

MONOGAMOUS MARRIAGE AND POLYGAMOUS MARRIAGE
IN SELANGOR DARUL EHSAN (CASE STUDY)

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KOLEJ UNIVERSITI ISLAM MALAYSIA

MONOGAMOUS MARRIAGE AND POLYGAMOUS MARRIAGE IN
SELANGOR DARUL EHSAN (CASE STUDY)

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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this thesis/ dissertation/ academic project is own except for quotations summaries which have been duly acknowledged.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

My graceful to Allah the Almighty, for blessing me with His Graciousness. Because of Him, this research paper is successfully accomplished with a thorough strengths, patience and confidence. Selawat and Salam to Prophet Muhammad s.a.w, who bring the truthfulness to human life and to this entire world.

My highest appreciation goes to Tuan Sheikh Salim bin Sheikh Salleh, as my supervisor of this research project for his continuous support and guidance during the research. Hopefully he and his family would be blessed in the world and the hereafter. Not forgotten to all my lecturers who had taught me since 2001 until 2004. Insyallah, all the knowledge that you had given me will benefit my future. Therefore, I am solely responsible for any mistakes, and would like to apologize for my weaknesses in this academic project.

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ABSTRAK

Kajian ini bertujuan mengenal pasti konsep perkahwinan monogami pada orang bukan Islam dan konsep poligami di dalam Islam di Negeri Selangor Darul Ehsan. Kajian ini merupakan tinjauan yang dibuat di Mahkamah Tinggi Shah Alam dan Mahkamah Syariah Negeri Selangor, Latihan Ilmiah Fakulti Syariah dan Undang-Undang, Kolej Universiti Islam Malaysia (KUIM), sesi 2003/2004. Di dalam penulisan kajian ini, penulis telah menggunakan beberapa kaedah untuk mengumpul maklumat dan data-data yang diperlukan. Kajian ini secara amnya merujuk kepada penyelidikan perpustakaan dan kajian di Mahkamah Tinggi Shah Alam, Mahkamah Tinggi Syariah Shah Alam, Mahkamah Rendah Syariah Shah Alam, Mahkamah Rendah Syariah Gombak Timur dan Mahkamah Rendah Syariah Hulu Langat, Selangor Darul Ehsan khususnya. Kaedah yang digunakan ialah dokumentasi yang banyak memerlukan bahan-bahan daripada perpustakaan. Bahan-bahan tersebut meliputi kitab-kitab fiqh, buku-buku perundangan, majalah dan risalah, akhbar tempatan, tesis dan latihan ilmiah. Penulis juga telah menggunakan teknik temubual, soal selidik, dan meneliti dokumen yang berkaitan untuk mendapatkan data yang berkaitan. Objektif kajian ini bertujuan untuk memahami konsep sebenar di dalam perkahwinan monogami dan poligami serta untuk memahami erti dan tuntutan yang terdapat di dalam monogami dan poligami dibawah peruntukan Akta Memperbaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 dan Enakmen Undang-Undang Keluarga Islam Negeri Selangor Darul Ehsan 1984. Akhir sekali penulis membuat rumusan dan kesimpulan daripada data kajian ini.

ABSTRACT.

This study is to identify the concept of monogamous marriage of non-Muslim and polygamous marriage under Islamic law in Selangor Darul Ehsan. The study is based on a survey which has been made in Shah Alam High Court and Selangor Syariah Court, Law Practice (Faculty Syariah and Law) Islamic University College of Malaysia (KUIM) session 2003\2004. In this study paper, the writer had used a few methods in order to gain all the needed information's and data's. The research was made throughout the sources from the library, besides the sources obtained from Shah Alam High Court, Shah Alam Syariah High Court, Shah Alam Subordinate Syariah Court, Hulu Langat Subordinate Syariah Court and Gombak Timur Subordinate Syariah Court. All of these courts are situated in Selangor, a state where my thesis is specialized to. In addition to that, the documentation of this topic needs many sources from the library. Among the sources are fiqh books, law books, magazines and brochures, local newspaper, thesis and so on. The writer also went through an interview session, research, survey and examining the documents to earn the correlated data. The objective of this study is to understand the meaning and claiming in monogamous and polygamous marriages under the allocation in Law Reform (Marriage and Divorce) Act 1976 and Selangor Islamic Law Enactment 1984. Finally, the writer makes a conclusion from all the information that he got for this study.

ملخص البحث

هذه الدراسة تدرس مفهوم الزواج الأحادي عند غير المسلم وتعدد الزوجات عند المسلمين في ولاية سلانجور دار الإحسان. وهذه الدراسة تركز على محكمة عليا شاه عالم ومحكمة شريعة عليا سلانجور، ممارسة قانون والأبحاث (كلية الشريعة والقانون) جامعة العلوم الإسلامية بماليزيا (KUIM) جلسة ٢٠٠٣ \ ٢٠٠٤ . تكتب هذه الدراسات، استعمل الكاتب عدة طرق أن لجمع كل المعلومات المحتاجة والبيانات المطلوبة. وهذه الدراسة هي الدراسة المكتبة والدراسة في محكمة عليا شاه عالم، محكمة شريعة شاه عالم، محكمة شريعة شاه عالم، محكمة شريعة هولوا لانجات و محكمة شريعة غومباك تيمور في سلانجور دار الإحسان. وهذه الدراسة تحتاج إلى العديد من المصادر من المكتبة. وهي تشمل على الكتب المصادر الفقهية والقانون يحجز، والمجلات، و الصحف المحلية، والأبحاث العلمية. الكاتب يستعمل طريقة المقابلة أيضا، والمراجعة الوثائق للحصول على المعلومات المطلوبة. إن الهدف من هذه الدراسة لفهم المعنى وتدعي الزواج الأحادي وتعدد الزوجات تحت سلطة القانون في إصلاح قانون (الزواج والطلاق) سنة ١٩٧٦ و سلانجور تشريع قانون إسلامي ١٩٨٤ . وفي النهاية قدم الباحث الخلاصة والنتيجة من هذه الدراسة.

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TRANSLITERATION

1. VOCAL.

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	a	آية	<i>âyat</i>
ب	b	برد	<i>burd</i>
ت	t	تلّ	<i>tall</i>
ث	th	ثوب	<i>thawb</i>
ج	j	جدر	<i>jidâr</i>
ح	h	حليب	<i>halib</i>
خ	kh	خادم	<i>khâdim</i>
د	d	ديك	<i>dik</i>
ذ	z	ذهب	<i>dhahab</i>
ر	r	رفيق	<i>rafîq</i>
ز	z	زميل	<i>zamîl</i>
س	s	سلام	<i>salâm</i>
ش	sh	شعب	<i>sha°b</i>

ص	s	صخر	<i>sakhr</i>
ض	d	ضيق	<i>dayq</i>
ط	t	طالب	<i>tâlib</i>
ظ	z	ظالم	<i>zâlim</i>
ع	ʕ	عقل	<i>ʕaql</i>
غ	gh	غلام	<i>ghulâm</i>
ف	f	فيل	<i>fil</i>
ق	q	قلب	<i>qalb</i>
ك	k	كلام	<i>kalâm</i>
ل	l	لبّ	<i>lubb</i>
م	m	مال	<i>mâl</i>
ن	n	نجم	<i>najm</i>
و	w	ورق	<i>waraq</i>
هـ	h	هول	<i>hawl</i>
ء	,	فوّ	<i>fa'r</i>
ي	y	يّم	<i>yamm</i>

2. Short Vowel.

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	a	نَصَب	<i>nasaba</i>
ي	i	فَسَدَ	<i>fasida</i>
و	u	عُلَمَاءَ	<i>ulama</i>

3. Long Vowel.

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
آ	â	آيات	<i>âyat</i>
ي	î	حديث	<i>hadîth</i>

4. Diphthong.

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
اي	â	عالم، فتى	<i>°âlim, fatâ</i>
ي	î	عالم، داعي	<i>°âlim, dâ°î</i>
و	û	علوم، أدعو	<i>°ulûm, Ad°û</i>

5. Exemptions

5.1 Arabic letter ء (*hamzah*) found at the beginning of a word is transliterated to the letter "a" and not to '.

Example: أكبر transliterated to: *akbar* (not '*akbar*).

5.2 Arabic letter ة (*ta' marbutah*) found in a word with ال (*al*) which is coupled with another word that contains ال (*al*) at the beginning of it is transliterated to the letter "t".

Example: مكتبة الإمام transliterated to: *maktabat al-imâm*.

However if the Arabic letter ة (*ta' marbutah*) found in a word with ال (*al*), in a single word or in the last word in a sentence, it is transliterated to the letter "h".

