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**RIGHTS AND DUTIES OF SPOUSES INCLUDING THEIR CHILDREN
A Comparative Study Between Muslim Family Law and
Positive Law in Indonesia**

By

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C O N T E N T S

CHAPTER I. INTRODUCTION

1.1. Background of the study	1
1.2. Purposes of the Study	3
1.3. Research Methodology	4
1.4. Concept of Marriage	5
1.5. Concept of Islamic Education	19

CHAPTER II. LEGAL SYSTEM AND SOCIAL STRUCTURE

2.1. Preliminary	24
2.2. Historical Background	32
2.3. Legal System	48
2.4. Social Structure	51
2.5. National Education	55

CHAPTER III. RIGHT AND DUTIES OF HUSBAND AND WIFE

3.1. Preliminary	60
3.2. Status, Role and Function of Husband and Wife ..	66
3.3. Duties of Husband and Wife	69
3.4. Duties of Polygamous Husband	79

CHAPTER IV. RIGHT AND RESPONSIBILITIES OF PARENTS TO CHILDREN

4.1. Preliminary	93
4.2. Status of Children	97
4.3. Rights and duties of Parent and Child	101
4.4. Custody	114
4.5. Maintenance	129
4.6. Guardianship	133

CHAPTER V. CONCLUSION

CHAPTER I
INTRODUCTION

1.1. Background of the Study

The most important purpose of marriage in Islam is the worship of Allah SWT., i.e Ibadah. Every good deed, every service to humanity, every productive effort, and even every good word is a part of the true Muslim's worship of his Creator. If both husband and wife observe this main purpose, this cardinal purpose of their union, they would easily learn how to help each other achieve this goal, a good greater than themselves. They would learn how to tolerate each other, how to love Allah SWT. in themselves and in other beings and how to overcome their difficulties.

The other purpose of marriage is to respond to basic biological instinct of procreation. Children are the realization of motherhood and fatherhood. Islam prescribes clear rights and obligations on parents and their descendants : Parents are legally responsible for the education and maintenance of their children.

In brief, Islam gives attention to the family affairs of the believers to build a model society i.e. Muslim Ummah. That is why Islam has put every member of the family in their rightful place and charged them to

carry out their responsibilities with taqwa.

The Muslim Marriage law is concerned for the welfare and interests of the parties of the marriage and the children. The right position of the Parent's duty on their children's education under Muslim Family Law will create the Muslim Family as a strong basis of Muslim ummah.

Marriage in Islam is a sacred bond and commitment. Islam condemns and forbids adultery, fornication, and premarital sex.

On the contrary, the legal and illegal prostitution is increasing, premarital sex among the young people does not seem to be decreasing, and Family or Marital Violence and juvenile delinquency create problems, especially in the big cities.

While Islamic law and Positive Law provide the set of laws to build the harmonious relationship between parents and their children in the matrimonial home.

How far is the role of laws to protect and develop the family life as the basis of the wealthy and healthy society.

1.2. Purposes of the study

1.2.1. To explain the concept of marriage of Islamic Law and Positive Law.

1.2.2. To identify the fact of legal system and social structure in Indonesia as a fruit of Islamic and National Education systems which are implemented.

1.2.3. To show the rights and duties of the husband and wife based on their status, role and function in the family life.

1.2.4. To show the responsibilities rather than the rights of parent to their children as compared between Islamic Law and Positive Law in Indonesia.

1.2.5. To try to prove that the Islamic Family Law system, especially the balance between rights and duties of the parent to their children is a comprehensive system to be implemented and it is compatible with the demands of the globalization era.

1.3. Research Methodology

This research is designed to be a qualitative type. As this study is based on library research, data are obtained through the collection and compilation of written sources. The main sources are the Holy Qur'an and Hadis of the Prophet Muhammad s.a.w.

The other sources are the writings and the compendiums of famous Muslim jurists including those of the four Sunni Schools and their eminent disciples. Data are also taken from the writings of the contemporary authors.

