freely declared and widespread among society.⁹⁶

⁹⁴ Azizah Mohammad (Associate Professor, (Dr.)), in an interview with the writer, April 16, 2014.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

From the Islamic perspective or *ḥukm*, Dr. Azizah states that the pronouncement of *ṭalāq* outside the court is considered valid. Dr. Azizah makes reference to verse 2:229 – is the declaration of *ṭalāq* as mentioned in this verse to be done in court? Based on the opinions of jurists, there are no references claiming that the pronouncement of *ṭalāq* must be done in court.⁹⁷

Dr. Azizah disagrees with the suggestion that the declaration of *ṭalāq* without the approval of the court is invalid as she is concerned with the circumstances that may ensue. Divorce is not a small matter and cannot be uttered at one's whim. If *ṭalāq* only be recognised in court, the declaration of *ṭalāq* outside of court will be taken lightly and arbitrarily. This is even more of an issue for those living outside of urban areas with inadequate access to go to court. Should the husband proclaim *ṭalāq* outside of court and it is not considered valid, would it be lawful for him to continue living with the wife within the perspective of Islamic law? These are issues that remain unclear and *shubuhāt* (doubtful).⁹⁸

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

5.2.2. PROBLEM SOLVING OF SIS REGARDING ISSUES RELATED TO *TA'LĪQ*: AN ANALYSIS FROM AN ISLAMIC THOUGHT PERSPECTIVE

Stipulation means a promise expressed by the husband after solemnisation of marriage in accordance with Hukum Shara' and the provision under the State Islamic Family Law Act/Enactment/Ordinance. Divorce under ta'liq or stipulation can be granted upon breach of stipulation and after complaint was lodged and certified by the Court.⁹⁹

The provision of *ta'liq* in the Shariah court is under Section 50.¹⁰⁰ Other provisions related to *ta'liq* are mentioned in Section 26 (2)¹⁰¹ and Section 22.¹⁰²

5.2.2.1. The Issue of the Wife's Right to Apply for *Ta'liq* if the Husband Marries Another

According to SIS, there is no explanation with regards to "other *ta'liq*" even though it is referred to in Section 22.¹⁰³

⁹⁹"Carian Soalan Lazim", *Portal Rasmi E-Syariah* website, February 14, 2015, <http://www.esyariah.gov.my/>.

¹⁰⁰ Section 50: Divorce under ta'liq or stipulation:

(1) A married woman may, if entitled to a divorce in pursuance of the terms of a ta'liq certificate made upon a marriage, apply to the Court to declare that such divorce has taken place.

(2) The Court shall examine the application and make an inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to Hukum Syarak, confirm and record the divorce and send one certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

¹⁰¹Section 26 (2): The Registrar shall also, upon payment of the prescribed fees, issue a ta'liq certificate in the prescribed form to each of the parties to the marriage.

¹⁰² Section 22: Entry in Marriage Register:

(1) Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other ta'liq of the marriage in the Marriage Register.

(2) The entry shall be attested to by the parties to the marriage, by the wali, and by two witnesses other than the Registrar, present at the time the marriage is solemnized.

(3) The entry shall then be signed by the Registrar.

¹⁰³ "News Item: : Perbandingan Rang Undang-Undang Keluarga Islam Dengan Akta Undang-Undang Keluarga Islam 1984 (January 2002)", *Sisters In Islam* website, November 2, 2014, <http://www.sistersinislam.org.my/print.php?news.1064>.

Recommended solution by SIS:

SIS suggests that an explanation should be given to the "other *ta'liq*" by providing the following definition: in the new subsection (4): "(4) *“Other ta'liq” may include conditions or additional terms agreed on the choice of the parties of marriage, including the condition that he will not marry another while married to her.*”¹⁰⁴

SIS also recommends that the *ta'liq* form should have the option of additional conditions which includes the right of the wife to apply for *ta'liq* if the husband marries another while they are married.¹⁰⁵

SIS suggests that any “other *ta'liq*” agreement that has been agreed by both husband and wife should be recognised by the law.¹⁰⁶ SIS refers to Sūrah Al-Māidah 5:1 and Sūrah al-Isrā’ 17:34.

