Protecting Muslim Women against Abuse of Polygamy in Malaysia: Legal Perspective

Zaleha Kamaruddin
(International Islamic University, Malaysia)
Raihanah Abdullah
(University of Malaya)

Abstract
Polygamy remains a controversial issue not only in Malaysia but also in many Muslim countries around the world. From the legal perspective, Muslim men, who choose to enter into polygamous marriages and abuse it, largely due to the absence of effective measures taken to curtail the problems brought about. In Malaysia, these steps include the incorporation of specific provisions controlling the practice of polygamy in the Islamic Family Law Enactments of each state. This move is considered as a step towards formulating better laws to control abuses in the practice of polygamy. This paper discusses the concept behind existing provisions and looks into adequacy of such laws. It also aims at identifying problems and provides suggestions on how women could remain protected within a polygamous set up.

Keywords
Polygamy, Family, Muslim men, Islamic Family Law, Malaysia

Introduction
Writings and studies on polygamy\(^1\) are nothing new in the area of Islamic Law. Nevertheless, the bulk of the work has concentrated more on debates discussing the ‘*hukm*’ or legal ruling of polygamy, its history before and after the advent of Islam, aside from the portrayal of Western criticism.

\(^1\) Azizah Kassim (1985) *Wanita dan Masyarakat*, Utusan Publications and Distributers, K.L., p. 185. In Malaysia, the word polygamy is understood to mean a husband who takes more than one wife, otherwise known as polygyny. Polygamy may be termed as a marriage to more than one spouse at any one time, be it practiced by a man or a woman. Polygamy is further divided into two types, i.e. polyandry and polygyny. Polyandry is a situation where a woman has more than one husband whereas polygyny is when a man takes more than one wife. Both types of polygamous marriages are still practiced in some societies today.
towards such practices and suggested reforms in the law relating to polygamy through reinforcements in the Islamic Family Law set up, as well as descriptions on how polygamy is practiced in a particular society.2

General writings relating to the legal position of polygamy show that there is an agreement amongst Muslim jurists that it is permitted in the Holy Qur’an.3 However, during the late nineteenth century, Sheikh Muhammad Abduh, a reformer who was also the then Grand Mufti of Egypt wrote in “Tafsir al-Manar” that polygamy might have once been useful and practical in early Muslim society. However, according to him, the practice could no longer be viewed in the same light in today’s society where it has, more often than not, been misused and has caused much pain and suffering amongst women.4 In fact, his views are shared by many other jurists and thinkers among other such as Rashid Reda, Qasim Amin, Huda Sharawi, Azizah al-Hibry, Muhammad Al-Ghazali and also M.M Madani.5

On the other hand, there have also been writers and jurists who vehemently oppose any form of limitation placed on a practice which has clearly been permitted in the Holy Scriptures. These opposite views are shared by Sheikh Muhammad Shaltut, Abu Zahrah, ‘Aisha ’Abdal-Rahman (Bint Shati’), Zainab al-Ghazali, Mustafa al-Siba’i 1915–1964) and Sheikh Abul-Ala al-Mawdudi and also Abdul Rahman I Doi.6 These jurists are of the view that those who try to reinterpret the Qur’an go against the very teachings of Islam.7 Anne Sofie Roald, in his study pertaining to polygamy, identified the views of Sheikh Muhammad Abduh as “an introduction of Western thought into the Islamic work force.” The approach taken by Sheikh Muhammad Abduh has, however, been staunchly supported by Muslim feminists such as Azizah al-Hibry and AQmina Wadud.8

2 Such discussions can be found for example in Wahbah Zuhayli (1925) Al Fiqh al Islami wa Adillatuhu, j: 7, Dar Al Fikr, Damascus; Rodinson, Maxime (1971) Mohammed, Penguin Books: London
4 Muhammad Abduh, Tafsir al-Manar, Dar al Fikr, Cairo.
5 Qasim Amin (1899) Tahrir al Mar’ah, Maktabah al Turqiy, Cairo; Madani, M.M. (1958) Rā’iyu Jaddī fī Tā’addud al Zawjat, Ahmad Mukhaimar, Cairo.
8 Azizah al Hibri (1982) “A Study of Islamic History: Or How Did We Ever Get Into
Although there exist two different views in analysing polygamy, many Muslim countries have made improvements in their Islamic Family Law legislations from as early as 1917. There have been some comparative studies done by Doreen Hinchcliffe, Mehrun Siraj and Kiran Gupta that look into the provisions on polygamy in West Asia, North Africa, the Indian Sub-continent, Malaysia and Singapore. Aside from that, there have also been writings which focus only on specific countries, as well as other writings written with a feminist orientation. On the other hand, some writings by Aharon Layish, Ron Shaham, Lynn Welchman, Amira el-Azhary Sonbol and Ziba Mir Hussein have analysed the effectiveness of the laws with regards to polygamy. There have also been empirical studies on polygamy from the anthropological perspective.


Clearly, polygamy has been the subject of many discussions and writings. However, it is still an issue that is far from settled and remains a polemic, which still causes friction between certain quarters. According to a Malaysian anthropologist Azizah Kassim, whenever the issue of polygamy is debated in Malaysia, the conclusion that can be made is that men are fond of it while women abhor it. Nevertheless, no matter how much women might hate the concept, opposition towards an already legally sound concept could be considered by some part of the society as going against the Islamic Law. The issue here is, why have such polemics occurred amongst the members of society and what are the sources behind these conflicts especially in a situation where, despite its legal validity, polygamy has been largely perceived by many as a practice which fails to protect the rights of women.