Data are analyzed by contemplating the views of Muslim scholars. This is done by studying their writings and the way they interpret the laws from the original sources i.e. Qur'an and Hadis.

Some ayats of the Qur'an and the sayings of the Prophet s.a.w. which are related to this study are chosen to support certain facts.

1.4. Concept of marriage

In Islam the greatest purpose of marriage is the worship of Allah, that is Al Ibadah. By worship it is not only meant the performance of rituals but it essentially implies righteousness in all transactional behavior. The concept of Ibadah is very wide.¹ Every good deed, every service to humanity, every productive effort, and even every good word is a part of a true Muslim's worship of Creator. If both husband and wife observe this main purpose, this cardinal purpose of their union, they would easily learn how to help each other achieve this goal - a good greater than themselves. They would learn how to tolerate each other, how to love Allah SWT in themselves and in other beings, and how to overcome their difficulties and their shortcoming.

The second purpose of marriage is to respond to basic biological instinct of procreation.² Children are the realization of fatherhood and motherhood. Islam is particular in provides the best possible atmosphere for bringing up the offspring.

1. Abdur Rahman I. Doi, *Shari'ah: The Islamic Law*, 116 (1992).

2. Ibid.

Islam prescribes clear rights and obligations on parents and their descendants : Parents are legally responsible for the education and maintenance of their children. What is of importance here is the husband - wife relationship - their sex role with in the context of Islamic comprehension. The Holy Qur'an states to the effect :

"And among His Signs is this, that He created for you spouses from among yourselves, that you may dwell in tranquility with them. And He has put love and mercy between your (hearts). Verily in that are Signs for those who reflect."¹

The Islamic concept of the family by defines the roles of man and woman in such a manner that each should act in accordance with his or her biological merits. The man, with his strength is charged with what is called the "instrumental" functions : maintenance, protection, dealings with the outwardly matters and leadership within the family. The woman is entrusted with caring for and rearing the children, organizing the home , and creating the loving atmosphere inside her matrimonial home.

1. Qur'an, Surah Ar-Rum (3)0 : 21.

The institutions of marriage and the family have been commended as the way of the Prophet as the Qur'an says to the effect : "We did send messengers before you, and appointed for them wives and children".¹ And the Prophet Muhammad s.a.w has said : "Marriage is a part of my Sunnah. Whoever runs away from my path is not from amongst us".²

Although marriage is a Divinely - ordained institution, each marriage as such is in the nature of a contract.³ The word nikah, used for marriage in the Qur'an and the Sunnah means aqd, that is contract. In the Qur'an, marriage has been specifically referred to as a solemn covenant (mithaqan ghalizah).⁴ The consent of both spouses in an explicit condition for a valid marriage in Islam. This means that marriage is a social contract, a noble and sacred contract, but a contract nonetheless. It leads to a number of relationships and engenders a set of mutual rights and obligations.⁵

1. Qur'an, Surah Al-Raad (13) : 38.

2. Ibn Majah, Sunan, *Book of Nikah*. See also Sahih-al Bukhari, Kitab al-Nikah.

3. Khurshid Ahmad, *Family Life in Islam*, 15 (1981)

4. Qur'an, Surah An-Nisa (4) : 21.

5. Khurshid Ahmad, *supra* note 3 at 15

A Muslim is not permitted to marry a non Muslim.¹ Marriage should be among partners who share a common outlook on life and morality, and who participate in this co - venture to fulfill their destiny as God's vicegerents.² Faith continues to play a decisive role in the entire system of family relationships. A father or a son is not to inherit or make a bequest to a non - Muslim son or father. Similarly, if one of the spouses changes his or her faith, the marriage contract is broken.

