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### **ISLAMIC FAMILY LAW ON POLYGAMOUS MARRIAGE IN MALAYSIA: BETWEEN ROSES AND THORNS**

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### **ABSTRACT**

Marriage is a way of gaining a peaceful mind and soul, be it monogamous or polygamous marriage. This is the sweetness of marriage as enshrined by Islam. To achieve this wisdom, conditions laid down by the religion and legal requirements must be observed. Otherwise, a marriage may turn into a miserable and thorny life for couples, especially in polygamy. Thus, the purpose of this paper is to disseminate legal knowledge and refine the understanding about polygamous law in Malaysia. The central arguments of this study are two-pronged: (1) to deliberate on the Malaysian legal framework for polygamous marriage and (2) to discuss a crucial legal issue related to polygamy, namely cross-border marriage and its effects. The qualitative method of doctrinal legal research was employed to obtain and analyse primary and secondary data from various sources. It included examining the statutes and decided cases of the Syariah

Courts, including reported and unreported cases. The relevant statutes studied were the Islamic Family Law (Federal Territories) Act 1984 and the Enactment of Islamic Family Law (Kedah Darul Aman) 2008. In substantiating arguments, data from e-Syariah Version 3 (ESV3) was used together with existing literature. The findings revealed that refusal or failure to comply with legal requirements pertaining to polygamous marriage may lead to cross-border marriage and its aftermath effects on the legality of the marriage, jurisdiction of the court, and the rights of wives and children in the context of law. Hence, the enforcement of existing laws on polygamy should be emphasised to control any abuse of power by a man to contract a polygamous marriage. More importantly, the laws and enforcement should be strengthened to protect the rights of the wives and children. Future research may focus on issues involving the rights of the wives and children of a polygamous marriage upon the death of the husband or father according to Islamic family law in Malaysia and its implementation.

**Keywords:** Islamic Family Law, Polygamy, Hukum Syarak.

## INTRODUCTION

The Holy Quran clearly mentions in surah ar-Rum: 21 that among the objectives of married life between man and woman is to have peace of mind and comfort. The verse indicates that the very foundation of a successful married life lies in a lawful marriage, be it monogamous or polygamous. To achieve this sacred wisdom behind each marriage, parties to the marriage must be aware of their respective responsibilities that come with rights and enjoyment, of which failure of fulfilment may invite chaos and disorder in marriage life. The situation is worsened when chaos in marriage life has been thrust into the limelight by media, particularly those involved with polygamous marriage. News about polygamous marriages among celebrities and public figures would easily catch the public's attention and invite comments from netizens even by those with no clear knowledge and authority. Polygamous marriage is often speculated by the media with third party's involvement in a household, marriage without permission or secret marriage, affliction and suffering, as well as hurdles and difficulties attached to the marriage, causing confusion and misunderstanding among people. There was a call for restriction

of polygamous marriage as it is believed to be a pre-Islamic practice with no relevancy in the modern time where conditions such as justice cannot be fulfilled wholly (Alamgir, 2014).

Polygamous marriage is not a new topic of discussion as numerous thoughts and debates have taken place across the world including Malaysia. It refers to a marriage with more than one wife. In Malaysia, the practice of polygamy can be traced not only among Muslims but also customary marriages for non-Muslims prior to the establishment of the Law Reform Marriage & Divorce Act 1976 (LRA). Nevertheless, the LRA has put a stop on polygamous marriage among non-Muslims in Malaysia through the introduction of the statutory law, which only recognises monogamous marriage. For Muslims, the legality and conditions attached to polygamous marriage are clearly illustrated by the Holy Quran and the Prophet's Sunnah. The verse indicates its permissibility with conditions, failure of which, one wife is sufficient. Allah says in surah al-Nisa': 3 to the effect that:

*"If you fear you might fail to give orphan women their 'due' rights 'if you were to marry them,' then marry other women of your choice—two, three, or four. But if you are afraid you will fail to maintain justice, then 'content yourselves with' one or those 'bondwomen' in your possession. This way you are less likely to commit injustice."*

The divine revelation through Prophet Muhammad was to rectify the practice of polygyny during pre-Islamic Arabia that exposed the parties to inequalities. Previously, it was customarily accepted that men could marry as many women as they wanted regardless of whether they had the ability to take care after the women and the family. This was allowed in response to situations where wives were widowed and children were orphaned due to wars. Quranic verses were revealed demanding that widows and children to be protected with fairness. The practice of polygamy is accepted with consideration of equitable laws in which the husbands are shouldered with responsibilities to look after the wife and the children alongside the limitation of the number of wives (Michele Alexandre, 2007).

Thus, the purpose of this paper is to study the procedure and formalities of application for polygamous marriage in Malaysia. While the law

provides for a platform to legalise the marriage, it can also bring about crisis and threat to the sanctity of the family institution when the dream clashes with reality. Furthermore, statutory provisions and decided cases have enlightened procedural and formal aspects for administrative purpose of the Syariah Court. The legality of polygamous marriage is provided by the Islamic Family Law (Federal Territories) Act 1984 (IFLA 1984) and the state enactments for Islamic family law including the Enactment of Islamic Family Law (Kedah Darul Aman) 2008 (Kedah Enactment 2008). Deliberation on the law and decided cases is important to foster better theoretical and practical apprehensions. Reported cases from journals and unreported Syariah Court cases, particularly from the Syariah High Court Alor Setar between 2017 to 2022, are selected to examine the relevant principles of law highlighted by the courts and their approach in approving or refusing polygamy applications.