Example: المكتبة الأهلية transliterated to: *al-maktabah al-ahliyah*

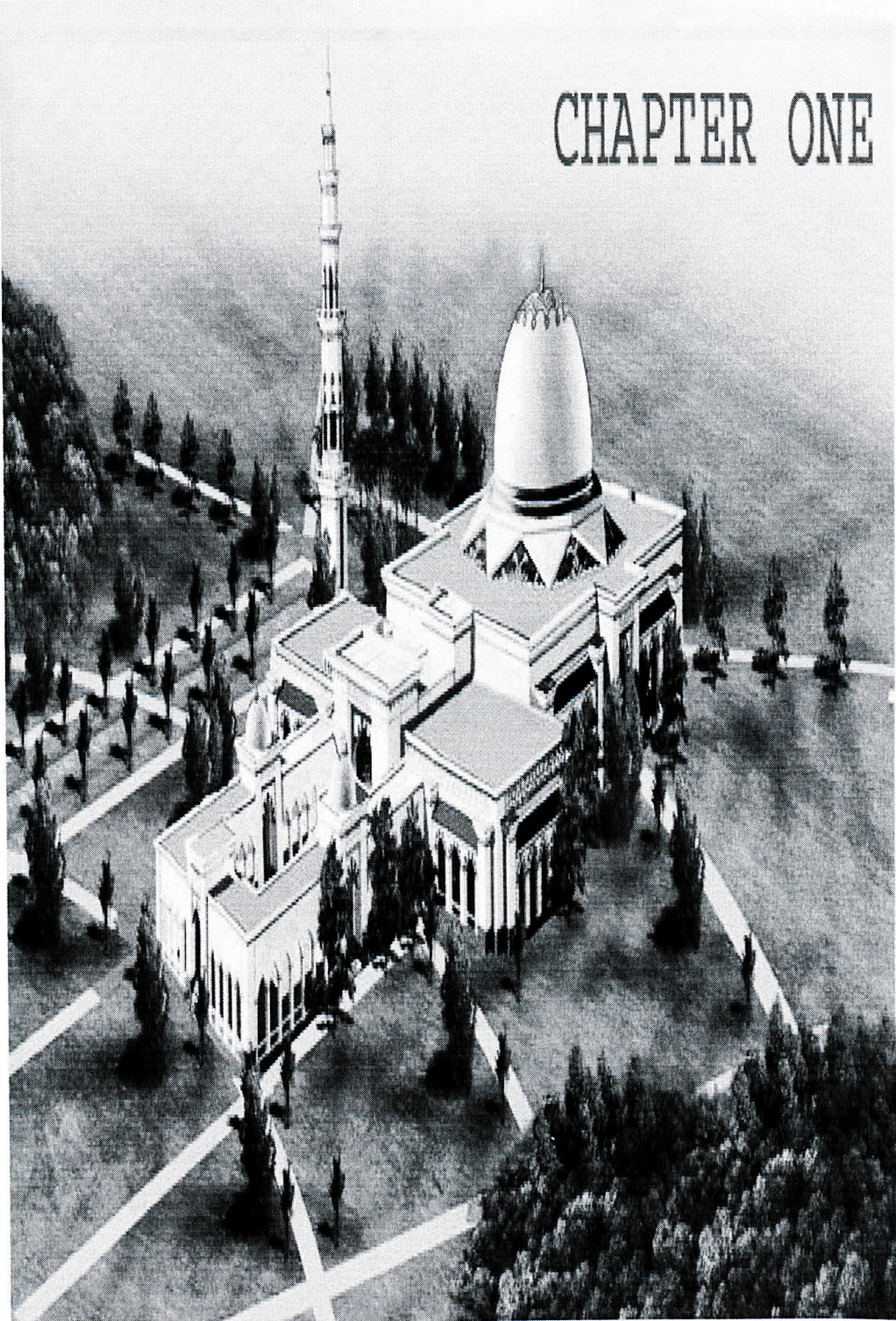
قلعة *qal°ah*

دار وهبة *dâr wahbah*

ABBREVIATIONS

AS	Alaihi Sallam
Comp.	Compiler/compiled by
Def.	Definition
ed.	Editor/edition/edited by
H.	Hijriyah
i.e.	That is to say
M.	mîlâdiyyah
n.a.	No author
n.d.	No date
n.pb.	No publisher
n.pl.	No place
Narr.	Narration
no.	Number
p.	Page
Perf.	Performers
pp.	Pages
r.a.	Radhi Allahu 'An Hu
rev.	Review/revision
s.a.w.	Sallallahu 'Alaihi Wa Sallam
s.w.t.	Subhanahu Wa Ta'ala
trans.	Translated
vers.	Version
vol.	Volume
writ.	Written by

CHAPTER ONE



PUSAT ISLAM



KOLEJ UNIVERSITI ISLAM MALAYSIA
جامعة العلوم الإسلامية بماليزيا
ISLAMIC UNIVERSITY COLLEGE OF MALAYSIA

CHAPTER ONE

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CHAPTER ONE

Monogamous Marriage and Polygamous Marriage in Selangor (Case Study).

BACKGROUND OF RESEARCH

GENERAL INTRODUCTION:

There are many researchers relating to non-Muslim monogamous marriage and polygamous marriage in Islam. Every research has different focus and issue. Until today, the hot debated issues on monogamous and polygamous marriage are still occurring, and there is various opinions emerged. Actually, there are no accurate answers that can satisfy the public. However, the intention of the researcher is not to discuss on the above issue, but to concentrate and focus on monogamous and polygamous marriages which occurred in Selangor besides discussing the related enactments for such type of marriage under Selangor Enactment.

The purpose of marriage is Allah created men and women so that they can provide company to one another, love each other, procreate children and live in peace and tranquility in order to obey the commands of Allah and the directions of His Messenger.

The words *zawj* is used in the Quran as a pair or a mate; in usage it connotes marriages. "Do they not look at the earth, how pairs of noble things we have produced therein ". Even in Paradise, the Quran informs us that we shall have mates. Allah created humans from one soul; from it He created the male and female. The story of creating Eve (the first female) from rib of Adam (the first male) is not mentioned in the Quran.

Polygamous marriage is not a new thing in world Islamic rule. Like other researchers, they are only focusing polygamous marriage in Islamic rule, the history, the polygamous marriage and Islamic family law, and the polygamy in social practice.

The Prophet orders Muslims to get married as soon as they can. The family is the nucleus of the Islamic society, and marriage is the only way to bring about such an institution. Extra-marital relations are categorically condemned and prohibited.

It's only logical that Islam sets up the rules to regulate the functioning of the family whereby both spouses can find peace, love, security, and relatedness. The elements are necessary for accomplishing the greatest purpose of marriage: the worship of Allah (*al-Ibadah*). By worship it is not only meant the performance of rituals merely having sex with your wife, but it essentially implies righteousness in all transactional behavior. The concept of *Ibadah* is very wide. Every good deed, every service to humanity, every usual productive effort, and even every good word is a part of the true Muslim's worship of his creator. If both husband and wife observe this main purpose, this cardinal purpose of their union they would easily learn how to help each other achieve this goal – a goal greater than themselves. They would learn how to tolerate each other, how to love Allah in themselves and in other beings, and how to overcome their difficulties and their shortcomings.

Polygamous marriage or marrying more than one wife is not a new phenomenon. It has always been with mankind from time immemorial among different peoples in various parts of the world. The Arabians were polygamous even before the advent of Islam and so were other people on most parts of the world during that time. When one goes through the Jewish and Christian religious scriptures, one finds that polygamous was an accepted way of life. All the Prophets mentioned in the Talmud, the old Testament and the Quran were polygamous with the exception of Prophet Jesus who if he had lived longer on this earth would have, perhaps, accepted the same system as his forefathers. In the Pre- Islamic Arabia there was the practice of limitless polygamy.

With the advent of Islam, The limitless polygamy was restricted to four wives at one time under special circumstances and that too with a number of rules attached to it which we will study afterwards. The Muslim jurists, therefore, have laid down the following conditions if at all someone wants to take more than one wife. (1) He should have enough financial capacity to look after the needs of the additional wives that he

has undertaken. (2) He must do equal justice to them all. Each wife should be treated equally in fulfilling their conjugal and other rights.

THE STATEMENT OF THE PROBLEM:

The main issue of the research is on the monogamous and polygamous cases, and at the same time tries to clarify the problems for the judges in giving their judgments in cases in court.

As we know the polemic of polygamous marriage is occurring as a result from misunderstanding by society about its concept as mentioned in Islamic rule. Even the polygamous and divorce are allowed but it is not encouraged. The polygamous and divorce can only be practiced if the functions and definitions are used as a solution of the problems in our society. In Malaysia, it seems like the Muslims who practice polygamy are not following the rules as mentioned in Al-Quran and Hadith and the provision under the Islamic family law. That is why the issue of polygamous marriage keep occurring and discussing by people. Probably these problems still exist because most of the men who practice polygamous marriage not really following the prophet's direction and Sunnah but for their personal interest.

Regarding the reasons of polygamous marriage, sometime it is unreliable, making the people keep asking and discussing about it. For sure, there are some admissions made by several organizations, e.g. *Majlis Kebangsaan Pertubuhan-Pertubuhan Wanita Malaysia* (NCWO). In their statement, they mention that they are not controlling, obstructing, and opposing the practice of polygamous marriage, but they want the rules of polygamous marriage are to be administered in a right track.

However, either in monogamous or polygamous marriages, the leader of the family, i.e. the husband has to serve the utmost responsibilities to the family members and managing the family institution with a right manner, besides fulfilling the

obligations which had been stated in Al-Quran *ayah 3 Surah Ar-Rum, ayah 19 Surah An-Nisa', ayah 237 Surah Al-Baqarah and ayah 32 Surah An-Nur.*

THE IMPORTANCE OF THE STUDY:

The importances of the study are as follows;

1. The researcher tries to discuss the types of the marriage requirement for Muslims and non-Muslims in Selangor.
2. The researcher also tries to discuss in general, the reasons of why the men want to have more than one wife.
3. The researcher also tries to study the enactments relating to these problems.
4. The researcher also tries to obtain information relating to the above topic as many as he can.
5. The researcher also tries to study in detail regarding the provisions and any Act relating to this topic especially in the Law Reform (Marriage and Divorce) Act 1976 and Selangor Islamic Family Law Enactment 1984.
6. Finally, this is the course work that has to be completed in one year as the condition for graduation.

