

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

BY

NIK NORIANI NIK BADLI SHAH

A dissertation submitted in partial fulfilment of the  
requirements for the degree of Doctor of Philosophy  
(Islamic Civilization)

International Institute of Islamic Thought and  
Civilization  
International Islamic University Malaysia

OCTOBER 2009

## 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 20<sup>th</sup> 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

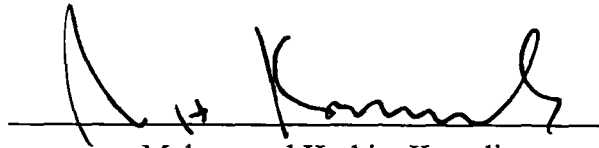
تهدف هذه الرسالة لتقديم دراسة مقارنة لمفهوم العدالة و تطوراته التاريخية في المجتمعات الإسلامية و الغربية منظورا إليه في اطار الواقع القائم في المجتمعات المعنية عامة، و في مليزيا على وجه الخصوص. هذا، ونظرا لاهمية كل من النهجين، الإسلامي و الغربي، في بلوره النظم القانونية في مليزيا، و هي محور الرسالة و موضوعها الأساسي، فلا شك أن دراسة كل من النهجين المذكورين دراسة مقارنة مما ينبغي أن يفيد - ليس فقط في فهم الاوضاع القانونية القائمة في مليزيا وحدها - بل فيما يتعلق باستكشاف نقاط الشبه والاختلاف بين النهجين - مثلا فيما يتصل بنظام الشورى الإسلامي، و نظام الحكم النيابي الغربي الحديث. و كما هو معلوم فقد تأثرت نظم الحكم النيابي الغربية بعوامل ثورية في بعض الاحيان، و اخرى اصلاحية تدريجية احيانا اخرى. هذا و بينما تأثرت مناهج المسلمين في النظر إلى مفهوم العدالة و في صياغة المذاهب الفقهية عامة باعتبارات دينية و فلسفية أساسية متباينة، فقد تأثرت مناهج الغربيين المحدثين واجتهاداتهم القانونية و الفقهية بعدد من الفلسفات الوضعية و الطبيعية كذلك. و من ثم فقد تضمن البحث النظر في آراء عدد من كبار المفكرين الذين تأثروا لدرجات متفاوتة وبصور مختلفة بالتفاعل الذي وقع بين التيارات الفكرية و الفقهية المذكورة، إسلامية كانت أو غربية، من أمثال الشيخ محمد عبده المصري و من سار على نهجه في بلاد الملايو من أمثال السيد الشيخ الهادي - كما استلزم البحث النظر في آراء عدد من كبار المفكرين الغربيين المحدثين من أمثال جون لوك الانجليزي و جان جاك روسو الفرنسي على ما بينهم من تشابه و اختلاف. هذا و قد كشف البحث عددا معتبرا من الأمور الهامة و الطريفة احيانا: من بينهما أن توقير النساء و صيانة حقوقهن لم يكن وقفا على المجتمعات الغربية الحديثة قبل القرن العشرين، و من بينهما ايضا الخلط الذي طالما وقع و شاع بين التقاليد البريطانية المتزمنة على عهد الملكة فكتوريا من جهة، و بين قيم الإسلام و تراث المسلمين من جهة اخرى. فكما قام عدد من المستشرقين الغربيين بدراسة الإسلام و المجتمعات الإسلامية من وجهة نظرهم، فعلى المسلمين المعاصرين أن يقوموا بدراسة المجتمعات الغربية بمختلف ابعادها الفكرية و الفقهية من وجهة نظرنا نحن. هذا وغنى عن القول أن القوانين العرفية الصينية و الهندية قد كانت سابقا ذات اثر معتبر في بلاد الملايو. أما الآن، ولا سيما منذ اجازة قانون الزواج و الطلاق عام 1976، فقد اصبح الأمر قسمة بين الشريعة الإسلامية المعتمدة بين الأكثرية المسلمة من أهل البلاد، و بين القوانين الإنجليزية المطعمة في بعض ابعادها بقوانين الأحوال الشخصية الإسلامية الداعمة لحقوق النساء لا سيما فيما يتعلق بحقوق الملكية و كفالة الأطفال. على أن من المؤسف أن فضل الشريعة الإسلامية و تميزها في مثل هذه الأمور الهامة كثيرا ما يغيب عن ادراك الكثيرين، اذ يشيع الظن بين العامة بل بين كثير ممن نالوا قسطا معتبرا من التعليم، أن توقير النساء و صيانة حقوقهن من ثمرات الحضارة الغربية الحديثة وحدها - وهذا كما تبين الدراسة محض جهل و افتراء.