## **LITERATURE**

### **Legal Framework for Polygamous Marriage**

Before the coming of Islam, there were various marriage practices in the Arab Peninsular such as capture marriage, agreement marriage, purchase marriage, and temporary marriage. Polygamous marriage was considered a custom and there was neither limitation concerning the number of wives that a man could marry nor the number of wives that the husband could abandon should the wives displease him (Michele Alexandre, 2007; Muradi & Nordin, 2019; Yasin & Jani, 2014). The practice of polygamy in Islam outweighs the desires of an individual (wife/woman) for the welfare of the community. It is designed to honour the widowed wives and children of fallen Muslim warriors in the battlefield. The best example is illustrated by the wives of Prophet Muhammad who were widows, with the exception of Saidatina Khadijah and Aisha (Muradi & Nordin, 2019).

The permission for polygamous marriage in Islam is sanctioned by the Holy Quran with certain restrictions. The revelation is never intended to allow polygamy without restriction but rather to limit its practice. Generally, the restrictions are twofold: first, it limits the number of wives to only four; secondly, the condition of justice (*‘adl*) is imposed on the husband to treat the wives with equality. Such restrictions aim

to avoid any mistreatment, abuse, and exploitation against women and children. The husband would be admonished if he could not do justice to his family and be advised to be content with only one wife. Hence, it should be understood that the practice of polygamy is never a general rule as it must be implemented out of necessity and with restrictions. It should not be recognised as a privilege to man and gained superiority due to sexes. Hence, the administrative procedure to contract a polygamy should not be viewed in isolation as it is for the benefit of the society, both the parties and the community (Yasin & Jani, 2013, 2014).

Generally, a marriage is deemed valid according to Islamic law if it satisfies five basic pillars or arkan al-nikah, namely bride (zaujah), bridegroom (zauj), guardian (wali), witnesses (shahidain), and pronouncement of offer and acceptance (sighah ijab and qabul) (Najibah et al., 2016). Conditions attached to each of these pillars must also be satisfied; otherwise, the marriage is deemed null and void as clearly described by section 11 of the IFLA 1984 and Kedah Enactment 2008. Specifically, the Second Schedule of the Kedah Enactment 2008 further prescribes what constitutes an invalid marriage, which refers to a marriage that is not in compliance with the canons and conditions as listed therein. This will result in the refusal of registration of such a marriage. These pillars and conditions are applicable generally to both monogamous and polygamous marriages.

The Enactment of Islamic Family Law (Kedah Darul Aman) 2008 outlines the legal framework for polygamous marriage in Kedah as governed under section 23. Such provision is rather similar with the provision in IFLA 1984. The legal framework postulates further requirements and conditions for a polygamous marriage as it is not an absolute right of a man (zauj) but rather a permissible marriage with conditions as stated in sections 23 (1) and (2) of the Kedah Enactment 2008.

*(1) No man during the subsistence of a marriage shall, except with prior permission in writing from the Court, contract another marriage with another woman.*

*(2) No marriage contracted without the permission under subsection (1) shall be registered under this Enactment unless the Court is satisfied that the marriage is valid according to Hukum Syarak and the Court has ordered*

*the marriage to be registered subject to section 124 of the Kedah Enactment 2008.*

Raihanah (2003) stressed that all states in Malaysia impose liability on a man who intends to have a polygamous marriage to make an application for polygamy and that he must obtain written approval from the Syariah Court or Syarie Judge before he can proceed with it. Unfortunately, polygamous marriage is among the reported cases of marriage without permission together with runaway marriage and marriage without a guardian (Siti Aishah et al., 2022).

Furthermore, Raihanah (2003) concurred that as Islamic family matter is a state's jurisdiction, legal provisions on this aspect are ununiformed among the states in Malaysia concerning the procedures for application, registration, punishment for those who perform a polygamous marriage without permission and those who are being unfair to their wives, and dissolution of marriage through fasakh because of polygamy. Essentially, section 23 (4) of the Kedah Enactment 2008 denotes that for a man to have a polygamous marriage, an application shall be made to the Syariah Court by following the prescribed procedures together with 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 alongside his ascertainable financial obligations and liabilities, the number of his dependents including those who would be his dependents as a result of the proposed marriage, and whether the consents or views of the existing wife or wives on the proposed marriage have been obtained.

By filling in the application form for polygamy, supporting affidavit/s and exhibits must be signed before the court's Registrar or Assistant Registrar. The applicant then needs to justify that his application for the proposed marriage is fit and reasonable. He also must declare in his affidavit inter alia about his means at the time of application, financial commitment, the total of dependents including the existing and potential dependents from the proposed marriage, and a statement pertaining to whether the consent or opinion of his existing wife or wives have been obtained. Nevertheless, the most important approval is not from the existing wife or wives but rather from the court. Upon receiving the application, the court shall summon the applicant and his existing wife or wives for it to be heard in a closed proceeding.

