

**Memorandum to Ahli Dewan Negara  
to Review the Islamic Family Law  
(Federal Territories) (Amendment) Bill 2005  
8 December 2005**

**Submitted by the Joint Action Group on Gender Equality (JAGGE)**

This memorandum by the Joint Action Group on Gender Equality (JAGGE) is handed over to members of Dewan Negara to request a withdrawal and review of the Islamic Family Law (Federal Territories) (Amendment) Bill 2005, passed by the Dewan Rakyat on 26 September 2005. Whilst several amendments in this Bill aim to safeguard the interests of justice for Muslim women in this country, nevertheless we are concerned that these and other amendments in the Bill will result in further injustice and discrimination against women.

Furthermore, the Dewan Rakyat was not given ample time to study and scrutinize the Bill. Consequently, Members of Parliament did not have sufficient opportunity to discuss with relevant parties and to cogently debate on those provisions which will have discriminatory effects upon Muslim women in Malaysia.

Therefore we hope that the Senators will re-examine these disturbing amendments and propose that the Bill be withdrawn for review and resubmitted to the Dewan Rakyat, having taken into consideration the submissions made by women's groups and other interested parties.

**Background**

On 26<sup>th</sup> September, the Dewan Rakyat passed the Islamic Family Law (Federal Territories) (Amendment) Bill 2005. Its aim is to improve the Islamic Family Law (Federal Territories) Act 1984 and to ensure that justice will be upheld.

We welcome some of the proposed amendments, particularly in respect of claims to *harta sepencarian* for the existing wife upon her husband's contracting a polygamous marriage, and the requirement for the existing wife, or wives, prospective wife and her guardian to be present in Court. These positive amendments should ensure protection for the rights of Muslim women after having to endure the hardships inflicted on them by discriminatory laws which are insensitive to the plight faced by Muslim women and the realities in their lives.

However, these amendments and others have discriminatory effects against Muslim women in Malaysia. Amongst the discriminatory amendments that need to be reviewed are:

- 1. Section 23(9): The right of the husband to claim a share of his existing wife's property upon his polygamous marriage.**

This amendment states "...Every Court that grants the permission or orders a marriage to be registered under this section shall have the power on the application by *any party* to the marriage... to order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of such assets and the division of the proceeds of the sale." As a result of this selective gender neutral language ("any party"), the husband will also be able

to claim *harta sepencarian* from his existing wife or wives. We are concerned that this provision may be abused by irresponsible husbands.

***Its implications:***

A husband who is going to marry a new wife will also be entitled to claim part of his existing wife's assets as *harta sepencarian* or to apply that their matrimonial home be sold and the proceeds divided in order to support his new lifestyle, or for whatever reason. Property that had already been given by the husband to his wife may also be claimed back as *harta sepencarian*. This would be grossly unjust to the existing wife and children. It should be remembered that except in cases involving *khul'* divorce, *Surah al-Baqarah* 2: 229 prohibits husbands from reclaiming whatsoever that they had given to their wives: "it is not lawful for you, (men), to take back any of your gifts (from your wives)".

**2. Section 23(3) and 23(4)(a): Making Polygamy Easier for Men**

This amendment makes it easier for men to practise polygamy. The principal provision of the Islamic Family Law (Federal Territories) Act 1984 (IFL Act, 1984), in section 23, provided that the proposed marriage must be "just and necessary", but this has been amended to "just or necessary".

***Its implications:***

The husband will only need to show to the Court that the proposed marriage is "necessary", and need not bother as to whether it is "just" or not for him to practise polygamy. This amendment appears to be a deliberate attempt to nullify and set aside the judgment of the Selangor Syariah Appeal Committee in the case of *Aishah vs Wan Mohd Yusof (1990) 7 JH 152*, which held that emphasis must be placed on all the conditions under this subsection, and that each condition must be proven separately.

The reason given by the husband for wanting to contract a polygamous marriage was that of legitimising his love for the other woman. The Selangor Syariah Appeal Committee, however, observed that while this may be sufficient ground to show why the proposed marriage was "necessary", it has no relevance to the question of whether the proposed marriage was "just". As a Muslim, he should be in control of his desires and be able to restrain himself from committing adultery and immoral activities. Thus, the court said while the defendant fulfilled the condition for "necessary", he failed to fulfil the condition for "just". His application to practise polygamy was rejected.

