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Reform of the Polygamy Law and Policy in Malaysia: An Empirical Study

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Summary

The concept of polygamy is not a recent phenomenon. In Islam it is to be found in the sharia which is seen as being divine in nature. The sharia details restrictions to and obligations arising from polygamous marriages that make the practice of polygamy far from easy. The practice of polygamy is widespread. In Malaysia changes in the nature of family life such as an increase in the divorce rate and the phenomenon of husbands moving states within Malaysia, leaving behind their old wives, have resulted in an increase in the practice of polygamy. In Malaysia the law relating to polygamy has been reformed by legislation such as the Islamic Family Law (Federal Territories) Act, 1984 which is based both on the sources of Islamic Law, including the Koran, and also family law to be found in other Muslim countries. Moreover, the law relating to polygamy in Malaysia has to be assessed in the light of other historical family law legislation such as the Civil Marriage Ordinance 1952, the Christian Marriage Ordinance 1956, the Divorce

Ordinance 1952, the Registration of Marriage Ordinance 1952, the Sarawak Chinese Marriage Ordinance, the Sarawak Church and Civil Marriages Ordinance, the Sarawak Matrimonial Causes Ordinance, the Sabah Christian Marriage Ordinance 1919 and the Sabah Divorce Ordinance 1963. In addition, consideration has to be given to other legislation reforming the law relating to polygamy such as the Family Law Ordinance 1984, the Law Reform (Marriage and Divorce) Act 1976 as amended by the Law Reform (Marriage and Divorce) (Amendment) Act 1980 and the Law Reform (Marriage and Divorce) Act 1986 and in the Law Reform (Marriage and Divorce Rules 1982.

This study will examine the present state of polygamy under the sharia in Malaysia in the light of a small-scale empirical study done in the city of Meleka.

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Background

Polygamy was to be found in many ancient societies including the Babylonians, Assyrians, Persians and the Israelites with there being no restriction as to the number of wives (Rizvi, 2002). However the prevalence of polygamy in modern societies is unknown. Nevertheless its practice has been documented in 80 per cent of societies across the globe including the United States (Bergstrom, 1994). Although polygamy is not legal in most Western countries, it is practiced in specific ethnic and religious communities (Al-Krenawi et al., 1997; Phillips, 1999). Polygamy has been grown up in India through custom and law (Syed Ameer Ali, 1979). This is also is the case in Bangladesh.

In Islam, polygamy stems from the different sources of the sharia including the Koran. Moses, Abraham, David, Solomon and some other great Prophets who historical figures in Islam all took several wives. Nevertheless, for Muslims, polygamy is an exceptional case. The biological need and economic capability of the husband and, above all, equitable treatment between the wives are pre-conditions for a husband to marry more than one wife (Faiz-ud-din, 1982). According to the Surah Nisa verse 129 of the Koran states as “Marry such woman as seem good to you, two, three, or four, but if you fear that you cannot do equal justice to them all, then marry only one.” As it is almost impossible for a husband to maintain complete equality in the treatment of the wives in all respects, Islam directs him to have only one wife at a time, though, however, under unavoidable circumstances, one is permitted to marry more than one wife but not exceeding four. The Surah an-Nisa 4:129 of the Koran unequivocally declares:

You will never manage to deal equitably with your wives, no matter how eager you may be to do so, yet do not turn completely aside from one so that you may leave another in suspense. If you maintain proper conduct and do your duty, Allah will be forgiving, merciful.

In fact, arguably, the provisions in the Koran as to the possibility of a polygamous marriage may be applicable only in time of necessity (Faiz-ud-din, 2008).