This is stated in subsection 6 of section 23 of the Kedah Enactment 2008:

*(6) A copy of the application under subsection (4) and of the iqrar required by that subsection shall be served together with the summons on each existing wife and the woman to be wedded.*

During the hearing, the court may also call other relevant parties to the proposed marriage such as the proposed wife and her wali. In exceptional cases, such as if the existing wife or wives could not attend the hearing due to mental or physical inability, the court may also call children from the existing marriage to provide information regarding the proposed marriage, especially on the applicant's conditions or their parent's marriage life (Mohd Zakian, 2023). The court will then grant permission upon being satisfied with the applicant's conditions. This can be seen in section 17 of both the IFLA 1984 and Kedah Enactment 2008.

Subsequently, a copy of the application and statutory declaration together with the call letter will be delivered to the existing wife or wives. Any aggrieved or dissatisfied party may appeal to the court by following the prescribed appeal procedures for civil matters. Remarkably, the solemnisation and registration of polygamous marriage is similar to those of ordinary marriage.

*(7) Any party aggrieved by or dissatisfied with any decision of the Court may appeal against the decision in the manner provided in the Islamic Civil Procedure Enactment 1979.*

A person's capability is subjectively determined and varies from one case to another.

Conditions for court's scrutiny

It is argued that the codification of conditions before practising polygamous marriage does not address the spiritual or wisdom of the original text in the Quran. A possible reason is to give a general understanding on why polygamy is permitted and the existence of preceding stringent conditions. It is crucial to make this information

available to ensure that the practice of polygamy is in line with the divine spirit and Islamic teachings (Yasin & Jani, 2014).

In considering an application for polygamy, the applicant must comply with all four conditions outlined in section 23 (5) of the Kedah Enactment 2008, namely paragraphs (a) to (d):

*(5) On receipt of the application, the Court shall summon the applicant, his existing wife or wives, the woman to be wedded, the wali of the woman to be wedded, if any, and other persons who in the opinion of the Court may provide information relating to the proposed marriage to be present at the hearing of the application, which shall be in camera, and the Court may grant the permission applied for if it is satisfied-*

- (a) that the proposed marriage is just or necessary, having regard to, among others, the following circumstances 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 Syarak, all his wives and dependents including persons who would be his dependents as a result of the proposed marriage;*
- (c) that the applicant would be able to accord fair treatment to all his wives as required by Hukum Syarak; and*
- (d) that the proposed marriage would not cause darar syari'e to the existing wife or wives.*

The use of the conjunction “and” between clauses (c) and (d) indicates that all the paragraphs therein must be considered and not for the court to opt or exempt any paragraph. The four conditions need to be read together conjunctively. This indicates that all four conditions must be complied. In the case of *Zambri bin Idrus v. Zaiti Akhtar binti Omar* [2017] 4 ShLR 12, the plaintiff sought for the permission to practise polygamy under section 23(4) of the Islamic Family Laws (State of Selangor) Enactment 2003. The issue was whether the plaintiff could fulfil the criteria under section 23(5) of the Enactment. It was held that a person who wishes to practise polygamy must fulfil conditions as



provided under sections 23(5)(a), (b), (c), and (d). The court decided that the plaintiff failed to satisfy all these conditions by emphasising that the proposed marriage possessed an extreme likelihood to cause harm, not only to the defendant but also to the children and the third party.

On the contrary, the court in *Syed Zulhusmi bin Syed Yusof v. Nor Anrina binti Ismail* (02200-011-0088-2020) approved the application for polygamy under section 23 of the Kedah Enactment 2008. Among the reasons presented by the applicant were to avoid immorality and to obtain offspring. The court proceeded to approve the application after being satisfied with the testimonies from the applicant, respondent, applicant's future wife, and her guardian. The court was of the opinion that the applicant had fulfilled the conditions provided in section 23 (5).

Remarkably, failure to meet one of the stipulated conditions under the law will cause the polygamy application to be rejected by the court. The condition of 'just or necessary' was raised in the case of *Mohd. Asrol bin Abdul v. Noorhafiza binti Yahya* (02200-011-0182-2020). Among the reasons for applying for polygamy was to avoid immorality; nevertheless, the court was satisfied that the existing wife did not suffer from any health problems that could prevent sexual intercourse between the husband and the wife. Hence, the reason given was deemed unconvincing to support his application, ultimately leading to it being rejected.

Similarly, the court in *Shazril Imran bin Shaukat v. Aizureen binti Burhanuddin* (02200-011-0010-2021) found that the applicant failed to present any reason to support his application related to the issue of 'just or necessary'. There was no allegation about any weaknesses on the part of the existing wife and the applicant did not deny the ability of the wife in conducting her wifely duties throughout the period of the marriage. Since the applicant had never claimed that the wife failed to conduct her responsibilities as a wife, the court was satisfied that the applicant failed to prove the reasons, hence supporting the application of this case as 'just or necessary'. Therefore, the application for polygamy was denied.