Islam forbids all forms of sexual relationships outside marriage.³ Islam enjoins marriage. It has to be institutionalized, in the form of marriage and a stable family life; it is a permanent relationship and enduring one and both partners are expected to make a serious and sustained effort to live together and play their role in society.⁴ The institution of the family plays a very important part in Muslim society. It is basic unit of that society and is organized in such a way that it operates as a society in miniature. A new balance has been established in the role and relationships that exist between men and women, between young

1. Qur'an, Surah Al-Baqarah (2) : 221.

2. Khurshid Ahmad, *Family Life in Islam*, 15 (1981)

3. Qur'an Surah An-Nur (24) : 3.

4. Khurshid Ahmad, *Supra* note 1 at 16

and old, between near relatives and distant kin and kin, between freedom and discipline, between individual discretion and social control. It is not surprising, because in Islam about one third of *ahkam*(legal injunctions of the Qur'an) relate to the family and its proper regulation. ¹ The Muslim family is an extended family, different relations occupying different positions. It is not a nuclear, atomic family consisting of the parents and children only, but it normally has three or four generations under its umbrella.

Islam affirms the equality of men and women as human beings. This, however, does not entail non differentiation of their respective roles and functions in society. The primary responsibility of woman is to concentrate on the home and the family, and all that is required to operate and develop these institutions. She, too, has certain social responsibilities, rights and duties, but her primary concern is the family. This is a functional distribution of roles and activities and is regarded as essential for the proper functioning of different institutions of society and for its moral and social health and well-being. ²

1. Khurshid Ahmad, *Family life in Islam*, 15 (1981)

2. Id. at 17

According to the second purpose of marriage, as above stated, parents are legally responsible for the maintenance of children, though a Muslim father provides financial help to his children out of his natural love for them, but at the same time he believes it to be his religious duty too. ¹ He fully knows that Almighty Allah has given them to him to be cherished and looked after in proper manner. So he not only gets pleasure and satisfaction by providing for their sustenance but also hopes that he would be rewarded by the Creator for fulfilling this duty in the life Hereafter.

While doing a good deed one should not have any other intention than to earn the pleasure of Almighty Allah Who might reward him in Hereafter. Otherwise any virtuous act loses its virtue and importance both.

In western Europe it is still deemed that a marriage is the basis of legal family and therefore provide the framework in which legal obligations of the adult parties toward each other and their children have been set. There are, however, many indications that marriage is losing this central position. Other forms of living arrangements which can broadly be considered

1. A.Hussain (Ed.), *Muslim Parents, their rights and duties*, 71 (1979).

"familial" are becoming more common. Marriage is still the most significant of these, but it is becoming difficult to see with clarity what are the characteristics which distinguish it from other modes of family life and correspondingly harder to know what legal responses are appropriate to each of them. ¹

In very recent years, however, the popularity of marriage has declined. A decline starting in early 1970s is observable for nearly all of western society.² In England, there is some evidence of an increase in couples living together before they marry which indicates an increase of what may be called "trial marriage". Thus one study reveals that around 10 per cent of women who first married between 1971 and 1975 had lived with their husbands before marriage. This compared with an estimated 3 per cent of first married women in the preceding five years, and only 1 per cent between 1956 and 1960. Furthermore, preliminary figures from the 1979 General Household Survey, which included a new question about cohabitation, show that as many as 20 per cent of women marrying in the late 1970s lived with their husbands before marriage.

In a survey carried out in 1976 of the marriage patterns of 6,589 women in England, Wales and Scotland, it

1. John Eekelaar, *Family Law and Social Policy*, 3 (1984)

2. *Id.* at 5

was only 15 per cent of premarital cohabitation lasting for more than two years, although the length of premarital living may be increasing. ¹

In United States, a study of the preliminary results of the 1977 population survey revealed that nearly two million adults maintained living quarters which they shared with an unrelated adult of the other sex. However the study could not accurately separate what we would call cohabitation from landlord/tenant and householder/housekeeper relationships. Further, the authors admitted that the number could be four times greater. ²

In Indonesia, the newly passed Marriage Act was promulgated in January 1974 and came into effect as from October 1st, 1975, according to Government Regulation No.9 of 1975. Article 66 declares that with the promulgation of this Act, all regulations on marriage are declared invalid as far as already ruled in the new Act. Article 66: "With respect to marriages and anything related to marriages by virtue of this Law, by the coming into force of this Law, the provisions contained in the Civil Code (Burgerlijk Wetboek),

1. Stephen Parker, *Cohabitees*, 6 (1981)

2. *Id.* at 5

Ordinance on Christian Indonesian Marriages (Huwelijk Ordonantie Christian Indonesiers, S.1933 No.74), Regulation on Mixed Marriages (Regeling op de gemengde Huwelijken, S.1898 No.158), and other regulations containing provisions in regard to marriages, insofar as have been regulated in this Law, shall be declared rescinded."

