COMPARATIVE CONCEPTS OF JUSTICE IN ISLAMIC AND WESTERN LEGAL-POLITICAL THOUGHT: A DUAL HERITAGE AFFECTING GENDER JUSTICE IN MALAYSIA

BY

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ABSTRACT

This dissertation proposes to look into certain concepts of justice from comparative Islamic and Western perspectives in legal-political thought, with a view of their historical developments in relation to their contemporary relevance. In recent decades, there have been calls both for the revival and preservation of Islamic systems and institutions, and for modernization and reform. Since both Islamic and Western influences play significant roles in the development of legal status in Malaysia, a comparative study would be useful in looking at similarities as well as differences, for instance it is possible to find common ground between some Western ideas on representative government with Islamic concepts on shura or consultation. Modern forms of representative government have been influenced by revolutionary upheavals as well as evolutionary developments. An understanding of Islamic theology and philosophy demonstrates the underlying bases of Islamic jurisprudence, and the intertwining of theological debates on justice with political notions. Western theories on law and justice, including classical positivism and natural law theories, and comparisons with Islamic legal theory on positive law in ideal form, will be discussed. Ideas of certain major thinkers in Islamic reformism and revivalism will be included, such as the modernist movement of Sheikh Muhammad ‘Abduh of Egypt, reflected in Malaya by Syed Shaykh al-Hady. Ideas of certain major thinkers in Western civilization, such as Locke and Rousseau, also influenced the historical developments of political and legal systems. Subordination of women in the West prior to the 20th century will illustrate that women’s rights were neither inherently nor exclusively part of Western traditions. Confusion may occur when practices of one culture are mistaken for another, for instance when Victorian values are mistaken for Islamic principles. Orientalists have conducted studies on Islamic civilization from their perspective; thus Muslims should also conduct studies on Western civilizations from our perspective. The dual heritage in Malaysia is reflected in its dual legal system. Chinese and Hindu customary laws also used to be significant, but are no longer so since the Law Reform (Marriage and Divorce) Act 1976 was enforced upon non-Muslims. Family laws have become a main dividing line between Muslims and others, as though necessarily incompatible and mutually exclusive. However, the discussion will show that areas of English family law have benefited from Islamic family law to the advantage of women, especially regarding married women’s property rights and child custody. It is unfortunate that contributions to gender justice from Islamic law are unrecognized and ignored. Instead, there is popular misconception that gender justice is based on Western civilizations.
ملخص البحث