In determining any application, the court will also emphasise the husband's physical and material abilities. This means that the husband must be fit physically, possesses good health, and does not suffer

from any chronic diseases which may defeat the purpose of marriage. Moreover, the husband must be financially capable of supporting his wives and dependents. This condition was raised in the case of *Ismail bin Bahari v. Fairus binti Mohamad* (02200-011-0024-2022) where the applicant had an income of RM1,700.00 per month. He had two children with his existing wife and his monthly expenses amounted to RM1,320.00. The court found that the existing finances did not provide the applicant with the financial ability to engage in polygamous marriage. Similarly, in the case of *Ridzuan bin Abdul Razak v. Nik Yam binti Abdul Ghani* (02200-011-0119-2022), the court found that the applicant did not have the financial ability and property to engage in polygamous marriage after assessing his means. In rejecting the application, the court stated that his expenses would be deficit if this application was allowed though the applicant stated that his main reason to have a polygamous marriage was to avoid sin as he felt uneasy to satisfy his lust by having merely one wife.

In the case of *Azhar bin Awang v. Che Gayah binti Usuf* (02100-011-0018-2020), the applicant worked as an Assistant Supervisor with a gross income of RM2,227.24 per month and an additional income of RM350.00 per month from house rental. With reference to the applicant's salary slip, the court found that the net salary stated in writing was only RM970.15 after deducting the gross salary of RM2227.24 with several deductions such as EPF, SOCSO, Advance, and EIS amounting to RM1257.09. Since the applicant failed to prove his additional income from house rental, the court decided to reject the applicant's claim regardless of the existence of such additional income.

### **The Ability to Provide Appropriate and Fair Treatment to Existing Wife**

Another condition that the court will normally emphasise is the applicant's ability to treat his wives fairly. This means doing justice among the wives, that is, generalising between wives in material aspects such as housing, eating, drinking, and clothing. Justice, therefore, becomes a critical factor in polygamy. In the case of *Maulidah binti Ngah v. Rosma binti Omar* [2017] 3 LNS 30, the court highlighted that justice in polygamy does not mean equality in terms of feelings and affection as it cannot be afforded by a person and that the only condition is to impose what a person can afford. From the context of polygamy, justice involves mandatory matters such as

giving maintenance, arranging shifts to spend the night, and voting to be taken on a journey. Husbands are obligated to practice justice not only towards their wives but also towards their children with different mothers. Nevertheless, it should be emphasised that the concept of justice in polygamous marriage demands not only the husband's financial ability to support more than one wife; he must also be fair in various other matters, including in terms of spending time, providing support, and playing a role as a guidance to his children.

Such condition is illustrated by the case of *Azhar bin Awang v. Che Gayah binti Usuf* (02100-011-0018-2020) whereby the court was satisfied that the existing marriage between the applicant and his wife was problematic, causing the wife to leave the house and that they had not been living together for five years. This gave the impression that the applicant failed to manage his existing wife well and to fulfil his responsibilities as a husband. Accordingly, the court was satisfied that the applicant did not have the capacity to act fairly if granted the permission for polygamy. Likewise, the court in *Mohd Rozaiman bin Aziz v. Nurfalizan binti Azali* (02200-011-0063-2022) found that the applicant did not completely conduct his responsibilities as a husband and depended on the respondent for daily expenses. In this case, the existing wife had provided evidence which was not in favour of the applicant, and it was not denied by the applicant. The wife stated that she had been burdened to jointly bear the cost of living and daily expenses because the existing sources of income were insufficient. She also claimed that the applicant did not spend enough time with the family because he was too busy. These facts supported the wife's allegations and were not disputed by the applicant; hence, the court viewed that the husband failed to fulfil the condition of giving fair treatment to all of his wives in accordance with the requirements of *Hukum Syarak*. Therefore, the polygamous application was denied.

### ***Darar Syari'e***

Finally, the Syariah Court will examine whether the proposed marriage can cause *darar syari'e* to the existing wife. *Darar syari'e* means persecuting, hurting, or torturing whether in the form of words, physical, or mental against the five basic human rights outlined by the Syariah principles, namely religion, body, mind, dignity or descent, and property. Intended persecution can not only occur in the form of physical abuse but also include psychological, emotional, sexual, social, and financial (property) abuses. This condition is illustrated by

the case of Mohamad Sazali bin Shaari v. Nurraiha binti Muhamadan (02200-011-0160-2022) where several questions needed to be examined by the court involving the issue of *darar syari'e*. Among them was the husband's ability to support his wives and dependents, in which granting the polygamy application might affect the standard of living of the existing wife. Based on these facts, the court found that the applicant did not have the ability to provide maintenance for the existing marriage. As such, the proposed marriage would certainly cause *darar syari'e* to the existing wife. In this matter, the husband could not reduce the alimony of the new wife on the grounds that she had her own financial resources or reduce the alimony of the first wife on the grounds of having to share it with the new wife. Therefore, the court was satisfied that the proposed polygamy marriage had a high probability of bringing *darar syari'e* to the existing wife.

In conclusion, polygamous marriage applicants must comply with all the conditions set under sections 23 (5)(a), (b), (c), and (d) of the Kedah Enactment 2008, which is *pari materia* with IFLA and Islamic Family Law Enactments for other states. Failure to comply with any of these conditions will result in the polygamy application being refused by the Court.