So, until implementation of the Marriage Act 1974 there had been diversity of laws on marriage in Indonesia.

The basic issues adversely affecting the position of women and children were those of child marriages (minors), forced marriages, incidents of polygamy wherein the requirements of Muslim law were not met, the case of the arbitrary divorce by the husband (repudiation) and the lack of proper maintenance for the divorced wife (only for about 3 months).¹

After the Proclamation of Independence in 1945, basic human rights were guaranteed in the Constitution of the Republic of Indonesia 1945. Indonesian women have been granted equal rights in many fields, such as equal political rights, equal pay for equal work and special protection for women workers. But the position of women in marriage has continued to be unsatisfactory

1. Mrs. Nani Soewondo, Family Law in Indonesia, LAWASIA, Vol.2,109 (1982).

for a long time, in spite of efforts by the Government and women's organizations to improve the situation.¹

The basic problem with regard to the marriage law has been the question of whether the principle of the unification of laws (one marriage law for all different religious groups) or the diversity of laws (different laws according to the different religious groups) should be applied. Religious Political Parties and groups, including their women's organizations, have usually supported the principle of diversity of laws, while other parties and groups have preferred the principle of unification of laws.²

Finally a compromise was reached between the four different fractions of political groupings in Parliament. As the new Marriage Law, Act no.1 1974 is a unique example of unification as it still takes cognizance of differences based on religion, thereby becoming the embodiment of Indonesia's official motto : Bhinneka Tunggal Ika (Unity in Diversity).

The principal topics in the new Marriage Law as the concept of marriage in the positive law in Indonesia are :

a. The aim of a marriage is to found a happy and last-

1. Mrs Nani Soewondo, Family law in Indonesia, LAWASIA, Vol.2, 109 (1982).

2. Mrs. Nani Soewondo, Id. at 110

ing family. (Marriage is a relationship of body and soul between a man and a woman as a husband and wife with the purpose of establishing a happy and lasting family (household) founded on belief in God Almighty as stated at Article 1, Marriage Law no.1,1974.)

b. A marriage is declared valid, when solemnized in accordance with the respective religious laws and beliefs of the parties concerned. Besides, each marriage shall be registered in accordance with the regulations. The registration of each marriage is the same as other registrations of all important events in human life, such as birth and death, which are stated, in a certificate, which is also entered in the official registers. Article 2 stipulates :

(1) "A marriage is legitimate, if it has been performed according to the laws of the respective religions and beliefs of the parties concerned.

(2)" "Every marriage shall be registered according to the regulations of the legislation in force."

c. A marriage is in principle monogamous. Only when wanted by those, whose law and religion permits them to do so is a husband allowed to marry more than one wife. Even so, a marriage of one husband with more than one wife, though wished for by the parties concerned, can only be solemnized with his first wife's consent and -----

1. Hartini Tranggono, The role of women in the law, HUKUM, No.3,104 (1975).

the Court's permission (Article 3). The Court will judge whether there is a reason for the man to marry again and whether he will be able to provide sufficient maintenance for his family. Also whether he will be able to be impartial and fair to all wives. It is hoped that on the above mentioned conditions polygamy will be kept within bounds (Article 4).

d. To perform a marriage, the prospective spouses shall be physically and mentally mature, in order to materialize properly the purpose of a marriage without ending in a divorce and moreover to obtain a good and healthy offspring.