Global Context

Polygamy is not a new issue or concept in the Islamic world. However, notwithstanding the provisions of the sharia, polygamous practices within the Islamic world have not always recognized the rights of wives. Because of this, in order to ensure equal rights and human rights, numerous Islamic states have passed legislation with relation to polygamy. Such legislation includes the Law of Personal Status, 1957 (Tunisia), the Polygamy Act, 1958 (Morocco), the Law of Personal Status, 1959 (Iraq), and the Marriage and Divorce Act, 1965, the Laws of Cyprus (Turkey). The content of this legislation varies widely. For example, polygamy is forbidden under the Tunisian Law of Personal Status 1957 (Anderson, 2008). Under the Iraqi Law of Personal Status 1959, marriage to more than one woman is allowed only by permission of the court (American Bar, 2010). Iranian Muslim Personal Law also prohibits the polygamy without obtaining the prior written consent of the Court of Qadhi (<http://www.docstoc.com/docs/6494322/Polygamous>). However the Jordanian Law of Personal Status 1976 does not impose strict restrictions in this regard (Gihane, 2005).

From the constitutional point of view, in order to reform Muslim family law, most of the Middle East countries follow constitutional guidelines such as in Egypt where the constitution states that "the principles of the Sharia are the main source of legislation in the Arab Republic of Egypt (Patricia, 2005). In Kuwait article 2 of the Kuwaiti Constitution provides that "the religion of the

State is Islam and the Islamic law is a principal source of legislation.” In the United Arab Emirates article 7 of the UAE Constitution states that the Sharia as a principal source of legislation. Article 75 of the Law of the United Arab Emirate Supreme Court provides that the Supreme Court shall firstly apply sharia and other laws in force if they conform to sharia principles. It may also apply custom, if such custom does not conflict with the principles of the sharia. Article 1 of the UAE Civil Code states that in cases when there is no express provision in the Civil Code, the judge must first rule in accordance with the Sharia, giving preference to Maliki and Hanbali schools of Islamic law. In the absence of that, the judge shall apply rules of custom, if consistent with public order and morals. In Saudi Arabia, the basic law of 1992 confirmed that Koran and Hadith are the sole sources of law and that all laws and regulations must conform to the sharia. It follows that neither foreign judgements nor any contractual provision contrary to Islamic principles may be enforced in Saudi Arabia. Saudi Arabia strictly follows the Wahabee school of, which developed out of Hanbali school of Islamic law, even though there exists a large Shia minority in Saudi Arabia. In Jordan, the article 2 of the Jordanian Civil Code stipulates that in the absence of applicable law, the court applies the principles of sharia, and in case of lack of any sharia rule, the court applies rules of custom, and then principles of justice provided that the applicable custom is consistent with public order and morals (Kamal, 2010). In Oman constitution, article 2 states that the religion of the State is Islam and the Islamic sharia is the basis of legislation. Article 5 of the Commercial Code of 1990 of Oman provides that if there is no express provision, custom shall apply, and in the absence of custom, the judge shall apply the principles of Sharia (Oman Constitution, 1996). Article 1 of each of the Civil Codes of Egypt and Iraq contains similar provisions that in the absence of any applicable legislative provisions, the court shall adjudicate according to custom and usage, and in the absence of applicable custom and usage, the court shall apply the principles of sharia relating to family matters like Malaysian sharia court, which are most consistent with the provisions of the law (Interim Constitution, 2004).

Malaysian Law

The Malaysian legal system is based on common law principles. The supreme law of the land is the “Constitution of Malaysia” that sets out the legal framework and rights of Malaysian citizens. Parliament passes federal laws under the constitution and state laws are enacted by individual State Legislative Assemblies. Malay customs are also an important source of law. The constitution of Malaysia also provides for a pluralistic legal system with both secular civil and criminal laws and also sharia law (Article 121(1A)). Article 3 provides that Islamic law is a state law matter with the exception for the Federal Territories of Malaysia. The sharia in Malaysia it termed *syariah*. The Islamic court is known as the *Syariah Court*. In the Malaysian legal system as a whole the sharia plays a relatively small role in setting the laws on the country. It only applies to Muslims. With regards to civil law, the Syariah courts has jurisdiction in personal law matters, for example marriage, inheritance, and apostasy.