## **METHODOLOGY**

This study employed the qualitative method of doctrinal legal research with the fundamental aim to discover, explain, examine, analyse, and present the issue of polygamy. It utilised primary and secondary data from various sources. The primary data was obtained from statutory provisions to examine the laws providing for polygamous marriage application in Malaysia by focusing on the law of the Federal Territory of Kuala Lumpur and the state of Kedah. Statute law cases from Syariah Courts were also examined. Meanwhile, the secondary data was gathered from books, journals, reports, Internet references, and e-syariah version 3 (ESV3).

## **RESULT**

Table 1 shows the statistics of applications for polygamous marriage permission made to the Kedah Syariah High Court and the applications for order to register polygamous marriage from 2019 to 2022.

**Table 1**

*Applications for Polygamous Marriage in the State of Kedah*

TYPE OF CASES	2019	2020	2021	2022
Application for polygamy permission	94	110	72	86
Application for order to register polygamous marriage	251	146	93	174

*Source:* Research Unit, Syariah Judiciary Department of the state of Kedah (2023).

The statistics denote that the highest number of applications was recorded in 2020 with 110 cases as compared to 94 cases in 2019, 72 cases in 2021, and 86 cases in 2022. Further observation revealed that throughout 2019 to 2022, the application for court's order to register was higher than the application for permission. This suggests that polygamous marriage has already taken place prior to the court's permission, necessitating the court to scrutinise its legality and conformity with Hukum Syarak. In the case of conformity, the court will order the parties to pay a penalty for the solemnisation of marriage without permission before ordering for the marriage to be registered. This is explained by section 40 of the IFLA and Kedah Enactment 2008.

The data also shows that the applications for polygamous marriage permission made from 2019 to 2022 might be approved, rejected, dismissed, or withdrawn by the Syariah High Court. 'Approved' means that the court granted permission for the plaintiff or applicant to have polygamous marriage while 'rejected' means the case was unsuccessful or disapproved. On the other hand, 'dismissed' refers to cases that were removed due to both parties or the plaintiff being absent whereas 'withdrawn' describes any cases that were withdrawn or retracted by the applicant himself.

**Table 2**

*Results of Applications for Permission to Polygamy*

Year	Registered	Approved	Rejected	Dismissed	Withdrawn	In Trial
2019	99	49	-	16	17	17
2020	112	43	3	32	26	8
2021	72	29	3	15	17	8
2022	89	36	10	12	10	19

*Source:* Data generated from e-Syariah Version 3 (ESV3) as of 02/03/2023

Table 2 shows the number of polygamy applications registered at the Kedah Syariah Court from 2019 to 2022. Comparatively, Table 3 lists the applications for polygamous marriage submitted to the Federal Territory of Kuala Lumpur Syariah Court, which are relatively higher in number.

**Table 3**

*Applications for Polygamous Marriage in the Federal Territory of Kuala Lumpur*

Year	Registered	Approved	Rejected	Dismissed	Withdrawn	In Trial
2019	290	220	14	29	21	0
2020	184	131	18	14	14	1
2021	183	139	11	9	16	3
2022	244	172	11	13	13	23

*Source:* Data generated from e-Syariah Version 3 (ESV3) as of 02/03/2023

These statistics demonstrate that the percentage of rejected applications is lower than the approved applications, indicating the low chance of a polygamy application being rejected if the applicant can satisfy the court with the underlying conditions as stipulated by the Islamic Family Law. It should be noted that the law being enacted and implemented, particularly on polygamy, is in accordance with *Hukum Syarak*, aiming towards avoiding *darar syari'e* to parties rather than merely benefiting the male applicant (Mohd Zakian, 2023).

## DISCUSSIONS

### Cross-border Marriage

Cross-border marriage (CBM), or runaway marriage, refers to marriages performed without recognition from the religion, custom, or law. It often does not conform to the conventional marriage solemnisation procedures and is not defined under the Islamic Family Law Act or any state enactment. Therefore, CBM can be regarded as a marriage done within or outside the Malaysian territory without permission from the State Islamic authorities, specifically the Registrar of Marriage, Divorce, and Rujuk as well as the Syariah Judge in case of polygamous marriage (Said et al., 2020). CBMs solemnised in foreign

jurisdiction often happen in the southern areas of Thailand (Satun, Yala, Songkhla, Pattani, and Narathiwat) and Indonesia (Lombok). On the other hand, the solemnising of CBMs within Malaysia requires the couple to travel to other parts of Malaysia that exceed two marhalah (98 kilometres) from the district where the bride is staying. Such distance will allow the use of wali hakim, particularly if wali nasab refuses to give consent to the bride. Wali hakim / raja refers to a wali authorised by the Yang di-Pertuan Agong, in the case of the Federal Territories, Penang, Sabah and Sarawak, or by the Ruler, in the case of any other states to give away in marriage a woman who has no wali from nasab/family.