It is in this light that this paper aims to discuss the concept of polygamy and its implementation whilst focusing on the effectiveness of certain provisions relating to polygamy as provided under Islamic Family Law in Malaysia. Its main concentration is on the relevant provisions in the Islamic Family Law enactments of the different states in Malaysia. Suggestions are also made on how perversions in the practice of polygamy should be handled from the legal perspective in order to ensure that stability and strength of the family institution is kept intact and women are protected.

Polygamy Laws In Malaysia

The early 1980s witnessed the promulgation of Islamic Family Law Enactments in Malaysia. Most of the women’s group welcomed the detailed and specific Islamic Family Law Enactments as this law enabled several problems in society, especially those relating to women and family, to be solved. In this regard Prof Mehrun Siraj said

16 This law has made several changes in which it made it easier for the authorities to administer Islamic Law. Where the public was concerned, particularly women, the laws have brought great changes to women’s rights, which were clearly provided under the law. Women have the right to claim maintenance and arrears, dissolution of marriage through ta’liq, fasakh and khulu’ and also claims on financial rights after divorce.
The most significant development in relation to Shari’ah has been the removal of the Family Law provision from the Administration of Muslim Law Enactment and their inclusion in their specifically enacted enactments.17

The Islamic Family Law Enactment which was first enforced in the State of Kelantan (the east coast state of Peninsular Malaysia) has made several changes in which it made it easier for the authorities to administer Islamic Law. Kelantan was the first state that enforced the Islamic Family Law Enactments in 1983. This was followed by other states that enforced the Islamic Family Law in the following years.18 Where the public was concerned, particularly women, the law has brought great changes to women’s rights, which were clearly provided under the law. Women have the right to claim maintenance and arrears, dissolution of marriage through *tal’iq, fasakh and khulu’* and also claims on financial rights after divorce. With regard to polygamy the existing wife is notified by the court to be present during the polygamous marriages proceedings.19

Malaysia has decided not to prohibit polygamy despite what has been practiced by many other Muslim countries such as in Egypt, Jordan, Pakistan

18 The new Islamic Family Laws, which have been passed, repealed the previous Administration of Islamic Law Enactments, Selangor 1952 in question pertaining to family matters only. In the previous Administration of Islamic Law Enactments, Selangor of 1952, family matters were provided in only thirty sections while the new legislation consists of 135 sections. In the Administration of Islamic Law Enactment there were two chapters that give provisions to family matters. Chapter 6 relates to marriage and divorce while Chapter 7 relates to maintenance. In Chapter 6, there were 18 sections that mainly related to marriage and divorce procedures while in Chapter 7 there are only 7 sections that gave provisions on maintenance. See Ahmad Ibrahim, *Islamic Law in Malaya*, at 147–244; Abdul Monir Yaacob, “Undang-undang Pentadbiran Agama Islam: Pengkajian, Reformasi dan Penyelarasan”, Paper Presented in Siri Sudut Pandangan IKIM, Organized by Institute of Islamic Understanding, Malaysia, 1988 at 28–36.
and also Indonesia. But such practices are governed by specific laws. The laws in Malaysia aim at controlling the practice so as to avoid abuse.

Being a country with a Federal system of Government, the Islamic Family Law Enactments is not unified between one state to the other states. This is because according to the Malaysian Constitution, matters pertaining to Islamic law are under the states jurisdiction. Although the Government has put efforts to achieve uniformity in the laws for all Malaysian states, unfortunately, the aim was not achieved as when it was finally enforced, the states had discretionally amended several matters in the provisions of the law. This is because each state engaged its efforts to retain its prerogative to enact its own laws for Muslims. Each state has its own committee members in deciding which provisions are suitable to enforce. As a result, the Islamic Family Law had become non-uniformed when the Kelantan Islamic Family Law Enactment 1983 first came into force. Many legal scholars were disappointed with this situation. The uniformity of the law cannot be achieved not only because the state government felt that matters relating to Islam are the rights of the state government but also because of the lack of a political will.

One of the significant provisions of this Enactment which is also not uniformed is that on polygamy. The lack of uniformity in the provisions for polygamy can be seen in the conditions that the applicant (husband) has
to fulfil, registration of polygamous marriages that have been contracted without adhering to procedure, punishment for the offence of polygamous marriages without the court’s permission, punishment for the offence of unequal treatment among the wives and provisions that give the rights to the wife to file for fasakh on the grounds that her husband has not treated his wives equally according to Hukum Shara’. The lack of uniformity has given rise to problems especially in its enforcement. This means that whenever provisions differ between one state and another, then its enforcement will also differ.

Although the details provisions on polygamy was not uniformed, the Islamic Family Law Enactments in every states give power to the Shariah court to approve each polygamy application. Section 23 (1) of the Islamic Family Law (Federal Territories) Act 1984 for example provides that

No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this act…

This provision stipulates that a request for polygamy must be submitted to the Shariah court. The Shari’ah Courts have found it necessary to interfere in deciding who may or may not enter into a polygamous marriage due to the failure of society to uphold the virtues of polygamy as envisioned by Islam. The function of the Court is to determine whether the husband can afford to have more than one wife. This is to ensure that the well being of the women is well cared for and to ensure that the polygamous marriage is practiced in a fair and proper manner. The role that the Courts play must


