

**ACCESS TO JUSTICE:
WOMEN'S EXPERIENCES IN PENANG SYARIAH
COURTS**

by

SHARIZA KAMARUDIN

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LIST OF ABBREVIATIONS

IFL	Islamic Family Law
IFLA	Islamic Family Law Act
IFLPE	Islamic Family Law (Penang) Enactment
LAB / BBG	Legal Aid Bureau / Biro Bantuan Guaman
LAC	Legal Aid Centre
WCC	Women's Centre for Change
SIS	Sisters in Islam
NGO	Non-governmental Organisation

AKSES KEPADA KEADILAN: PENGALAMAN WANITA DI MAHKAMAH SYARIAH PULAU PINANG

ABSTRAK

Kajian ini meninjau dan menganalisa pengalaman wanita di Mahkamah Syariah di Pulau Pinang yang merangkumi skop pindaan terkini di bawah Enakmen Keluarga Islam Pulau Pinang 2004 (IFLE 2004). Kajian ini bertujuan mengkaji dan mengenalpasti kapasiti wanita untuk mendapatkan remedi melalui mahkamah dan kapasiti Mahkamah Syariah di Pulau Pinang dalam memberikan remedi kepada wanita dengan menepati hak-hak wanita untuk akses kepada keadilan. Pada masa yang sama, kajian ini memberi perhatian kepada hubungan antara dapatan hasil kajian dengan kandungan IFLE 2004 untuk menganalisa preskripsi keadilan untuk wanita di mahkamah Syariah dengan lebih lanjut. Kajian ini menggunakan metod kualitatif: temubual mendalam secara individu dengan 30 responden (melalui teknik *snowballing*) yang berpengalaman dengan Mahkamah Syariah Pulau Pinang di antara tahun 2004 hingga 2011. Kajian ini menganalisa pengalaman wanita dengan menggunakan rangkakerja Akses kepada Keadilan oleh United Nation Development Programme (UNDP) yang mentakrifkan akses kepada keadilan dalam satu matriks yang mengandungi tiga kumpulan utama iaitu: Perlindungan Normatif (remedi sediada), kapasiti untuk menggunakan remedi (pemeriksaan undang-undang), dan kapasiti untuk memberikan remedi (institusi). Kajian ini mendapati bahawa walaupun ada perlindungan normatif di bawah IFLE 2004 untuk wanita Muslim, peruntukan poligami dan perceraian adalah menjadi punca ketidakadilan dan penderitaan wanita disebabkan oleh ketidakcekapan undang-undang substantif yang bias gender. Hasil dari kajian ini menunjukkan rangkaian kekangan yang terpaksa dihadapi oleh wanita di Mahkamah Syariah untuk mendapatkan keadilan, di mana ia

menunjukkan kemungkinan bahawa mahkamah bersifat tidak tegas terhadap para suami dan bekas suami sehingga menyebabkan hak-hak wanita dan anak-anak mereka di bawah undang-undang tidak dapat dinikmati. Ketidaktegasan ini mewujudkan kelemahan dalam keputusan perundangan untuk perlaksanaan dan penguatkuasaan dan ia mungkin berpunca dari kurangnya kesedaran gender di Mahkamah Syariah.

ACCESS TO JUSTICE: WOMEN'S EXPERIENCES IN PENANG SYARIAH COURTS

ABSTRACT

This study explores and analyses the experiences of women in Syariah courts in Penang within the scope of the latest amendment in 2004 of the Penang Islamic Family Enactment (IFLE 2004). It attempts to examine and identify women's capacities to seek remedies and the capacity of the Syariah courts in Penang to provide judicial remedies in a manner that is consistent with the rights of women's to access justice. At the same time, the study draws the connection of the findings to the content of the IFLE 2004 to further assess the prescription of justice for women in the Muslim courts. The study uses a qualitative method: in-depth one-to-one interviews were conducted with thirty (30) identified respondents (through snowballing technique) who have experienced being litigants in the Penang Syariah court from 2004 to 2011. The study analyses the experiences of the women by adopting the United Nations Development Programme (UNDP) Access to Justice Framework, which defines access to justice within a matrix of three items: normative protection (existence of remedies), capacity to seek remedies (legal empowerment), and capacity to provide remedies (institutions). This study finds that although there exists normative protection for Muslim women in IFLE, provisions related to polygamy and *talaq* divorces are a constant source of injustice and distress for women and it stems from the inadequacy in the substantive law (as provided in the IFLE), which uses gender biased and gender neutral language. The findings highlight a series of barriers to justice that women encounter in the Syariah court, and indicate a possibility that the courts are lenient on Muslim husbands and ex-husbands to the point that divorced Muslim women and their children lose their legal entitlements.