They also suggest that the Shariah Court and the government should recognise the right of a woman to include a condition prohibiting her prospective husband from practicing polygamy as long as they remain married as this is not against Islamic Law. In the opinion of SIS, there is no form of coercion as both parties would be aware of the terms of the agreement.¹⁰⁷ In this situation, SIS says that the conditions would be agreed upon by both husband and wife before the marriage is officiated. The husband would willingly agree to a condition where the wife states that she is not willing to be part of a polygamous marriage. SIS states that if the prospective husband does not agree with the condition, he may reject it and thus it is at the discretion of the woman to proceed with the marriage. If the husband agrees to the condition, then it must be recognised by the court.¹⁰⁸

¹⁰⁴ *Ibid.*

¹⁰⁵ “News Item: : Cadangan Pembaharuan Sementara (Interim Reform) Rang Undang-Undang Keluarga Islam (Pindaan) (Wilayah Persekutuan) 2005”, *Sisters In Islam* website, October, 28, 2014, <http://www.sistersinislam.org.my/print.php?news.1074>.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

According to SIS, there is a hadith which states that the Prophet did not allow Ali to marry another.¹⁰⁹ SIS states that the agreement prohibiting a husband from polygamy and the right of a wife to protest and demand a divorce was practiced by Sukayna, the great-granddaughter of the Prophet (daughter of Ḥusayn who was the son of Fāṭimah and ‘Alī). According to SIS, the Ḥanbalī sect also permits such an agreement. SIS further states that it is practiced in some countries such as Egypt, Jordan, Lebanon, Morocco and Sudan where they recognise the right of the wife to include a condition where she has the right to divorce her husband if he chooses to marry another. SIS says that Yemen, Syria and Saudi Arabia allow the woman to include additional such conditions.¹¹⁰

Analysis:

In the opinion of Dr. Raihanah, it is useless to include such a condition prohibiting the husband from marrying another. She suggests that the clause should state that if the husband proceeds to practice polygamy, the wife will have the right to a divorce.¹¹¹

Muslim jurists have different opinions on the issue of including a condition that “prohibits her husband for contracting another marriage in her marriage contract”. The majority of the jurists are in the opinion that such a condition is invalid because polygamy is permitted in the Qur’an and thus, a condition against polygamy in *ta’līq* is in contradiction to the Qur’an.¹¹²

The Ḥanbali school of law is of the opinion that such a condition is valid and does not forbid the husband from marrying another woman; rather the condition allows the wife to request for a divorce through *ta’līq* from the court if the husband does so. It is

¹⁰⁹ *Ibid.*

¹¹⁰ “News Item: : Cadangan Pembaharuan Sementara (Interim Reform) Rang Undang-Undang Keluarga Islam (Pindaan) (Wilayah Persekutuan) 2005”, *Sisters In Islam* website.

¹¹¹ Raihanah Binti Haji Abdullah, (Assoc. Prof. Dr.), in an interview with the writer, April 8, 2014.

¹¹² Raihanah Abdullah, Inserting Stipulation Pertaining to Polygamy in a Marriage Contract in Muslim Countries, Volume 46, No 1 (2008), 154, *Al-Jamiah: Journal of Islamic Studies* website, November 4, 2014, <http://journal.aljamiah.org/index.php/AJ/article/view/95/98>.

based on the principle that every condition of an agreement has to be obeyed by every Muslim.¹¹³

Nevertheless, many jurists agree that it is unacceptable to include conditions that would adversely affect the wife. As an example, a future wife puts in the condition that her husband-to-be has to divorce his existing wife if he wants to marry her. Therefore, such a condition is considered invalid¹¹⁴ as it is unfavourable to the existing wife.

In the Muzakarah of the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia, their 71st meeting held from 22 to 24 November in 2005 discussed the Law of Divorce through *ta'liq* as an option for the wife should the husband has intentions to practice polygamy. Based on the discussion:¹¹⁵

1. Polygamy is permissible in Islam. Therefore, the Muzakarah decided that the proposal of inserting the stipulation of prohibiting the husband to practice polygamy does not need to be implemented.

2. The Muzakarah were also of the view that the existing Islamic Family Law is complete and covers all issues related to Muslim family institution. Therefore, any amendment in the existing legislation for the purpose of adding *ta'liq* as another form for the declaration of divorce is not required.

Based on the discussion above, SIS identifies that among the problems faced by Muslim women in Malaysia is caused by limitations to include *ta'liq* which prohibits their husbands from practicing polygamy. However, it is found that there are opinions that claim women do have the right to include such conditions. Therefore, SIS has offered a solution to the problem which they believe can uphold justice among women. Even though their recommended solution does not contradict with the practice of certain

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ "Hukum Cerai Taklik Pilihan Kepada Isteri Sekiranya Suami Berpoligami", *e-Fatwa* website, Portal Rasmi Fatwa Malaysia, November 3, 2014, <http://www.e-fatwa.gov.my/fatwa-kebangsaan/hukum-cerai-taklik-pilihan-kepada-isteri-sekiranya-suami-berpoligami>.

Muslim societies, the authorities have chosen the opinion of the Shāfiʿī *madhhab* in this matter for several reasons.

