

Selected Issues in Family Law

Editor
Nora A. Hak



IIUM PRESS
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

SELECTED ISSUES IN FAMILY LAW

EDITED BY

NORA A. HAK



HUM Press

Published by:

IUM Press
International Islamic University Malaysia

First Edition 2011
©IUM Press, IUM

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without any prior written permission of the publisher.

Perpustakaan Negara Malaysia Cataloguing-in-Publication Data

Selected Issues in Family Law/Nora Abdul Hak
ISBN: 978967-418-226-7

Member of Majlis Penerbitan Ilmiah Malaysian – MAPIM (Malaysian Scholarly Publishing Council)

Printed by

IUM PRINTING SDN. BHD.
No. 1, Jalan Industri Batu Caves 1/3
Taman Perindustrian Batu Caves
Batu Caves Centre Point
68100 Batu Caves
Selangor Darul Ehsan

TABLE OF CONTENTS

CHAPTER ONE

Definition of Marriage: Is 'Same Sex Marriage' A Marriage? Hanna Ambaras Khan and Nora Abdul Hak

Introduction	15
Definition of Marriage	15
The Law in Australia	18
The Law in the United States	21
The Law in Malaysia.....	29
Conclusion	34

CHAPTER TWO

Women in Shariah: With Respect to Polygamy and Divorce Murni Wan Mohd Nor and Nora Abdul Hak

Introduction	37
Women According to Quran and Sunnah	38
Polygamy in Islam.....	42
Divorce in Islam	46
Women in Other Civilizations, Religions, Countries and Cultures	51
Conclusion	53

CHAPTER THREE

Polygamy Issues in Muslim Countries: The Legal Provisions and Practices Ameera A. Abdul Malek and Nora Abdul Hak

Introduction	55
Forms of Marriage.....	57
Polygamy in Various Religions.....	58
Islam.....	58

Judaism.....	60
Christianity	61
Hinduism	63
Buddhism.....	63
Legal Provisions in Selected Muslim Countries....	64
Turkey	65
Tunisia	65
Egypt	66
Syria	67
Morocco.....	67
Iraq	68
Somalia.....	69
Indonesia	69
Malaysia	70
Polygamy in Contemporary Muslim Societies.....	72
Polygamy in Non-Muslim Societies	74
Future Reform and Conclusion.....	76

CHAPTER FOUR

Issues in Eloped Marriage (Kawin Lari) Among Muslims in Malaysia

Noraini Md. Hashim

Introduction.....	79
Definition	81
Background of Kawin Lari	82
Types of Marriage in Islam	86
‘Urfī Marriage	87
Sirrī Marriage	88
Issues Pertaining to Kawin Lari.....	89
Wali’s consent	89
Wali of marriage according to priority.....	92
Wali mujbir (guardian with power of compulsion).....	92
Right of the woman in choosing her husband to be	94
Wali ‘Adhal (Wali who refuses to be a wali)	95
Juristic views on wali ‘adhal	98
Wali Hākim	100
Two Marhalah	102
The Issue of Kul`u/Equality of Status	105
Conclusion	107

CHAPTER FIVE

Resolution of Family Disputes: Mediation Vs Litigation

Nur Ezan Rahmat, Nora Abdul Hak, Nurdianawati Irwani Abdullah and
Noraini Md. Hashim

Introduction.....	111
Mediation and Its Advantages	112
The Mediator(s)	114
Principles and Application of Mediation	116
Conclusion	119

CHAPTER SIX

Family Mediation and Other Dispute Resolution Processes Distinguished

Nora Abdul Hak

Introduction.....	121
Family Mediation.....	121
Litigation.....	123
Conciliation	125
Counselling/therapy	126
Arbitration	128
Mediation-arbitration	129

CHAPTER SEVEN

Alternative Dispute Resolution in Pakistan in Settling Family Disputes

Mian Kauthar Hussain and Nora Abdul Hak

Introduction.....	131
Domestic (Pakistani) Laws and Rules.....	132
West Pakistan Family Court Act 1964.....	132
Muslim Family Law Ordinance 1961	133
The Small Claims and Minor Offences Courts Ordinance of 2002	133
SBNP Local Government Ordinance of 2001.....	134

Arbitration Act 1940 (X of 1940)	134
View of the superior courts of Pakistan	135
Hakam and Tahkim in Islamic Law.....	136
Occasion of revelation (<i>Sabab al-Nuzul</i>)	136
Appointment.....	137
Objective of Hakam.....	137
Legal Power of Hakam	138
Observation.....	140
Requirements of Qualification and Procedure... 140	
Prerequisites of Tahkim	141
Conclusion and Suggestions	142

CHAPTER EIGHT

Establishment of a Unified Family Court in Malaysia: Implication on the National Family Policy

‘Ain Husna Mohd. Arshad and Roslina Che Soh @Yusoff

Introduction	145
Family Court Defined	147
Overview of the Administration of Family Law. 147	
The Civil Courts	147
The Shariah Courts	149
The Need for a Unified Family Court.....	150
Family Courts in Other Countries	154
Family Court of Singapore.....	154
Family Court of Australia	157
Family Court of Egypt.....	160
Conclusion.....	162

CHAPTER NINE

The Role of Family Support Division (BSK) in Helping Muslims Single Parent in Malaysia: An Overview

Nora Abdul Hak, Najibah Mohd Zin, Roslina Che Soh and Noraini Md.
Hashim

Introduction	165
Child Support Scheme in other jurisdictions.....	166

Background to the Establishment of BSK.....	168
The Aims of BSK	169
Role and Function of BSK	169
BSK Organization.....	170
Performance of BSK so far	171
Some Emerging Issues.....	172
Conclusion	173

CHAPTER TEN

The Impact of CEDAW on Muslims Marriage and Family: The Malaysian Perspective

Nora Abdul Hak

Introduction.....	175
An Overview of CEDAW.....	176
Marriage and Family	180
CEDAW and National Family Policy	185
Conclusion	186

CHAPTER ELEVEN

Pre-Marital Gift and Its Position after Divorce

Norliah Ibrahim

Introduction.....	187
Provision Relating to a Matrimonial Property ...	188
Pre-marital Gift	190
Pre-marital Gift after Divorce	191
Conclusion	195

CHAPTER 9

THE ROLE OF FAMILY SUPPORT DIVISION (BSK) IN HELPING MUSLIMS SINGLE PARENT IN MALAYSIA: AN OVERVIEW

By

Nora Abdul Hak, Najibah Mohd Zin, Roslina Che Soh and Noraini Md. Hashim

Introduction

In Malaysia, it is reported that in the year 2000 there were 128,810 single parent families, and the number has been increasing. Past research had found that single parent families and their children experienced more difficulties in the context of family life and well-being than two-parent families (Anjli Panalal K. Doshi, 2005). From the legal perspective, one of the problems of single parents is the difficulty of enforcement of the maintenance (*nafkah*) order granted by the courts upon divorce. Recognizing this, the Government in 2008, decided to establish a new division known as the Family Support Division (BSK) under the Department of Shariah Judiciary of Malaysia. This division is to handle matters related to the enforcement of the maintenance orders issued by the Shariah courts against ex-husbands/fathers. Alimony advances will be made by the division to help the divorcees and their children whose ex-spouses or fathers failed to provide maintenance, or comply with the Shariah court's order. In principle, this function is similar to that of the Child Support Agency