The leniency creates a lack of implementation and enforcement of judicial decisions and could be due to a poor level of gender-awareness in the Syariah courts.

CHAPTER ONE

INTRODUCTION

This chapter provides the background of this study and includes the objectives and significance of this study, definitions of pertinent terms, scope of problem, and the organisation of this thesis.

1.1 Access to justice: law, justice system and women's experiences in Malaysia

Justice is about fairness and equity, that the end results should give due rights to all parties. One fundamental duality in human society, however, has the potential to upset the scales of justice. The construction of society, languages, thoughts and philosophies, religion and family is said to be based on the assumption that the world is male (Beauvoir, 1989).

“She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the Other (Beauvoir, 1989).”

Reflecting on this phenomenon in relation to law, Barnett (1998) opines that traditional law is male-made and women are at worst oppressed and at best ignored. Gender justice touches on the aspect of inequality between women and men in all aspect of life including in law and accessibility to get rights. In general, women's position in society is still secondary compared to men. Therefore lack of gender justice under the law means that women are not protected and their rights are not given to them accordingly.

Scholars and researchers, especially those in the field of feminist jurisprudence, have identified three main areas that affect women's access to justice. Firstly, laws which are gender-biased or that use gender neutral-language but have the effects of discriminating against women; secondly, institutions or mechanisms of the law which are not gender-sensitive; and finally, cultures and societies that adhere to patriarchy (Barlett, 1991; Barnett, 1998).

Worldwide, studies on access to justice have been conducted in many countries, which focus on women and the legal system. Bandi (2007) studied the Middle Eastern and North African countries. The findings were that for societal groups such as women and the poor, there is a lack of enforcement and implementation of various provisions of the law; there is a need for more gender awareness among those who work in justice agencies; men have easier access to justice than women due to their status in society.

Malaysia is governed by a plural legal system consisting of the use of the common law system inherited from the British colonial period for most matters; the application of the Syariah or Islamic law for Muslims for specified matters and the use of customary laws, also in specified matters, for natives of Sabah and Sarawak. The court systems in Malaysia reflect this plurality. Generally, justice for Malaysians is accessed through constitutionally created courts and courts created under the Courts of Judicature Act 1964 and the Subordinate Courts Act 1948. Justice for Muslims for matters included in the Federal Constitution¹ is administered at State level in judicial bodies called the Syariah courts. Customary law cases of natives of Sabah and Sarawak are litigated in Customary Courts².

¹ See Federal Constitution, Ninth Schedule, State List, para 1

² Customary Courts follows the Native Laws of people in Sabah and Sarawak

Not much research has focused on women as users of Islamic family law in Malaysia. There had been only two important research that use the feminist method of asking the women questions by Women's Centre for Change (WCC) research in 1996 and Sisters in Islam (SIS) research in 1999. The findings from both research are similar. Women do have difficulty in accessing the Syariah legal system. Firstly, the law is biased and favours men. Secondly, there is a lack of implementation and enforcement by institutions of law that could help women find justice and equity. Finally, in the patriarchal culture of Muslim families, Muslim women are discriminated, marginalised and lack knowledge of their rights. The women feel inadequate about moving forward to ask for their rights and get access to courts because of this patriarchal system (SIS, 1999, Maznah, 2000).

Since 1988, the Malaysian Constitution provides for the exclusive jurisdiction of Syariah courts in judicial matters of marriage and Muslim families. The administration of Syariah law and the courts is further exclusively enforced separately by the thirteen States and the Federal Territories. Thus, there are 14 sets of Islamic law regulating Muslim family issues and the administration of the Syariah courts. There were a few attempts in the early 1970s to reform the 14 sets of Islamic family law (IFL) in a uniformed way (Ahmad Ibrahim, 1997). In 1984, the Islamic Family Law Federal Territories Act (IFLA) 1984, which reform previous legislations on Islamic family law of the Federal Territories, was enacted and informally became the model for the amendments of corresponding legislations in a few other states (Zainah, 2007). The IFLA 1984 notably improved women's rights and security under the law especially on the issues of polygamy, divorce and maintenance. For example, under the IFLA 1984, polygamous marriages (Section 23) and divorces (Section 124) must take place in court. Further, a married Muslim man intending to take another

wife must meet five stringent conditions before receiving judicial permission (Section 23 (a) (b) (c) (d) and (e)).