## ABSTRAK

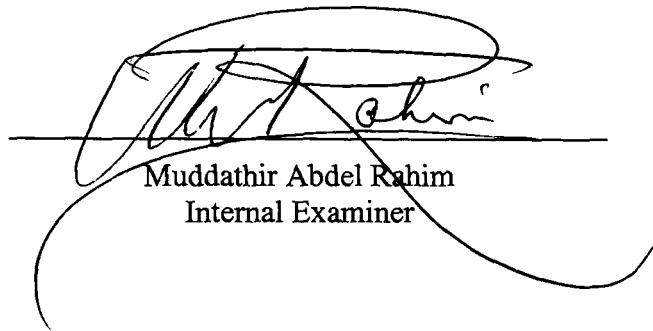
Dissertasi ini akan melihat beberapa konsep keadilan dari perspektif perbandingan pemikiran Islam dan Barat berkaitan politik dan perundangan, mengenai perkembangan sejarah yang relevan bagi keadaan masakini. Dalam beberapa dekad kebelakangan ini, terdapat seruan untuk kebangkitan semula dan pemeliharaan sistem dan institusi Islam, serta juga bagi pemodenan dan pembaharuannya. Oleh kerana pengaruh Islam dan pengaruh Barat kedua-duanya memainkan peranan penting dalam perkembangan status perundangan di Malaysia, kajian perbandingan adalah bermanfaat untuk melihat persamaan serta juga perbezaannya; misalnya kemungkinan untuk mencari persamaan di antara idea Barat mengenai kerajaan berpewakilan dengan konsep Islam mengenai *shura* atau perundingan. Bentuk moden kerajaan berpewakilan telah juga dihasilkan melalui perubahan revolusioner di samping perkembangan yang beransur-ansur. Kefahaman mengenai teologi dan falsafah Islam akan menunjukkan asas perundangan Islam dan hubung-kait antara perbincangan teologi mengenai keadilan dengan unsur politik. Teori perundangan Barat mengenai undang-undang dan keadilan, termasuk teori positivism klasik dan undang-undang semulajadi, dan perbandingan dengan teori perundangan Islam sebagai undang-undang positif dalam bentuk ideal, akan dibincangkan. Idea beberapa tokoh pemikir Islam juga dibincangkan, misalnya gerakan modernist Sheikh Muhammad 'Abduh di Mesir, yang dicerminkan di Malaya oleh Syed Shaykh al-Hady. Idea beberapa tokoh pemikir tamaddun Barat, misalnya Locke dan Rousseau, juga mempengaruhi perkembangan sejarah sistem politik dan perundangan. Taraf rendah wanita di Barat sebelum kurun ke 20 akan menunjukkan bahawa hak wanita bukanlah merupakan budaya atau sebahagian asas tradisi Barat. Kekeliruan mungkin berlaku apabila amalan sesuatu budaya dicampur-aduk dengan budaya lain, misalnya apabila nilai zaman Victorian dikelirukan dengan prinsip ajaran Islam. Para Orientalist telah lama menjalankan kajian mengenai tamaddun Islam dari sudut pandangan mereka, dengan itu orang Islam juga patutlah menjalankan kajian mengenai tamaddun Barat dari sudut pandangan Islam. Dwi-warisan di Malaysia dicerminkan melalui dua sistem perundangannya. Undang-undang adat Cina dan Hindu juga pernah mempunyai peranan penting, tetapi tidak lagi sejak Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 dikuatkuasakan ke atas orang bukan-Islam. Undang-undang keluarga kini menjadi garisan utama yang membezakan pihak Islam dengan yang lain, seolah-olah ianya memang sentiasa bercanggah. Namun, perbincangan ini akan menunjukkan bahawa terdapat bahagian undang-undang keluarga Inggeris yang telah mendapat manfaat dari undang-undang keluarga Islam mengenai hak wanita, terutamanya hak isteri untuk memiliki harta dan mendapat jagaan anak. Malangnya, pengaruh Islam ke atas keadilan jender biasanya tidak diketahui dan tidak diiktiraf. Sebaliknya, terdapat pula prasangka bahawa keadilan jender adalah berasaskan tamaddun Barat.