27 See also Section 23 (1) of Islamic Family Law (State of Selangor) 2003 (No. 2 of 2003); Section 23 (1) of Islamic Family Law (State of Johor) Enactment 2003 (No. 17 of 2003); Section 23 (1) of Islamic Family Law (Negeri Sembilan) 2003 (No. 11 of 2003); Section 23 (1) of Islamic Family Law Sabah 1992 (No. 15 of 1992); Section 21 Administration of Islamic Family Law Enactment Terengganu 1985 (No. 12 of 1985); Section 23 of Islamic Family Law Enactment Perlis 1992 (No. 4 of 1992); Section 21(1) of Islamic Family Law Sarawak 1991 (No. 5 of 1991); Section 23 (1) of Islamic Family Law Penang 1985 (No. 2 of 1985); Section 17 (1) Islamic Family Enactment Kedah 1984 (No. 1 of 1984); Section 21 (1) Islamic Family Law Enactment Perak 1984 (No. 13 of 1984); Section 19 of Islamic Family Law Enactment Malacca 1983 (No. 8 of 1983); Section 23 (1) of Islamic Family Law Enactment Pahang 1987 (No. 3 of 1987); Section 19 of Islamic Family Law Enactment Kelantan 1983 (No. 1 of 1983).
not be taken as trying to put a stop to polygamy but as a form of control towards the practice. The Court has the heavy responsibility to carry out thorough investigations to ensure that the husband is financially stable and has the ability to be fair to both his wives and their children and every husband who contracts another marriage without prior permission from the court is a punishable offence. Polygamous marriages can no longer be carried out with ease. Apart from this, the husband must fulfil several conditions and the court will inform the existing wife of the husband’s intention.\(^{28}\)

It is also understood from this section that if a polygamous marriage occurs without the court’s permission, then the marriage cannot be registered. It is then clear that such a provision serves to control and discourage polygamous marriage because the law will not recognize any polygamous marriage that has been carried out against what is provided in this section. However, the issue arises on the validity of polygamous marriages, which was contracted without prior permission from the Shari’ah court.

After several years of implementation, such provisions have negative consequences particularly to women who become the second wife. Her marriage could not be registered as polygamous marriage was contracted in contravention with the law. The effect of a non-registered marriage would then deprive the second wife of all her rights to claim maintenance, custody, or even inheritance in the event of divorce or upon death of her husband. Hence, upon realization that women would be the victims of such a regulation, Kelantan was the first state that amended such provision. In 1992, section 23 of the Federal Territory Islamic Family Law Act 1984 was also amended. With this amendment, polygamous marriage without the court’s permission can now be registered but is subjected to penalties as provided by the law. Section 23 of the 1984 Act would then read:

No, man during the subsistence of marriage, shall, except with the prior permission in writing of the Syariah Judge, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act:

Provided that the court may if it is shown that such marriage is valid according to Hukum Syara’, order it to be registered subject to section 123

This amendment gives better opportunity for the second wife to register her marriage and thus the law recognizes her marital position. This means that the new wife is entitled for legal relief upon divorce or the death of her husband. Although the legal position of the new wife is better with the amendment, some have criticized the amendment and viewed the provision as an easy way out for contracting another marriage, thereby considering such a provision as a weakness in the law for polygamy.29

Whoever wishes to apply for polygamy must complete the said form which contains all the information that is required from section 23(3) of the Islamic Family Act (Federal Territory) 1984. This section provides that

An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by an iqrar 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 persons who would be his dependants as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained.

Upon receiving the application, the court shall summon the existing wife or wives to present at the hearing. Seeking the opinion of an existing wife has its advantages, then it clearly does not go against the Shari’ah. The reason for taking such an approach is to avoid any form of cruelty and unfairness in the practice of polygamy. Among the purpose of this procedure is to notify the intention of her husband and also to avoid any false allegation made to the existing wife. Most of the states in Malaysia provide this procedure. For example under section 23(4) IFLA provides that “On receipt of application, the Court shall summon the applicant and his existing wife or wives to be present at the hearing of the application, which shall be in camera . . .” On contrary, in Perlis, the court will only summon the husband (the applicant) to present and to give evidence of his applica-
tion. In other words the existing wife is not required by the law in this state to present and give any information regarding his husband's application. The court, however, requires the husband to bring two witnesses to support his allegation together with one Imam (a religious man of the village) to obtain any agreement (if any) from the existing wife. It is submitted that the existing wife has no rights to protest and disagree with her husband's applications. The lack of uniformity in the procedure regulating the presence of the existing wife at the hearing has led to the practice where men who wish to enter into a polygamous marriage would run to Perlis to avoid the hassle of seeking the opinion of the existing wife. This allows men, as Jones puts it: "... to 'shop around' and find another state where his application will succeed".30

Section 23 (4) of Islamic Family Law Act (Federal Territories) 1984 provides that the Court may grant the permission applied for if satisfied:-

(a) that the proposed marriage is just or necessary, having regard to, among others, the following circumstances, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;
(b) that the applicant has such means as to enable him to support, as required by Hukum sharak, all his wives and dependants including persons who would be his dependants as a result of the proposed marriage;
(c) that the applicant would be able to accord fair treatment to all his wives required by Hukum syarak; and
(d) that the proposed marriage would not cause darar sharie to the existing wife or wives.

The aim in having these conditions for polygamy, is to ensure that there is no abuse in practicing polygamy. These conditions are to guarantee the rights and needs of the existing wife and children and that the responsibility of the husband over them, is not affected.31 At the least, with these procedures in place, the practice of polygamy would not be that easy and

31 Mahmud Saedon Awang Othman, "Poligami, Kesesuaianannya menurut Undang-undang Islam dan Permasalahannya dalam Masyarakat" Al-Ahkam, 6, at 75–79.
The laws mentioned above have reduced the problems that arose from such marriages. The court will only grant the permission of polygamy if the husband can fulfill the conditions laid down under the law.

In the case of *Aishah Abdul Raof vs Wan Mohd Yusuf*, the Appeal Committee of the Selangor Shari’ah court, held that the four conditions laid out under Section 23(4) are not against the al-Quran especially the Surah al-Nisa’ verse 3. The existence of these conditions is aiming at ensuring that justice is practiced onto the wives as required by the al-Quran. Section 23(4) does not intend to abolish polygamy but rather to provide constructive measures with the hope that justice in the Muslim family can be achieved effectively.

