

Regulating Polygamous Marriage to Prevent its Abuse: A Case Study of Malaysia

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ABSTRACT

Regulating polygamous marriage is essential to preserve the sanctity of the marriage institution. As marriage in Islam is a religious contract, restricting polygamous marriage is vital to ensure marriages serve their holy purposes. In Malaysia, several provisions are incorporated in the Islamic Family Law Act /Enactment to control the practice of polygamous marriage. Yet, cases of abuse do occur in such marriages affecting the stability of the family. This paper therefore, aims to analyse the weaknesses of the mechanisms governing polygamous marriage from a legal and administrative perspective. Recommendations are made to formulate better laws and procedures to minimise such abuses. A combination of library research and semi structured interviews are employed in this study as both methods highlight important weaknesses in the current legal and administrative mechanisms. The findings of this research reveal important flaws in the present governance of polygamous marriage that have led to abuses. These findings can be an eye opener for the relevant authorities in identifying causes of abuse in polygamous marriages. Therefore, current laws must be reformed to ensure abuses do not occur in such marriages.

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INTRODUCTION

Polygamous marriage was prevalent in the pre-Islamic era. A man was absolutely free to take more than one wife and the marriage was entirely unrestricted, as there were no rules or restrictions regarding polygamy (Hammudah, 2008, p. 99; Jawwad, 1993, p. 534). However, when Islam was introduced, it restricted the number of wives a man may

have concurrently to four. The Qur'an also allowed a man to practise polygamy with the condition that he can be equitable to all his four wives. As stated in the Qur'an, "... marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one," (Qur'an, al-Nisa' (4): 3). Polygamy in Islam is neither mandatory nor encouraged, but merely permitted. Allah said in another verse, "you are never able to be fair and just as between women, even if it is your ardent desire..." (Qur'an, al-Nisa' (4): 129). The combination of these two verses shows discouragement of such plural marriages.

There have been numerous studies on polygamy looking at from different aspects (Abdullah, 2007, 2009; Kamaruddin & Abdullah, 2006; Shah Haneef, 2008). Abdullah (2015), for instance, looked at the legal history of polygamy in Malaysia from pre-colonial to post-independence Malaysia. He highlighted the complexities of polygamy laws throughout the historical periods. Fatah, Raudhotul and Jani (2014) examined the efficiency of the legal provisions on polygamy in Malaysia. The findings showed that the current legal provisions on polygamy in Malaysia are insufficient in curbing the abuse of polygamy. A good suggestion made by the authors is the condition of being able to do "just" should be from every aspect including justice in treatment, children's education and care, religious educational background and awareness, not just merely relying on financial ability as required in the existing provision. With regards to the positive and

negative impacts of polygamous marriage, studies by Fatah (2014), Zain (2010), and Exposito (2017), are good references. Polygamy, according to the researchers, can reduce women's socio-economic problems in Malaysia. Several researchers have called for Islamic family law reforms particularly relating to polygamous law. Noor (2007), for instance, analysed arguments of prominent scholars, such as Abduh and Qasim Amin, on the need to restrict polygamy practices to situations where the wife is barren or afflicted with a chronic disease that prevents her from fulfilling her marital obligations. Kamaruddin and Abdullah, (2006, p. 321-322) argued that the abuse of polygamy was largely due to the absence of effective measures taken to curtail the problems. Important reformations relating to legal mechanisms were suggested.

No studies have discussed comprehensively on the legal and administrative aspects in preventing abuse of such marriage. Thus, this research aims to examine important flaws in the governance of polygamous marriage and to propose significant mechanisms in curbing abuse of polygamous marriage. Among the recommendations proposed are to have specific guideline on the financial capability of the husband, and to extend the concept of *ta'liq* divorce to include polygamy.