## APPROVAL PAGE

This thesis of Nik Noriani Nik Badli Shah has been approved by the following:



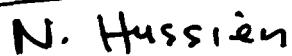
Mohammad Hashim Kamali  
Supervisor



Muddathir Abdel Rahim  
Internal Examiner

---

Ziba Mir-Hosseini  
External Examiner



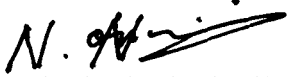
---

Nasr Eldin Ibrahim Ahmed Hussein  
Chairman

## 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.

Nik Noriani Nik Badli Shah

Signature.....  .....

Date..... 30/9/2009 .....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

**DECLARATION OF COPYRIGHT AND  
AFFIRMATION OF FAIR USE OF UNPUBLISHED  
RESEARCH**

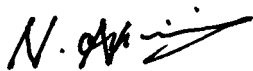
Copyright © 2009 by Nik Noriani Nik Badli Shah. All rights reserved.

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

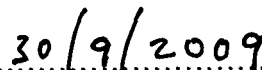
No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder except as provided below.

1. Any material contained in or derived from this unpublished research may only be used by others in their writing with due acknowledgment.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes.
3. The IIUM library will have the right to make, store in a retrieval system and supply copies of this unpublished research if requested by other universities and research libraries.

Affirmed by Nik Noriani Nik Badli Shah



.....  
Signature



.....  
Date

To My Parents



## **ACKNOWLEDGEMENTS**

The writer wishes to express her thanks and gratitude to Professor Dr Mohammad Hashim Kamali for his kindness in supervising the writing of this dissertation, and his highly valued advice and comments. The writer also wishes to express her thanks and gratitude to Professor Dr Ahmad Kazemi Moussavi, who was involved in supervising the initial preparation of this dissertation when he was at ISTAC, until August 2005.

## TABLE OF CONTENTS

Abstract .....	ii
Abstract in Arabic .....	iii
Abstract in Malay.....	iv
Approval Page.....	v
Declaration Page .....	vi
Copyright Page.....	vii
Dedication .....	viii
Acknowledgements.....	ix
List of Cases.....	xiii
<b>CHAPTER 1: INTRODUCTION.....</b>	<b>1</b>
Objective and Purpose .....	1
Scope.....	3
Research Methodology .....	13
Limitations.....	14
<b>CHAPTER 2: CONCEPTS OF JUSTICE, ISLAMIC AND WESTERN .....</b>	<b>15</b>
Concepts of Justice .....	15
Al-Farabi on Justice .....	17
Ibn Miskawaih on Justice.....	17
Justice and <i>adab</i> .....	18
Theological-Political Debates.....	20
The <i>Qadariyyah</i> .....	21
The <i>Jabariyyah</i> .....	25
The <i>Mu'tazilah</i> .....	27
The <i>Ash'ariyyah</i> .....	29
The <i>Maturidiyyah</i> .....	30
Controversies over Justice.....	31
Legal Methodology and Justice .....	33
Western Concepts of Law and Justice .....	35
Natural Law.....	35
Classical Positivism .....	38
Utility .....	39
Modern Developments .....	40
Justice, Law and Society.....	44
Centrality of Justice in <i>Shari'ah</i> .....	45
Justice and Integrity .....	46
Justice and Purposes of Law .....	50
Gender Justice and Feminism.....	53
Feminism in the West .....	54
Gender Justice in the Muslim world .....	56
Concluding Remarks .....	60