5.2.2.2. The Issue of the Evidence for *Taʿlīq*

According to SIS, when the wife demands a divorce through *taʿlīq*, there is no reason for the court to further confer on the matter if the husband really did breach the agreement made. Thus, in this situation, SIS suggests that it should be resolved within the shortest time possible because a divorce through *taʿlīq* should suffice with witnesses testifying the condition has been breached and no other evidence is required. SIS believes that an extended trial is a waste of time and resource. They suggest that the evidence in the form of the oath by the wife and two witnesses should be accepted as sufficient to grant a divorce through *taʿlīq*.¹¹⁶

Recommended solution by SIS:

SIS suggests to include the new provisions of subsection (3) for brief proceedings of divorce through *taʿlīq* as follows: "(3) If there is no other evidence that can be brought to Court, the Court shall ask the wife to take an oath *Sharʿī* for it, and to bring two witnesses who are willing to take such an oath, and if the wife and witnesses make the oath *sharʿī*, then the divorce should be verified and recorded."¹¹⁷

Analysis:

¹¹⁶ "Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah", *Sisters In Islam* website, October 23, 2014, <http://www.sistersinislam.org.my/news.php?item.1066.8>.

¹¹⁷ "News Item: Perbandingan Rang Undang-Undang Keluarga Islam Dengan Akta Undang-Undang Keluarga Islam 1984 (January 2002)", *Sisters In Islam* website, November 2, 2014, <http://www.sistersinislam.org.my/print.php?news.1064>.

According to Dr. Raihanah, this suggestion is related to the aspect of implementation to ensure an efficient divorce proceeding. Therefore, any suggestions relating to implementation can be considered as long as it is not against Islamic teachings. Dr. Raihanah herself has made many suggestions for amendments in the technical aspect of law to further improve the overall system.¹¹⁸

According to Dr Azizah, this suggestion can be considered as it is related to the procedures in granting a divorce. However, she believes the court has included that provision to ensure the seriousness of the matter and to avoid divorce over arbitrary reasons. The court intends to decrease the rate of divorce. The court wants to achieve *maṣlahah* and *maqāṣid al-Sharī'ah*. If divorce is easily granted, can *maṣlahah* and *maqāṣid al-Sharī'ah* be achieved? By giving these rights to the wife, can *maṣlahah* be achieved?¹¹⁹

Dr. Azizah believes that *iqrār* is the way to help the wife in such cases. As an example, when the wife declares that her husband does not provide *naḥqah*, the court should approve her application for a divorce.¹²⁰

¹¹⁸ Raihanah Binti Haji Abdullah, (Assoc. Prof. Dr.), in an interview with the writer, April 8, 2014.

¹¹⁹ Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

¹²⁰ *Ibid.*

5.2.3. PROBLEM SOLVING OF SIS FOR ISSUES REGARDING ISSUES RELATED TO *KHUL'* DIVORCE: AN ANALYSIS FROM AN ISLAMIC THOUGHT PERSPECTIVE

The word *khul'* literally means "to take off clothes" (*khul' al-thawb*). *Khul'* is defined by jurists as a divorce between a husband and wife, with the compensation given to the husband by the wife.¹²¹ *Khul'* is a divorce initiated by the wife.

The provision for *khul'* divorce is mentioned in Section 49:¹²² *Khul'* divorce or *ṭalāq* with compensation.

5.2.3.1. The Issue of the Requirement of the Husband's Consent in *Khul'*

According to SIS, the consequences of Subsection (4) under section 49 with regards to *khul'*, is that there will be unnecessary delay if the husband does not agree to the requested divorce. This causes further hassle and problems to the wife. With regards to divorce through *khul'*, SIS highlights that there are certain disagreements among the scholars. SIS states that some scholars are of the opinion that *khul'* is the right of the wife and does not require the consent of the husband, similar as to how the declaration of *ṭalāq* is the right

¹²¹ Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 295.

¹²² Section 49:¹²² *Khul'* divorce or *cerai tebus talaq*:

(1) Where the husband does not agree to voluntarily pronounce a *talaq*, but the parties agree to a divorce by redemption or *cerai tebus talaq*, the Court shall, after the amount of the payment of *tebus talaq* is agreed upon by the parties, cause the husband to pronounce a divorce by redemption, and such divorce is *ba-in sughra* or irrevocable.

(2) The Court shall record the *cerai tebus talaq* accordingly and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(3) Where the amount of the payment of *tebus talaq* is not agreed upon by the parties, the Court may assess, in accordance with *Hukum Syarak*, the amount, having regard to the status and the means of the parties.

(4) Where the husband does not agree to a divorce by redemption or does not appear before the Court as directed, or where it appears to the Court that there is a reasonable possibility of reconciliation, the Court shall appoint a conciliatory committee as provided in section 47 and that section shall apply accordingly.