METHODS

This is a qualitative study on the legal mechanism in preventing abuse in polygamous marriage. A library research method is mainly used to examine the

current legal provision in restricting such marriage. Literatures in the form of books, journal articles, legal provisions, procedures and related court cases are referred to provide insights and information relating to the research area. Islamic Family Law Act of Federal Territories 1984 (hereinafter called IFLA 1984) is selected in this study to present other states in Malaysia. This is because Federal Territories is the capital of Malaysia and directly administered by the federal government. Laws and procedures from selected Muslim countries are also referred to highlight their practices. This research also employs a semi-structured interview on respondents which consists of three judges from the Shariah Court. This interview method aims to examine the current legal and administrative mechanism in minimising polygamous marriages and to identify the loopholes in the system.

RESULT AND DISCUSSION

The findings of this research are discussed below.

Malaysian Legal Mechanism in Governing Polygamous Marriages

With regards to polygamous marriages, Malaysian laws have neither allowed nor prohibited it. It is left to the Court to decide based on the grounds they think fit. A Muslim man who wants to practise polygamy has to apply for and obtain prior written consent or permission from the Shariah Court judge (Section 23 of the IFLA 1984). The application for permission must be submitted in the prescribed manner and

must be accompanied by an *iqrar*¹ stating the grounds on which the proposed marriage is alleged to be just or necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependants including would be dependants as a result of the proposed marriage, and whether the consent or views of the existing wives on the proposed marriage has been obtained (Section 23 (3) of the IFLA, 1984).

To obtain the consent of the Shariah Court, the applicant of the polygamous marriage must satisfy four conditions. First, he must prove that the proposed marriage is just or necessary having regards to, among others, sterility, physical unfitness for conjugal relations, wilful avoidance of an order for restitution for conjugal right, or insanity on the part of the existing wife or wives. Second, the applicant must prove that he has such means to enable him to support all his wives and dependants, including would-be dependants. Third, the applicant must prove that he would be able to accord equal treatment to all his wives, as required by *Hukum Syara'*. Fourth, the applicant must prove that the proposed marriage would not cause legal harm to the existing wife or wives (Section 23 (3) of the IFLA, 1984).

There are many court cases that illustrate this point. One such case is Negeri Sembilan's *Ruzaini Hasaan* ([2004] I CLJ

¹ "*iqrar*" means an admission made by a person in writing or orally or by gesture, stating that he is under an obligation or liability to another person in respect of some rights, refer to Section 2 of the IFLA, 1984, 5.

(SYA) 405). The issue that arose in this case was whether the applicant could be said to have the financial means to support two wives. The evidence showed that the applicant only had a balance of RM291.90 left from his monthly income after deducting the expenses for his existing family. The judge dismissed the application and stated that it is a prerequisite that the proposed polygamous marriage should not result in any injustice or victimisation. In this case, it was clear that the applicant did not have the means to support two wives and families, or fulfil the requirements of Section 23 (3) and 23 (4) (a), (b), (c) & (d) of the Enactment that resulted in its rejection. In the case of *Mohd Izuddin Mohd Ilias v. Rozeta Hasan* ([2008] 4 ShLR 180), the judge stressed that Section 23 (4) was not intended to abolish polygamy, but to provide constructive conditions with the hope that justice could be achieved more effectively among Muslim families. In polygamy, justice is the main concern and it is a religious obligation. Other than fulfilling the conditions of polygamy, the applicant should obtain a written consent from the Shariah Court in which failure will subject to penalty. For example, in *Syarie Prosecutor v. Mohd Salleh Idrose Haji Zakaria* ([2008] 4 ShLR 180) and *Adibah bt Mohd Salleh & Anor v. Shareena bt Azali* ([2012] 4 ShLR 60), the applicant was convicted under Section 123 of the Islamic Family Law Enactment of Selangor for contracting polygamous union without prior consent.

Section 23 is to minimise abuse of polygamous marriages as it states that a

marriage contracted without the court's permission shall not be registered under this Act/Enactment (Section 23 of IFLA 1984). However, the provision provides further that, if the court is satisfied that such marriage is valid according to *Hukum Syara'*, the court could order it to be registered but is subjected to penalties as provided by Section 123.

