Polygamous marriage is permitted in Islam as stated in the Qur’an, its meaning:

Marry women of your choice, two or three or four, but if ye fear that ye shall not be able to deal justly (with them), then one only, or a captive.” (4: 3)

Ye will not be able to deal equally between (your) wives, however much ye wish (to do so). But turn not altogether way (from one), leaving her as in suspense. (4:129).

According to the Qur’anic verses mentioned earlier, it is crystal clear stated that Islam grants a conditional permission to marry up to four wives.

The practice of polygamous marriage is not new. In fact it was practiced since the period of Jahiliyyah. During those days, the practice of polygamous marriage was different from Islamic teaching that is to limit the number of wives to four. Thus, Islam has evolved on the practice of polygamous marriage that is instead of limiting the number of wives to four, it also emphasized on the capacity of the husband in terms of providing maintenance and equal treatment to his wives.

Polygamous marriage as permitted in Islam received criticism from the Malaysian communities, from Muslims, non-Muslims and also from the NGO such as Sister in Islam that view polygamy as humiliating the women’s rights. It is an undeniable fact to believe that some cases of polygamous marriage is practice against the Islamic teaching thus brings negative perspective and impact towards Islam. This may be caused by incapability of the husband in providing the appropriate maintenance and treating wives equally. Prior research shows that the negative perception towards Islamic teaching, especially in the case of polygamous marriage is due to the influence of patriarchal system that is based on their cultural practices which honour the man more than women to the extend of degrading the women’s dignity. Some of the cases happening to the women who are in polygamous marriage is highly due to the practice of polygamy that is against the Shariah Law, that is either caused by the lack of appropriate maintenance, unfairness treament to the wives or even depression.
On 4th Ogos 1995, Malaysia has ratified CEDAW that is a Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted in 1979 by the UN General Assembly. It has been introduced with its objective of ensuring gender equality between man and woman through ensuring women's equal access to, and equal opportunities in, political and public life including the right to vote and to stand for election as well as education, health and employment. The convention also demands on the abolishment of the provision of permitted polygamous marriage that they considered as degrading women’s rights. CEDAW receives support from both Islamic and non-Islamic countries where most of them has agreed on the CEDAW’s conditions; one of them concerning banning the permission of polygamous marriage. Hence, certain countries like Tunisia, Indonesia, Turkey and Uzbekistan have completely outlawed polygamy. For instance in Article 18 of the Code of Personal Status of Tunisia states that any man who contracts a polygamous marriage is punishable with one year imprisonment or a fine of 240,000 Tunisian francs or both. However, other Islamic states such as Singapore, Brunei and also including Malaysia are still making reservation on the provision that allows polygamous marriage.

Besides ractifying CEDAW, Malaysia still authorizes the Muslim men’s right to polygamy as specified in section 23 of the Islamic Family Law Act of the Federal Territory (IFL). In Malaysia, assurance of a fair polygamous marriage is carried out when the men’s rights are met and when the women’s and the children’s rights are protected. Therefore, a provision of law regarding polygamous marriage was established for every state in its Islamic Family Law and Enactment. This article aims to analyse on the legal provision of polygamous marriage in Malaysia, by referring to the provision of polygamy as mentioned in section 23 of the IFLA. For the purpose of this discussion, specific reference is made to Islamic Family Law Act 1984 that generally has similar provision with the other state’s law.

Legal Provision On Polygamous Marriage In Malaysia

Previously, there is no legal provisions on polygamous marriage that could control and administer the practice of polygamy in Malaysia. The polygamous marriage was solemnized without the need to seek consent from the court as practiced nowadays. It occasionally happens that even the wife herself does not know that her husband has already married with other wife or wives at that time. However, when there was misapplication on the practice of poligamy, such as the husband was incapable to treat the wives equally or the wives’s rights were abandoned, the polygamy leads depression to the wives, particular provision is needed in order to enforce on rules and regulations that could be applied in order to administer the practice of polygamy in Malaysia (Hamidah Harun. 2013).
The history on the enforcement of law of polygamous marriage in Malaysia began in the year of 1942 starting from the State of Kelantan, then in 1960 it was introduced in the State of Selangor and by 1971 in the state of Sabah. In the year of 1977, through the new provision in the states’s Enactment of administration of Islamic Law, the practice of polygamous marriage has to grant an application of consent of polygamy, before the marriage can be solemnised (Noor Aziah Mohd Awal, 2008). Nowadays, all of the thirteen states in Malaysia have similar provision on polygamous marriage. Section 23 of the Act of Islamic Family Law of the Federal Territory 1984 mentions that anybody who intends to enter into polygamous marriage has to get consent from the court beforehand. The other states also has the similar provision such as the states of Selangor, Negeri Sembilan, Malacca, Kelantan, Johore, Penang, Perak, Pahang, Perlis, Sabah & Ordinance of the Law of the State of Sarawak (after amendment), section 21 of the Enactment of Islamic Family Law of the State of Terengganu and section 17(1) of the Enactment of Islamic Family Law of the State of Kedah. Seksyen 23(1) of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) states;