It is argued that CBM cases mainly occur due to the implementation of the Islamic Family Law Act and various other enactments that require the parties to obtain permission from authorised bodies to solemnise their marriage, either for first-time or polygamous marriages (Md. Hashim @ Yusoff, Hak, & Said, 2019). These legal conditions often prompt the husband to administratively abuse the system by preferring to conduct their polygamous marriage outside Malaysia with the intention to have it approved by the Syariah Court. Such marriage is often committed by husbands who can fulfil all conditions stipulated by the legal provisions. This type of polygamous marriage is argued to be the main cause of family breakdown, abandonment of wives and children, as well as unregistered births and marriages (Yasin & Jani, 2014). Hence, the validity of CBM is questionable due to the following issues:

- (1) Whether the wali hakim is a qualified personnel?
- (2) Whether the parties fulfil the requirements as bride and groom?
- (3) Whether the witness is a qualified individual?
- (4) Whether the refusal of wali nasab is justified?
- (5) Whether the parties fulfil the requirements of two marhalah?
- (6) Whether the parties register their marriage upon returning to Malaysia or their place of residence?

Any marriage solemnised in a foreign country, such as Thailand, is questionable as the country is governed by non-Muslims with limited understanding on matters concerning Islamic administration and management. There are also doubts regarding the qualification of the jurunikah (marriage commissioner) and witnesses and whether they

are rightfully appointed by an authorised institution. Conversely, marriage syndicates often take advantage of the couple's urgency to get married by solemnising the marriage without having concern on the validity of the marriage itself (Md. Hashim et al., 2019).

### **Why Comply if can Elope?**

Among the reasons for CBM is bureaucracy which can delay the marriage by months or even years. Various procedures have been adopted by the state Islamic authority to ensure there is no legal impediment between the parties and the marriage and that the divorce and polygamous ceremonies are conducted according to Syariah. Marriage in Islam is a legally binding contract with the condition of offer and acceptance by parties who have the legal capacity to enter such contact. The pronouncement of offer and acceptance must be witnessed by two male witnesses and mahr must be given from the groom to the bride. The proceduralist approach by the Islamic state authority symbolises itself as a protector whose duty is to protect the interest of its citizens, especially women and children.

The application of polygamous marriage is regulated by the Islamic Family Law Act 1984 and other state enactments. The law requires the men to apply to the Syariah Court and ask for permission to practice polygamy. The condition imposed by the Quran in practicing polygamous marriage is multiplied where the husband must obtain consent from the Syariah Court. Under the Syariah law, the primary condition imposed concerns just and equitable treatment to the wives. Just treatment within the context of marriage describes the provision of maintenance and equal treatment on marital relationship and companionship. However, concerning love and affection, it is impossible to be just as it involves matters of heart and feelings (Hak, 2008a). Effectively, the husband is not at whim to practice polygamous marriage because the court will investigate his "capability" before the application is approved. This is necessary to avoid any harm to the existing wife and family and to uphold justice between the wives. The husband's 'inability' will be considered a sign of injustice and abuse to the existing and future wives alongside the family (Abdullah, 1997).

Firstly, polygamous marriage will be permitted if it is "just" and "necessary". This condition will benefit the husband if there are



any disadvantages on the part of the existing wife such as inability to perform conjugal relationship or wilful refusal to be in a marital relationship with the husband. Secondly, the condition of financial and just characteristics will effectively restrict men of least financial means out of polygamous marriage. This condition will require the husband to declare his income and financial means that enable him to support more than one household. Finally, it is important to ensure that the polygamous marriage will not cause *darar syari'e* to all wives. To meet these requirements, hearing in camera will be held and both husband and wife will be notified to attend. Once the husband has fulfilled all the requirements, though in the absence of consent from the existing wife, the court shall grant the application to practice polygamous marriage. Conversely, even with permission from the existing wife, the court will not grant permission to perform polygamous marriage if the husband does not fulfil the requirements above. In *Ruzaini bin Hassan v. Nurhafizah binti Manon* (2002) JH/XV (1) 79, the application for polygamous marriage was rejected by the Syariah Court in Negeri Sembilan although it was consented by the wife. The reason cited by the court concerned the husband's financial inability to maintain his second wife should the application be allowed. This shows that refusal and consent from the existing wife will not bind the decision of the Syariah Court (Abdullah, 1997).

By adhering to this procedure, the existing wife will be notified on the intention and submission by the husband to contract another marriage regardless of whether the husband will personally do so. This is important as the Syariah Court will examine whether the husband is capable of contacting polygamous marriage and whether he has the financial ability to maintain the existing wife and children and soon the second wife and her children. This process will also allow the court to ascertain whether the claim made by the husband is correct (Hak, 2008b). His ability to be just to all wives will also be questioned. The notice will require the presence of the existing wife on whether she approves or disapproves her husband's application. This will ensure that the existing wife is aware of the husband's intention to marry again. Interestingly, the husband fears the wrath of the existing wife as compared to legal action by the state Islamic authority, making CBM a favourable option.

Most couples prefer to undergo CBM as they will eventually register their marriage upon returning to Malaysia and have it validly

registered upon paying the fine. This alternative offers more benefits in terms of time and money. Although CBM is viewed negatively due to its nonconformity to the customs and religious requirements in the country, it is considered cheap, express, less hassle, and most importantly Syariah compliant. While the marriage is perceived as valid by Syariah law, it does come with several consequences. To legalise the intimacy that may occur between the parties, the state religious authority has no choice but to recognise the marriage provided it is proven to have fulfilled the requirement of a valid marriage in the Syariah Court. Once the couple's union is recognised by Syariah law, they will apply to the state religious authority to be clothed with recognition as a valid husband and wife to the union solemnised abroad.