The provisions on polygamy as discussed above are considered as guidelines to discourage the abuse of polygamy, whereas the procedures are introduced to ensure equality in the treatment of co-wives. However, the state of Terengganu is the only state in Malaysia that has no such condition, the only requirement is obtaining the permission in writing of a Shariah judge (Section 21 of the Terengganu Administration of Islamic Family Law Enactment 1985). In the absence of the detailed provisions on the laws and procedures of polygamy, it is difficult for a judge to make a decision, as there is no proper guideline provided (Kamaruddin & Abdullah, 2006, pp. 321-322).

Significant Weaknesses Relating to Governance of Polygamous Marriages

The following are the unresolved issues of the governance for the polygamous marriage that need to be addressed.

Failure on the part of the Shariah Court judges to adhere to the laws of polygamy.

It is considered good governance if the court plays their role diligently to ensure justice and fairness are upheld. The court has

significant roles in safeguarding the people's rights. With regards to the polygamous marriage, the court's role is important in preventing abuse in a polygamous marriage by determining who may or who may not practise polygamy. The judge should strictly adhere to the conditions of polygamy as stated in the provision. The use of discretionary powers without specific guidelines will run counter to the purpose of marriage.

In the issue of a polygamous marriage, it has been widely criticised that the courts are not protecting the interests of the existing wives and children (Siraj, 1994) as studies showed that the court would still give approval for applications for polygamy although the income of the applicants were not satisfactory and incapable of supporting more than one wife (Abdullah, 2009; Edman & Shakur, 2004; Ismail, 2001). Hence, this proves that even though the capability of supporting the wives is one of the most important criteria of polygamy, the judge still has the discretion in making decision. There are no specific guidelines or measurement to define the financial capability of the applicant.

The study also revealed that the Shariah Court also approved applications for polygamy for certain reasons which are not stated in the Act/ Enactment. This means that the court has discretionary powers by taking into account other aspects in approving the application of polygamy. For example, it is reported that the court approved applications for polygamy on the grounds that the applicants had known

the prospective wife for a long time, the applicants showed their enthusiasm to practise polygamy, the applicants deeply desired to practise polygamy, the case had been postponed for too long etc. (Abdullah, 2009). In such circumstances, the court felt that a polygamous marriage was necessary and the judges believed that they acted on the basis of the Islamic legal concept to avoid evil which is more important than doing good.

The other reason for the approval of polygamy that should be stressed here is the existing wife's agreement with the husband's proposal of such marriage, as it is reported that the wife's agreement is sometimes considered the sole factor for the court to approve a polygamous marriage (Abdullah, 2009; Edman & Shakur, 2004). In fact, research conducted in Kuching, Sarawak showed that the consent of the first wife is the main factor in approving the application of polygamy, even though it is not the required condition of the polygamy application as stated in Section 21(3) (a), (b), (c) and (d) OUKI, 1991 (Edman & Shakur, 2004). According to Tuan Muhamad Adib Husin, Shah Alam Shariah High Court judge, consent from the first wife could be accepted, but the judge should make sure that the consent is freely given. According to him, asking the wife to give information by writing is one way to know whether her consent is genuine or not. By writing the wife normally will reveal everything and the judge will also know whether the husband is eligible or not to practise polygamy (Tuan Muhamad Adib Husin,

personal communication, 15th of June 2012 at 11.00 am).

Thus, the judge should observe the conditions of polygamy as stated in the provision of the Islamic Family Law Act/Enactment with the aim is to secure justice to wives and children as well as for having a harmonious family life.

Weaknesses of polygamy laws and inadequacy of penalties. The Islamic Family Law Act in Malaysia has attempted to control polygamy and prevent its abuse by requiring the permission of the court before a polygamous marriage may be contracted (Section 23 of IFLA 1984). However, studies show that statutory restrictions do not prevent the abuse of polygamy. In fact, more problems arise and the most obvious result is the tendency to cross the border to Thailand and solemnise the marriage there by *wali hakim* (Kamaruddin & Abdullah, 2006, pp. 321-322; Saleema, 2002; Salleh, 1992, p. 130). Studies revealed that among the factors which contribute to the practice of polygamous marriage in neighbouring countries are difficulties to contract polygamous marriage in their own country, the couples have to wait longer for the process, or it is difficult to get approval from the court (Md Hashim, 2009; Muhammad, 2003). In view of this, one may question as to whether the present laws on polygamy should be revised to make it easier to contract polygamy.