(Laws of Malaysia Act 303 Islamic Family Law (Federal Territories) Act 1984 Incorporating all amendments up to 1 January 2006 (t.t.p.: The Commissioner of Law Revision, Malaysia Under the Authority of the Revision of Laws Act 1968 in Collaboration with Percetakan Nasional Malaysia BHD, 2006), 34, <http://www.agc.gov.my/Akta/Vol.%207/Act%20303.pdf>, 7.11.2014)

of the husband. They further mention that this view has been accepted by several Muslim countries, for example through court decisions in Pakistan and legislations in Egypt.¹²³

Although these scholars support *khul'*, SIS argues that it still does not share equal rights to the case of *ṭalāq* for the husband. This is because the wife requires the consent of the court for the dissolution of the marriage. Therefore, SIS states that the husband still has the advantage in the rights of *ṭalāq* even though *khul'* is accepted as the right of the wife.¹²⁴

Recommended solution by SIS:

In this issue, SIS recommends that *khul'* should be recognised as the right of the wife that does not require the consent of the husband.¹²⁵

Analysis:

Khul' is only valid if it fulfils the stipulated pillars. Before further discussion of this topic, it is important to understand these pillars.

According to the majority of Muslim Scholars (*jumhūr*) not including the school of Ḥanafī, there are five pillars of *khul'*: 1. *Al-qābil* or the person who accepts (the person who accepts is the one who must pay *'iwaḍ*); 2. *Al-Mujīb* or the person who answers (the person who answers is the husband or his guardian or his representative); 3. *Al-'iwaḍ* or compensation (that is used as *khul'*); 4. *Al-ma'ud* (the right to have sexual intercourse); and 5. *Al-sīghah* or the declaration of *khul'*.¹²⁶

¹²³ “Ringkasan Memorandum Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah (13-14 Novemver 1999)”, *Sisters In Islam* website, February 14, 2015, <http://www.sistersinislam.org.my/news.php?default.0.1170>.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Wahbah az-Zuhaili, Prof. Dr., *Fiqh Islam*, 422.

One of the pillars of *khul'* is the person who answers, which is the husband, his guardian or his representative.¹²⁷ Thus, this means that *khul'* requires the consent of the husband.

Dr. Azizah disagrees with SIS' suggestion that *khul'* should be recognised as the wife's right that does not necessitate the consent of the husband. It is because divorce *khul'* requires mutual consent.¹²⁸

However, in the situation where the husband does not give his consent for the case of *khul'*, the judge can still grant a divorce through *ṭalāq* and not through *khul'* based on certain considerations where the divorce would be beneficial to the wife.

In Malaysia, there is a legal provision for cases where the husband does not agree to divorce the wife through compensation as stated in Section 49, subsection (4): "*Where the husband does not agree to a divorce by redemption or does not appear before the Court as directed, or where it appears to the Court that there is a reasonable possibility of a reconciliation, the Court shall appoint a conciliatory committee as provided in section 47 and that section shall apply accordingly.*"¹²⁹

Therefore, the recommendation made by SIS in this issue is unnecessary because there is already a provision provided in Section 49, subsection (4) to address the issue where the husband does not agree to a divorce through *khul'*. Furthermore, one of the pillars for *khul'* according to the *Jumhūr* is that the person who approves it is the husband, his representative or his guardian. Thus, the divorce from *khul'* requires the consent of the husband. However, the authorities involved should also continue to improve their systems and procedures to mitigate the technical issue highlighted by SIS.

¹²⁷ *Ibid.*, 423.

¹²⁸ Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

¹²⁹ Laws of Malaysia Act 303 Islamic Family Law (Federal Territories) Act 1984 Incorporating all amendments up to 1 January 2006 (t.t.p.: The Commissioner of Law Revision, Malaysia Under the Authority of the Revision of Laws Act 1968 in Collaboration with Percetakan Nasional Malaysia BHD, 2006), 34, <http://www.agc.gov.my/Akta/Vol.%207/Act%20303.pdf>, 7.11.2014.

SIS claims the appointment of a conciliatory committee as required per Section 47 only further delays the dissolution of the marriage and burdens the wife.