In 1994, the IFLA was amended, resulting in changes that include provisions that may be seen as biased towards women (SIS, 1997). For example, the amendment recognised the validity of a husband's pronouncement of divorce by unilateral declaration (*talaq*) outside of court (Section 55A). It allowed for the registration of polygamous marriages that had taken place without prior judicial permission, and removed some of the conditions required for court approval of polygamous marriages (Section 23 (1), Section 23 (a)). Such amendments have complicated issues such as post-divorce maintenance, and custody and guardianship of children, since a husband could divorce his wife outside of court and have another marriage registered later, thereby separating the custody and maintenance issues from the divorce proceedings.

Attempts to uniform Islamic family law in Malaysia had failed, and more discriminatory provisions on women were introduced. In 2005, an amendment to the IFLA in the form of the Islamic Family Law (Federal Territories) 2005 Bill was tabled in Parliament. This version may be argued to further contain gender biased provisions and a few provisions use gender-neutral language. An example of the gender neutral language used in the proposed IFLA 2005 is on *harta sepencarian*, where either spouse can claim a share in the properties acquired by the other spouse during the marriage (Section 107A). The new subsection 23(9) allows "any party" to claim *harta sepencarian* before a polygamous marriage is contracted. The right to divorce by *fasakh* is extended to men as well (subsection 52(1) (a), (c), (d), (f), and (i), and subparagraphs (h)(i), h(ii), (h)(iv) and (h)(v), and subsection (2)).

But at the same time he is still allowed under the law to unilaterally divorce his wife by *talaq*. The new section 107A allows the court to grant an injunction preventing the disposal of property by a wife or former wife, to protect the husband and former husband's financial claims. And at the same time, he still retains his rights to greater inheritance shares. These amendments are discussed in greater detail in Chapter Two.

Women's groups in Malaysia have been critical of the development of Islamic Family Law legislation since the 1994 amendment due to the increasingly biased change in the law. Coalitions of women groups called Joint Action Group for Gender Equality (JAG)³ led by Sisters in Islam (SIS)⁴, have written several memorandum to the government on the implications of the current IFL in an effort to bring law reform which addresses areas of particular concern providing for legal discrimination against Muslim women including the gender specific provisions on polygamy, divorce and guardianship. Discrimination against Muslim women also stems from the existence of selective gender neutral provisions, for instance, the provision on the distribution of *harta sepencarian*, where the gender neutral language is similar to the provisions on matrimonial assets in the Law Reform (Marriage and Divorce) Act 1976 for non-Muslims. However, the effect is discriminatory to Muslim women because, unlike the Law Reform Act, the other provisions in the Islamic family law are not gender neutral. SIS and other women NGOs have submitted several memoranda on discrimination against Muslim women.⁵ Despite these amendments, between 1994 and 2003, no changes were made

³ Joint Action Group for Gender Equality consists of All Women's Action Society (AWAM), Women's Aid Organisation (WAO), Women's Centre for Change (formerly known as Women's Crisis Centre (WCC)), Sisters in Islam (SIS), Women's Development Collective (WDC)

⁴ SIS is a group of professional Muslim women in Malaysia committed to promoting the rights of Muslim women within the framework of Islam. The organisation was registered in 1991 under the name SIS Forum (Malaysia) Berhad.

⁵ Memorandum on Reform of the Islamic Family Laws on Polygamy in 1996, Memorandum on Reform of the Islamic Family Laws and Justice in the Syariah System in 1997 Memorandum

to the law. In 2003, the State of Selangor introduced the first set of amendments through its Islamic Family Law Bill 2003. The states that later followed suit were Johor (2003), Negeri Sembilan (2003), Penang (2004), Perak (2004) and Sabah (2004).

The Federal Territories presented its amendments in Parliament in 2005. Despite women's concerns regarding gender bias and selective gender neutrality in Islamic family law that have been put forward in the Selangor Enactment 2003⁶, the Federal Territories amendment bill that was tabled and passed in Parliament in 2005 to amend the IFL 1984 contains substantially the same provisions as the Selangor Enactment 2003. Although the Bill was passed, various concerns were expressed by several women senators⁷. Among them, the honourable Senator Datuk Hajah Dayang Mahani binti Tun Pg. Ahmad Raffae and the honourable Senator Dato' Dr Norraesah binti Mohamed had drawn public attention. The Cabinet decided not to gazette the Islamic Family Law (Federal Territories) (Amendment) Act 2005 pending to be reviewed by the Attorney-General in consultation with the Syariah Committee.⁸

The Penang IFLE 2004 was gazetted in November 2005 and enforced accordingly. Since it contained many of the provisions that are similar to the ones in the Selangor and Federal Territories legislations, it arguably consisted of many

Pembaharuan Proses Perceraian dan Tuntutan Sampingan dalam Prosiding Mahkamah Syariah in 2000 and Memorandum Perbandingan Rang Undang-Undang Keluarga Islam dengan Akta Undang-Undang Keluarga Islam in 2002.