No man, during the substance of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall he be in such marriage contracted without such permission be registered under this Act:

Provided that the court may if is shown that such marriage is valid according to Hukum Syarak order for it to be registered subject to section 123.

1) Subsection (1) applies to the marriage in the Federal Territory of a man who is resident without or outside the Federal Territory and to the marriage outside the Federal Territory of a man resident in the Federal Territory.

2) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, and the number of his dependants, including persons who would be his dependants as a result of the proposed marriage. Also whether the consent or views of the existing wife or wives on the proposed marriage have been obtained.

3) On receipt of the 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, and the Court may grant the permission applied for if satisfied -

a) That the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical information, 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 dependants, including persons who would be his dependants as a result of the proposed marriage;

c) That the applicant would be able to accord equal treatment to all his wives as required by Hukum Syarak

d) That the proposed marriage would not cause darar syarie to the existing wife or wives (Deleted by Act A902).

4) A copy of the application under subsection (3) and of the statutory declaration required by that subsection shall be served together with the summons on each existing wife.

5) Any party aggrieved by or dissatisfied with any decision of the court may appeal against the decision in the manner provided in the Administration Enactment for appeals in civil matters.

6) Any person who contracts a marriage in contravention of subsection (1) shall pay immediately the entire amount of the mas kahwin and the pemberian due to the existing wife or wives, which amount, if not so paid, shall be recoverable as a debt.

7) The procedure for solemnization and registration of a marriage under this section shall be similar in all aspects to that applicable to other marriages solemnized and registered in the Federal Territory under this Act.

8) Every Court that grants the permission or orders a marriage to be registered under this section shall have the power on the application by any party to the marriage-

a) To require a person to pay maintenance to his existing wife or wives; or

b) To order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division of the proceeds of the sale.

The legal provision ilucidates on the matters of the application of polygamy: Based on the provision of section 23(1), states that any Muslim man who intends to enter into polygamous marriage in Malaysia has to adhere to the current legal procedure by making an application to enter into polygamous marriage at the court.

Subsection (3) states on the condition that should be attached together with the application such as a declaration stating the grounds on which the proposed marriage is alleged to be just and 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.

According to section 23(4), states that after receiving the application, the court will call or produce a summons calling the wives to make decision on the application. Research made by Md Zahari Abu Bakar and Wan Ab. Rahman (2011) discovers that every state in Malaysia has legislation procedures to practice polygamy based on the IFL. Basically, every polygamous marriage must go through certain procedures and obtain permission from the Shariah Court beforehand. However, there are differences in the provision of polygamy, for example in Terengganu a man is only required to get a written permission from a Shariah judge. Whereas in other states, the applicants has to follow certain conditions in order to obtain the judge’s permission such as his presence, his current wife, his future wife, wali (guardian of marriage) of the future wife and other involving individuals. If in the state of Perlis, only the applicant must be present, while in the Federal Territories, the attendance of both the applicant and his current wife are compulsory during the hearing before the Shariah court judge.

In determining such application, particulars that will be taken into consideration by the court before granting any consent to contract polygamous marriage are as follows;

a) The proposed marriage is just and reasonable, based on the husband’s intention to contract polygamy or wife’s health conditions.

b) Husband’s capability of earning or supporting his current and future dependants.

c) Husband’s effort of equal treatment to the wives.

d) The consent of the existing wife.

e) The marriage will not caused harm under Sharia Law (darar syarie) to the wives

The requirement of ‘just and necessary’ means that the husband who intends to contract polygamous marriage need to show that such marriage is necessary and it is also just for him to do so. These two elements should be proved simultaneously to enable the husband to be considered as qualified to contract polygamous marriage (Zanariah Noor. 2007). For example, in the case of Ruzaini Hassan vs. Nurhafizah (2012), the applicant’s request was turned down by the court because his income did not suffice him for practicing polygamy even though his current wife supported the application. In the case of Rajamah Mohamad vs Abdul Wahab Long (2004) CLJ, (Sya) pp.233-241, the appellant argued that the husband provided false monthly personal income during the permission for polygamy hearing. The court accepted the plaintiff’s appeal as the defendant failed to fulfil the necessities and the required polygamy conditions. The requirement of
justice means equality with regard to material and tangible matters, but not inner feelings, love and affection (Zanariah Noor 2007).