Not many CBM couples realise the importance of registering their marriage in the Syariah Court until it is too late, such as in the event of divorce. The need to legalise the divorce will require the CBM to be validated first. This is forcible as the CBM does not take a normal course in legalising the intimacy between the couple. It starts with elopement and ends with unrecognisable divorce. The validation of marriage usually commences during the breakdown of marriage as the couple seeks the Syariah Court's assistance to recognise their rights as husband and wife, the entitlement to property, and the validity of the children.

### **Legalising CBM**

Despite the threats of fine and imprisonment for CBM or polygamy without permission, the government has taken the attitude of condonation in legalising such marriages upon fulfilling certain set requirements. Such recognition by the government shows contradictory role. On one side, the government assumes a protective agency in regulating the affairs of its citizens by imposing conditions before polygamous marriage can take place. However, once it is solemnised even without permission from the Syariah Court, the recognition is given to the point of acknowledging the power of a husband to make own decision in contacting polygamous regardless his financial capabilities or possible harm to the existing wife(s). In *Siti Aishah bt. Awang v. Mohd Johari bin Abdullah* [2013] 4 SHLR 77, the issue was whether the marriage contracted in Sungai Golok Narathiwat, Thailand had fulfilled all necessary requirements of a

valid marriage according to the Syariah and Malaysian laws. The observation made by the court was on the pillars of a valid marriage whereby the pronouncement of nikah must be clearly expressed and well documented as to the time, date, and location. Secondly, on the requirement of a wali, the court was satisfied that the bride's father gave permission (wakalah) for the jurunikah (marriage commissioner) to solemnise the marriage on his behalf. The pronouncement of nikah and taqliq was supported with a marriage certificate issued by Majlis Hal Ehwal Agama Islam Wilayah Narathiwat, Thailand. Thirdly, the court investigated the eligibility of the bride to enter into marriage upon satisfying the requirements under section 8 Enakmen Undang-Undang Keluarga Islam 1985 (Terengganu). Similar investigation was done to determine the eligibility of the groom. After all the elements were satisfied, the court later declared that the marriage contracted is valid according to the Syariah law and Enakmen Undang-Undang Keluarga Islam 1985 (Terengganu).

However, in subsequent cases, the court did not recognise the validity of the CBM as it was conducted within Malaysia in the absence of one of the elements of a valid marriage. The absence of wali or any authorisation from wali (to qualify for wali hakim/raja) to give permission during the marriage would prove to have dire consequences. On the mounting pressure to get married quickly, although the wali nasab had exceeded the requirement of two marhalah, the parties did not apply for wali hakim/raja and substituted it with whomever wali available during the ceremony. In substitution for wali nasab, the application has to be made to the Syarie Judge to declare that the authorisation of the marriage will be conducted by wali hakim/raja. Subsequently, if the marriage is conducted by wali hakim/raja, the jurunikah (marriage commissioner) must be appointed by the Islamic state authority.

The primary reason in recognising CBM is to protect both women and children. Once recognised by the authority, the CBM will stand in the same vein as if the marriage was solemnised locally with the permission of the Syariah Court. This recognition will allow the couple to claim maintenance, inheritance, and lineage from the husband. In the absence of this recognition, the right of the wife will not be recognised where she will not be entitled to antenatal care provided by the government. This is in addition to the missing information of the father on the children's birth certificate (section 7 of the Births

and Deaths Registration Act 1957), which may cause future difficulty to register them in publicly funded schools. More importantly, it will raise the question of wali (male guardianship) for the daughters. According to section 13 of the Births and Deaths Registration Act 1957, if a marriage is not recognised under the Malaysian law, the children cannot be ascribed to the father or the husband.

The CBM validation process in Kedah begins with the submission of Form 2 Enakmen Undang-Undang Keluarga Islam (Kedah Darul Aman) 2008 alongside supporting documents such as the couple's personal identification cards and/or passports, proof of residence in the state, and details about the marriage conducted abroad like the qadi, nikah ceremony, wali, and mahr (dowry). For ease of registration, the couple is advised to evidence the nikah ceremony via photographs with the qadi and witnesses together with a video of the marriage pronouncement. Examples of documentary evidence are as follows:

1. Identification document
2. Marriage certificate
3. Passport with note of entry and exit.
4. Registration of marriage in the Islamic Department within the foreign jurisdiction
5. Recognition of marriage in the Malaysian General Consulate within the foreign jurisdiction.

Upon submitting the application and supporting documents, the couple will be summoned for a hearing. The two witnesses present during the nikah ceremony will also be called to testify in court. If the documents are in order, the couple will attend another hearing about the judge's decision and the amount of fine that they must pay. The fines are for the offence of marrying out of state, which shall be paid by each husband and wife. In the case of polygamy, the husband will be fined for practising polygamous marriage without consent from the Syariah Court. While the husband is more likely to be obliging, cooperative, and responsible, the couple must register the marriage or run the risk of uncertainty as to the validity of the marriage and the legitimacy of the child born (if any).