هدف هذه الرسالة لتقديم دراسة مقارنة لمفهوم الوعي والتطورات التاريخية في المجتمعات الإسلامية الغربية منظوراً إلى إطار الواقع القائم في المجتمعات العربية عامة، وفي مليزيا على وجه الخصوص. هذا، ونظراً للاهتمام كل من النهجين، الإسلامي والغربي، في بحثه النظري القانوني في مليزيا، وهي محور الرسالة و الموضوعاً الأساسي، فلا شك أن دراسة كل من النهجين المذكورين دراسة مقارنة بما ينبغي أن يفيد - ليس فقط في فهم الأوضاع القانونية العامة في مليزيا وحدها - بل فيما يتعلق باستكشاف نقاط الشبه والاختلاف بين النهجين - مثل فيما يتعلق بنظام الشريعة الإسلامي، ونظام الحكم النبوي العربي الحديث. و كما هو معلوم فقد تأثرت نظم الحكم النبوي العربي بعوامل ثورية في بعض الأحيان، و أخرى إصلاحية تدريجية احياناً أخرى. هذا و بينما تأثرت مناهج المسلمين في النظر إلى مفهوم الوعي والوعي في صياغة المذاهب القانونية والفقهية باعتبارات دينية و فلسفة أساسية متائية، فقد تأثرت مناهج الأئمة التأريخيين واجتهاداتهم القانونية والفقهية بعديد من الفلسفات الوضعية والطريقة كذلك. ومن ثم فقد تضمن البحث النظر في آراء عدد من كبار المفكرين الذين تأثروا لمراحل متافقة وبصورة مختلفة بالتفاعل الذي وقع بين الثقافات الفكرية والفقهية المذكورة، الإسلامية كأن أو أخري، من أمثال الشيخ محمد عبد المصري ومن سار على سفح في بلاد الملايو من أمثال السيد الشيخ الهادي - كما استلزم البحث النظر في آراء عدد من كبار المفكرين العرب محدثين من أمثال جون لوك الإنجليزي و جان جاك روسو الفرنسي على ما بينهم من تشابه و اختلاف. هذا وقد كشف البحث عددًا معتبرًا من الأمور الهامة والطريقة احياناً: من بينهما أن توفر النساء و صيانة حقوقهم لم يكن وقفاً على المجتمعات العربية الحديثة قبل القرن العشرين، ومن بينهما أيضًا الخلاف الذي طالما وقع و سياع بين التقاليد البريطانية والتراثية على عهد الملكة فكتوريا من جهة، و بين قيم الإسلام وتراث المسلمين من جهة أخرى. كما قام عدد من المستشرقين العرب بدراسة الإسلام و المجتمعات الإسلامية من وجهة نظرهم، فعلى المسلمين المعاصرين أن يقوموا بدراسة المجتمعات العربية مختلفة اबاعها الفكرية والفقهية من وجهة نظرنا نحن. هذا و غنّر عن القول أن القوانين العربية الحديثة في الهند قد كانت سابقاً ذات أثر معمر في بلاد الملايو. أما الآن، ولا سيما بعد إجابة قانون الزواج والطلاق عام 1976، فقد أصبح الأمر قاسماً بين الشريعة الإسلامية المعمدة بين الأطراف المتمسكة من أهل البلاد، و بين القوانين الإنجليزية المطروقة في بعض أعدادها بقوانين الأحوال الشخصية الإسلامية الداعمة لحقوق النساء لا سيما فيما يتعلق بحقوق الملكة و كفتي الأطفال. على أن من المؤسف أن فضل الشريعة الإسلامية ينحصرها في مثل هذه الأمور الهامة كثيراً ما يغض عن ادراك الكثيرين، إذ يشيع الظلم بين العاملين بين كثير من نالوا فقطًا معًا بعينهم في التعليم، أن توفير النساء وصيانة حقوقهم من ثمرات الحضارة العربية الحديثة وحدها - وهذا كما تبين الدراسة محض جهل و افتقار.
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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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A DISCUSSION ON THE INTELLECTUAL PROCESS FORMING THE
INTENTION: A CHIEF BASE FOR LEGAL CAPACITATING IN
CONTRACTS WITH SPECIAL REFERENCE TO MAJOR JUDICIAL
EVENTS

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CHAPTER 1
INTRODUCTION

OBJECTIVE AND PURPOSE

This dissertation proposes to look into comparative concepts of justice from Islamic and Western perspectives in legal-political thought, with a view of their historical backgrounds and developments in relation to their relevance in contemporary times. In recent decades, in the areas particularly of constitutional government and women's rights, there has been an upsurge of interest and debates on Islamic political and legal systems and their relevance in the modern contemporary societies, as well as calls both for the revival and preservation of the Islamic heritage and its modernization and reform. Both Islamic and Western influences play significant roles in the development of legal status in Malaysia. Therefore a comparative study of such concepts within its legal and political theories would be useful in looking at the similarities as well as the differences. For instance, Malaysia’s system of parliamentary democracy is derived mainly from the British Westminster model, but it is possible to find common ground between some aspects of Western ideas on representative government and Islamic concepts on *shura* or consultation.

The dual heritage in Malaysia is most sharply reflected in its dual legal system which is divided into the general courts with civil and criminal jurisdiction, and the shari'ah courts with its main jurisdiction in the area of Muslim personal status or family laws. Local customary laws also used to be of great significance to the different ethnic and religious groups in Malaysia in the area of family laws. However, the Chinese and Hindu customary laws have greatly lost their significance since 1982,
when a uniform civil family law (the Law Reform (Marriage and Divorce) Act 1976) based on developments in the English family law up to the early 1970s, was enforced upon the non-Muslim population. The area of personal status laws has become a main dividing line between the Muslims and people of other faiths in Malaysia, as though there are misconceptions that they must necessarily be incompatible and mutually exclusive. A disturbing trend that has emerged in this attitude is its effect regarding the status of Muslim women, for there is a popular misconception that the idea of women's rights and gender justice is based on Western and hence “un-Islamic” civilization, leading to an attitude that while the sphere of women’s legal rights may be expanded for non-Muslim women, it must be denied to Muslim women. Such attitude would lead to grave injustice to Muslim women in this country, as they would be legally inferior not only to Muslim men, but also to non-Muslim women. While it may be said that this attitude is only in relation to personal status laws, the broader implications to society in general cannot be ignored, and its possible future effects upon the developments in the public arena as well, for family norms may also be regarded as a microcosm of societal norms.