In this case, the Appeal Committee of the Selangor Shari’ah court allowed the appeal made by the applicant (wife) and held that the learned trial judge had only considered the condition of sufficient means but had not considered other conditions. The learned Judge of the Shariah Lower court gave the permission and held that the applicant had the means to support more than one wife. The court also held that the husband feared to commit *zina* (adultery) if he is not allowed to take another wife. The learned trial judge had accepted the mere statement of Wan Yusuf (the husband) regarding his means without any proof or evidence to support. The wife was dissatisfied with the decision of the Lower Shari’ah court in Petaling and she appealed. In this case, the husband also made a confession in the declaration form and under the witness of the learned judge that his main reason to practice polygamy was on the basis of wanting to legalize his love and affection. However, the Appeal Board found this reasoning sufficient, which was only to fulfill his personal needs but it was considered inadequate to support the basis of his ability and that the proposed marriage would be just and necessary. Mohd Azmi Kamaruddin AJ in his judgment said that as a Muslim, the husband should be able to control his sexual desires and somehow try to avoid adultery. In addition, when cross-examined by the Court however, he conceded that Aishah, his wife, has no physical defects and always give him the satisfaction in his sexual needs besides

32 Mahmud Saedon Awang Othman, “Poligami, Kesesuaiannya menurut Undang-undang Islam dan Permasalahannya dalam Masyarakat” *Al-Ahkam*, 6, at 80.


being obedient. Thus, there is no justification why he should be allowed to practice polygamy since the husband had failed to fulfil the condition (a) of Section 23(4). The Appeal Committee of Shari’ah Court in Selangor rejected the application from the husband; the husband had then submitted his application in Terengganu. In Terengganu, his application was successful as there were no conditions to fulfil according to the laws in that state.35 The lack of uniformity in the process and procedures for his application for polygamy has resulted in the abuse of the law by certain people. Those who intend to practice polygamy will then approach the states, which have easier regulations to achieve their goals.

Research done by Aishah Saleema and Raihanah Abdullah shows that many of the applicants were men between the ages of 30 and 50. The percentage of men between the ages of 20 and 30 years old committing themselves to polygamy is very low. Husbands within this category are still struggling to build a new family and thus might not have the time to think of opening “new outlets”. Research further shows that the working status of the man also plays an important role in allowing polygamy. For example, many applicants on the average are on the RM3,000 and above salary scale. There have been cases where permission has been granted to applicants who earned below RM2,000 per month due to the low cost of living in certain states.36 Decisions are based on discretion of the judges.

Among the most common reasons cited for polygamy is to allow them to have valid sexual intercourse with their future wives. Many men within this age group have already established a stable career, with a well-paid income and have the financial ability to support a new wife and even more children.37

The discussion above may lead to the conclusion that many applications presented to court for permission to transact a polygamous marriage have been granted based on their financial stability and physical well being which is an indication that they are more able to support their families

35 Ahmad Ibrahim, Undang-undang Keluarga Islam di Malaysia, at 53.
36 Ibid.
than those who do not have a stable income. It is feared that those within the low income bracket will face difficulties in managing two families, especially those who reside in big cities. We must also consider another factor, i.e. men who contract polygamous marriage outside the borders of Malaysia. Due to the realization of the possibility of having their applications rejected under the Malaysian law, some men have resorted to contracting their subsequent marriages outside of Malaysia. This practice is supported by data which shows the high number of marriages contracted in Southern Thailand and some part of Indonesia. This shows that the law relating to polygamy in Malaysia, in reality, is only being followed by law abiding citizens.

As mentioned earlier that polygamous marriages contracted without prior permission from the Shariah court is an offence. Section 123 of the Islamic Family Law Act (Federal Territories) 1984 provides that “Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit (RM) or with imprisonment not exceeding six months or with both such fine and imprisonment”. Polygamous marriages that took place without the permission from the Malaysian Shariah court have actually, created problems to women in particular. If the marriage was found to be invalid by the Shari’ah law, then the marriage cannot be registered. Therefore, the courts will not entertain any claims, particularly regarding property made by the woman resulting from this marriage. The additional wife will suffer in situations such as divorce or death as her marriage is not valid and cannot be registered. In the matter of Zainal Abidin bin Mohamed, the Shari’ah High Court in Terengganu had rejected Zainal Abidin’s application to validate his marriage that had been solemnized as a polygamous marriage in Narathiwat, Thailand. The court refused to validate the marriage because the marriage was not in accordance with Hukum Shara’ and

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38 Ibid.
39 Supra. Footnote 63.
40 In a seminar attended by the researcher, it was discovered that there still exist wives in polygamous marriages who had not yet registered their marriage even though they had been married for more than five years. Their reason for not registering was because they were not aware of it and also because their husbands did not want to do so. Bengkel Luncheon Isteri Kedua Mengikut Undang-undang Keluarga Islam di Malaysia, Kuala Lumpur, 28 September 2002.
the marriage was regarded as void. The court felt that the marriage in Narathiwat could not be legally recognized because it did not follow the principles of Hukum Shara'. The applicant was unable to register his marriage that was conducted in Narathiwat. However if the Shariah court satisfied that the polygamous marriage contracted in Thailand is according to Hukum Shara, then the court may order it to be registered subject to section 123.

Even though the Islamic Family Law in Malaysia has provided a specific procedure for the purposes of polygamous marriages, the incidence of polygamous marriages contravening such procedures is not a new phenomenon in Malaysia. The solemnization of polygamous marriages that violate the rules laid down by the law has been an issue since the past forty years and, was normally termed by Malaysian society as ‘runaway marriages’ or ‘cross-border marriages’ or marriage outside of the jurisdiction.