### **Children of Cross-border Marriage**

Until and unless the CBM is registered under the Islamic state authority, the court will not have the jurisdiction to entertain any

application relating to divorce, maintenance of wife and children, and other matrimonial reliefs. If the parties fail to prove that the marriage is valid according to the Syariah law in addition to failure to register, the child born will face consequences if the parent decides not to register the marriage. Consequently, without a marriage certificate, the birth certificate will not bear the father's information, which will eventually affect the child's personal identification card (Mykad) application upon reaching the age of 12 (Md. Hashim et al., 2019).

In terms of ascription fatherhood, validity of marriage is important in matters pertaining to guardianship of property (*wilayah al-mal*), custody (*wilayah al-abdan*), and inheritance. Ascription to paternity is to determine the father of a child. Failure to adhere to the procedure of validating the marriage will result in the child born being illegitimate, which will bring greater harm to the child rather than to the parent as Islam places great emphasis on the division of responsibility within the family institution and to avoid the mixture of lineage. According to the case of *Mohd Faizol bin Zainal v. Suhaila Yusoff* [2014] 2 SHLR 83, an illegitimate child is a child born out of wedlock and cannot be ascribed to the father. However, application section 13 Birth and Death 1957 is not in accordance with Islamic law as the illegitimate child can be ascribed to any man who admits that the child is his. Understandably, such Act is applicable to the Muslim and non-Muslim citizens of Malaysia. According to the court's findings, many Muslims have resorted to various excuses in putting the name of the father to his illegitimate child. Alternatively, in accepting such application by virtue of section 13 of the Births and Deaths Registration Act 1957, the National Registration Department has recorded a note of "registration under section 13" in the birth certificate belonging to the illegitimate child.

## CONCLUSION

There are always thorns in roses and a rose's essence lives in the thorn as well. Polygamy is beautiful to a man and it is possible and permissible if all the legal requirements are fulfilled. Even though law provisions governing polygamy have been prescribed, the vibe of polygamy remains controversial and cases of abuse of polygamy continue to rise. Regulating polygamy requires approaches from both the legal and non-legal aspects. The thorny part of polygamous marriage starts

when the marriage is often conducted secretly, disordering the Syariah law Enactment by not getting the court's approval. The most traumatic circumstance of a polygamous marriage is when it is done outside the wife's knowledge. This may cause a serious family breakdown, causing financial impact and emotional trauma to the existing wife and children. Additionally, children in polygamous families may face emotional challenges, such as feelings of rejection or inferiority.

Despite the beautiful roses in polygamy, it also entails some difficulties or problems to the family, especially the wife. In a normal circumstance, it would be difficult for wives to share their husband's attention, affection, and resources. This can create feelings of jealousy and competition, which can lead to conflicts and tensions in the marriage. Nevertheless, polygamy is legal in Malaysia but it is subject to certain conditions under Islamic law. A Muslim man must obtain the consent of his first wife and prove that he can provide equally for all his wives before he can take in additional wives. Moreover, there are legal and administrative procedures that must be followed to register a polygamous marriage. These procedures can be time-consuming, complicated, and involve issues such as inheritance and custody rights in the future if the marriage is unregistered. Therefore, Islam has highlighted in surah an—Nisa': 3 that If you fear you might fail to give orphan women their 'due' rights 'if you were to marry them', then marry other women of your choice—two, three, or four. But if you are afraid you will fail to maintain justice, then 'content yourselves with' one 1 or those 'bondwomen' in your possession.

In addition, the cases and data discussed in this study denote that polygamy is allowed and recognised under the law. Although polygamy may be seen as conditional to practice, it is indeed possible and permissible according to the law. The data also manifests that some polygamous marriages are contracted prior to approval from the Syariah Court. The number of applications to register the marriage is more than the applications for approval from the court. It may be concluded that couples may disregard the need to obtain court's approval as they can apply for marriage registration later on. This calls the emphasis on the enforcement of the existing polygamy-governing laws to control the abuse of power conferred to a man to marry more than one. It can also be regarded as a legal mechanism to protect the wife's best interests and rights in the existing marriage.

Concerning the law governing Muslim polygamous marriage, it can be said that such law has taken a proactive step to legalise justice and fair treatment to the existing wife. Thus, a man must ensure that fair and justice is evidenced in the polygamous marriage. The law makes polygamy conditional upon obtaining a court order and confers powers to the authority (Syariah Court) to refuse permission for polygamous marriage if the husband fails to fulfil certain requirements. Such condition is exemplary in the elaborated example of cases. A husband needs to prove that the proposed marriage is just and necessary—an element that is not prescribed by legal provision. Hence, it is for the court to scrutiny the facts from each case to determine whether the proposed marriage is considered just and necessary. This open-ended concept of just and necessary may differ from one person to another. The Syariah Court judge has a major responsibility to evaluate this element before giving approval for a man to remarry.

It may be said that all factors prescribed in section 23 (5) of the Kedah Enactment 2008 are interrelated. These include elements like financial stability, the ability to provide fair treatment, and that the marriage must not cause any *darar syari'e* to the existing wife and family. The law also guarantees that the proposed marriage shall not diminish the standard of living of the existing wife and dependents.

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