It is hoped that this study would help to dispel such misconceptions. Since an understanding of Islamic theology and philosophy would demonstrate the theological bases of the principles of Islamic jurisprudence and its underlying philosophy, it is proposed to include the views of certain major thinkers in the history of Islamic civilization, especially in the area of Islamic reform and modernism, as well as Islamic revivalism, e.g. the modernist movement inaugurated by Sheikh Muhammad ‘Abduh of Egypt and reflected in pre-independence Malaya by Syed Shaykh al-Hady. The views of certain major thinkers in Western civilization, e.g. Locke and Rousseau, would also play a role in understanding their contributions and influences in the
historical developments, including the development of the various political and legal systems, such as the ideas on representative government. There is also the question of the inter-relatedness and cross cultural influences of various historical developments and customary practices as well as philosophies on various different civilizations which is felt would provide a useful background to this study.

The legal subordination of women in the West prior to the 20th century, and their struggle for emancipation, both in the area of public law e.g. for political participation and representation, as well in the area of private law e.g. for the rights of married women to own property, will be highlighted to point out that notions such as women’s rights and gender justice were neither inherently nor exclusively confined to Western tradition. A comparative perspective is needed to understand common ground and similarities, as well as contrasts and confusion, between the different religious and cultural influences, especially in a country like Malaysia, with its diverse background. Confusion may occur when some norms or practices of one culture are mistaken for that of another. Moreover, Orientalists have conducted their studies on Islamic civilization from their perspective, and it is felt that Muslims should also conduct such studies on Western civilization from our perspective. The discussion on Western history included in this dissertation may thus be regarded as a partial Occidentalist study in an attempt to balance some of the many Orientalist views on Muslim civilization. The Orientalist discourse on Islam and women has added complexity, and even misunderstanding, that need to be addressed.

SCOPE
This dissertation proposes to begin by discussing certain rather abstract and philosophical principles related to the concept of justice, including certain theological
debates related to the issue of political justice, divine omnipotence and human responsibility. It then proceeds to view some of those principles in a more concrete form by looking into certain selected historical developments, in both Muslim and Western societies, such developments which the writer feels to be important and relevant to the issue of justice and good governance in general, and the issue of gender justice and the status of women in particular. It is submitted that comparative perspectives are important so as not to look at historical events in isolation since there is the question of the inter-relatedness of the influences of different historical cultures and customary practices. The later chapters will narrow down to focus upon the Malaysian context, to relate such perspectives from the earlier chapters to the relevant parts of the Malay historical heritage and the Malaysian contemporary issues affecting gender justice, especially regarding the status of Muslim women, in relation to the dual legal system on personal status.

This study thus begins with broad principles related to concepts of justice; it next looks at certain historical illustrations of such concepts among some Muslim and Western societies; and then proceeds to the Malaysian context. It is therefore divided into the following three main parts and a conclusion --

- the first part looks into comparative concepts of justice from Islamic and Western perspectives (chapter 2);
- the second part proceeds to certain historical developments in related legal and political theories, including revolutionary changes in ideas on representative government and the role of citizens (chapter 3), as well as women's struggle to be admitted to citizenship (chapter 4); and
- the third part relates such concepts and developments to the Malaysian cultural heritage (chapter 5), and the contemporary issues from the scope
and context emerging through the dual heritage and the dichotomy of the two legal systems in Malaysia (chapter 6).

- the conclusion emphasizes those aspects of Islamic legal concepts, principles and values that are capable of universal acceptance, instead of treating the Islamic legal system as though necessarily exclusive to Muslims, while imposing Western-imported rules on others (chapter 7).

In looking into various concepts of justice in chapter 2, it is submitted that the notion of justice in Islamic law and jurisprudence, which is also related to adab and taqwa, could not be adequately understood by itself in a vacuum. Thus, certain philosophical views of justice in Islam will be briefly mentioned, as well as theological-political debates on notions of justice in Islamic history. Comparative perspectives on Western concepts of law and justice under the theories of natural law, classical positivism, utility and certain developments in the twentieth century will be discussed.

The centrality of justice in the Shari'ah may be seen in various verses of the Qur'an; for instance, Surah al-Nisa' (4: 58) states that “Allah commands you to render the trusts to whom they are due, and when you judge between people, you judge with justice.” 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. Justice and equality are, however, not identical, in the sense that under certain circumstances, justice may only be achieved through inequality or unequal distribution of wealth. It is submitted that the concepts of justice as fairness, justice as a balancing process, and justice as coming in aid of many, may serve as underlying principles in striving towards a fairly free and egalitarian society in which there is no place for either gross inequalities on the one hand, nor extreme rigidity or excessive regimentation on the
other hand. In Western legal theories, legal positivism which focuses on a strict division of “what the law is” from “what it ought to be”, and ideals of morality or justice under natural law, are often portrayed as opposed to each other.