It is suggested that research should first be done before amending the laws as the unjust practice of polygamy would not preserve

the family wellbeing (Tuan Shahrudin Selamat, personal communication, 2012).

This is because research had shown that runaway marriages is preferred because the application of polygamy is rejected by the Court due to either the applicant is unqualified to practise polygamy or could not fulfil the required conditions (Md Hashim, 2009).

Section 12(2) and Section 34 are considered as confusing. This is because even though the law requires the husband to get consent from the court, it still gives recognition to extra-jurisdictional marriages upon payment of a sum as fine (Section 12(2) and 34 of IFLA 1984). Thus, the existence of law that allows the registration of the cross-border polygamous marriages undermines the whole exercise of controlling polygamy, as getting such extra-jurisdictional marriages registered has been made easy by imposing a fine (Shah Haneef, 2008). This runs counter to the purpose of the law that seeks to preserve human wellbeing, physically as well as emotionally, as the polygamous marriage seriously disturbs the wellbeing of these wives who are psychologically ill prepared to share their life partner with another woman (Zain, 2010).

Other problems that have occurred are the existence of separate state jurisdictions within the Federation of Malaysia that enables a man to take advantage of the most convenient law for personal gain (Badlishah, 2004). The case of *Aishah v. Wan Mohd Yusof* ([1990] 3 MLJ, lx) is the best example to illustrate this issue. In this case, the husband was able to circumvent the decision

of the Selangor Shariah Appeal Committee, which had rejected his application to marry another woman, by simply crossing to the state of Terengganu to get married. Thus, the existence of different laws on polygamy should be avoided to prevent abuse of polygamous marriages.

With regards to statutory penalties provided for those who contract polygamous marriages without permission of the court, the present penalties are fines not exceeding one thousand ringgit or imprisonment not exceeding six months or both (Section 123, IFLA 1984). It is argued that such penalties are insufficient to serve as an effective deterrent for men who contravene the law (Abdullah, 2009; Md Hashim, 2009). Based on the interviews conducted in this research, all respondents agreed that the penalty should be increased.

Limited application of *ta'liq* agreement.

This research finds that in practice, the application of the *ta'liq* agreement is subject to the prescribed provisions provided by the State Islamic Religious Department (JAIN). However, it is worth noting that the *ta'liq* provision as stated in Section 22 of the Islamic Family Law Act/Enactment does not limit to any specific matters as it provides that:

“Immediately after the solemnization of a marriage, the Registrar shall enter the prescribed particulars and the prescribed or other ta'liq of the marriage in the Marriage Register”

The words “*prescribed or other ta'liq*” refers not only to the specific terms of *ta'liq* as practised, but any stipulation which is agreed by the spouse could also be included. In this regard, additional terms of polygamy can be included to provide for the right of the wife to obtain a *ta'liq* divorce if the husband takes another wife. This ruling has been adopted and followed by other Muslim countries such as Jordan and Morocco (Abdullah, 2008).

The absence of measurement or guideline on financial capability of applicant.

Defining financial capability is very important in measuring the competency of the applicant of the polygamous marriage. Unfortunately, there is no measurement or guideline in defining the financial capability of the applicant. The normal practice is that it is up to the *Shariah* Court judge to determine the financial competency of the applicant. The judge has absolute freedom as it is based on his personal view. Several researches proved that the court still gives approval for the application of polygamy, although the applicants are not financially capable of supporting more than one wife. Abdullah (2009) for example, found that the court had given approval to 10% of the applicants of whose income was less than RM1000.

Edman and Shakur (2004) also revealed that the court had given approval for the application of polygamy to applicants whose income was between RM501 to RM1000 (10.5%) and between RM1001 to RM2000 (44%), i.e. the highest percentage from the

overall research. In one case, the court gave its approval to the applicant even though his income was only RM500 and the wife was not working (Tuan Anwan Ab. Mutalib, personal communication, 3rd of May 2012 at 3.00 p.m.). The court had approved the application of polygamy as the applicant showed eagerness to practise it.