This leads to the discussion on the issue of elopement. Even though such an act obviously contravenes Islamic Family law in Malaysia, it is still committed to fulfill emotional desires which could not be permitted by the law. In trying to fulfill this overwhelming desire, they are forced to seek alternative avenues, for to them such acts are considered as fulfilling the demands of the Shari’ah. As mentioned before, states which are bordered by Thailand such as Kelantan, Kedah and Perlis have recorded a high percentage of polygamy cases compared to other states in Malaysia. This may be caused by the high activity of runaway marriages which is further worsened by the

42 Details see Raihanah Abdullah, *Prosedur Perkahwinan*, Department of Shari’ah and Law, Academy of Islamic Studies, University of Malaya, 2001 at 14–19.
43 There are several studies that show couples who intend to practice polygamy have performed their marriage outside the country. See Lang, G., Smart, J., “Migration and the “Second Wife” in South China: Toward Cross-Border Polygyny” (2002) Vol. 36 No. 2 *The International Migration Review* at 552; See also Djamour, J., *The Muslim Matrimonial Court in Singapore*, The Anthlone Press, 1966 at 145–146. In her study, Djamour noticed that many of the couples whose application for polygamy were rejected looked to other places in Malaysia which did not frown on such unions, to solemnize and register their marriage especially after Singapore introduced specific procedures relating to polygamous marriages.
45 Gavin W. Jones, *Marriage and Divorce in Islamic South-East Asia*, at 76.
involvement of middlemen and even syndicates which actually offer marriage services to couples who wish to marry if they are willing to pay the cost of the marriage which is comparatively higher than those marriage arranged by the Department of Religious Affairs.

The issue of runaway marriages has not been taken seriously by many quarters. It actually leaves very serious and far-reaching consequences. The problem usually relates to the permission that must be granted by the wali or guardian of the bride to be. Malaysia follows the Shafie School of legal thought, which places the permission of the wali as one of the pre-requisites of a valid marriage and its registration.\(^47\) In the case of elopement, in order to avoid this provision, the couple will usually resort by going to neighbouring countries and opting for the permission given by the wali hakim. In such a situation, the permission given by a wali Hakim may be valid only in the absence of a wali mujbir. Absence can be established by the distance of more than two marhalah (masafr al-qisr or the distance that a person can travel in one day), which is equivalent to eighty-six kilometres.\(^48\)

Problems, however, arise when there are cases of runaway marriages supported by syndicates in Thailand which operate beyond the bounds of the Shari'ah. This syndicates operate illegally by forging marriage certification. They even went to the extent of making false claims that they were authorized by the relevant authorities to solemnize marriages.\(^49\) It is due to this reason that the Islamic Councils of certain states in Malaysia, such as Selangor, Johor and Pahang only accept marriage certificates from qualified persons to solemnize the marriage and this is only limited to the provinces of Narathiwat, Songkhla, Satul and Patani.\(^50\) Other states such as Perak and the Federal Territory of Kuala Lumpur refuse to give any kind of recognition to certificates issued by the Islamic Council of Thailand. According to the Chairman of the Islamic Council of Perak, the main reason for the rejection is due to the fact that these certificates are easily forged.\(^51\) Failure to obtain recognition from the Malaysian Islamic Councils will give a huge legal impact to the parties involved especially in deter-

\(^47\) See Section 13 (Kuala Lumpur, Selangor, Kelantan, Melaka, Johor, Pulau Pinang, Perlis, Sabah), Section 11 (Negeri Sembilan, Perak, Trengganu, Sarawak), Section 10 (Kedah).

\(^48\) Supra. Footnote 4.


\(^50\) Datuk Ishak Baharom, Mufti negeri Selangor, Berita Harian, 12 May 1992, p. 15.

mining the status and maintenance of children born from the marriage. Polygamy is not a new practice to the Muslim Malay community in Malaysia. Although the numbers of polygamous marriages are not as many as monogamous marriages, polygamy nevertheless remains a controversial issue. Research shows that the number of registered polygamous marriages constituted 2% to 4% of the total recorded marriages in specified areas.\(^{52}\) Kelantan has showed the highest rate of polygamous marriage with approximately a hundred to three hundred cases per year. Although this is considered to be a large number, it actually shows that there has been a comparative decrease in the rate of polygamy compared to the rate of polygamy in previous years.\(^{53}\) The decrease in the rate of polygamy may be attributed to the level of education and increased understanding of the system of polygamy by men and women.\(^{54}\) On the other hand, studies showed that the decrease was not due to the attempts made by *qadhis* to control polygamy, but it was due to limited number of candidates which could fulfil the conditions set by the Courts. Therefore, almost half of the applications for polygamy were rejected as the applicant failed to fulfil the conditions that would allow polygamy.

Although the percentage of polygamy is below 4% from the total of marriages, polygamy becomes an issue when it is misused and results in unfair treatment of women and children. Such unfortunate incidences still occur due to the existence of men who practice polygamy without really understanding the true concept of fairness and equality among wives. Even if some were to claim to understand the concept, as shown in Shu Le Cho's study, there are still women who are of the opinion that their husbands have treated them unfairly.\(^{55}\) The reason for such views may be caused by the way in which equality is judged. The material wealth of the husband is not the only issue considered by the Courts. Usually, the Courts will allow an application for polygamy even if the husbands earn less than RM1, 000

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52 Updated May 2002 by ICT Services Division, Department of Islamic Development Malaysia.