THE OBJECTIVES OF THE STUDY:

To view the actual environment of polygamous marriage in Malaysia with the objectives as follows:

1. To study the implementation relating to polygamous marriage that include under the Enactment of Islamic Law in Selangor and the Law Reform (Marriage and Divorce) Act; which is monogamous marriage for non-Muslim.
2. To see the implementation of the provisions and the practice in Syariah Court and Civil Court.
3. To differentiate between the practice of monogamous and polygamous marriages between Muslims and non-Muslim.

THE METHODOLOGY:

The techniques of collection and analyzing the data are by threefold:

- a. **Library research**, this mean that the researcher use and obtain the information's as many as he can in the library. The purpose is to gain knowledge and gather relating issues and articles of monogamous and polygamous marriages.
- b. **Interview**, this means that the researcher uses this technique to gather the information from the judge and also other officers relating to the issue.
- c. **Read the file case**, meaning that the researcher has to read the cases of polygamous marriage in Syariah court as many as he could. Basically the cases are from the year 2000 until 2003. The researcher found about 50 cases which are registered in Syariah Court and Civil Court. From the file, the data includes as follow:
 - i. The applicant's data, like the age, the occupation and the salary.
 - ii. The data from wife like the age, the occupation and the salary.
 - iii. The data of their marriage like children and length of marriage.
 - iv. The data from future wife like the age, the occupation and the salary, status of marriage, and her children if exist.
 - v. The maintenance by the husband to the wife, his children, and future wife.
 - vi. The reason of polygamy.
 - vii. The statement from wife about the application from her husband intention (agree or disagree)
 - viii. Reason from the judge in judgment on polygamy cases.

2. The sources.

- a. Al-Quran *ayah 3 Surah Ar-Rum, ayah 19 Surah An-Nisa', ayah 237 Surah Al-Baqarah and ayah 32 Surah An-Nur*
- b. Hadis *bab An-Nikah fi ta'addud Az-Zaujat.*
- c. Oxford Dictionary Law. Page 370
- d. Family Law in Malaysia by Mimi Kamariah page 60 and 86

- e. Selangor Islamic Family Law Enactment 1984.
- f. Law Reform (Marriage and Divorce) Act 1976.
- g. Jurnal Syariah 5 Bil 2 Poligami di Malaysia.
- h. *Pemantapan Sistem Kekeluargaan* by Ustaz Basri Ibrahim Darul Nu'man.
- i. Family Law in Malaysia, Third Edition, Ahmad Ibrahim.

THE LITERATURE REVIEW:

Polygamy is the practice of having more than one spouse. English law consider a marriage actually polygamous if there is in fact more than one spouse and potential polygamous if there is only spouse but the marriage was contracted under a system of law that permits polygamy. **(Oxford Dictionary Law. Page 370)**

The term of polygamy is referring to general deed where the men or women are marrying more than one. The term of polygamy is referring to the man; meanwhile the term of polyandry is referring to the woman. Nevertheless, in focus, the researcher will discuss only for a deed of a man that is marrying more than one woman. Therefore, through the discussion the researcher will use the term of polygamy, which is suitable for the understanding of the society about the idea of polygamy for today. **(Law Majalla International Islamic University Malaysia)**

Section 5(1) of the Law Reform (Marriage and Divorce) Act 1976 provides that **“every person who on the appointed date is lawfully married under any law, religion, custom, or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia”**. This fact bring to our minds that if a man has say to have two wives from two customary marriages prior to 1st March 1982, those two marriages, if valid, would render him incapable of marrying a third woman after the appointed date.

Section 5(2) of the Act also provides that **“every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all spouses, shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the second mentioned marriage or purported third mentioned marriage is contracted within Malaysia**

or outside Malaysia”. This subsection refers to the situations where a man may have, e.g. two wives; X and Y from marriages contracted prior to 1st March 1982. X passed away, while Y was divorced. The man then married to Z after 1st March 1982. He is now prevented from marrying another woman; P because his marriage to Z is monogamous marriage in accordance with the Law Reform (Marriage and Divorce) Act.

Section 5(3) provides that **“every person who on the appointed date is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia”**.

The subsection above would be relevant to those people who were unmarried on 1st March 1982. If they contract a marriage, it has to be in accordance with LRA, and such marriages would be monogamous. Although the subsection appears to allow marriages 'under any law, religion, custom or usage' after 1st March 1982, those marriages must necessarily be in accordance with part III of the LRA or the marriage would be void marriages. Section 5(4) further emphasizes this rules when it provides that after the appointed date, no marriage under any law, religion, custom or usage may be solemnized except as provided in Part III. **(Page; 86)**

A Muslim man may marry up to maximum of four wives. Although polygamy is allowed, the condition is that the man must be able to treat all his wives equally.

The Islamic Law (Federal Territories) Act 1984 by section 23 talks about polygamous marriage. Section 23 (1) which was replaced in 1994 provides no man, during the subsistence of a marriage, shall, except with the prior permission in writing of the court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under the Act. Be that as it may, the court may if it shown that such marriage is valid according to *hukum syara* order it to be registered subject to section 123.

Instead, section 123 declares that **“any man who, during the subsistence of a marriage, contract another marriage in any place without the prior permission in writing of the court commits an offence punishable with a fine not exceeding RM 1000 or with imprisonment not exceeding six months or with both”**. Section 23 (1) applies to a marriage in the Federal Territory of a man who is resident within or outside the Federal Territory and to a marriage outside the Federal Territory of a man resident in the Federal Territories.

An application for permission shall be submitted to the court in the prescribe 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, 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. A copy of the application and the declaration shall be served on the wife or wives. **(Family Law in Malaysia by Mimi Kamariah page 60)**

The permission to enter into polygamous marriages has sometimes been abused and it is sad to hear those who abuse this privilege justifying their action by quoting what they interpret to have been example given by the Holy Prophet (peace is upon him). Yet for more than 25 years of his life the Holy Prophet (peace is upon him) had only one wife. It was only after his wife, *Khadijah*, died that he married a number of women. Of these only *Aisha* was a virgin. All the others were widows or had been divorced from their husbands. If one examines these marriages it will be seen that they were partly designed to assist the women who would otherwise have been destitute or to cement bonds of personal or tribal friendship.

A study of some of some of the juridical treaties on Islam does in fact support the interpretation that polygamy was suggested only when it helped to cure social injustice. Shaik Abu Bakar Al- Razi, for example, in his book *Akhamul Quran*, said that Allah commands marriages with one wife only if there is fear of injustice in marrying more than one. Some Muslim jurists interpreted justice in such a case to

mean cohabitation in turn, equality in maintenance and in treatment. In other words their interpretation was one of outward justice but not justice in matters of the heart, as for example, in love and affection. This interpretation is based on the *ayat* on the Holy Quran which reads: 'You are never able to be fair and just as between women even if it is your ardent desire.' (Surah An-Nisa', 4: 129)

The Muslim jurists considered also the problem of showing such types of justice to wives in different towns or countries. They suggested that the conditions of equality of treatment and of cohabitation in turn must be satisfied even in such cases and could only be waived with the permission of the wives.

A further condition of the permission of adopting polygamy is that the husband must provide adequate maintenance to each of his wives and his dependants. This condition is based on the interpretation by Imam Shafii of the concluding words in the *ayat* of polygamy that is, *dhalika adna ana la ta'ulu*. These words which are usually interpreted by Imam Shafii to mean 'that you may not cause them (the wives) to suffer in their livelihood'. **(Family Law in Malaysia, Third Edition, Ahmad Ibrahim)**

1. INTRODUCTION TO MONOGAMOUS MARRIAGE

Monogamous:

1. Someone who is monogamous or who has a monogamous relationship has a sexual relationship with only one partner. Do you believe that men are not naturally monogamous?¹

Monogamy:

1. Monogamy is used to refer the state or custom of having a sexual relationship with only one partner. People still option for monogamy and marriage.
2. Monogamy is the state or custom of being married to only one person at a particular time in many non-western societies; however, monogamy has never dominated².

Monogamy:

- The state or practice of having only one husband or wife over a period of time. Compare bigamy, polygamy (sense: 1)³.

Monogamy:

- The state, practice or custom of being married to one person at a time. Bigamy is having one husband too many is the same.
- Monogamist + noun, monogamous/-mes /adj, monogamously/-mesli/ adv. (French monogamie via Late Latin from Greek monogamia from monogamos; monogamous from MONO- + gamos marriage)⁴.

¹ Editorial Team in Chief by John Sinclair ,Reprinted 1995, 1997(twice), 1998(twice), 1999, *Collins Co build English Dictionary*, Harper Collins Publisher.p.1071.

² *ibid.*

³ General consultant: J M Sinclair, Formerly Professor, Department of English Language and Literature, reprinted 1999, *Collins English Dictionary*, Harpers Collin Publisher, University of Birmingham.p.1006.