⁶ Sisters in Islam has submitted a "Memorandum Perbandingan Rang Undang-Undang Keluarga Islam Selangor 2003 dengan Enakmen Undang-Undang Keluarga Islam 1984: Ulasan dan Syor", to the Selangor Government's State Legal Adviser and the Director of the Selangor Islamic Religious Affairs Department (JAIS) in 2003.

⁷ The debate is reported in *Penyata Rasmi Dewan Negara* (Official Report of Dewan Negara), 22 December 2005 (DN. 22.12.2005), 108-172.

⁸ The Syariah Committee consists of the government department on Islamic affairs as well as several non-governmental organizations

provisions that may be gender-biased, as claimed by women's groups about the 2005 FT Act.

This study is hoped to shed more light on these issues from the women's perspectives. The understanding of women's lived realities is important in determining whether the system has successfully catered to the needs of women and women's access to justice. Delving into the different concepts of equality based on women's experiences is important.

By using in-depth interviews to probe deeply into the lived experiences of the women in relation to their use of the Syariah judicial system, it is possible to identify areas of improvement previously overlooked or to cognise flaws in the law or the legal system which policymakers, legal and governmental agencies had not realise could impede women's access to justice. Surveying the women with preset questions and answers could limit the responses and reduce the results' ability to point out conclusions not foreseeable by the researcher.

The United Nations Development Programme (UNDP) had taken a step in developing its programmes on access to justice by incorporating a framework covering three areas to holistically tackle justice issues in poverty and development for marginalised groups including women (Sudarshan, 2003). This framework is chosen and adopted as the conceptual framework of this study, which will be discussed in Chapter Two.

1.2 Problem Statement

Women consist of the majority of plaintiffs in Syariah Courts in Malaysia (Maznah, 2000a). Muslim women go to court to seek judicial remedies in the form of applications for divorce (*Taq'liq* (Section 50), *Fasakh* (Section 53), *Khul'* (Section 49)), and for mutual divorce under *Talaq* divorce (Section 47)) when their marriages break down, applications for rightful maintenance dues from their husbands for example *iddah* (Section 66), *mut'aah* - a parting gift to the wife following a divorce (Section 58), and matrimonial properties (Section 108 and 122). Women also go to court for child custody (Section 82) and child maintenance issues (Section 73) during marriage or post-divorce. Other reasons for women to seek legal remedies are to obtain certainty as to their legal status when their husbands make pronouncement of divorce outside of the courts, rights as wives when their husbands desert them, or because their husbands apply for polygamous marriages or divorce in court. Women also go to court because they seek redress when the husbands failed to follow court orders from previous cases, for example, with regard to self and children maintenance.

In order to get remedies provided by law, women must go to court and file a case. This process involves some documentation and this sometimes can be overwhelming to women who lack legal awareness. Some would hire lawyers or some were advised by the court staffs to hire lawyer for their cases.

However, there had been reported complaints by women that Syariah courts are biased, inefficient and full of delays, and some women also claim that judges themselves are biased towards them. There are also reported situations where women made errors in their divorce applications due to a lack of knowledge or legal representation and this had caused their cases to be delayed. The lack of enforcement

on court orders made it common for husbands to be absent from divorce hearings and this has fatigued the women who had to return to court repeatedly.

It has become increasingly common to hear dissatisfaction expressed by women seeking justice in Syariah court, particularly women dealing with matrimonial-related cases such as divorce, maintenance, division of marital assets and custody of the children. (Raihanah Abdullah 2001; Maznah Mohamad 1999; Noor Aziah Mohd Awal 2001).

Women dealing with Syariah court expressed their dissatisfaction primarily over the undated adjournments and the lengthy trials of their cases, be it divorce, maintenance, custody or any other case (SIS, 1999). The typical dissatisfaction voiced out by women is in regards to the divorce cases (Raihanah, 2001), which sometimes took years to settle (Sharifah Zaleha Syed Hassan, 1986).