**3. Section 23(9)(a): Forcing a wife to choose maintenance OR division of *harta sepencarian* upon a husband's polygamous marriage.**

This new section which is intended to protect the existing wife in a polygamous marriage can cause injustice as it forces a wife to choose between alternatives, either to apply for order of maintenance OR to apply for order of division on *harta sepencarian*. This is unjust and has no basis in Islamic law as it is a mandatory obligation upon the husband to maintain his wife. The additional right for the wife to claim a division on *harta sepencarian* is to protect the interest of the existing wife and children and to ensure that justice is done in a polygamous marriage. Therefore the wife should not be asked to choose one or the other form of financial security. She is entitled to both under Islamic law.

**4. Section 52(1): Extending the wife's right to *fasakh* divorce to the husband.**

The right to *fasakh*, which is traditionally a woman's right under Islamic law is now extended to the husband, even though he still possesses the absolute right to pronounce *talaq* to divorce his wife. We find it very strange that when there is a conflict of juristic views among the ulama' over a certain rule, there is a tendency to adopt that which is more advantageous for the husband, and even to further extend his advantage. On the other hand, when there is a conflict of juristic views among the ulama' over another rule which may be advantageous for the wife, the view that is beneficial to the wife is set aside and rejected (for e.g. the rule that extends the right of *isma'* or *talaq tafwid* (delegated divorce) - where the husband delegates to his wife a general right to dissolve the marriage in the same manner as he may dissolve it through *talaq* - juristic opinion based on *Surah al-Ahzab, 33:28-29*).

***Its Implications:***

The husband's rights to divorce have been further increased but the wife's rights remain unchanged. The husband can easily, at his whim and fancy, pronounce *talaq* even when the wife is not willing to be divorced, and now he is to be given a general right to claim *fasakh* as well. There is no equivalent provision to restrict the Court from dissolving the marriage if the dissolution of marriage would be unjust to the wife. Moreover, the husband's ability to obtain *fasakh* divorce enables him to escape paying any form of compensation to his divorced wife.

**5. Section 107A: A husband can now get a court order to stop his wife from disposing her property.**

Under this new section, a husband can prevent/restrain the wife from disposing her property. Under hukum syara', the wife has no responsibility to provide maintenance. Therefore, the husband has no rights over his wife's property, but the wife has rights over her husband's property in respect of maintenance for herself and their children

***Its implications:***

The original provision in the IFL Act, 1984. is to enable the Court to set aside and prevent the disposition of property by a husband or parent whose intention is to reduce his means to pay maintenance to wife or children, or his means to pay *mut'ah* to his former wife, or to deprive his wife of any rights in relation to the property. In

making the amendment, the Bill appears to extend equal rights to both husband and wife, but its implication will be to increase discrimination against women as it actually increases men's rights without any corresponding development with regards to women's rights.

This amendment already adopted in Johor has led to the first complaint received by us from a woman whose husband successfully obtained a court order to freeze her bank accounts in order to claim matrimonial property. This has caused her severe hardship as she could not use any of her savings to maintain herself or the children. Neither did the husband provide any form of maintenance while the negotiations for divorce was going on.

### Proposals

Considering that the implications of these amendments are gravely detrimental to the principles of justice and equality in Islam, JAGGE urges Senators of the Dewan Negara to consider withdrawing this Bill for further review and scrutiny and that the Bill be then resubmitted to the Dewan Rakyat, having taken into consideration the submissions made by women's groups and other interested parties. Failing this, should the Bill still be adopted, then JAGGE proposes that the following sections be reviewed and the amendments as we proposed be adopted:

- (1) **Section 23(9)(b):** This amendment on claims for *harta sepencarian* upon a husband's polygamous marriage be limited to entitle only the **WIFE** to apply for *harta sepencarian* from the husband;
- (2) **Section 23(3) and 23(4)(a):** These amendments should revert to the original "just and necessary".
- (3) **Section 23(9):** This new section should be amended to recognise the wife's right to maintenance and *harta sepencarian*, without requiring her to make a choice for one or the other;
- (4) **Section 52(1):** This amended section extending the right to *fasakh* divorce to the husband should be removed;
- (5) **Section 107A:** This new section that enables a husband to prevent his wife from disposing her own property should be removed.

### Submitted by the Joint Action Group on Gender Equality (JAGGE)

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