⁴ Consultant editor Robert Allen, 2000, *The New Penguin English Dictionary*, Penguin Books, p.896.

Monogamy:

- The practice of being married to or having a sexual relationship with only one person at a time.
- Derivatives: monogamist n. monogamous adj. monogamously adv.
- Origin C17: from French, monogamie, via eccles .L. from Greek. Monogamia, from monos 'single' + gamos 'marriage'⁵.

⁵ Edited by Judy Pearshall, *Oxford Concise Dictionary*, Oxford University Press, Tenth Edition.p.921.

1.1 DEFINITION OF MONOGAMOUS MARRIAGE.

The term 'marriage' is used in family law in three specific senses: to indicate an institution within society as a whole; to name a ceremony resulting in a change in the legal status of the parties; and to refer to the joint status of husband and wife. The precise meaning to be attached to the term will appear from its context. In general terms, 'marriage' is viewed in this text as a culturally approved and legally binding set of formal relationships of one man and one wife. It involves, in our society, a fusion of social, political, sexual and legal principles, although within our time a number of these principles appear to have been found increasingly unacceptable, giving rise to questions as to their relevance for contemporary life and law. To a significant extent, family law reflects changes in attitudes towards the principle of marriage and legal effects.

A general dictionary defines 'marriage' as 'the legal union of man and a woman in order to live together'.

Quite apart from its abstract meaning as the social institution of marriage, "marriage" has two distinct meanings: the ceremony by which a man and woman become husband and wife or the act of marrying, and the relationship existing between a husband and his wife or the state of being married. This distinction largely corresponds with its dual aspect of contract and status.

Marriage as a Contract.—In English law at least, marriage is an agreement by which a man and woman enter into a certain legal relationship with each other and which creates and imposes mutual rights and duties. Looked at from this point of view, marriage is clearly a contract. It presents similar problems to other contracts—for examples, of form and capacity; and like other contracts it may be void or avoidable. But it is, of course, quite unlike any commercial contract, and consequently it is *sui generis* in many respects. In particular we may note the following marked dissimilarities.

- (1) The law relating to the capacity to marry is quite different from that of any other contract.
- (2) A marriage may only be contracted if special if special formalities are carried out.
- (3) The grounds on which a marriage may be void or avoidable are for the most part completely different from those on which other contracts may be void or avoidable.
- (4) Unlike other avoidable contracts, avoidable marriage cannot be declared void *ab inito* by repudiation by one of the parties but may be set aside only by a decree of nullity pronounced by a court of competent jurisdiction.
- (5) A contract of marriage cannot be discharged by agreement, frustration or breach. Apart from death, it can be terminated only by a formal legal act, usually a decree of dissolution (or divorce) pronounced by a court of competent jurisdiction.

Marriage as creating Status. — This second aspect of marriage is much more important than its first. It creates a status, that is, "the condition of belonging to a particular class of persons (i.e., married persons) to whom the law assigns certain peculiar legal capacities or incapacities"⁶.

In the first place, whereas the parties to a commercial agreement may make such terms as they think fit (provided that they do not offend against rules of public policy or statutory prohibition), the spouses, mutual rights and duties are very largely fixed by law and not by agreement. Some of these may be varied by consent; for example, the spouses may not be altered; thus the wife may not contract out of her power to apply to the court for financial provision in the event of divorce.

Secondly, unlike a commercial contract, which cannot affect the legal position of anyone who is not a party to it, marriage may also affect the rights and duties of third persons. Thus a husband has an action against anyone who by committing a tort against the wife thereby deprives him of her consortium, and it is not open to argue that the marriage is *res inter alios acta*.

⁶ Allen, *Status and Capacity*, 46 L.Q.R. 277, 288.

Definition of Marriage. — The classic definition of marriage in English law is that of Lord Penzance in *Hyde v Hyde*⁷.

"I conceive that marriage, as understood in Christendom, may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others".

It will be seen that this definition involves three conditions.

First, the marriage must be voluntary. Thus, it can be annulled if there was no true consent on the part of one of the parties.

Secondly, it must be for life. If by marriage "as understood in Christendom" Lord Penzance was referring to the view traditionally taken in Western Europe by the Roman Catholic Church and some other denominations, his statement is of course unexceptionable. But it does not mean that by English Law marriage is indissoluble: divorce by judicial process had been possible in England for over eight years when *Hyde v Hyde* was decided. If, say, two people enter into a marriage for the sole purpose of enabling a child to be born legitimate, intending never to live together but to obtain a divorce by consent at the earliest opportunity, it cannot be doubted that their union is a marriage by English law. If one may draw an analogy (perhaps not very happy) from the law of real property, marriage must resemble a determinable life interest rather than a term of years absolute.

Thirdly, it must be monogamous. Neither spouse may contract another marriage so long as the original union subsists⁸.

It is impossible to provide a single definition of marriage. Indeed, one approach is to say that one cannot define marriage because marriage is whatever the parties to a marriage take it to mean. Thus a Christian couple seeking to base their marriage on biblical principles may well see their marriage in very different terms

⁷ (1866) LR 1 P&D 130.

⁸ P.M Bromley, 1976, *Family Law*, London Butterworths, Fifth Edition, p.14.

from a couple who see their marriage as open and short-term, entered into for tax purposes. Further, the wife's experience and understanding of marriage may be very different from the husband's.

But it would be too easy to see marriage as simply being whatever the parties want it to be because this denies a wider understanding of marriage within society. The concept of marriage is an important symbol within our society—marriage is not just a personal matter between the parties.

Marriage can be examined from a number of perspectives:

(1) Functional

From a functionalist approach it would be necessary to decide what the purpose of marriage is. Some insist that children are at the heart of marriage. On the other hand, saw the role of marriage and family as an integral part of the regulation of private property and the creation of legitimate heirs. Others would emphasize the role of creating an environment of love and comfort for the husband, wife and any children.

(2) Psychological

Others analyze marriage by considering the psychological need to marry and psychological interactions between the two marriage partners. For examples, one perspective is to see marriage as a conversation between the spouses, formulating their own relationship and their common view of the world. In other words, people are now individualistic and are only willing to stay in relationships so long as they feel they personally are benefiting from them. Taking a different approach, has written of the need to appreciate both the external and internal elements of marriage. Couples constantly seek to balance the interests of each individual spouse and the interests they have as a couple together. He sees both the legal and

social difficulties in marriage as involving a resolution of the tension between these elements.

(3) Political

It is also possible to consider the role marriage plays in wider society. Some see subjugation of women as the essence of marriage. Marriage has been described as 'a public form of labor of relationship between men and women, whereby a woman pledges for life (with limited rights to quit) her labour, sexuality and reproductive capacity, and receives protection, upkeep and certain rights to children. Others reject the idea that marriage is a conservative institution. Mount has suggested that marriage can be regarded as a subversive institution, protecting individuals from the power of the state and the church.

(4) Religious

There is a wide variety of religious understanding of marriage. Some religions teach of a spiritual union between spouses on marriage, with the spouses' love reflecting God's love. Some religions regard marriage as indissoluble, although others do not take a hard line on divorce. In England and Wales the law's understanding of marriage has historically been strongly influenced by Christian theology⁹.

⁹ Jonathan Herring, 2001, *Family Law*, Exeter College Oxford University, Pearson Education.n.30.

1.2 MARRIAGES AS A STATUS OR CONTRACT.

Marriage could be regarded as either a status or a contract. In law, a status is regarded as a relationship which has a set of legal consequences which flow automatically from that relationship, regardless of the intentions of the parties. A status has been defined as 'the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities'. So the status view of marriage would suggest that, if a couple marries, then they are subject to the laws governing marriage, regardless of their intentions. The alternative approach would be to regard contract as governing marriage. The legal consequences of marriage would then flow from the intentions of the parties as set out in an agreement rather than any given rules set down by the law.

Marriage is perhaps best regarded as a mixture of the two. There are some legal consequences which flow automatically from marriage and other consequences which depend on the agreement of the parties. The law sets out: who can marry; when the relationship can be ended; and what are the consequences for the parties of being married.

Some have argued that it would preferable to move towards a more contract view of marriage. The law could require each couple wishing to marry to decide for themselves exactly what the legal consequences of their marriage will be in a pre-marriage contract. If necessary, the law could produce some sample contracts that people might choose to use. The supporters of such a proposal tend to fall within three camps. First, some feminists argue that a contract view of marriage would enable women to avoid the traditional marital roles that are disadvantageous to them. Secondly, from a libertarian perspective some argue that the law should not impose upon people any regulation of their intimate lives. Spouses should choose their own form of regulation rather than there being on one kind of marriage sanctioned by the state. Thirdly, there are traditionalists who believe that the present law on marriage is too liberal and that a couple should be allowed to contract to enter a 'traditional' marriage, for example severely restricting access to divorce.

Opponents of contractual marriage argue that entering a fair contract is only possible if the parties are fully aware of the other's financial position and are independently advised and have equality of bargaining power. In only a few cases will this be so. Even if the parties do have full information and equality of bargaining power, the parties cannot foresee the future, and so the contract may rapidly become out date and need to be continually renegotiated. Other opponents argue that the contracts approach overlooks the interests the state might have in the marriage: the state might wish to support marriage because it has benefits for society as a whole. If this is so, the state will not want to leave the law of marriage entirely up to the parties themselves¹⁰.