5.2.3.2. The Issue of the Amount of Compensation after *Ṭalāq*

Subsection (3): “Where the amount of the payment of *tebus talaq* is not agreed upon by the parties, the Court may assess, in accordance with *Hukum Sharak*, the amount, having regard to the status and the means of the parties.”¹³⁰

SIS states that the payment of compensation after *ṭalāq* should be referred to the *mahr* given to the wife by the husband. Generally, the *mahr* and the gift given to the wife by the husband cannot be taken back, but in the case of divorce by *khul‘*, it is permitted. In the opinion of SIS, references to the status and financial resources of both parties should be considered in assessing the amount of *mut‘ah* which is *ma‘rūf*, where it is given to the wife by the husband, but it is not necessary in determining the amount of compensation through *khul‘*, which is given to the husband by the wife.¹³¹

Recommended solution by SIS:

SIS suggests that subsection (3) should be replaced with the following: If the amount of compensation for *khul‘* is not agreed upon by both parties, the court may assess the amount by reference to the amount of the payment of dowry and gifts given by the husband to the wife, with the deduction of any reward and benefit that has been given by the wife to the husband.

¹³⁰ The author is unknown, *Laws of Malaysia*, 34.

¹³¹ “Ringkasan Memorandum Pembaharuan Proses Perceraian dan Tuntutan Sampingan Dalam Prosiding Mahkamah Syariah (13-14 Novemver 1999)”, *Sisters In Islam* website, February 14, 2015, <http://www.sistersinislam.org.my/news.php?default.0.1170>.

Analysis:

According to Dr. Azizah, this suggestion is reasonable.¹³² Everything that is given as dowry can be used as a compensation for *khul'*. In the view of the Shāfi'ī school of thought, the compensation for *khul'* can be the total dowry given or a part of it, or any other form of payment, whether a little more than the dowry or substantially more.¹³³

There is no minimum for the amount of compensation in *khul'*. *Khul'* is valid whether the amount of compensation (*'iwad*) is large or small. However, according to a majority of the Muslim scholars, it is recommended that the husband does not receive compensation (*'iwad*) where the amount is more than the dowry that was given to the wife.¹³⁴

Therefore, the recommendation made by SIS for the amount of compensation for *khul'* can be considered as long as it does not contradict with the teachings of the Qur'an and *Sunnah*.

5.2.4. PROBLEM SOLVING OF SIS REGARDING ISSUES RELATED TO FASAKH: AN ANALYSIS FROM AN ISLAMIC THOUGHT PERSPECTIVE

Literally, the word *fasakh* means to cancel (*naqada*) or dissolve (*farraqa*).¹³⁵ *Fasakh* means to annul a marriage and dissolve the relationship between a husband and wife.¹³⁶

¹³² Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

¹³³ Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 297.

¹³⁴ Wahbah az-Zuhaili, *Fiqh Islam*, 423.

¹³⁵ Ibn Manzur, *Lisan al-Arab* (t.tp.: Dar al-Fikr, 1994), 3:45.

¹³⁶ Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 314.

5.2.4.1. The Issue of Extending the Right of *Fasakh* to the Husband

With reference to the 2005 amendment, SIS points out that the changes added the right of the husband to request for *fasakh* without any additional right or protection over the wife. According to SIS, only the wife was eligible to apply for *fasakh* in the 1984 Act. However, after the 2005 amendments were made, a husband can also apply for *fasakh* as stipulated in paragraphs (1) (a), (c), (d), (f), and (i), subparagraph (h) (i), p (ii), (h) (iv) and (h) (v), as well as subsection (2).¹³⁷

According to SIS, it is unjust to extend the right of *fasakh* to the husband while he still retains the unilateral right to divorce through *ṭalāq*. SIS mentions that there are different juristic opinions among the four Sunni schools of law with regards to the right to *fasakh*. As an example, the Ḥanafī sect is of the opinion that only the wife should be given the right to request for *fasakh*, whereas the others are of the opinion that the right should be granted to both the husband and the wife in dire situations, such as a spouse suffering from an infectious disease or physically incapable of fulfilling marital obligations.¹³⁸

SIS believes that this amendment only gives more reasons for the husband to request for *fasakh*. The group believes that the husband can benefit more from *fasakh*. SIS questions is it the ex-husband does not be required to pay for *‘iddah* maintenance and *mut‘ah* to his former wife in the case of divorce through *fasakh*? SIS questions why whenever there are disagreements among scholars, there is a tendency to accept opinions

¹³⁷ “News Item: : Rang Undang-Undang Keluarga Islam (Wilayah-Wilayah Persekutuan) (Pindaan) 2005: Ulasan Dan Syor”, *Sisters In Islam* website, October 27, 2014, <http://www.sistersinislam.org.my/print.php?news.1055>.