Zaleha Kamaruddin (1999) studied court data from 1990-1997 and found that delays in disposition of matrimonial cases in the Syariah courts are partly due to imbalances between work burden and the number of judges within that period. However, the situation has hardly improved because the occurrence of delay is still there, even after that period of study. This is supported by the number of public complaints lodged to state Syariah courts in the recent years.

Raihana (2001) found that some women were compelled to forego their rights in order to expedite the process of divorce as an inducement to bargain with the husbands to let them go. This includes waiving all her financial rights after divorce like *iddah* maintenance, *mut'aah* (consolatory gift of money) and sometimes, custody of the children.

Selangor Judiciary Department (JAKESS) had conducted their own research to find the root of the problem of delays in all the Syariah courts in Selangor. Based on the research, the main contributors for adjournments leading to delays were the parties themselves (54%), followed by miscellaneous such as procedural reasons/technicalities (26%), judges (9%), document management like the servicing of notices and summons (6%) and lawyers (5%) (Ismail, Abdul Ghani Azmi, & Yaso, 2011)

A research was done on court case management concerning delays and looking at factors contributing to the delays of divorce cases. Selangor was chosen as the sample since it has the highest divorce cases in Malaysia. The research focused on two district courts namely, Gombak Timur and Gombak Barat Syariah Courts by looking at court case files from 2005 to 2010. A total of 30 cases were identified which took more than 360 days to settle within the five-year period. Apart from that, observations of court proceedings were conducted in the selected courts in Gombak Timur, Johore Bahru and also Penang with in-depth interviews with two experienced judges, Chief Court Registrar of Shah Alam and two lawyers with five years' experience. The findings of the research found that the main factors of the delays cases in court were due to the litigants themselves. The main causes had been their absence from hearings, delays in submitting either statements of defence or statements of claim, failure to appoint lawyers and changing their cases and making new applications mid-way (Ismail, Abdul Ghani Azmi, & Yaso, 2011).

If the above research is reliable (majority of the delays are caused by litigants), and women make up the majority of litigants in Syariah court, then a phenomenological look into the lived realities of women litigants in Syariah court could have immense value for identifying areas for improvement and development.

Allowing research participants to express in their own words without being limited to fixed answers as with quantitative research will make available the behavioural, emotive, social and connotative meanings in the experiences (Sokolowski, 1999).

There is a lack of empirical and academic studies that focus on users of the Syariah court in Malaysia. The objective of this study is to highlight women's experiences and their perceptions of using the Syariah justice system. The findings of this study is hoped to shed light on the situations that women face in the Syariah legal system in Malaysia, particularly in the State of Penang.

1.3 Research objectives

The study is guided by the research objectives below:

1. To explore women's experiences in the Syariah Courts in Penang;
2. To identify the remedies and resources that are available to Muslim women in Penang at the Syariah Courts;
3. To examine the effectiveness of the remedies and court procedures provided under the Penang Islamic family law based on women's lived experiences;
4. To explore the needs and expectations of women based on their experiences in the Syariah Courts in Penang.

1.4 Research questions

To achieve the objectives, this thesis seeks to answer these research questions:

1. What are women's experiences in the Syariah Courts in Penang?
2. In the women's experiences, how do they seek remedies and what resources are made known to them in seeking justice from the Syariah legal system in Penang?
3. From the women's perspectives, how effective are the remedies and the court processes in Penang ensuring justice for Muslim women?
4. What are the needs and expectations of women based on to their experiences in the Syariah Courts in Penang?

1.5 Significance of study

Many studies have been conducted on the application of the Islamic family law in Malaysia, particularly in the areas of divorce, polygamy, post-divorce issue on child support, *mut'aah*, jointly acquired properties of husbands and wives and the pluralism of Malaysia's legal system related to marital issues (Ibrahim, 1965, 1980, 1997 & 1999; Siraj, 1963 and 1988; Muhammad, 1996 and 1988; Buang, 1996; Noriani, 1992 and 1999; Tapah 2001; M. Adil, 1994; Majid, 1992; Zuhdi & Azhari, 1989; Kamaruddin, 2000; Abdul Rahman, 1999).

Much of these studies have focused on the analyses of the substantive provisions of the Islamic family law legislation. Unfortunately, and the studies rarely

investigate the application and effectiveness of the law through users' experiences and perspectives.