The condition of the permission for polygamy that based on strict conditions defined as just and necessary also includes the conditions of insanity or barrenness of the wife, viability of the economic status of the husband to support additional family, ability of the husband to treat all wives equally, the consent of the existing wife, and so on.

Section 23(9) deals with the granting of maintenance and distribution of jointly acquired property. In order to safeguard the welfare of the existing wife; supposedly the husband is allowed to practice polygamy; she is allowed the right to own any jointly acquired properties, before the solemnization of the polygamous marriage. Previously, this right is only eligible after dissolution of a marriage or upon the death of a husband. Now, an amendment made to the law has eligible the distribution of any jointly acquired property been made even during a marriage wedlock.

In polygamous marriage, upon the successful acceptance of the application, the applicant can proceed with the ordinary application of intention to contract a marriage whereas upon the failure of the application, the husband can make an appeal to the court’s decision.

Apart from section 23, there is other provision in the IFLA that also deals with the polygamous marriage such as section 123 on punishment of contracting polygamous marriage without consent and section 128 that deals with punishment for an offence of failure to give proper justice to wife. Section 123 of the IFLA states:

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 or with imprisonment not exceeding six months or both.

Section 128 of the IFLA states:

Any person who fails to give proper justice to his wife 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 both.

An analysis made on the provisions of polygamous marriage shows that the IFL has protected the women’s rights starting from the period before contracting the polygamous marriage up to after entering into the marriage; either it has been practiced with or without the court’s consent. Furthermore, the wife or wives rights during the wedlock period are well protected by section 128 that provides punishment of failure to treat the wife or wives justly. A research done by Md Zawawi B. Abu Bakar and Wan Ab. Rahman Khudzri (2011), shows that the study on equality in the Shariah Court discovers that women’s rights in the Shariah Court is well protected by the court’s rejection on the application of husband who intent to contract polygamous marriage, if the court finds that he is actually incapable to treat the wives equally or
incapable to provides sufficient maintenance for the subsistence and future wives or will cause harm to the wives. For instance in the case of Ruzaini v. Nurhafizah (2002) Jurnal Hukum, 79, the Shariah Court judge decline to give consent to contract a polygamous marriage, besides the subsistence wife’s consent to the marriage, due to the fact that the judge is in doubt on the husband’s capability to treat the wives justly.

According to Orzala Ashraf Nemat (2006), statisticly the numbers of registered polygamy are quite low compared to the statistic of application to register the marriage. However there are lots of solemnization of unregistered polygamous marriages contracted, where the first marriage is registered but the second marriage is not registered due to their claim on the complexity of polygamous marriage.

Application of Registration of Polygamous Marriage without Consent

Occasionally the polygamous marriage without consent happens because the defendans have solemnized the marriage beforehand and later on make an application to register the marriage. A research done by Hamidah Harun (2013) discovers that polygamous marriage is the main factor of the increasing numbers of marriage without consent. The numbers are increasing yearly, as reported in the report of registration of marriages at the Federal Territory Shariah Court at Kuala Lumpur. Since 2009, there were 156 cases of application to register polygamous marriage without consent, and it continues to increase to 162 cases within 2010. The following year, the amount of cases increased with an addition of 6 cases making it with a total of 168 cases. Hence it is proven that the number of application of registration of polygamous marriages is higher compared to the application of entering into polygamous marriage.