¹⁰ P.M Bromley, 1976, *Family Law*, London Butterworths, 1976, Fifth Edition, p.14.

2. INTRODUCTION TO POLYGAMOUS MARRIAGE.

Polygamous:

In a polygamous society, people can be legally married to more than one person at the same time. A polygamous person, especially a man is married to more than one person¹¹.

Polygamy:

Polygamy is the custom in some societies in which someone can be legally married to more than one person at the same time¹².

Polygamy:

The practice of having more than one wife or husband at the same time. Compare polyandry, polygyny¹³.

Polygamy:

- The practice or condition of being married to more than one person at a time, especially marriage in which a husband has a more than one wife: compare polyandry, polygyny.

- Polygamist noun, polygamous adj, polygamously adv. (early French polygamie via Late Latin from Greek polygamia, from poly + gamia – gamy¹⁴).

¹¹ Editorial Team in Chief by John Sinclair, 1999, *Collins Co build English Dictionary*, Reprinted 1995, 1997(twice), 1998(twice), Harper Collins Publisher.p.1274

¹² ibid

¹³ General consultant: J M Sinclair, Formerly Professor, Department of English Language and Literature, *Collins English Dictionary*, Harpers Collin Publisher, University of Birmingham, reprinted 1999.p.1200.

¹⁴ Consultant editor Robert Allen, *The New Penguin English Dictionary*, 2000, Penguin Books, p.1080.

Polygamy:

- The practice or custom of having more than one wife or husband at the same time.
- Derivatives: polygamist n. polygamous adj. polygamously adv.
- Origin C16 from French polygamie, via late from Greek polygamia, from polygamos 'often marrying'¹⁵.

Many orientalist give a lot of accusations that said Rasulullah s.a.w or Islam has brought and introduced polygamy. But the truth of Islam was actually continued and restored the custom and limited the practiced of the system that has no limit before that¹⁶.

The polygamous is a marriage to more than one. Polygamous refers to the origin of a practice of polygamous. Due to the first history, the term polygamous refers to lots of wives for example two persons or more. Marriage with four or more wives is a practice that was widely spread out. He also defined that anthropologist often uses this term to picture a marriage which is more than one. The term actually has obvious differences because it can imagine a situation where one man with more than one wife or one woman with more than one husband. Most writers use the term or polygamy to refer to a situation of having many wives. Whatever, polygamous must be separated into two parts as poligyny and polyandry¹⁷.

Polygamous marriage had also spread into the societies of Hebrew, Slav, Tautens, Irish and Indian. For example in India no Hinduism Law that prohibits a man to marry more than one wife: that mean, Hinduism is also allowed the use of this practice. The truth of this practice is used in India was explained in book of Vedic. Polygamous also showed the low status of women in the beginning of century. One

¹⁵ Edited by Judy Pearshall, *Oxford Concise Dictionary*, Oxford University Press, Tenth Edition.p.1108.

¹⁶ Ahmad Shalabi: , 1971, *Sejarah dan Kebudayaan Islam, Singapura*, Pustaka Nasional Pte Ltd,p. 152.

¹⁷ Douglas,M: 1938, *Handbook Of Tsawana and Custom*, London,p.13.

man can marry as many women as he wants depend on his background in the society¹⁸.

In caste Manu, said caste Brahman, a group of holy people that can have four wives where one of them has to be from his own caste and three more can be from any other castes. *Kasatriyan* can marry three women in the same time and one of them comes from his own caste, another two come from any other caste. For *Vaisyana*, a man can marry two women and one of them must be in the same caste. For *Sudra*, a man can just only marry one woman that is practicing monogamy¹⁹.

Polygamy and polyandry is an institution that had existed for a long time ago as it even matches with the age of human formation itself. Before the age of Islam, both of these practices were used all over the world. Whether in Asia, Europe and America and many more countries had already practiced it. Those were the same for Arabic, Greek and Persian²⁰.

Many countries practiced polygamy as their tradition. This routine was done by powerful people and rich men to use women to fulfill their passions. The Chinese, Japanese, Persian, Arabic, mayors of German and Kings of Europe had practiced polygamy.

All leaders of the church had come out with statements that allowed one man to give or lend his wife to another man for a period of time as demanded by the man. As the leaders, they can make sexual relationships with a peasant's wife for fourteen years since the woman did the wedding ceremony²¹.

The polygamous marriage had existed in the major societies of Indo Europe and also for a group of slaves before the times. He had also said in the society of

¹⁸ n.a, *Enclopedia Of Britannica*, n.d., London and New York n.pb. Vol. xvii, p.18

¹⁹ ibid.

²⁰ Fida Hussain Malik, 1982, *Wives of The Prophet*. n.pl, Taj Company, p.63.

²¹ Ramli Haji Panjang ,n.d, *Poligami di Kalangan Masyarakat Dunia*, Kuala Lumpur, Dewan Bahasa dan Pustaka, Vol.7,n.p.

Pastoral, polygamy had been practiced widely and there were evidences that explained these true facts.

In the middle of 16th century, Diarmid, the King of Ireland had two women. Kings of Merovingian, Ireland practiced polygamous. Charlemagne also had two wives and a number of women. Then Philips of Hesse and Frederick William of Prusia made a wedding in bigamy way with the permission of Christian priest with Luther²².

In the Bible as well, in century Talmud, polygamy one of the institutions that had been admitted by its religion and society. The people of Anabaptist and Mormon not only practice polygamy, but also advocated it as an assertion by its religion. By the primitive people of Africa, one man can marry eight women or more at the same time²³.

In Israel, polygamy was also being practiced; a man can have more than one hundred wives at one time. *Prophet Sulaiman a.s* had seven hundred to one thousand wives, *Prophet Daud a.s* had ninety nine wives and also *Prophet Ibrahim a.s* and *Prophet Musa a.s* had two and three wives. Actually, Muslims can practice polygamous marriage in the right view through an Islamic ways. This is despite the fact that the messenger, may Allah bless him and grants him a peace to the unique privileges of having more than four wives.

²² ibid.

²³ ibid.

2.1 INTRODUCTION TO POLYGAMOUS MARRIAGE IN ISLAMIC VIEWS

'Polygamy although permitted in the Holy Quran is a concession to necessary social conditions which was given with the greatest reluctance, in as much as it was accompanied by the proviso that a man may marry more than one wife only when he is able to care for all and give each her rights with impartiality and justice. The practical impossibility of doing so indicates that the divine law, in its intent, contemplated monogamy as the original and ideal state of marriage'—Sheikh Mohammad Abduh, Mufti of Egypt.

Muslims have been allowed polygamy by God's words, though its permissibility is conditional depending on the circumstances. Islam neither introduced nor invented polygamy. It only restricts it, regulates it in an honest, practical manner to prevent unchecked abuse of women as evident during the pre-Islamic era among the Arabs. In fact, Islam is the only one of the monotheistic religions that deals openly and frankly with the question to arrive at a just and practical solution.

It is to be noted that monogamy, and not polygamy, is the norm, the ideal situation in family structure in Islam i.e. one husband, one wife. Polygamy is only an exception, a way out for some under certain circumstances. And though it is a permissible act, it is in no way a commendable one. It is, in fact, not encouraged in Islam.

2.2 DEFINITION AND AUTHORITY IN POLYGAMOUS MARRIAGE..

In Islam, polygamy can be defined as an act referring to a man who is married to more than one wife, but not more than four. The backbone of the Islamic definition of polygamy can be derived from the verses of the Holy Quran that deal with the question of polygamy.

﴿وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَتِلْثًا وَرُبْعًا ۚ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً﴾

"If you fear that you shall not be able to deal justly with the orphans, marry the women of your choice, two or three or four. But if fear that you shall not be able to deal justly with them, then only one" ²⁴

﴿أَمْسِكْ مِنْهُنَّ أَرْبَعًا وَفَارِقْ سَائِرَهُنَّ﴾

"Keep four out of them and make the others free"

Similarly Abu Daud mentions from Haristh bin Qays;

قال: ﴿أسلمت وعندي ثمانى نسوة فذكرت ذلك للنبي صلى الله عليه وسلم فقال: اختر منهن

أربعاً﴾

I accepted Islam and had eight wives. I mentioned it to the prophet. He advised:

"select four out of them"

²⁴ Abdul Malik Abdul Karim Amrullah (Dr Hamka) Prof. Dr. Hj., 1982, *Tafsir Al-Azhar, Juzu' 4-5-6*, Yayasan Nurul Iman, Surabaya., pp. 252.

﴿أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وَجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ ۚ وَإِنْ كُنَّ أُولَاتٍ حَمْلٍ
فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ ۚ مِثْلَ مَا أَنْفَقْتُمْ بَيْنَكُمْ
بِمَعْرُوفٍ ۚ وَإِنْ تَعَاَسَرْتُمْ فِئَتَكُمْ فَسْتَزِيعُ لَهُ أُخْرَىٰ﴾²⁵

Meaning: `Let the women live (in *iddah*) in the same style as ye live, according to your means: annoy them not, so as to restrict them. And if they carry (life in their wombs) then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable and if ye find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf`

In Hadith, the prophet of Muhammad clarifies of maintenance from the husband to the wife,

﴿ما حق زوجة الرجل عليه؟ قال تطعمها إذا طعمت وتكسوها إذا اكتست﴾

{رواه أبو داود والحاكم}

Meaning: "One man asks the prophet (peace be upon him) about the woman's right. The prophet said "you should give your wife food when you eat and you should give your wife cloth when you wearing the cloth"

﴿وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَّةَ وَرَبْعَ ۚ مِمَّا خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً﴾

"If you fear that you shall not be able to deal justly with the orphans, marry the women of your choice, two or three or four. But if fear that you shall not be able to deal justly with them, then only one"²⁶

²⁵ Al-Quran. *Al-Talaq*. verse 6

²⁶ Al-Quran. *Sūrah An-Nisā'* verse 3.