54 Ibid.

55 Ibid. Shu, Le Cho, p. 36.
per month. The Court takes into account other factors which might allow polygamy such as the fear of *khalwat* (close proximity with other women), sexual desire, infertility and infirmity of the wife, bad behaviour of the wife, breakdown in marriage, assisting widows or divorcees, and to increase progeny.56

This has resulted in dissatisfaction for many women who are unhappy with the way their husbands carry out their responsibilities. In a case of *Abdul Hanif vs Rabiah*, the Federal Territory Shariah Appeal Court upheld its decision by retaining the decision of the Shariah High Court that had granted *fasakh* to the wife on the ground that the husband had abused her. The act of abuse are physically hurting the wife’s body, not acting fairly towards her in a polygamous marriage and not providing a separate house for her from the rest of the wives. It is hardly difficult to prove to the court that the husband does not treat his wives with fairness required by the Shariah. This is the main reason why there is a need for strict control over the practice so as to ensure that the rights of these women are well protected. The issue of polygamy not only poses questions in the realm of Islamic Family Law, but the problem has also spread to unfairness in the distribution of pension payments arising out of polygamous marriages. This has been brought to the attention of the House of Representatives whereby the issue arose in the event of death of the spouses in a polygamous marriage. Should the wives die, the husband will have full liberty to receive any pensions from his late wife, but should the husband dies, the wives would have to share between them whatever pensions which were left behind by their late husband.57

**Amendment to the Islamic Family Law Enactment**

Efforts of the Government to standardize the Islamic Family Laws have finally seen results. Only Kedah and Terengganu have not yet enforced the new Islamic Family Law Enactments. As for today, most of the states that have enforced the Islamic Family Law in the 2000s, have not made any amendments towards the original draft that were prepared by the Legal Section of the Department of Islamic Development, Malaysia. As far as the laws of polygamy are concerned, the amendments to the new Islamic Family Law have not brought major changes to most of the states in Malaysia.

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57 See the New Straits Times, 16/12/1996.
If we examine the provisions in the current Islamic Family Law Bill closely, it’s clear that the suggestions brought about by the women’s groups to amend several of these provisions have been taken into consideration. Even though not all of the suggestions were accepted, the Islamic Family Law Bill has included two additional provisions to the previous ones. Similar provisions regarding procedures and processes still stand in the application for polygamy. The husband must fulfil certain conditions before the court grants permission for contracting another marriage. However, significant amendments in the new laws relating to polygamy are seen in the summoning of the prospective wife and her guardian (wali) to be present during the hearing. This particular provision was well received by women’s groups and praises came from the Women, Family and Community Development Minister Datuk Seri Shahrizat Jalil. She said that the main beneficiaries of such amendment would be the women and the children. It is interesting to note that this amendment, however, is not the first, and is a new step in protecting the welfare and the rights of children. This is because Kelantan has enforced the procedure of summoning the existing wife, the prospective wife and her wali in the application for polygamy even though the Kelantan Islamic Family Law 1983 does not statutorily legislate such provision.

Apart from this, another provision was well received by society, especially women. The court made an order on maintenance and jointly acquired property before granting permission for polygamous marriage or when the court orders the marriage to be registered under the section. In addition both the husband and wife have the right to claim any asset or property acquired during their marriage. However, this directive can only be issued if there is an application from either party. This would mean that when the court gives permission for the marriage to be registered, the right of maintenance and jointly acquired property are not an automatic order, issued by the Shariah court. Apart from these two new provisions, the procedure of summoning the existing wife to a court hearing was made uniformed for all the states. If this procedure is approved for States such as Perlis and Terengganu, the amendments to the future laws will bring about changes in the processes and procedures in polygamy. This is a rather significant

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59 Kelantan and Perak did not give provision for the existing wife to be summoned to court as part of the procedure for a polygamous marriage but, in practice, this procedure is carried out.
step for Terengganu and Perlis as under current Islamic Family law enactment in Perlis and Terengganu, the existing wife in both states are not required to be present during the hearing.

The procedure of summoning the existing wife, which would be implemented in all the states created debates among society. It was believed that this procedure was related to the increasing number of polygamous cases that did not receive the court’s permission. Dato’ Daud Muhammad, Kelantan Chief Judge was uncomfortable with the increasing number of these cases in Southern Thailand. Based on existing statistics, he discovered that the percentage of polygamous marriages carried out without the court’s permission in comparison with monogamous marriages solemnized not according to the procedures provided under the law, was 18.93% in 1993, 27.21% in 1993, 31.42% in 1994, 27.25% in 1995, 55.6 in 1996, and 41.35% in 1997 (January–June). The percentage of polygamous marriages without the court’s permission had risen year after year. Even though the wronged party would be penalized, the court has no choice but to have the marriage registered according to Section 19 of the Kelantan Islamic Family Enactment 1983, if it finds that the marriage was carried out according to Shariah Law. In order to overcome the problem of the increasing number of polygamous marriages without the court’s consent, he has forwarded a suggestion to re-examine the procedures and processes of polygamy in Kelantan so that they may be more lenient or deleted all together, to decrease the ever-increasing number of cases. He is also of the opinion that any wives, who have been unjustly treated by their husbands, may seek their rights in court. A circular letter no. 1/91, of which one of the procedures was to summon the existing wife to the hearing, was believed to be the reason for the increase in the number of polygamous marriages without the court’s consent. In this matter, a study by Siti Fatimah discovered that the percentage of polygamous marriages fell sharply from 6.3% in 1991 to 2% in 1992. This shows that the procedure has no doubt reduced the

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number of polygamous marriages application but at the same time has increased the number of polygamous marriages contracted without prior permission from the Shariah courts.