The polygamous marriage solemnized without the court’s consent is considered as a marriage solemnized without following the administrative procedure, that is the marriage was solemnized without granting consent from the registrar of Muslim Marriages, Divorce and Ruju’ in their particular district. However, the marriage solemnized through administrative offence may be considered as a valid marriage if it is proven as a valid marriage according to the Sharia Law. A marriage that is considered as a valid marriage is when it has fulfills all the conditions of marriage in Islam. The conditions of a valid marriage in Islam are that the groom is a male, the bridegroom is a female, there are guardian of marriage (wali) that gives consent for the groom to marry, there are two male witnesses that are just and there are an offer and acceptance of the marriage contract. If the marriage has fulfilled all of the five conditions, it is regarded as a valid marriage according to the Sharia Law. The same ruling is provided in section 11 of the IFLA that states a marriage is considered as a valid marriage if it fulfilled all the conditions required according to the Sharia Law. Therefore,
eventhough the marriage without court’s consent is against section 40 of IFLA 1984 (and also family law enactments of the state of Selangor, Johore, Perak, Malacca, Penang, Pahang, Malacca, Kedah, Negeri Sembilan and Sabah) such marriage is still be considered as a valid marriage if it has been solemnized in according to Sharia Law. The parties who are involved in the solemnisation of the marriage such as the kadi, two male witnesses, and the bride and bridegroom if found guilty will be amounted to fine not more than one thousand ringgit or imprisonment for a period that is not more that six months.

As for a polygamous marriage contracted abroad, occasionally at the Sourthen Thailand, the marriage may be regarded as valid or invalid depending on its fulfillment of the conditions of marriage in Islam. The 52 Muzakarah of Committee of National Fatwa on Islamic Matters in Malaysia that was held on 1 July 2002 while discussed on the matter of Cross-Boundry Marriage in the Sourthen Thailand states that;
1) The marriage has fulfilled all the conditions of marriage in Islam
2) The solemnization of the marriage happens at the place that is more that two marhalah (more that 60 km) from the place of her guardian of marriage (wali) residence
3) There is no court’s decision that prevents the bride from entering into a marriage contract in her place of residence
4) The marriage is solemnized by the authorized guardian of marriage (wali) at that the state’s district

The ruling in the Muzakarah had affirmed the Islamic Law that considered a marriage solemnized by parties after complying with all conditions and requirements of Hukum Syarak is a valid marriage regardless of whether or not the marriage has been registered. This is pursuant to provision in IFLA that states that a marriage shall be void unless all conditions are satisfied. Consequently, non-compliance with the provisions relating to the solemnization and registration of marriage, will cause the parties to the marriage as committing offences and shall be punished with a fine or imprisonment or both by the Shariah Court. In pursuant to section 39 of the IFLA, it provides that any person who without authorization has solemnised or purported to solemnize a marriage, commits an offence punishable with a fine not exceeding RM1,000 or imprisonment not exceeding six months or both.

Legal Implication of The Polygamous Marriage Solemnized without The Court’s Consent

Registration of marriage is vital in order to ensure the legal rights of the parties are well protected. If the marriage is not registered, the wife is prevented from bringing any of their marriage conflicts or claims to the Sharia Court. The wife is not entitle to any claims of maintenance due to non-registration of the marriage. The wife’s rights to inherit any of her late husband’s properties is also ignored. In the case of Mohd Azam Shariff v. Che Norina Long (1999) Jurnal Hukum XVIII) where
parties solemnized their marriage in Songkla Thailand and applied for registration in Sharia Court of Penang. The issue before the court was whether the solemnization was valid? The Sharia High Court then held that by referring to the evidence produced by the respondent and the two witnesses together with a marriage certificate certified by the Islamic office in Songkla, Thailand, the learned judge had declared that the marriage was solemnized in accordance with Shariah Law. Therefore it was valid and deemed to be registered. The next example is the case of Mohd Yusuf Bin Idris dan Zuraida Binti Muhamed Zain (Case no: 14600-010-1-0115-2011) Their polygamous marriage was solemnized at Yala, Thailand by the bride’s guardian and was decided as a valid marriage according to Islamic Law, though was solemnized without the court’s consent. In the case of Kes Mohamed Tahir bin Md. Khalil Iwn Pendakwa Syarie ([2003] 23/II Jurnal Hukum, p. 229, No kes 14500-101-009-2003) the court held that a polygamous marriage without court’s consent is valid but upon registration of the said marriage the parties involved were found guilty for non-registration of the marriage and have been sentence to imprisonment for a month and fine RM500 under section 123 of IFLA solemnized by the Qadi (wali hakim) because the father of the bride were nowhere to be found and the bride’s siblings is facing social problems such as mental problems and drug addicts.