﴿يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرِهًا مَدًى وَلَا تَعْضُلُوهُنَّ
لِتَذْهَبُوا بِبَعْضِ مَآءِ آتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُّبِينَةٍ ۚ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ ۚ
فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَىٰ أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا﴾

Meaning: “O ye who believe! You are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them except where they have been guilty of open lewdness, on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them it may be that ye dislike a thing, and God brings about through it a great deal of good²⁷.

﴿وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ﴾

Meaning: On the contrary live with them on a footing of kindness and equity.²⁸

﴿اللهم إنك تعلموا أبي عادلوا بما أستع ولكني لا عادلوا بما لا أستع﴾

This means in English "Dear Allah, you are well aware that I try to be just with all I can, but I can't be just with what I can't."

This prayer means that our Prophet always tried to be fair as much as possible, but he couldn't always do that.

²⁷ Al-Quran. *Sūrah An-Nisā'* verse 19

²⁸ Al-Quran. *Sūrah An-Nisā'* verse 19

﴿الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ
فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللَّهُ ۗ وَاللَّي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ
وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاصْرَبُوا ۗ هُنَّ مَرِيضٌ فَإِنِ اطَّعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ اللَّهَ عَلِيمٌ
كَبِيرٌ﴾²⁹

“Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband’s) absence what God would have them guard. As to those women on whose part ye fear disloyalty and ill conduct. Admonish them first, next, refuse to share their beds, and last beat them lightly: but if they return to obedience, seek not against them means for annoyance, for God is Most High, Great (above you all)”

﴿وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً ۗ إِنَّ
فِي ذَٰلِكَ لَآيَاتٍ لِّقَوْمٍ يَتَفَكَّرُونَ﴾³⁰

“And among His Signs is this, that he create for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between yours (hearts) verily in that are signs for those who reflect”

²⁹ Al-Quran. *Surah An-Nisa'*: verse34

³⁰ Al-Quran. *Surah Ar-Rum* verse 21

﴿إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ۗ﴾

﴿إِنَّ اللَّهَ نَعِمًا يَعْظُمُكُمْ بِهِ ۗ تَلَىٰ إِنَّ اللَّهَ كَانَ سَمِيعًا ۖ بَصِيرًا﴾³¹

“God doth command you to render back your trust to those to whom they are due and when ye judge between man and man, that ye judge with justice verily how excellence is the teaching which He gives you For God He who hearten and set all things”

Surah An-Nisa 4:3 provides to the effect that:

﴿وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَّةَ وَرُبْعَ ۚ فَإِنْ

خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً﴾

"If you fear that you shall not be able to deal justly with the orphans, marry the women of your choice, two or three or four. But if fear that you shall not be able to deal justly with them, then only one"³²

The above rule on polygamous marriage was introduced conditionally. The verse especially refers to justice to be done to orphans. It was revealed immediately after the battle of *Uhud* when the Muslim community was left with many orphans and widows and some captives of war³³. On the above Surah, Maulana Muhammad Ali had commented:

"It is admitted that this chapter was revealed to guide the Muslims under the conditions which followed the battle of *Uhud*... in that battle 70 men out of 700 Muslims had been slain and this decimation largely increased the number of males, who being the breadwinners, were the natural guardians and supporters of the females. The number was likely to suffer a still greater diminution in the battles which

³¹ Al-Quran. *Surah An-Nisa* Verse 58

³² Abdul Malik Abdul Karim Amrullah (Dr Hamka) Prof. Dr. Hj., *Tafsir Al-Azhar*, Juzu' 4-5-6, Yayasan Nurul Iman, Surabaya, 1982, pp. 252.

³³ Abdur Rahman I. Doi (1990), *Women in Shariah*, A.S Nordeen Kuala Lumpur, p.51

had yet to be fought. Thus many orphans would be left in charge of widows, who would find it difficult to procure the necessary means of support"³⁴.

The verse was not merely limited to orphans, but has a general application with regard to the marriage laws in Islam. The Muslim jurists, therefore, have laid down the following conditions if someone wants to take more than one wife:

- (a) He should have sufficient financial resources to look after the needs of the additional wives that he has taken.
- (b) He must do equal justice to them all. Each wife should be treated equally as far as the fulfillment of their conjugal and other rights is concerned³⁵.

Thus, if a man feels that he will not be able to treat another wife with equality and justice or he does not have the means to support another wife, he should restrict himself to marrying only one wife³⁶.

In the case of having more than one wife, it is a tyranny to incline towards one wife exclusively as to leave the other wife or wives in a state of suspension³⁷. This is declared unlawful by the Holy Quran, in unambiguous terms, as stated in Surah An-Nisa 4:129 to the effect that:

﴿فَلَا تَمِيلُوا كُلَّ الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ﴾

"Do not incline towards one so exclusively as to leave the other in a state of suspension".

³⁴ Maulana Muhammad Ali, *The Holy Quran* (Lahore 1973) n. 535, quoted in Asghar Ali Engineer, *The Rights of Women in Islam* (1992) at p.156, as cited in Nik Noraini Nik Badli Shah (1998), *Marriage and Divorce under Islamic Law*, ILBS, at p.32.

³⁵ Abdur Rahman I. Doi (1990), *Women in Shariah*, A.S Noordeen, K.L p.51.

³⁶ *ibid* at p.51.

³⁷ M.I Siddiqi,(1988),*Family Laws of Islam*, International Islamic Publishers,p.181.

Surah An-Nisa' 4:129 further also states:

﴿وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ﴾

"You are never able to be fair and just as between women,
even if it is your ardent desire".

At first glance, the verse (4:3) seems to say 'yes' to polygamy on certain conditions while the second seems to say 'no'. It's like saying to a person, 'you can eat the fruit, but you'll be punished if you eat it'. It is the writer's opinion that those who oppose polygamy, using the Quranic text to support their contention, may have placed too much emphasis on the second verse (4:129) while discounting almost all other considerations.

On the other hand, there some Muslim jurists, who stress the need and permissibility for polygamy based on the first verse. It is their contentions that:

- a) If polygamy is not permissible, then God will not state as He did. God will not discuss or mention a particular topic for no reason. It is clear that the first verse acts to validate polygamous marriage.
- b) According to a few *Hadith*, namely, al-Ghailan al-Thaqafi, Qays bin al-Harith and Nawfal, all of which had more than four wives before professing the religion of Islam, upon converting to Islam were asked by the Prophet to only choose four among their many wives³⁸.
- c) There is no evidence of disagreement among the companions of the Prophet. This would mean that the need for polygamous is of the companions' *ijma'*. *Ijma'* has been accepted by the *fuqaha'* as a sound authority in Islam³⁹.

³⁸ Umar Abdullah (1963), *Ahkam al-Syariah fi al-Ahwal al-Syakhsiyyah*, Kaherah, p.164. as cited in Ab. Kadir Hj. Muhammad, *Poligami dan Pengamalannya di Malaysia*, Undang-Undang Islam Di Mahkamah Syariah Di Malaysia (UM) 1998, p.85.

³⁹ Ab. Kadir Hj. Muhammad, 1998, *Poligami dan Pengamalannya di Malaysia*, Undang-Undang Islam Di Mahkamah Syariah Di Malaysia (UM), p.85.

As regard verse (4:3), some of the Zahirities that he Quranic words, '*mathna*' means two, two, and '*thulath*' means three, three, and '*ruha*' means four, four, and thus the number permitted swells to eighteen⁴⁰. There are some who think erroneously that '*mathna wa thulatha wa ruha*' put together come up to nine and so nine wives are allowed in Islam. This is, in reality, an incorrect interpretation of the Quranic interpretation⁴¹.

In regards to the above discussions, we had arrived at the conclusion that polygamy is allowed, to only a number of four wives. With this, the claim that a man is allowed to have more than four wives, according to a certain group, is therefore in correct. Opinions that say that polygamy is an altogether prohibited are also denied by the above contentions.

The majority of the Muslim jurists stress that one of the conditions of polygamy is that the man must be just and fair. The element of just and fair, according to them, is something that cannot be achieved by mere mortals (4:129). It is their interpretation that through this particular verse, God actually forbids polygamy indirectly. This interpretation has been disregarded by Islamic scholars.

The scholars pointed out that the actual justice and fairness highlighted in that particular verse refers to the inclination of the heart or predilection⁴². Fairness which is being conditioned in polygamy actually refers to physical fairness, such as maintenance and appropriation of time spend between wives. It is thereby submitted here that to interpret the verse (4:129) otherwise, would be tantamount to an undesirable misconception of the Quranic laws.