<b>CHAPTER 3: COMPARATIVE HISTORY.....</b>	<b>62</b>
Introduction.....	62
Government in Islamic History .....	63
Early non-hereditary leadership .....	63
Medieval views .....	67
Character of justice for office holders.....	73
Judicial redress – the <i>Mazalim</i> .....	76
Consultation ( <i>Shura</i> ) and consensus ( <i>Ijma'</i> ).....	77
Public interests ( <i>Maslahah</i> ).....	83
Revolutions in Western History.....	86
Seventeenth century England.....	88
American War of Independence.....	92
French Revolution.....	97
Comparative Revolutionary Upheavals .....	103
Comparative Observations.....	105
Liberty and Equality in relation to Justice .....	105
Individual Autonomy and Social Cooperation.....	115
Islam and Democracy.....	120
Concluding Remarks .....	131
<b>CHAPTER 4: HISTORICAL PERSPECTIVES ON WOMEN’S RIGHTS ....</b>	<b>134</b>
Introduction.....	134
Women in the West .....	134
Traditional views on Women.....	135
Women’s Suffrage Movement .....	140
Early Decades of Women’s Emancipation .....	148
Women in Muslim Society .....	152
Women’s Educational and Property Rights .....	153
Women’s Political Rights .....	155
Misconceptions on Women’s Rights .....	166
Concluding Remarks .....	174
<b>CHAPTER 5: MALAYSIAN HERITAGE AND DEVELOPMENTS .....</b>	<b>177</b>
Introduction.....	177
Historical Background of Malay World .....	178
Early Islamization and Westernization .....	178
Early Malay-Muslim rulers.....	181
Religious and Cultural Influences .....	185
Religion and Culture on Gender Relationships.....	186
Islamic Reform and Modernism.....	195
Islamic Revivalism.....	204
Heterogeneous Society in Malaysia .....	211
Concluding Remarks .....	215

<b>CHAPTER 6: MALAYSIAN CONTEMPORARY CONTEXT .....</b>	<b>217</b>
Introduction.....	217
Legal and Religious Views on Family .....	218
Increasing Duality between Muslims and Non-Muslims.....	219
Family Norms as Microcosm of Societal Norms.....	221
<i>Shari'ah, Fiqh</i> and Qur'anic View on Marital Relationships.....	224
Islamic Family Law Act 1984 and 1994 Amendments.....	232
Misconceptions on Marriage and Financial Rights .....	236
Polygamy .....	236
Dissolution of Marriage .....	246
Marital Relationships and Domestic Violence.....	252
Welfare of Children.....	256
Inheritance.....	258
Matrimonial Property .....	263
Recent Developments .....	268
Concluding Remarks .....	284
 <b>CHAPTER 7: CONCLUSION AND RECOMMENDATIONS .....</b>	 <b>286</b>
Universality in Islam.....	286
Towards Holistic Understanding on Purposes of <i>Shari'ah</i> .....	296
Islamic and Civil Laws: Strengthening Common Ground.....	303
Marriage Contracts.....	305
Divorce and its Consequences .....	308
Approaches to Inheritance.....	314
General Observations.....	317
 <b>BIBLIOGRAPHY .....</b>	 <b>321</b>

## LIST OF CASES

- Aga Mahomed Jaffer Bindanim v. Koolsoom Beebee\_ILR 25 Cal. 9 (India Law Report, Calcutta)
- Ansar Burney v. Federation of Pakistan PLD (1983) FSC 73. (Pakistan Legal Decisions, Federal Shariat Court)
- Chulas v. Kolson\_(1867) Leicester's Reports. 460
- Fakhariah v. Johari [1993] 1 MLJ lxxvii (Malayan Law Journal)
- Gotliffe v. Edelston [1930] 2 KB 378 (King's Bench Division)
- Mansjur bin Abdul Rahman v. Kamariah bte Noordin [1988] 3 MLJ xlv
- Mary Ng vs. Ooi Gim Teng[1972] 2 M.L.J. 18.
- Md. Hefzur Rahman v. Shamsun Nahar Begum 47 (1995) Dhaka Law Reports 54 High Court Division
- Mohd Ahmad Khan v Shah Bano Begum AIR 1985 SC 945 (All India Reporter, Supreme Court)
- Mohd. Habibullah bin Mahmood v Faridah bt. Dato Talib [1992] 2 MLJ 793
- Noraini Mokhtar v. Abd Halim Samat [2005] 1 CLJ (Sya) 21 (Current Law Journal, Syariah)
- Rokiah bte Haji Abdul Jalil v. Mohamed Idris bin Shamsudin [1989] 3 MLJ ix
- Tijah v. Mat Alli(1890) Kyshe's Reports, 124
- White v. White [2000] 3 WLR 1571 (Weekly Law Reports)

# 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 20<sup>th</sup> 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 Occidental 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 19<sup>th</sup> 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 18<sup>th</sup> 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 18<sup>th</sup> century that even a radical thinker like Rousseau was unable to break away from it. In 19<sup>th</sup> 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 19<sup>th</sup> and early 20<sup>th</sup>

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 “*adi*” 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 homogeneity 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 21<sup>st</sup> 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