The situation will be different if the marriage is organized by an unauthorized qadi through syndicates. It is the duty and responsibility of the unit of enforcement department of Islamic state in the particular state to investigate further in order to examine the validity of the marriage by bringing the case before the court. Most of the polygamous marriages solemnized in the Southern Thailand can be categorized as a valid marriage that eventually is allowed to be registered. Some of the cases may be decided as invalid marriage and the court will order it to be separated, due to its lacks to fulfill the marriage conditions in Islam or failure to fulfill the requirements as stated in the Fatawa. For instance in the case of Che Alias Che Muda and Nor Azura Mohd Radzi ([2000] 35/1 Jurnal Hukum, 139) the court decided that their marriage that was solemnized by an authorized kadi and not in according to Sharia Law in the Province of Narathiwat of the Southern Thailand and therefore is regarded as invalid and order the spouse to be separated.

Not all of the responden will bring their case to court for registration. Upon the spouse reluctant to register the marriage will cause difficulties to register the birth certificate of their children. Thus, merely a valid marriage according to Sharia Law is not satisfied because it has to be completed with registration of the marriage in order to enable the marriage been recognized under the administration of Islamic Law in Malaysia. According to the State Registration Department, failure to register their marriage as required by the Islamic Religious Council in any states in Malaysia will disallowed the registration of their children’s birth certificate (Nasran et. al., 2008).
The other legal implication to the wife is that she cannot bring any complaints before the court in case of their marital problems. For instance, if she is divorced or in case of the death of the husband, the wife is refrained from making any application on any undue payment of maintenance, payment of iddah or wills, before the court due to the lack of registration of the marriage. As a conclusion, the Shariah Court has no jurisdiction to hear cases of non-registration of the marriage.

Findings and Suggestions on Current Provision of Polygamous Marriage

The provision of polygamous marriage is complained by respondent as complex that caused them to contract the marriage beforehand and registered it later. On the other hand the legislative and court see the provision on polygamous marriage is capable to ensure the rights of the husband, wives and children are well protected. In the case of Mohd Azwan bin Abdul Rahman dan Siswati binti Asah (No. kes 14600-101-0009-2010) the spouse has contracted their marriage at di Pattani on 1 September 2006 by the groom’s guardian. The reason that they solemnized their marriage at Thailand is because the procedure is easier and can be done in one day compared to the ordinary procedure. The court finds that the marriage is a valid marriage as it was solemnized in accordance to the Islamic Law. Among the other reason that encourage the husband to contract the polygamous marriage without granting court’s consent is that in order to avoid the polygamous marriage application procedure as stated in section 23 of the IFLA. They feel uncomfortable to disclose to their substance wife on their intention to enter into a polygamous marriage. They also are afraid of their incapability to contract a polygamous marriage according to the law procedure.

Furthermore the provision that allows registration of polygamous marriage without consent has been made after the court is satisfied with the solemnization of the marriage which is according to Hukum Syarak has pave a way to breach the law of polygamous marriage itself. It also contributes to the increasing numbers of wedding planner syndicates that aims of making profits upon couples; in this case couples that has intention to contract polygamous marriage will turn to the syndicates’ services in order to solemnize their marriage through easier way.

Moreover, the sentences of fine that is not more than RM1, 000 and imprisonment not more that six months are not enough to educate the society to respect and abide by the law. Furthermore, the sentences that can be appeal, especially on imprisonment sentence, have impliedly caused the society to not respecting the law.

Conclusion

Based on the discussions, there is a need to review the provisions relating to the registration of polygamous marriage and it’s enforcement. In our opinion, the provision is good enough to protect
the marriage institution. As stated in Islam, the criterions on polygamous marriage are absolutely different from contracting a single marriage because any husband who contracted a polygamous marriage are entrusted with huge responsibility to handle his families institutions from the aspect of maintenance, treating wives in good manner and equal treatment. Thus the provisions have been enacted in such way that it can protect the rights of the parties involved. Unfortunately, the respondents failure to obey the law has caused breach of law that has to be reviewed from every aspects or law and its enforcement. Even though section 23 provides that the provision has certain conditions but there are other provisions that still allows the marriage to be registered afterwards, provided that it is a valid marriage according to Shariah Law. The implication of such provision shows the gaps in the enforcement of law that leads to the defendants to contract the marriage abroad without the court’s consent. A review has to be made on the provision in terms of its law and enforcement in order to suggest a law that will be obeyed.

References