¹³⁸ “News Item: : Further Discrimination Against Muslim Women under the Islamic Family Law (Federal Territories) (Amendment) Bill 2005 through selective gender neutral provisions”, *Sisters In Islam* website, October 27, 2014, <http://www.sistersinislam.org.my/print.php?news.1049>.

that favour and benefit the husband more. Conversely, when there are disagreements among scholars about other opinions that may benefit the wife (e.g. the right to *ta'liq* and *tafwid* divorce), opinion that do benefit the wife are pushed aside or are unacceptable.¹³⁹

Recommended solution by SIS:

SIS states that if the pronouncement of *ṭalāq* by the husband is recognised, then *ismā'* should be implemented.¹⁴⁰ Alternatively, SIS believes that if the right for a husband to pronounce *ṭalāq* without permission is still recognised, this right should be extended to the wife, too – this can be done through the adoption of the laws from the Ḥanbalī school of thought that gives women this right through *ismā'*.¹⁴¹

Analysis:

*The husband can delegate his right to divorce his wife in the following way:*¹⁴²

Tafwid, Tawkil,¹⁴³ or Tamlik¹⁴⁴

Tafwid: permanent delegation. Using this way the husband leaves the matter of divorce at his wife's disposal.¹⁴⁵ Baillie defines talak-e-tafwid (delegated divorce): "As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party". That is, the husband may delegate the power of divorce to his wife. He may do so at the time of marriage contract or at any time when he so likes.¹⁴⁶ For example, he says to her one of the following, "Go through with the divorce by yourself", or "I give you the right to divorce", or "You are free, if you want it". From this moment on a woman can decide on divorce by herself. The man will not be able to retract his words. The woman, in this case, cannot free her husband saying, "You are free". To be divorced from him she has to say, "I free myself".¹⁴⁷

¹³⁹ "Memo: Kesaksamaan Dalam Islam", *Sisters In Islam* website, October 24, 2014, <http://www.sistersinislam.org.my/news.php?item.982.42>.

¹⁴⁰ "Memo: Kesaksamaan Dalam Islam", *Sisters In Islam* website, October 24, 2014, <http://www.sistersinislam.org.my/news.php?item.982.42>.

¹⁴¹ "Memo: Kesaksamaan Dalam Islam", *Sisters In Islam* website, October 24, 2014, <http://www.sistersinislam.org.my/news.php?item.982.42>.

¹⁴² Muhammad Koz-koz, "Divorce on the wife's initiative," in *Love & Sex in Islam*, 180-181.

¹⁴³ In this case of tawkil the husband can appoint his wife at his trustee for the divorce. This way of delegation of the right to divorce differs from the first one. Here the husband can deprive his wife at anytime of the right to act as his trustee.

¹⁴⁴ Tamlik is the delegation of the right to divorce to the wife by third party or via the letter. From the moment of receiving this, the wife will get the right to divorce at once. Tamlik is also used if there is a certain reason for the divorce, which is specified by the husband.

¹⁴⁵ Muhammad Koz-koz, "Divorce on the wife's initiative," in *Love & Sex in Islam*, 180.

¹⁴⁶ Syed Khalid Rashid, *Muslim Law* (Lucknow: Eastern Book Company, 1979), 88-89.

¹⁴⁷ Muhammad Koz-koz, "Divorce on the wife's initiative," in *Love & Sex in Islam*, 180.

Since the right of divorce belongs to the husband, he may delegate the power of divorce to his wife. However, the Zāhiriyyah school of thought has a different opinion on this issue.¹⁴⁸

In the opinion of Dr. Azizah, the practice of *ismā'* can be considered by the government if they intend to make it easier for the wife to divorce her husband, especially when the husband refuses to divorce her. This *ṭalāq* is called *ṭalāq tafwiḍ* in *ḥukm Shar'*. However, if the court wants to allow the practice of *ṭalāq tafwiḍ*, the court has to review whether the practice of *ṭalāq tafwiḍ* is necessary or otherwise in Malaysia. They also need to ensure that its practice can benefit and is impartial to both husband and wife. It has to look at the *maqāṣid* Shariah on the reason of granting the right of *ṭalāq* to the husband. One of the reasons is that women are not physiologically equal to men. When it comes to giving a testimony, two women would represent one man. This is a step of precaution as a woman's testimony may be prone to physiological effects of menstruation or pregnancy. This is one of the *maṣlahah* of giving the right of *ṭalāq* to men.¹⁴⁹

As highlighted by Dr. Azizah, Bangladesh is an example of a country that practices *ismā'*, where the husband is given the power to delegate the right of *ṭalāq* to his wife after the *'aqd al-nikāh*. Therefore, the wife is able to declare *ṭalāq* at any time she feels necessary, and the request for divorce will be granted by the court. This is the concept of delegation, where the husband is able to delegate his rights to anyone he wishes. As an example, the husband is also permitted to request a representative to declare *ṭalāq* from his wife on his behalf. *Ṭalāq tafwiḍ* is based on this concept of delegation.

¹⁴⁸ Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 281.