In its effort to restrict polygamous marriages in Southern Thailand, the government of Perlis announced that the procedure for polygamous marriage was made simple. Conditions for polygamy were reduced in that the fees were low and the husband had no necessity to obtain the signature of the existing wife. The Perlis government allowed this in order to restrict men from travelling to Thailand to marry other wives. This move did not go against the court’s decision or Islamic law. Several reactions were received from society in which many women NGOs were against such recommendation. In this matter, the President of the Muslim Lawyers Association of Malaysia has pointed out that the steps taken by the government of Perlis carries good intentions to curb the increase in percentage of men involved in polygamy without the court’s consent. However, its decision can have dangerous repercussions. The New Straits Times gathered several views from women’s groups. It was reported that, in reality, the procedure did not look after the interest of women and children. The decision of the husband to practice polygamy without the knowledge of the existing wife encourages cheating, neglect and leaves a negative effect on the institution of marriage and the family itself. The Association of Shariah Lawyers has criticized the steps taken by the Perlis government also expresses the same view. They felt that the actions on the procedure of polygamy brought up by the Perlis Government show that the husband involved is not qualified to practice polygamy, as he has not been fair to his wife and children. The action taken by the Perlis government has looked down upon women. This view was, however, rejected by the Perlis Chief Minister who said that the action of the Islamic Council of Perlis aims to preserve the dignity of women, who up to now, have been victimized by syndicates operating “false marriages” in Thailand. The announcement made by the Perlis Chief Minister in which the husband does not require the wife’s permission in order to practice polygamy is not a new procedure.

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It has been implemented since Perlis began implementing the Islamic Family Law in 1992. Based on numerous reactions from members of the public on this announcement, it is, therefore, clear that the procedure of summoning the existing wife, is extremely important. Until today, Perlis is the only state that the application for polygamous marriage is simple in which summoning the existing wife to the court is not a procedure.

The Islamic Family Law Enactment passed in several states provides that the wife is entitled for *fasakh* on the grounds of unequal treatment of the wives by the husband. This is a new amendment for Kedah and Perak if they accept this provision that has been made uniform. In the situation where polygamous marriage is contracted without the court’s permission, the penalty has increased from RM500 to RM1000 in Kedah. In Malacca, this is seen as a new provision, while in other states, no changes have been made. For states like Sabah and Sarawak, this uniform penalty has actually been decreased from RM3000 to RM1000. However, in the Sarawak Islamic Family Law Ordinance 2001 that was passed; the penalty for wrongly practicing polygamy without the court’s consent remains the same. The present law that is being enforced charges RM3000 as a maximum penalty or three years jail, or both.\(^6\) This means that the Sarawak Islamic Family Law Ordinance 2001 has made amendments to the original draft in the Islamic Family Law that tries to standardize the provision for this offence.

Several of the suggestions put forward by women’s groups have been accepted. However, their suggestion of having a standard recitation of *ta’liq* for the existing wife who files for divorce in the case where her husband contracts another marriage without the court permission was not accepted by the legislators. The divorce *ta’liq* is a divorce by breaking of a condition.

In Malaysia, upon marriage registration, the husband is required by the marriage procedure to utter standard and specific conditions relating to desertion, non-maintenance and cruelty. In regards to this matter, Sisters in Islam, a women’s group, feel that the official recitation *ta’liq* that currently exists does not provide redress for the woman. They also express the opinion that such a recitation *ta’liq* does not go against Islamic Law, as the husband is not prevented from practicing polygamy. They add on to say

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\(^6\) During the debate, there have been suggestions that the penalty be increased to RM5,000. For this, we find that Sarawak has no intention to reduce the penalty fine to RM1000 even though this provision has been standardized. Interview with Tuan Nejardudin Nedri, Kuching Shariah Court Judge on 2nd March 2006.
that this recitation is enforced in many countries in the Islamic world such as Saudi Arabia, Sudan, Pakistan and Iran.\textsuperscript{70}

The \textit{ta'liq} recitation has permitted the wife to apply for an annulment of marriage if any one of the above items happens. The recitation of the \textit{ta'liq} with the aim of providing a better solution to wives who feel that they have been victimized as a result of their husbands’ action. With the existence of such a \textit{ta'liq} recitation, which is related to the problems arising from polygamy, hence, it gives opportunities to annul the marriages. The said \textit{ta'liq}, on the other hand, varies from the proposal put forward by a group who had prepared a memorandum on the reform of Islamic family law, which is polygamy-related. Their proposal on the \textit{ta'liq} recitation is that the wife is entitled to nullify the marriage if the husband marries another and it should be the wife to choose if she feels that she is unfairly treated as a result of the polygamy and she is unwilling to live within such a marriage.

The content of the \textit{ta'liq} is that the husband is not allowed to practice polygamy even though the right to nullify the marriage belongs to the wife if she feels that she is victimized by the husband’s practice. Although the said \textit{ta'liq} is allowed at least under the Hanbali school of thought, however, Malaysian society is not ready to accept such a situation. This is so because there are views among the Islamic Law scholars that if the law prevents the husbands from practicing polygamy, it is then regarded as going against the hukum Shara’. As a result, it is only appropriate if the Islamic family law does not prevent the husband from practicing polygamy if he has fulfilled all the conditions and criteria laid out. At the same time, the wife is provided an opportunity to get out of a marriage if the husband has ill-treated and abused her as a result of polygamous marriage. It is advisable to recite the \textit{ta'liq} in which the wife has the right to nullify the marriage if the husband is proven of not being fair towards the wife, besides ill-treating or abusing her, as a result of polygamous marriage.

\textbf{Conclusion}

Although polygamous marriages are allowed, as is divorce, both practices are not encouraged. On the contrary, polygamy and divorce may only be

resorted to as a form of solution to problems faced by the society. In the words of Khan, “Islam did not initiate polygamy, neither does it advocate or even encourage it”. Nevertheless, what has happened in Malaysia is that many of those who practice polygamy have disregarded the guidance in the Holy Qur’an and Hadith even though these provisions have been incorporated in the Islamic Family Law enactments.