Polygamy under Malaysian Law

The Islamic Family Law (Federal Territory), Act 1984 required an application for a polygamous marriage to be fulfilled at least five conditions such as it just and necessary; has the financial means to support his existing and future dependents; the consent of the existing wife; ability to accord equal treatment to his wives as required by *hukum syara*. This Act of 1984 set out the necessity of consultation with the existing wife. The provisions of IFL 1984 are followed in most of the states in Malaysia, with the exception of Kelantan, Terengganu and Perak. The Kelantan Islamic Family Law Enactment 1983 provides in section (19) that “[n]o male person shall marry another woman at any place while he is married unless he has obtained a prior written consent of the Court of Qadhi”. The Terengganu Administration of Islamic Family Law Enactment 1985 contains in section (21) a similar provision to that of the Kelantan enactment. The Perak Islamic Family Law Enactment 1984 provides that “no man shall, during the subsistence of a marriage, contract another marriage except with the prior certification in writing of a judge to the effect that the applicant had made a declaration before the judge that ‘he shall be fair toward his wives’”. Under the Johor Islamic Family Law Enactment 1990 section 127(2) of the Act states that any person who has more than one wife and has failed to give justice to the wives on maintenance, clothing, place of abode and other entitlements according to *hukum syarak* commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment.

Previous Research

In Malaysia, Islamic Law and civil law are the sources of family law. It is arguable that Malaysian Family Law including the nature of the Islamic family is the most studied area of the existing legal literature in Malaysia (Raihana, 2007). This existing literature looks at polygamy both in the Malaysian context and in the international context. Ahmad Ibrahim (1997) has discussed the polygamy under the Federal Territories Act 1984 pointing out that in order to undergo a valid polygamous marriage every Malaysian Muslim needs to have permission from the Court and not just observe any provisions under Islamic Law. Mehrun Seraj has discussed divorce and polygamous marriage using a comparative approach looking at countries that are neighbours of Malaysia such as Singapore and Brunei. Mimi Kamariah (1992) has emphasized on the importance of the implementation of the family law legislation for both Muslims and the non-Muslims. Malaysian family law issues and developments based on the sources of Islamic Law, particularly focusing on the Koran, have been critically analyzed by Hashim Kamali (2000). Kelantan Muslim family law issues have been discussed by the Abdullah Alwi Haji Hasan (1996). Faiz-ud-Din (2009) has looked at Islamic family laws issues including Malaysian Islamic provisions in the context of a comparative examination of Bangladeshi statutory provisions.

The Present Study

Our study focusses on the law relating to polygamy and policy issues in Malaysia, dealing with the impact of polygamy on social life. The research findings are based on interviews with a range of Malaysian citizens. The results of this study show that whilst the number of polygamous marriages is still increasing wives in polygamous marriages are, in general, unhappy with such relationships (Othman, 2010). A number of general findings emerge from this study. First, both husbands and wives blame each other for not being fair in their relationship. Secondly, amongst wives it is the first wife who is most dissatisfied with the polygamous relationship, often expressing a feeling of being wronged or of betrayal. The majority of first wives had suffered a loss of social status after their husband's second marriage. Of the first wives interviewed, 45.6 per cent were dissatisfied with their polygamous marriages, compared with 39.3 per cent who were satisfied. This was in sharp contrast with second wives, 68 per cent of whom were satisfied with their marriages with only 18.8 per cent saying they were dissatisfied. A majority of first wives also indicated that their love, respect and trust for their husbands deteriorated after discovering their intentions.

The top three reasons cited by husbands for marrying again were to validate their love for their second wives, and to avoid adultery and khalwat. This was roughly echoed by second wives. A majority of first wives, however, cited "to satisfy lust" as their husbands' main reason for marrying again, followed by "to avoid adultery" and only thirdly "to express their love for their second wife".

Polygamous marriages are significant in Malaysia. This was realised by the respondents to the case study. However, amongst respondents, perceptions about the prevalence of polygamy varied.