To understand the historical backgrounds and developments in Islamic and Western legal-political thought, chapter 3 looks into certain selected historical developments. In comparisons between Islamic and Western concepts, there is sometimes an unfortunate tendency, among both Muslims and Westerners, to identify practices of obtaining redress or justice in modern societies such as institutional safeguards in government, with Western concepts, and the practices in traditional societies such as dependence on personal integrity of individual rulers, with Islamic concepts. It is submitted that such an approach is both confusing and misleading.

The emergence of institutional safeguards may result from revolutionary changes as well as evolutionary developments. In fact, it was the highly personal system of government in France established by Louis XIV which led to such problems for his successors who lacked the ability to administer the government, which ultimately led to the French Revolution in 1789. The fact that institutional safeguards are still lacking in the practices of many Muslim societies today should be regarded as due to a variety of factors in history rather than as an integral aspect of Muslim political theory. Islamic reform and modernism from the 19th century was intended to bridge the glaring disparity between Islamic idealism and the historical developments of the Muslim community, e.g. redefinitions of terms like *ijma*’ and *bay’ah* as equivalents of “public opinion” and “social contract” may deviate from their traditional usage, but they are no more removed from their original meanings than modern European models of democracy are from the ancient Greek demes.
In Europe, intellectuals have played a leading part in most revolutionary movements since the 18th century. It is proposed to look at the views of such major thinkers as Locke whose libertarian social contract theory justified the idea of limited government in the Glorious Revolution of 1688 in England. The American War of Independence in 1776 began as a quarrel between the colonists and the British Parliament over the question of “taxation without representation”. The social contract theory of Rousseau in part influenced the French Revolution of 1789. Historical events in the period from the English Civil War in the 1640s to the Glorious Revolution, the American Revolution or War of Independence, and the French Revolution, played influential roles in developing modern ideas on representative government. There is also the question of the inter-relatedness of the influences of various historical cultures and customary practices, including the influence of Islamic civilization on the European renaissance, and the influence of Western civilization in the premodern and modern eras; for instance, there is the possibility that part of the thinking of both Locke and Rousseau might have been influenced by Islamic thinking on the relationship between citizens and the state.

It is interesting to notice however, that in spite of Rousseau’s revolutionary ideas on citizens’ participation in government, he excluded women from citizenship, as he regarded men as naturally strong and active and women as naturally weak and passive. It would appear that the view regarding women’s weakness and incapacity was so dominant among the men of the 18th century that even a radical thinker like Rousseau was unable to break away from it. In 19th century Britain, although Queen Victoria was queen regnant because she had no brothers, she regarded her own position as an anomaly and strongly opposed the women’s rights movement. The suffrage movement for women’s voting rights during the late 19th and early 20th
centuries faced bitter opposition e.g. in England, some suffragette leaders endured
imprisonment until the outbreak of the First World War. It was only after the War that
the women’s movement achieved success in obtaining voting rights for women,
mainly in recognition to the women’s contributions during the war – in the hospitals,
the farms, the factories and the offices.

By contrast, in the early history of Islamic government, during the era of the
*Khulafa al-Rashidin*, in the election of the third Caliph, Abd al-Rahman ibn Auf, who
was put in charge of the election, consulted women as well as men as to the choice
between the two candidates, Uthman and ‘Ali. Translated into modern terms, this
would appear to be a recognition of the voting rights of women in Islam. This part of
the dissertation intends to emphasize that Muslim women’s rights are accorded in the
Qur’an and Sunnah, and that Muslim women who seek to reclaim those rights should
not be regarded as ignoring Islamic traditions and being influenced by the traditions of
the West. Chapter 4 discusses this misconception which appear to be due to a lack of
historical understanding of developments in both Muslim as well as Western societies
i.e.:

1. of the revolutionary principles of the Prophet (s.a.w) emphasizing upon
   human dignity and justice for women as well as men, and over the
   centuries, the gradual erosion of such values in practice particularly upon
   the political decline of the Muslim societies during the colonial era, and

2. of the subordination of women in Western civilizations prior to the
   women’s rights movement in the twentieth century. In fact, it is submitted
   that some of the values that are regarded as “Islamic” may not be
   “Islamic” at all, but actually Victorian in origin.
In the Malaysian context, the historical background and developments that is discussed in chapter 5 include –