Aside from the problem mentioned above, many of the reasons for resorting to polygamy have also been disputed. The cause for conflict in cases of polygamy whether in Malaysia or elsewhere stems from the lack of understanding on the concept and execution of justice in polygamy. Misunderstanding of the concept of fairness and equality in polygamy and even the refusal of husbands to be fair has led to a prolonged antagonism towards polygamy and has caused various reactions from the public. Nevertheless, the National Council for Women's Organisations admits that they do not seek to have polygamy prohibited but only wants the better administration of the laws relating to polygamy and to ensure that the provisions allowing polygamy are not misused. This has been concurred by Datuk Dr. Abdul Hamid Othman, Minister in the Prime Minister’s Department (as he was then) who said that, women’s organisations are not seeking to abolish polygamy which is a part of the Shari’ah but they oppose the way in which polygamy is being practiced and issues of enforcement which include finding better solutions to ensure justice and welfare of the wives and children. As such, as long as there are deviations and abuse as well as cruelty brought about by the wrong approach towards polygamy, there will be no end to the discussions and debates on polygamy. There are also those who even go to the extent of looking at polygamy as an unimportant matter. In answer to this, the abuse and extent of cruelty arising from the wrong approach to polygamy actually reflects the failure of our community to understand the concept and its role in society.

Aside from legal enforcement polygamy needs to be controlled through precise and adequate public education. Pre-marriage courses need to bring up issues on polygamy so that both the bride and groom understand the true nature of their responsibilities and even the rights of their spouses in

72 Utusan Malaysia, 23 October 1996.
73 Mingguan Malaysia, 1 November 1996.
74 Utusan Malaysia, 1 December 1996.
a marriage and especially in a polygamous union. Stress must be given to the explanation and understanding of the concept of justice and equality in polygamy because it is on the basis of the fulfilment of these crucial elements that the holy Qur’an had allowed polygamy. It is only when polygamy is not based on fulfilling human desires that polygamy can be practiced in the way, which it was practiced by the Holy Prophet s.a.w.

Should today’s society feel that the existing laws are inadequate, especially in protecting the rights of women, then it would not be wrong to call for a review of these laws. This is due to the fact that the interpretation of the verses on polygamy is not exhaustive. The Holy Qur’an itself had been sent down to reform the practice of polygamy as it was practiced during the pre-Islamic period. Any feelings of dissatisfaction towards existing laws indicates that the steps taken are still not adequate and have yet to fulfil the philosophy behind polygamy as envisioned by Islam. The only solution to the problems brought about by polygamy is through true compliance to the conditions of polygamy based on the true teachings of Islam. It is the absence of such realisation that has led to various difficulties associated with polygamy.

Marriage in whatever form, be it monogamy or polygamy, must be led by a stable and dependable head of the family whose actions are based on the principles laid down in surah al Rum verse 3, surah al Nisa’ verse 19, surah al Baqarah verse 237 and surah al Nur verse 32. Should the teachings of these verses be actualised, cases of abuse and cruelty could surely be alleviated. Based on the data that there is a rise in cases of polygamy without permission from the court, it can be concluded that the Shari’ah laws in Malaysia have failed to control the abuse of such practice.

In order to ratify and improve the situation, there is a need to consolidate the laws and formulate a uniform approach to polygamy that could be applied at the national level. Aside from that, a more detailed review in deciding applications should also be made. Judges should also play a more proactive role in ensuring that the applicant is truly capable of being fair at least financially before allowing any application for polygamy. Aside from that, views of existing wives should also be taken into consideration. Steps need to be taken to ensure that the existing wife (or wives) must be informed of her husband’s intention to enter into polygamy.

Discrepancies in the law have also led some men wishing to enter into polygamy to escape from one state to another in order to avoid having to fulfil certain conditions for polygamy which are stricter in certain states. Not only that, light penalties and limited jurisdiction between states also
contributes to the increase in the inability of putting a stop to the contra-
vention of the laws. The imposition of a minimum fine of RM1,000 and
mandatory imprisonment ranging from as short as one month to a year
should be imposed on offenders. Based on the decrease in the rate of
household crimes in countries which impose the mandatory imprison-
ment, it is believed that similar punishments could help control the inci-
dence of polygamy without the Court’s permission.

In order to achieve justice which is the main objective of a polygamous
marriage, or at least in order to avoid any form of unfairness, it is advo-
cated that the wife be facilitated in making claims against her husband
should he fail to do so adequately. Not only that, there is also the need to
expedite enforcement of other rights such as; (i) providing proper main-
tenance, (ii) allowance for claims of joint property.

It is also proposed that the provisions in the law relating to claiming for
maintenance, which has been abolished be reintroduced. Among them are
provisions which prohibit husbands, whether or not they are in a polyga-
mous marriage, from affecting the economic status of the existing wife and
children.

Aside from that, it is also suggested that there be a review of the amount
of maintenance that should be paid to the wife before permission for
polygamy is given by the court. This should be provided without the wife
having to file an application for maintenance. Provisions should also be
made to give the wife access to her husband’s income in order to ensure
prompt payment to the wife.

In general, any parties involved in the marriage, i.e. the husband or the
wife, has a right to make claims for joint property in the event of a divorce.
It is recommended that a woman whose husband has entered into a polyga-
mous union be allowed to claim for joint property before her husband
enters into the polygamous marriage. It is not fair for the husband to use
the first marriage as a method of increasing his wealth and then, when he
is in a relatively comfortable position, contract into a new marriage. It
would be extremely unfair for the wife—who has worked equally as hard
as her husband—to suddenly have to share not only her husband but also
their property with another woman. A provision which gives the wife the
right to claim for the property acquired during the marriage will at least
balance the unfairness she experiences from the financial perspective. To
date, these proposals are being looked into by the Technical Committee on
Civil and Islamic Law and there are some, especially on the issue of joint
property that have been taken to be included in the amendments in relation to polygamy. However, one should remember that law has its limitation especially in matters relating to “the heart”. When love fails, somehow people will seek the assistance of the law as their matrix. If the law fails to answer their problems, who does? Who would they turn to?