⁴⁰ Abdur Rahman I. Doi (1990), *Women in Shariah*, A.S Nordeen KL, p.53

⁴¹ *ibid* at p.53.

⁴² *ibid*, p.85

2.3 POLYGAMOUS MARRIAGE: A MAN'S RIGHT CREATED BY THE QURAN.

From the observation we have just made, there is no solid evidence in the Quran that polygamy is forbidden, nor is there evidence that it is required or encouraged either. Polygamous marriage is actually not a 'male's right' created or granted by Islam. Many men believe that polygamy is a God given right enshrined in the Quran. Many believe that Islam, by allowing polygamy, has found that ideal solution to men's alleged insatiable sexual drive and many also believe that if a woman allows her husband to take on a second wife, she is assured of a place in heaven. Even non-Muslims are of the opinion that polygamy is a form of legalized adultery⁴³.

These are some of the many misconceptions of the theory of polygamous marriage. Polygamous is, in fact, a pre-existing institution in the Age of Ignorance that the Quran drastically reformed by introducing limitations and conditions before it could be allowed in a restricted form under certain circumstances.

It should always be remembered that Surah An-Nisa' 4:3 was revealed after the tragedy of the battle of *Uhud* in which many Muslim men were killed, leaving behind many war widows and war orphans⁴⁴.

The permission to adopt the practice of marrying more than one wife was therefore given to encourage social justice. It is from the above observation that many people have come to the conclusion that polygamy is only permitted within the context of war and orphans. This is not so where Islam is concerned. Islam is not time bound, place bound, race bound or circumstance bound, and any notion that we have to restrict ourselves to that particular circumstance would only be to underscore the purpose and wisdom for which it is intended. We have only to look at the examples of the Prophet and his companions to verify the permissibility of polygamy in Islam. If

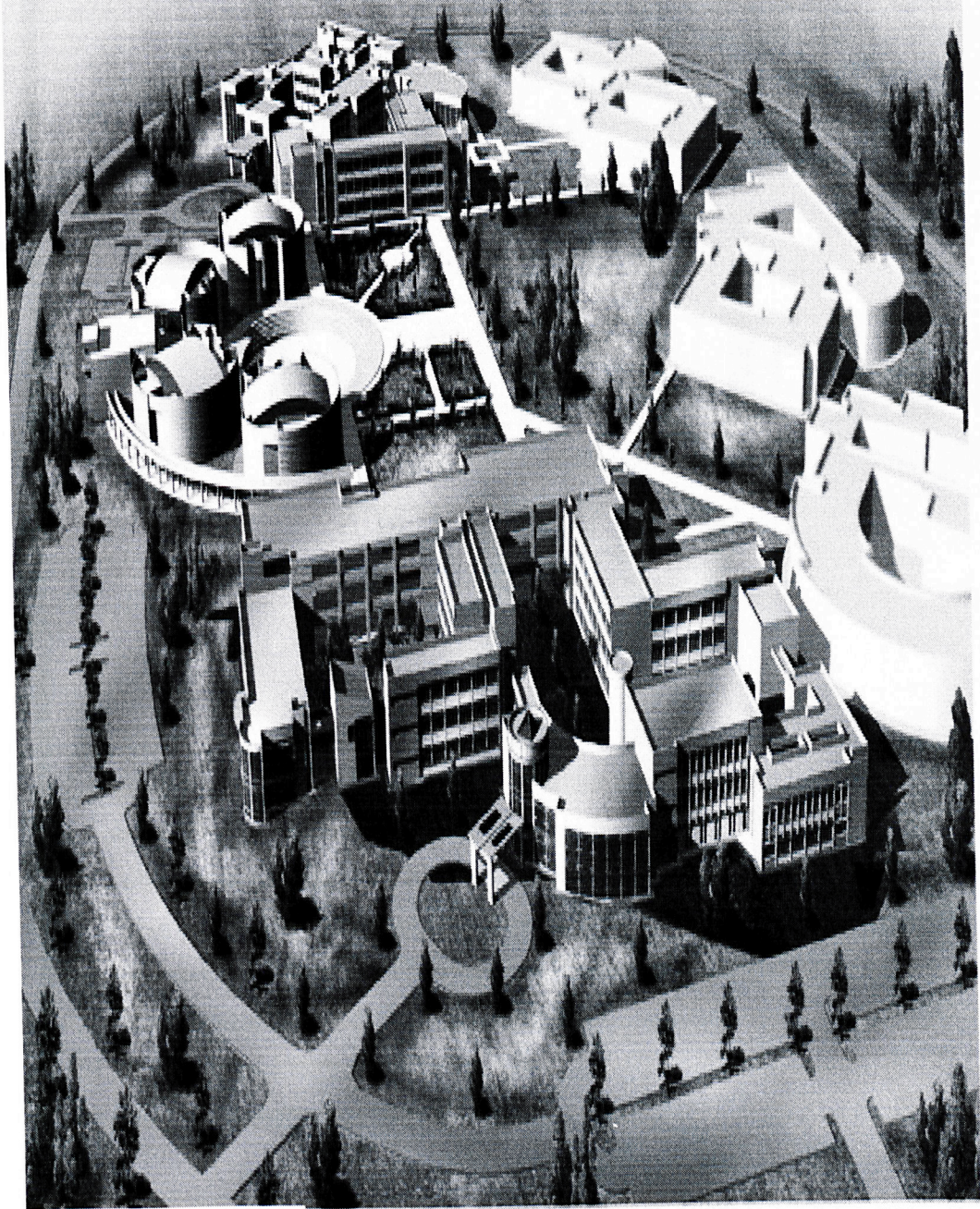
⁴³ *News Straits Times* 20.8.1990, p.19.

⁴⁴ Nik Noraini Nik Badli Shah (1998), *Marriage and Divorce under Islamic Law*, ILBS, at p.33.

God prohibits it, surely the Prophet himself would have put a stop to it or discouraged some of his companions from practicing polygamy.

Although polygamy is allowed, we have to bear in mind that a man who wishes to venture into this area will be bound by two important conditions. First is the issue of fairness that has been discussed earlier, and second is the issue of giving maintenance to the wife and children. With regards to the second condition, a monogamous marriage could even be sinful if the man cannot provide adequate maintenance to his wife, what more if the marriage is polygamous in nature.

CHAPTER TWO



KOMPLEK AKADEMIK



KOLEJ UNIVERSITI ISLAM MALAYSIA
جامعة العلوم الإسلامية بماليزيا
ISLAMIC UNIVERSITY COLLEGE OF MALAYSIA

CHAPTER TWO

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CHAPTER TWO

2.1 EXPLANATION OF THE ACT IN LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976 RELATED TO MONOGAMOUS MARRIAGE

Section 5: Disability to contract marriages otherwise than under this Act.

- (1) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.

After the enforcement of Act 164, any person who is mentioned in section 3, for those who has been married before this Act and the marriage is still in existence and continuous, he or she is prohibited to contract another marriage. This prohibition imposed not only to prevent him or her from contracting another marriage under this Act, but also include a contract of marriage with another person under any law, religion, custom or usage. This section is bound to any person in Malaysia or whoever wishes to contract a marriage outside Malaysia.

- (2) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all such spouses, shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the second mentioned marriage is contracted within Malaysia or outside Malaysia.

Subsection (2) further explain about subsection (1), which provides no impediment for a divorcee to contract another marriage after his or her divorce. Instead, if a person

wishes to contract another marriage, while the prior marriage is still in existence and continuous, then this subsection will prevent him of doing so.

- (3) Every person who on the appointed date is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.**

For those who are unmarried before or after the enforcement of the Act, and afterwards contract a marriage, under any law, religion, custom or usage, he or she will be prohibited to contract another marriage during the existence of his or her prior marriage, whether the suggested marriage is going to be contracted inside or outside Malaysia. In other words, any marriage contracted by a married person, whether male or female, will deem to be invalid under any law, religion, custom or usage.

- (4) After the appointed date, no marriage under any law, religion, custom or usage may be solemnized except as provided in Part III.**

All marriages contracted after the enforcement of the Act 164 must be solemnized in accordance with Part III of the Act. This part is concerning the marriage, its starting point, its limitation and the solemnization of the marriage itself.

Section 6: Avoidance of marriage by subsisting prior marriage.

(1) Every marriage contracted in contravention of section 5 shall be void. A marriage will be considered as not valid if it being solemnized contravene with this Act. This section provides strict rule pertaining polygamous marriage.

- (2) If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage contract another union with any woman; such woman shall have no right of succession or inheritance on the death intestate of such male person.**

Any woman, who got married with the man who is already had a valid wife, the subsequent wife, neither get anything nor have the rights of inheritance from the matrimonial properties, if the husband died intestate.

If the man died testate, all the properties should be distributed according to the will. If he died intestates, and leave behind him properties, the distribution of the properties should be in accordance with the Partition Act 1958 (Act 300) Checked 1983⁴⁵.

According to Act 300, the wife of the deceased is entitling to the share of her husband's properties.

If a person is having two or more wives, if he dies, all the property which he left behind should be distributed equally to all of his wives⁴⁶.

If the marriage is contracted right after the Act 164 is enforced, only the first wife will entitle to the husband's property, provided that the husband died intestate. Nevertheless, this rule is silent on the position of a second wife, or wives, from a marriage which had been contracted before the enforcement of this Act.

(3) Nothing in this section shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law.