For this purpose a marriage between adolescents should be prevented. Besides a marriage is connected with the population problem. It is proved that a marriage at a low age for women results in more births than one at a higher age. Therefore the act has fixed the age limit to marry i.e. 19 years for men and 16 years for women. Article 7 Marriage Law no.1,1974 states : (1) " Marriage shall be permitted only if the male aspirant has reached the age of 19 (nineteen) years and the female aspirant has reached the age of 16 (sixteen) years."

e. Because the aim of a marriage is to found a family that is happy, prosperous and lasting, the act follows the principle of controlling divorce. In Islamic Law the husband has the right to divorce his wife. But the new Act stipulates that all divorces shall be ruled in

Court. Wives have the same right as husbands to request for a divorce. Article 39, Marriage Law no.1,1974 states :(1) "A divorce shall be carried out before a session of a Court of Law after the Court concerned has endeavored and has been unsuccessful in bringing about a reconciliation between the two parties."

f. The right and status of a wife are equal to those of the husband in the household as well as in society, so that everything concerning the family can be discussed and decided by husband and wife together.

As the State is based on the Principles of Pancasila, the First Principle being "Belief in God Almighty", so marriage is also closely related to religion and spiritual values. It does not only possess a physical value but a mental value as well which plays a vitally important role. The establishment of an ideal marriage is closely connected with the phenomenon of birth which is the essence of marriage so that the care and education of the offspring are the responsibilities of the parents.¹

Article 2 states : "With the formulation in Article 2, paragraph 1, it is established that there is no marriage contracted beyond the Law of the respective Religions and Beliefs, in line with the 1945 Constitu-

1. Clarification Law of the Republic of Indonesia-
no.1/1974 on Marriage, Article 1, 36 (1976).

tion."

What is meant by the Law of the respective religion and beliefs also incorporates regulations valid for the followers of those religions and beliefs as long as they do not run counter to this Law or are not otherwise decided therein.¹

1. Ibid.

1.5. Concept of Islamic Education

The fundamental element inherent in the Islamic concept of education in the inculcation of **adab** , for it is adab in the all - inclusive sense here meant as encompassing the spiritual and material life of man that instils the quality of goodness that is sought after. Education is precisely what the Prophet, s.a. w, meant by adab when he said to the effect : ¹

"My Lord educated (addaba) me, and made my education (ta'dib) most excellent."

Education is the instilling and inculcation of adab in man - it is ta'dib. Thus adab is precisely what applies to man if he must acquit himself successfully and well in this life and the Hereafter.

Syed Muhammad Al Naquib Al Attas stated : "As the philosophical basis for the purpose and aims of education, and for the establishment of an integrated core of knowledge in the educational system, it seems to me important to recollect the essential character of the Islamic vision of Reality." ² In the same way that the Islamic vision of Reality is centered of Being, so is that Being viewed in Islam as a Hierarchy from the

1. Syed Muhammad Al- Naquib Al- Attas, *Islam and - secularism*, 144 (1978).

2. Id. at 141

highest to the lowest. Within this context is also seen the relationship between man and the universe, his position in the order of Being and his analogical description as a microcosm reflecting the macrocosms without the reverse being the case. ¹

Knowledge is also ordered hierarchically, and our task at present is to alter the system of education known to us - and in some cases to modify it - so that it patterns itself after the Islamic system of order and discipline. ² The aim of education in Islam is therefore to produce a good man . ³

Education is something peculiar only to man, and the activity involved and qualitative elements inherent in education are not the same as those inherent in tarbiyah. Moreover, tarbiyah basically also refers to the idea of possession, and it is usually the "possessor" who exercises tarbiyah on the objects of tarbiyah. God, the Sustainer, Nourisher, Cherisher, Lord and Possessor of all (al - rabb) is already ever exercising His Dominion over all, so that tarbiyah is something that man must do. In the case of man it is usually the parents who exercise tarbiyah over their off-

1. Syed Muhammad Al-Naquib Al-Attas, *Islam and - Secularism*, 142 (1978).

2. Ibid.

3. Id. at 144