Studies that investigate women's experiences in the Syariah Courts are few. Most of the studies on the Syariah courts system focused on the legal aspect rather than the users of the system. The case studies from this study can be used as examples that represent voices of many women who have experience Syariah court system in Penang and how the experiences have impact their lives. By making the voices of these women heard and visible, it is hoped it can provides insights and useful data to be used for transformation of the Syariah Courts Sytem in Penang by the law and policy makers, and also for the womens' groups that advocate for better laws and sufficient support systems for the people particularly women in access to justice in Syariah Court System.

This study is also to help both governmental and non-governmental organisations to reform Syariah law and the justice system, to improve legal aid services, to develop suitable gender awareness training and to develop programmes that will enhance the level of legal awareness among Muslim women.

Lastly, this research is my personal journey in delving into Muslim women's experiences of building families and seeking justice, and it has revealed the amazingly strong hearts of women to fight for their rights and care for their families. It is hoped that all the effort made in this study can improve the issue on access to justice for women especially Muslim women.

1.6 Definition of Terms and Concepts

Justice / Access to Justice

Justice refers to standards of rights set and defined by the justice system, which includes the substantive law and the enforcement of the justice delivery system – the courts. Access to justice in this study refers to the ability of Muslim women to access legal remedies meted out by the Syariah judicial system in Penang.

Women's Experiences

Women's experiences in this study refer to the realities that women encounter in the process of seeking legal remedies from Syariah courts in Penang. It is shown via their transcribed verbal comments as their answer questions posed by the researcher. Much of the original comments were in Bahasa Malaysia and are translated here into English, taking into account the contextual and connotative meanings intended by the women.

Syariah Court

Syariah Court in this study refers to the Syariah justice system in State of Penang which constitutes the substantive law, namely the Islamic Family Law Penang Enactment 2004 and the Syariah courts as law enforcement institutions namely the Syariah Subordinate Court or the Syariah High Court, as the case may be,

under the Administration of the Religion of Islam (State of Penang) Enactment 2004 subsection 55(1) or 55(2).

1.7 Scope of the study

This study focuses on the case studies of 30 Muslim women who have experienced litigation in the Syariah courts in Penang within 7 years period, between 2004 and 2011, at the time of the interview. The purpose of the time in this manner is to explore their experience in the context of the latest amendment to the Islamic Family Law Penang Enactment of 2004. The women went to five districts of Syariah lower courts according to their domiciled Penang districts, namely, the Northeast, Southwest, Northern Seberang Prai, Central Seberang Prai and Southern Seberang Prai districts.

1.8 Organisation of the Chapters

This thesis is divided into five chapters. Chapter One provides an overview of the study. It also presents the objectives, significance and contributions of the study.

Chapter Two presents a review of past and present literature related to this study. The chapter begins with a discussion on the law and legal systems from the Western and Syariah historical backgrounds and provides a critical view on the concept of gender justice and feminine jurisprudence. It continues with the background of the Islamic legal and judicial system in Malaysia which also touches

on the historical context of Syariah law, Syariah courts, and Penang Syariah law and courts. The chapter highlights provisions under Islamic family law and relevant legislation affecting Muslim women. This section also discusses the issues of polygamy, dissolution of marriage, issues on orders and claims after dissolution of marriage and guardianship and custody of children. The chapter draws attention to the overall experiences of Muslim women in Malaysia in the context of Islamic family law. Chapter Two also presents the Conceptual Framework of the study that was chosen and adopted for this study.

Chapter Three explains the methodology of the study. It describes the qualitative approach to this study and why it is suitable for this kind of study. This chapter further describes the choice of the technique for data collection, which is in-depth interviews and argues why it is important to use it for the study. It explains the steps taken to get the respondents, and how the interviews are done. Next is a discussion on ethical issues of the study that includes confidentiality, the process of getting respondents to agree to be interviewed for this research, the process of recording the in-depth interviews and how they are then transcribed for analysis. This chapter also discusses the limitations of the study.

Chapter Four presents the analysis and findings of the study. The chapter starts by showing the socio-demographic background of the respondents, followed by the presentation of the substantive sections of the analysis and the findings that emerge from the data collected.

And lastly, Chapter Five presents the conclusion of the study. It also makes recommendations based on the findings and suggests areas for future research.