Abdullah's (2009) research at the Shariah Courts in West Gombak, Sepang, Ipoh, Kuala Kangsar, Kuala Muda, Kuala Terengganu, Marang and Kota Bharu found that about 40% to 60% of the applicants of polygamous marriage earn an average gross monthly income between RM1001 to RM2999. Interestingly, 20% of the applicants in Kuala Muda, Marang and Kuala Terengganu earn less than RM1000 (Abdullah, 2009). This shows that even though the applicants are financially incapable of practising polygamy, they are still granted approval. Thus, a standard measurement in defining the financial capability of the husband is needed.

Recommendations

In Malaysia, even though specific provisions governing polygamy have been formulated, it remains controversial and cases of abuse of polygamy continue to rise. This necessitates State intervention for regulating polygamy not only from the legal perspectives but also through non-legislative measures. The following are suggested in order to minimise abuses in polygamous marriages.

Provide specific guidelines in defining financial capability. In the Malaysian

practice, the judges have discretionary powers in determining the financial capability of the applicant and studies show that even though the capability of supporting the wives is one of the most important criteria of polygamy, some judges do not consider it as an important element. The use of these discretionary power without specific guidelines will run counter to the purpose of marriage itself, namely to preserve the welfare of the human being.

Therefore, this research proposes that relevant authorities such as JAKIM, JKSM or JAIN to provide specific guidelines or measurements in defining financial capability of the applicant for polygamous marriage. The purpose is to guide the judges in determining financial capability of the applicant. It will also become a guide for anybody interested in practising polygamy to ensure that they are financially fit to support the existing and new families. The basic element that should be taken into consideration in defining financial capability is the cost of living. It is suggested that components in determining cost of living are based on *dharuriyyah* (human needs) which include among others, shelter, food, clothing, health, education and transportation. It means that the husband should have the financial capability to support the basic needs of all his dependents. Different states could have different methods of calculation as it is based on the cost of living. The amount of maintenance of the wife/wives and children will be estimated and the surplus will indicate whether the applicant is eligible or not for a polygamous marriage.

Views of wife/wives and other related persons. It is submitted that the provision in Section 23 (5) of IFLA, i.e., the requirements to summon existing wife/wives, the woman to be wedded, the *wali* of the woman to be wedded and any other related persons to be present at the hearing of the application are very important in order to know the capability of the applicant to practise polygamy. Such persons will provide relevant information relating to the proposed marriage which will help the judges in making an informed decision. Unfortunately, this provision for the State of Selangor is being reviewed to give discretion to the judges whether to summon or not those related persons to be present at the hearing of the application.

Therefore, this research suggests that Section 23 (5) of IFLA should be maintained as it is important to ensure justice in polygamous marriages. Views of the existing wife/wives are very important as she/they is/are the closest person(s) to the husband. To have genuine information, it is suggested that the judge should ask the wife/wives to give information in writing, as she/they will freely give the information without fear.

It is also proposed that the existing wife/wives' consent should not be considered as the sole factor for the court to approve the application for polygamous marriage. In addition to the consent of the wife, the financial capability of the applicant should be equally emphasised.

Revise related laws. The provision of Section 12(2) and Section 34 should be

revised as it allows registration of cross-border polygamous marriages. They undermine the entire exercise of regulating polygamy, as registering such extra-jurisdictional marriages has been made easy, i.e. through a simple fine. This runs counter to the purpose of the law and its ultimate goal of preserving human well-being. The penalties provided are insufficient to serve as an effective deterrent for persons who contravene the law.

The law on polygamy in Malaysia should also be standardised. The existence of separate State jurisdictions within the Federation of Malaysia enables persons to take advantage of the most convenient law for personal gain. At present, the laws in the State of Terengganu requires the applicant to obtain permission from the Shariah Court only for polygamous marriage. There are no other conditions prescribed and the judges have absolute discretionary powers whether to allow it or not. The State of Perlis on the other hand, has a different requirement. It requires the Court to summon the applicant to be present at the hearing of the application, whereas other States require the Court to summon not only the applicant but also the existing wife/wives, the woman to be wedded, the *wali* of the woman to be wedded and any other persons who in the opinion of the Court may provide information relating to the proposed marriage.