¹⁴⁹ Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

There are discussions relating to *ṭalāq tafwīḍ* by the *fuqahā'*. This recommendation does not contradict with the teachings of Islam.¹⁵⁰

According to Dr. Azizah, this recommendation is reasonable; however the court or state assembly has to conduct proper research on whether the situation in our country is at the level where the power of *ṭalāq* is necessary to be delegated to the wife. They have to analyse the rate of divorce among married couples, and the rate of the number of cases where the husband does not agree to divorce the wife. If they find that the situation requires this delegation of pronouncing *ṭalāq* to women, the *ṭalāq tafwīḍ* should be permitted. According to Dr. Azizah, if the court does allow this, it should not be made compulsory as the current procedures should take precedence.¹⁵¹

However, according to Dr. Abdul Basir, the wife can request for *ṭalāq tafwīḍ* in the Shariah court if she wants. In his opinion, SIS does not really understand about the law.¹⁵²

SIS does not need to be concerned on the rights of *fasakh* being extended to men. As mentioned by Dr. Azizah, divorce through *fasakh* covers specific reasons. In earlier provisions, the husband can request for a divorce through *fasakh* if she is unable to have sexual intercourse, and this is an exceptional case. However, the new amendments to the provision of *fasakh* mentions the reasons permitted for a man or woman to be granted a divorce.¹⁵³ According to Dr. Azizah, giving equal rights to divorce through *fasakh* for both men and women is not a cause for concern as it does not contradict with *Shara'*. If a wife is divorced from her husband through *fasakh*, she can receive *mut'ah*, but not *naḥqah 'iddah*.¹⁵⁴

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Abdul Basir bin Mohamad (Professor, Department of Shariah, Faculty of Islamic Studies, Universiti Kebangsaan Malaysia), in an interview with the writer, February 2nd, 2015.

¹⁵³ Azizah Mohammad (Assoc. Prof. Dr.), in an interview with the writer, April 16, 2014.

¹⁵⁴ *Ibid.*

However, if the husband does not intend to provide his wife with *naḥqah ‘iddah*, *ḥasakh* is not the only choice he has. He can declare *ṭalāq* three times, and the wife would not be entitled to *naḥqah ‘iddah*. Therefore, the claim made by SIS where the right of *ḥasakh* being extended to men is to offer additional benefits to them is untrue. *ḥasakh* is not the only form of divorce where provision of sustenance is not obligatory.

Dr. Azizah mentions that obtaining the approval for a divorce through *ḥasakh* is not an easy procedure. Even though the husband is given the right to request for a divorce through *ḥasakh*, it is actually easier to get an approval for *ṭalāq*. In addition to this, a woman who is divorced by her husband through *ḥasakh* can request for *naḥqah ‘iddah* under the proviso section. Even though the application is not declared under the provision, it is part of *ḥukm Shar‘*, thus the wife can request for *naḥqah ‘iddah* through it. Based on the Ḥanafī *madhhab*, the wife is entitled to *naḥqah ‘iddah* even through *ḥasakh* or after the third *ṭalāq* is declared. According to Dr. Azizah, the court implements the provisions of Shāfi‘ī *madhhab* in this matter.¹⁵⁵

Dr. Azizah also stresses on reviewing the evidence (*dalīl*) that is referred to when selecting opinions of any mazhab. The evidence (*dalīl*) that is referred to in SIS’ arguments must be backed with strong evidence and proof. Based on the Shāfi‘ī *madhhab*, a couple that has undergone divorce through *ḥasakh* or *ṭalāq* (after three times) is considered free from any ties between one another. Thus the husband does not have the right to *ruj‘*.¹⁵⁶

As highlighted by Dr. Azizah, the Muslim scholars who had reviewed this matter selected the opinions of the Shāfi‘ī *madhhab* as they found the *dalīl* and arguments presented were sound and valid. It is not a gender-bias decision, thus any claims of it being so is a misrepresentation. In addition to this, the wife is not entitled to the *naḥqah*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

'iddah (in the divorce through *fasakh*), but the responsibility of providing *nafqah* would be shifted to the government. Hence, the government that has validated the provision must be responsible in ensuring that this is followed through. As an example, the divorced wife would have the choice of making the necessary applications at a welfare organisation backed by the government.

There are many different angles to look into this matter; therefore the relevant authorities must make decisions based on the prevailing opinions that best suit the current situation.¹⁵⁷

After reviewing the present circumstances, the available *dalil* and opinions of differing parties, *ṭalāq tafwiḍ* is a valid option. However, SIS must understand that a man can also request for divorce through *fasakh* as it does not contradict with *Shar'*.