1.9 Conclusion

Chapter One has provided an overview of the study. It clarifies the aims, objectives and significance of the study. The following chapter continues by explaining past and current literature on the subject.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This chapter provides an in-depth discussion and review of literature on the issues of women's access to justice under the law and the justice system. It starts by discussing the various concepts of justice offered in the literature. Then it moves into reviewing the issue of justice in Syariah law and how the substantive and procedural aspects of the law affect women. The section then reviews the Syariah legal system and judicial system in Malaysia. It does so by looking at the Malaysian plural legal systems, historical background of the Syariah law and courts in Malaysia. Then, the chapter narrows down on the Penang Islamic Family Law Enactment and the Penang Syariah courts. This chapter then reviews materials that present the experiences and discourses of feminist and women's groups on the issue of Muslim women's access to justice in Malaysia. Finally, this chapter highlights and discusses the conceptual framework that was chosen from the United Nations Development Programme (UNDP) approaches on issues of access to justice that was adopted and modified for the study.

2.2 Access to Justice: Law and the justice system

The word "justice" is derived from the word 'just' which generally means "fair, reasonable, right, deserved, the same as" (Hornby, 1992), while 'justice'

generally means “right and fair treatment or the quality of being reasonable or fair” (Hornby, 1992). In sociology, justice is a fundamental philosophy of the modern democratic state and it implies creating a system based on equity and equality in social, political or economic perspectives (Subberwal, 2009).

The concept of justice has been defined since Ancient Greek times by philosophers, for example Plato and Aristotle, in discourses about the ideal State and the role of citizens. Plato, in his book called *The Republic*, stated that every citizen in society is the same. Women and men are equal because both are trained physically and mentally in the same manner. Aristotle, in his book *The Politics*, on the other hand, stated that the concept of the ‘ideal State’ is natural but the human being is political. Aristotle opined that women are subject to men even when their position may be seen as higher than slaves. He felt that women were naturally inferior to men because the “deliberative element” in women “lacked authority”. According to Aristotle, “The slave is wholly lacking the deliberative element; the female has it but it lacks authority; the child has it but it is incomplete” (as quoted in Clayton, 2004). Though Aristotle did not elaborate about what he meant by “lack of authority”, these thoughts have later penetrated into the natural law school of thoughts. For example, under Christian natural law, even though the concept of soul is equal for all human beings, women are mentioned after men in equality before God. These writings can be found in St. Thomas Aquinas writings (1225-74).

In this age of modernity, the concept of justice in a State comes from the concept of positive law and social contract theory. The concept of positive law rejects the approach by natural law by believing in human thoughts, rationale and reason. ‘I think therefore I am’ claimed French philosopher, Rene Descartes (1596-

1650). Later, the liberal social contract theory emerged. These concepts celebrate rationality, the maximisation of individual liberty and the control of government power through law. These theories assume that all humans have the same characteristics (Barnett, 1998). In the matter of jurisprudence, Hart and Kelsen, who are jurists themselves, believe in human agencies to create and administer the law. The positive law is claimed to be more concerned with the structure and characteristics of the law, rather than the effect of the law to people (Barnett, 1998). In the liberal social contract theory, John Rawls in his famous book the *Theory of Justice* suggested that in order to make sure justice is equally distributed to all citizens, they should have representatives from the community (Rawls, 1972). All these theories have a great influence on the modern interpretation of justice systems and governance in the present time.

In Islam, the term for justice is '*adil*' which is described as "just, fair, equitable, upright, honest, straightforward, righteous" (Cowan, 1993). Justice in Syariah is reflected in many verses of the Qur'an, for instance Surah al-Nisa (4:85) and Surah al-Nahl (16:90) which touch on issues of equality and fairness. According to Nik Noriani (2007) the legal structure of Islam is a semblance of Natural Law and Positive Law, in that the former is divine (*Syariah*), and the latter is human interpretation (*fiqh*). Justice in Islam is closely related to equality, which focuses on the equal distribution of rights and duties, advantages and burdens in the community (Mohamad Hashim Kamali, 1999). These fundamental goals of justice in Syariah should be reflected in the purposes of Syariah (*Maqasid al-Syariah*).

The concept of justice is deeply rooted in Islamic teaching and is integral to the basic outlook of Syariah (Mir-Hosseini, 2009). Muslim family laws

are based on principles of justice, but the notion of justice is defined within the framework of social hierarchy as rights and responsibilities are defined in terms of status of a person in society (Mas'ud, 2009). In Quranic discourses, justice is asserted as an obligation owed to God and also owed to human beings to one another. The Qur'an does not define the constituent elements of justice and in fact seems to treat it as intuitively recognisable, it emphasises the ability to achieve justice as a unique human charge and necessity through intuition, reason or human experiences (Abou El-Fadl, 2009). Justice is closely related to equality in that it aims at a state of equilibrium in the distribution of rights and duties, advantages and burdens in the community. Therefore, the concept of justice in Islam acknowledges that there is no justice without equality. It is rather a process, a complex and shifting balance between many factors, some of which are also relative and changeable. Besides, equality has also meant different things to different peoples and cultures (Kamali, 1999).