	Percentage (%) based on perceptions								
	20	30	40	50	60	70	80	90	100
Malay	3	8	70	121	106	81	7	4	400

121 people, the largest group of respondents, thought that 50 per cent of ethnic Malays in Malaysia practice polygamous marriage. However 106 respondents put the figure at 60 per cent and 81 respondents put the figure at 70 per cent.

80 per cent of respondents out of the 400 in the case study agreed that there were some good reasons for polygamous marriages such as the sexual needs of parties, their lifestyle and social practices, the betterment of the parties and the need to avoid adultery. However they also argued that there polygamous marriages could result in some harmful impact such as injustice between the parties, property fights following the breakdown of marriages and increased stress during the life of the marriage. In order to remedy these problems respondents felt that there needed to be a clear law regulating these marriages and counselling about what such marriages entailed.

However it would seem that 50 per cent of the respondents were unclear as to what the present law regarding polygamous marriages was. These results full support the findings of the work done by the Professor Dr. Norani Othman which is available on the website that she edits (Othman 2007).

Problems of in the Application of Malaysian Laws Relating to Polygamy

Ratna Osman and Sen Lam, executive director of the organization “Sisters in Islam” in Malaysia, have found that most Muslim men who have more than one wife cannot cope financially and emotionally. “Sisters in Islam” have called for an amendment to current laws to ensure that polygamous Muslim men treat their wives honourably and fairly (<http://www.sistersinislam.org.my>, 2011). Ratna Osman has argued that an applicant for a second polygamous marriage needs to prove in court that he can be just, he can be fair to all the families, and also that the second marriage is necessary. This is the condition that was in the 1984 Islamic Family Law, which was, however, amended in 1994 the test now being "just or necessary" rather than "just and necessary". This amendment means that a man can now, when he wants to apply in court to be allowed to conduct a polygamous marriage, just prove in court, that it is necessary for him to take this woman as his second wife in order to, "to legalize my love ... the fear is I might commit adultery. Thus it is necessary for me to take this second wife." Usually, this is the argument will be accepted by the court.

From the empirical findings described above it would seem that there is a need to go back to the conditions required by the original 1984 Act. It is necessary to show that the marriage will be “just” because, as we have seen above, that is required by the Koran. Moreover it is necessary to show that a second marriage will not lower the standard of living of the existing family. From our research the most significant harm done by polygamous marriages is to the standard of living of the first family, including the children of that family, although second families often also suffer from a poor standard of living.

The fact that different states in Malaysia have different laws relating to polygamy is, in itself, a problem. There is no unified family law system throughout Malaysia. Moreover in some states the requirements for a valid polygamous marriage are not very strict. In Kelantan, for example, the requirement is merely that the applicant of the marriage must get prior written consent from the Court of Qadhi without specifying any conditions for the grant of that consent whilst in Perak the requirement is merely that there has to be prior certification of the marriage in writing by a judge with the husband merely making a declaration before the judge that “he shall be fair toward his wives”. Equally, in terms of application of the law courts are often very lenient. In an unpublished five-page letter by Sisters in Islam and the association of Women Lawyers, entitled “Memorandum on Reform of the Islamic Family Laws on Polygamy, submitted to the Prime Minister Datuk Seri Dr. Mahathir Mohamad” on 11 December 1996, it was alleged that it was the common practices of Syariah Court to imposed only 300 ringgit fines under section 123 even

though a maximum fine of 1,000 ringgits was provided for in law. It is also commonly known that consent to polygamous marriages given by wives to courts is often obtained through duress, the wives being threatened with divorce by their husband if they do not give their consent.

Conclusion and Recommendations

The research results above shows that there needs to be a great consciousness of people's duties and responsibilities towards each other. More attention needs to be paid to illegal activities both in relation to secular law and the sharia. Stronger and more comprehensive laws need to be introduced with respect to polygamy covering the rights for each family member.

Based on the above study, some recommendations are as follows:

- To unify Malaysian family law
- To apply that family law strictly
- To make tighter and more comprehensive family law
- To organise training programmes for both men and women with respect to marriage
- To educate Malaysian people more fully about Islam
- To follow the Islamic Laws and principles more strictly

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