5.2.4.2. The Issue of *Mut'ah* and *Nafqah 'Iddah*

SIS questioned the consequences on women after she is divorced by her husband through *fasakh*. They challenged that the extension of the right of *fasakh* gives an additional advantage to the husband as he is not obliged to provide *'iddah* and *mut'ah* to his former wife.¹⁵⁸ According to SIS, decisions made where there are differences in opinions tend to benefit the husband, and in some cases provide even more benefits to the men. They claimed that this is in contrast to any suggestions or opinions that may benefit the wife (such as *ṭalāq tafwiḍ*), where it is completely ignored or rejected.¹⁵⁹

¹⁵⁷ *Ibid.*

¹⁵⁸ “News Item: : Further Discrimination Against Muslim Women under the Islamic Family Law (Federal Territories) (Amendment) Bill 2005 through selective gender neutral provisions”, *Sisters In Islam* website, October 27, 2014, <http://www.sistersinislam.org.my/print.php?news.1049>

¹⁵⁹ *Ibid.*

Recommended Solution by SIS:

SIS has brought up their concern that the provisions of Islamic family law in Malaysia do not clearly state the wife's entitlement to receive *nafqah* after she is divorced by her husband through *fasakh*. They suggest that the provisions be amended in order to stipulate the provision of *nafqah* in the case of *fasakh*. They are concerned that the husband would not provide *nafqah 'iddah* and *mut'ah* through *fasakh* as these are requirements under divorce through *ṭalāq*.¹⁶⁰

SIS raises these concerns as there are currently no provisions for the entitlement of *nafqah 'iddah* or *mut'ah* to the wife should the husband divorce her through *fasakh*. SIS claims that proposals made for the entitlement of *mut'ah* are being ignored even when they are recommended by a number of women organisations.¹⁶¹

Analysis:

In discussing *mut'ah*, SIS must first fully comprehend the meaning of it.

Muta'ah originates from the Arabic word al-Mataa' meaning things which may delight the heart and can be put to good use. From Syarak point of view it means granting of a husband's assets which is compulsory (*wajib*) to the wife after divorce under certain terms and conditions." "According to the definition by the Islamic Family Laws Act (Wilayah Persekutuan) 1984, "muta'ah" refers to the gift payment which is given to a divorced wife in accordance to Islamic Laws".¹⁶²

They must strive to understand that it is compulsory for the man to recompense with *mut'ah* should the divorce be initiated by him. However, *mut'ah* is not compulsory if the divorce is initiated by the wife.¹⁶³

¹⁶⁰ "News Item: : Letter to Utusan Malaysia: Responding to Datuk Dr Mashitah Ibrahim", *Sisters In Islam* website, October 27, 2014, <http://www.sistersinislam.org.my/print.php?news.493>.

¹⁶¹ *Ibid.*

¹⁶² "Muta'ah (A Gift for Ex-Wife after Divorce)", *Jabatan Kemajuan Islam Malaysia* website, October 28, 2014, http://www.islam.gov.my/sites/default/files/mutaah_0.pdf.

¹⁶³ H. Sulaiman Rasyid, *Fiqh Islam (Hukum Fiqh Lengkap)* (Kuala Lumpur: Dewan Pustaka Fajar, 1988), 428.

Based on the reasons highlighted above, SIS does not need to be concerned with *mut'ah* in the case of *fasakh* as it is compulsory when it is initiated by the husband. In addition to this, *nafqah 'iddah* can also be requested by the wife should she be divorced through *fasakh* by the husband through a proviso. In this case, the former wife can apply through the court the amount of *mut'ah* that she believes she is entitled to. The judge would look into all angles in determining the amount of *mut'ah* that is requested by the former wife. Hence SIS' claims that there are gender discriminations in the provision of *fasakh* may come from their lack of understanding and knowledge with regards to the matter. They must strive to understand and refer to the al-Qur'an and *Sunnah*. They must also refer to those who are specialists in this field.

5.2.5. CONCLUSION

Based on the analysis of the issue, the researcher found that SIS does not apply the principles of Qur'anic hermeneutics when solving what they claim are problems related to *ṭalāq*, *ta'liq*, *khul'* and *fasakh*. The group often comes up with solutions without referring to any Qur'anic verses or the Hadith of the Prophet. When dealing with these issues, SIS also seems to favour opinions from *madhhabs* other than *Jumhūr*. Instead, they choose opinions that they believe can benefit women. That 'benefit for women' is interpreted based on their own mind. However, in these issues, if SIS offers solutions based on opinions from other *madhhabs* within the *Ahl al-Sunnah wa al-Jamā'ah*, the solutions can be considered. In providing solutions and suggestion, SIS must refer to *maqāṣid* Shariah. All solutions and recommendations must be parallel with the Qur'an and Hadith

Ibid.