Law and the justice system are the tools that ensure harmony in society. Justice is also a factor in the issue of the accessibility of legal remedies. The just quality of law and the justice system must also be assessed based on the accessibility of the law to the people (Doughlas, 2007). If people cannot access the justice provided by law, they are then not protected by it even though it exists. In order to make sure justice is served, one of the measurements to look at is the ability of users to access it. Access to justice means that substantive law is enforced by the justice delivery system and the quality of the justice is defined by how the system carries out the enforcement (Munaabaa, 2004).

The rise of feminism in the late 60s and 70s has challenged the theory of law and jurisprudence. According to the legal feminists, conventional jurisprudence portrays all people as the same without looking into the substantial aspect of reality where there are inherent differences in terms of class or gender. Gender is the framework, lens or tool that the feminists use to measure if there is discrimination on the basis of gender in the economic, social and political arenas. Mainstream jurisprudence discounts gender differences and perpetuates patriarchal power (Barnett, 1998). The individual is portrayed as genderless in mainstream jurisprudence, and it is more concerned with the characteristic of law, rather than the impact of law on users or user groups.

From the feminist standpoint, women have always been invisible; they are excluded from and are deemed inferior to men in social, economical and political aspects (Bahdi, 2007). For the feminists, formal equality from mainstream law and jurisprudence, with the principle of treating like alike and treating different cases differently, place no guarantee that justice shall be served to all. Many legal and judicial systems operate on the principles that all people are equal before the law and have equal access to the law and protection under the law. In reality, though, some laws do permit systematic discrimination. According to MacKinnon (1991) in law and law making, women are excluded from the domain and must enter the domain of males, which is patriarchal. Patriarchy means a culture that places men higher than women, and according to feminists, this culture has penetrated into all aspects of life. From the feminist standpoint, women receive a lesser degree of the law's protection. Women are required to enter the male domain, under patriarchal terms. This also has resulted in the inferiority of women's position in social and political spheres (Barnett, 1998).

2.3 The Islamic Legal and Judicial Systems in Malaysia

Malaysia is a Federation consisting of 14 States: Perlis, Kedah, Penang, Perak, Kelantan, Terengganu, Selangor, Pahang, Negeri Sembilan, Melaka and Johor (all known as West or Peninsular Malaysia) and Sabah and Sarawak. The country also has specially designated areas called the Federal Territories (Kuala Lumpur, Putrajaya and Labuan). The state and federal governments share executive and legislative powers. These powers are stated under the Federal List, State List and the Concurrent List in the Ninth Schedule of the Federal Constitution (Ahmad Ibrahim, 1997). Although the powers on each list are technically separated, some do overlap. All civil and criminal laws, including family law, are legislated at the federal level, with the exception of laws for Muslims and for natives of Sabah and Sarawak, as they fall within the legislative and administrative powers of the states. This is provided for in the State List II of the Federal Constitution (Ahmad Ibrahim, 1997).

2.3.1 The Malaysian plural legal system: contextualising the position of Syariah justice system

Under the Federal Constitution, Islamic law is a matter falling within the State List, that is, it is a matter over which the State Legislature has jurisdiction, not the Federal Legislature (Federal Constitution, 1957). The State List in the Ninth Schedule of the Federal Constitution begins with matters relating to the personal and family law of Muslims:

Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs and the definition of and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters Islamic law and doctrine and Malay custom.

There were attempts to codify Islamic laws in all States since 1952, starting with the modelling of Islamic law in Selangor. Slowly, other States started to gazette their own Islamic laws. For example, Kelantan in 1953, Terengganu in 1955, Penang and Melaka in 1959, Negeri Sembilan in 1960, Pahang in 1965, Kedah in 1962, Perlis in 1963, and in Perak in 1965 (Ahmad Ibrahim, 1997).

The plural legal system in Malaysia generally has two implications. Firstly, there are different sets of laws for Muslims and non-Muslims especially on matters of marriage and divorce. Secondly, there are 14 sets of Syariah laws in Malaysia, each legislated by the respective state legislature. This legal system creates some difficulties for Muslim women to seek redress under Islamic family law. Muslim women seeking redress must go to the court in the State where their marriages were solemnised or in the State stated as their residential addresses in their identity cards. Failing these, a Muslim woman seeking remedies in the courts must prove her current domicile by obtaining the testimony of an official of the mosque