Laws of other Muslim countries can also be used as a guide. The Algerian Code (article 8), for instances, strictly provides that if the husband has not obtained the

judge's authorisation, the new marriage is dissolved before consummation. Syrian Codes of Personal Status 1953 also provides that a marriage contracted out of court is not to be certified without such procedures with the exemption of cases where the wife is pregnant or a child has been born. A harsher rule is applied in Bangladesh, in which it provides that any person who wants to marry during the subsistence of an existing marriage to contract another marriage, he shall have to first obtain permission from his existing wife and second permission from the arbitration council, without which the subsequent marriage will be illegal and liable to punishment (Section 6 of the Bangladesh Family Court Ordinance 1985). Unfortunately, those provisions which are good to deter the husband are not found in any other Family Codes of other countries. Indonesia is another example of a country that set out strict limitations on the practice of polygamy. Section 56 of the Kompilasi Hukum Islam (Indonesian Compilation of Islamic Law 1991) provides that the husband shall obtain the permission from *Shariah* Court (Pengadilan Agama) first before contracting a polygamous marriage. The *Shariah* Court would not grant permission unless the reason for polygamous marriage is in line with section 57, i.e. first, failure on the part of the wife in performing her duties as a wife, second, the wife is suffering from physical disability or an incurable disease, and third, sterility on the part of the wife. Interestingly, Section 59 provides that the permission from the court is subject to the consent of the first wife

and the court is satisfied that the husband has such means to support all his wives and dependents. However, if the present wife does not give her consent and the husband has sufficient ground as stated in Section 57, the judge will use his discretion to approve the husband's application for a polygamous marriage (Section 56-59 of the Indonesian Compilation of Islamic Law; Adriaan & Stijn, 2010; Nurmila, 2008).

Stipulation of no polygamy in marriage contract. Another way to strengthen rules governing polygamous marriage and to protect the right of a woman is by providing stipulation of no polygamy in the marriage contract. This requirement allows the wife to stipulate in the marriage contract that the husband shall not take another wife and which entitles her to sue for divorce if there is a breach of contract by the husband. Interestingly, this stipulation of no polygamy has been practised in most Arab countries. However, this practice is not common to Muslims in Southeast Asian countries including Malaysia.

In Malaysia, even though *ta'liq* agreement is practised, it is only subject to the prescribed agreement provided which does not include polygamy. However, it is worth noting that the *ta'liq* provision stated in IFLA 1984 (Section 22) and other State Family Enactments refers not only to the specific agreements as has been practised, but any matters which are agreed by the spouse. Thus, it is suggested that this *ta'liq* agreement should be broadened to include additional terms on polygamy. The purpose

is to provide the right for the wife to obtain a *ta'liq* divorce if the husband takes on another wife.

Provide counselling sessions and courses.

State Islamic Religious Department (JAIN) should provide counselling sessions or pre-marriage course to any men who wish to practise polygamy so that they will understand the concept of polygamous marriage. During the counselling session, emphasis should be given to the issue of duty and responsibility of the husband and also the issue of justice, as those issues are often neglected by the husbands. The husband should also be advised on his important responsibility to support all his dependents, and his capability to practise polygamy. This is because research has shown that most of the applicants of the polygamous marriages are financially incompetent.

JAIN and JAKIM should increase advocacy programmes on polygamous marriage for the purpose of educating the public on the true reason for such marriages and family life. Knowledge and information on polygamous marriages should be disseminated nationwide by using all available mediums, both printed and non-printed. However, emphasis should be given to responsibilities and justice, as they are the most important elements in having a polygamous marriage.

CONCLUSION

Islam permits polygamy to protect women's interests and to avoid moral as well as social problems. Unfortunately, a number

of polygamous marriages among Muslims in Malaysia are problematic and abusive as they do not reflect the true reason behind its recommendation in Islam. As a consequence, polygamy is controversial and this had invited criticism on the credibility of the laws on polygamy. This study has pointed to several weaknesses in the governance of polygamous marriage, both legally and administratively. It provides recommendations to improve the current mechanism in order to avoid abuse.

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