- the reciprocity of the Malay *adat* between the king and the people which would appear to describe the social contract that existed in the early Malay-Muslim kingdoms, with its emphasis on the quality of “*adil*” or justice as the necessary requirement in a king demanding the obedience of his subjects;

- the role of women among the early Malay Muslim rulers in the Melaka Sultanate e.g. Tun Fatimah and the *seri kandi* (warrior heroines) spirit;

- the influences of religion and culture on gender relationships in the matrilineal *adat perpateh* and the bilateral *adat temenggong*, including its recognition of women’s rights to *harta sepencarian* (matrimonial property), certain detrimental effects of British colonial rule on Malay women’s rights especially where the colonial judges were reluctant to allow claims for *harta sepencarian* in spite of the Kadhis’ support for the women’s claims as based on Islamic principles of justice and fairness, because under English law at that time, joint earnings were the property of the husband;

- the influences of Islamic reform and modernism (the ‘Abduh oriented trend as reflected by Syed Shaykh al-Hady and his attitude towards Muslim feminism as described in his novel *Faridah Hanom*) in the late nineteenth and early twentieth centuries; and

- the influences of Islamic revivalism in the later decades of the twentieth century (the Wahabi oriented trend towards conservatism, strictness and conformity).
Prior to the enforcement of the civil Law Reform (Marriage and Divorce) Act 1976 (LRA) in 1982, there was a rich diversity or plurality reflected in the various legal cultures in this country, in the customary laws of the different ethnic and religious communities. Since then, however, personal status laws applicable to non-Muslims, regardless of their respective faiths, have been derived not from their indigenous cultural heritages, but are mainly influenced by Western developments. Ironically, the Malaysian Muslims appear to be promoting Western homogeny among its citizens of other faiths, while resisting what is perceived as Western values within the Muslim community, with a tendency towards a compartmentalized dichotomy between what is "civil" and what is "Islamic", as though the two systems are necessarily incompatible, with a lack of consideration as to the possibilities of finding common ground as well as the universality of certain Islamic principles. As mentioned earlier, a possible confusion of values—a tendency to regard women’s rights as part of Western heritage and patriarchy as Islamic—may have caused some of the values to be regarded as "Islamic" when they are actually Victorian in origin, such as the emphasis on the wife’s duty to perform housework. At the same time, beneficial influences of Islamic principles upon the civil family law system, such as the important consideration to be given to the best interests of the child’s welfare in custody cases, are usually unacknowledged and ignored.

A drastic reform made by the LRA is the imposition of absolute monogamy on non-Muslim marriages. Prior to it, even Chinese Christians could lawfully practice polygamy if they chose to marry under Chinese customary law. Since the banning of polygamy for non-Muslims, polygamy has increasingly come to be associated with Islam, so much so that any criticism regarding the abuse of polygamy among Muslims is often misconstrued as an attack against the religion of Islam itself. This attitude may
be due to ignorance of the fact that polygamy was not invented by Islam but was a pre-existing institution that was restricted and reformed by Islam. The younger generation in particular is often surprised when told that unlimited polygamy was practiced among non-Muslims prior to the LRA. It is submitted that a just polygamous marriage (and the condition of justice is mandatory according to the Qur’an, in Surah al-Nisa’ (4: 3) should involve consensual polygamy; and that forced polygamy would inevitably be bound to lead to injustice. In Malaysia today, there would appear to be two extremely opposite situations under the dual system of laws – non-Muslim men are now forbidden to practice polygamy legally, even when polygamy forms part of their religious or cultural heritage and even if their existing wives are willing to give their consent, while Muslim men expect to have the legal right not only to practise polygamy, but also to force their existing wives to accept their subsequent marriages even if the existing wives have refused their consent and would prefer a divorce rather than to continue in the marital relationship.

Chapter 6 also proposes to highlight the point that non-discrimination on the basis of gender does not merely mean formal equality, for some aspects of formal gender equality or gender neutrality may in fact result in actual discrimination and injustice. A disturbing development within the Malaysian Muslim community in the opening years of the 21st century is a tendency towards selective gender neutrality. Traditional Islamic law granted men and women different rights and assigned them different responsibilities in the family e.g. men had greater rights due to their greater financial responsibilities. The traditional approach was that those different, gender specific rights and responsibilities would result in an equitable balancing of rights and responsibilities. Unfortunately, certain statutory provisions enacted in 2003-05 e.g. the Selangor Islamic Family Law Enactment 2003 and the Islamic Family Law (Federal