Regarding the matter of maintenance, if any person has been ordered by the court to do so whether under this Act or any other written law such as Wife and Child (Maintenance) Act 1961, this subsection will ensure that the rights of those wife or children is not be interrupted, although the marriage of that particular party was not valid according to section 5, i.e. after the enforcement of the Act.

⁴⁵ P. Balan & Rafiah Salim, 'Partition Act 1958' (1984) JMCL 179.

⁴⁶ S. 6, Partition Act (1958); Lam Wai Hwa v Toh Yee Sum & Ors (1983) 2 MLJ 302; Re Ho Khian Cheong (Decd) (1963) MLJ 316.

Section 7: Offences

- (1) Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of section 5 shall be deemed to commit the offence of marrying again during the life-time of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code.**

Section 5 prohibits any person from contracting a marriage while his or her prior marriage is still in existence. Failure to comply with this section will make the marriage to be invalid according to section 6. His or her act will be considered as an offence, as provided by section 7(1), which have the similarity with section 494 of Penal Code (N.M.B chapter 45), which denotes that;

'Anyone, who was still, has husband or wife that shall alive. The remarriage and that marriage is not valid because it happen when her husband or his wife is still alive, he/she must be sentenced imprisonment until 7 years and fine'.

Exception – This section is not allocated for a person whose marriage had been considered as invalid by the court, or for a person who contracted a marriage in the time of his or her prior spouse is whereabouts unknown for a term of seven years or more, and the party did not get his or her spouse's news of dead or alive, provided that he or she had informed his or her subsequent spouse about the truth.

Section 494 must be read with section 495 was allocated that;

Offences for hiding the past wedding from the husband/wife that been married is; he or she can be sentenced with an imprisonment until 10 years and fine.

- (2) Where an offence under section 494 of the Penal Code is committed by virtue of subsection (1) by any person in any place outside Malaysia he may be dealt with in respect of that offence as if it had been committed at any place within Malaysia at which he may have been brought in**

consequence of any proceedings against him under the Extradition Act 1992, in respect of the same offence outside Malaysia. Provided that any proceeding against any person under this subsection which would be a bar to subsequent proceedings against him for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under the Extradition Act 1992, in respect of the same offence outside Malaysia.

When someone is detected with an offence under section 494 of the Penal Code, although it took place outside Malaysia, it will be regarded as if it had been done inside Malaysia. This allocation gives a power to any court to try the person in which the commission of the offence took place. If he committed the offence outside Malaysia, he or she will be entitled to an extradition trial.

Subsection (2) denotes that when someone had been alleged in Malaysia, the person will be prevented to any trials of the same offence under the Extradition Act 1958 or Commonwealth Fugitive Crime Act 1967⁴⁷.

Section 8: Continuance of marriage.

Every marriage solemnized in Malaysia after the appointed date, other than a marriage which is void under this Act, shall continue dissolved---

- (a) by the death of one of the parties;**
- (b) by order of a court of competent jurisdiction; or**
- (c) by a decree made by a court of competent jurisdiction that the marriage is null and void.**

There is similarity between section 8 and section 4(3) Act 164, on a matter of dissolution of marriage. Section 4(3) talks about a marriage contracted prior to the Act and section 8 provides for a marriage that has been done after the enforcement of the Act. Under section 8, there are three situations that can make a marriage come to an end;

- (a) Death wife or husband.
- (b) Dissolved order by the court.
- (c) With any decree from the court⁴⁸.

⁴⁷ Mohammed Suffian, "Extradition Law of Malaysia", (1986) 2 MLJ 1 xi.

**2.2 POLYGAMOUS MARRIAGES OF CHINESE AND HINDUS BEFORE
THE LAW REFORMS (MARRIAGES AND DIVORCE) ACT 1976 (LRA)
OPERATION.**

Prior to the Law Reform (Marriage and Divorce) Act 1976's operation in Malaysia, it is common for Chinese and Hindus to practice polygamy. Polygamous marriages under Chinese customs and Hindu laws were recognized in Peninsular Malaysia by the application of the principle, where the local law was wholly unsuited to the conditions of the parties, by reason of the peculiarities of religious opinion and custom, then their own laws or custom were applied to them. In *Dorothy Yee Yeng Nam v Lee Fah Koi*,⁴⁹ Thomson CJ said:

'In the Straits Settlements, however, whatever may be the position as regard to other races, the only conclusion that can be drawn from the Six Widow's case,⁵⁰ which is the classical case on the subject, is that as regards to the Chinese, the question of personal law is based on race. The courts in effect have been given judicial recognition to certain customs prevalent or thought to be prevalent among persons of Chinese race irrespective of their domicile or religion. They have thus set up what might be called a sort of common law as effecting persons of Chinese race and it would seem that the case is the same in those portions of the present Federation, which were not formerly part of Straits Settlements or, perhaps more accurately, which were part of the former Federated Malay States.'

⁴⁸ Shamsudin Suhor, 1994, *Panduan Ringkas Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 (Akta 164)*, Dewan Bahasa dan Pustaka, Kuala Lumpur, n.p.

⁴⁹ (1956) MLJ 257, at p. 263.

⁵⁰ (1908) 12 SSLR 120.

In *Re Ding Do Ca deceased*⁵¹ the Federal Court held that in regard to persons of the Chinese race, the Courts have given judicial recognition to certain customs which have been imputed to such persons and under such customs, Chinese can contract a polygamous marriage.

There was nothing in the Christian Marriage Enactment (Cap 109) which rendered a party who had married under it incapable during its continuance of contracting a polygamous marriage and therefore it was held that the deceased could contract a valid marriage under the Chinese custom despite his earlier marriage with another woman under the Christian Marriage Enactment. In that case Thompson LP said:

'The whole question of personal law in this country, particularly as regards to questions of marriage, divorce and succession, calls for the attention of the legislature ... The questions involved are questions which go to the very root of the law relating to the family which, after all, is the basis of society at least in its present form, and the existence of a civilized society demands that these questions be settled beyond doubt by legislation which will clearly express the modern norms of the classes of persons concerned and put the rights of individuals beyond the chances of litigation.'

Hindu law has always looked up to monogamous but polygamous is recognized. Hindus were permitted to practice polygamy, though it was not encouraged. The effect of recognition of polygamous, however, was that a Hindu man can marry any number of wives as he pleases, and Hindu marriages were regarded as potentially polygamous except in the case of a Ceylon Tamil Hindu whose marriage was regarded as monogamous in Nature.

⁵¹ (1966) 2 MLJ 220.

In *Parameswari v Ayadurai*⁵² the court accepted the evidence of the priest who performed the marriage ceremony between the petitioner and the respondent and also expert evidence on the traditional features of a marriage between Ceylon Tamil Hindus. The marriage in that case was solemnized according to Ceylon Tamil Hindu custom and according to the expert witness and the priest who performed the marriage, such marriages are monogamous. The court found as a fact that the parties were parties to a binding marriage contract that was monogamous in its nature. As there was proof of the respondent's subsequent marriage to another woman, it was held that the petitioner was entitled to a decree of dissolution of the marriage.

It was provided that any male person having a wife and being debarred according to the institutions of the religion he professed, or which he professed at the time of his marriage to such wife, or by the law or custom having the force of law applicable to the parties or attempted to procure the registration of a marriage between himself and any other women or female child shall, subject to the exceptions contained in section 494 of the Penal Code, be liable to the same penalty as if he had committed an offence punishable under the section. When the law or custom applicable to the parties allows polygamy, it was possible for a man to marry more than one wife and the law recognized the polygamous marriage as valid. It was expressly provided that neither the registration of nor the omission to register any marriage would effect the validity of the marriage, nor would any error in the particulars recorded, nor any omission to record any particular which ought to have been recorded, affect the validity of the registration of marriage.

⁵² (1959) MLJ 195.

2.3 MONOGAMOUS MARRIAGES OF CHINESE AND HINDUS AFTER LAW REFORM (MARRIAGE AND DIVORCE) ACT 1976 OPERATION.

In an attempt to modernize the personal laws of the non-Muslims in Malaysia, a Royal Commission on non-Muslim Marriage Divorce Laws was set up in 1970 to study and examine the existing laws relating to marriage and divorce and to determine the feasibility of reform. The Commission considered the existing laws on marriage and divorce (excluding Islamic Law) paying particular attention to the Chinese and Hindu Law as well as to the difficult decisions in conflict of laws, Christian and Civil marriage and the legislation on these marriages.

The major reforms recommended by the Commission, bearing upon personal laws, were the abolition of polygamy and compulsory registration of all marriages. Polygamous marriages already contracted were exempted and the rights of succession and maintenance flowing from them were preserved. The report and recommendations of the Commission were finally incorporated into the Law Reforms (Marriage and Divorce) Act 1976. The Act came into the force on 1st March 1982.

The incapability to contract a polygamous marriage dealt within section 5 of the LRA. Section 5, as it originally appeared, was in *pari materia* with section 4 of the Women's Charter. It can be read together with section 6(1) as having extra-territorial effect, meaning that every marriage, where ever contracted, in contravention of section 5 will be void. After 1986, this provision was made in clearer terms. The 1986 amendment to the Law Reform (Marriage and Divorce) Act 1976 introduced this particular phrase, where ever the marriage is contracted, whether within or outside Malaysia into section 5. Part II of the Law Reform (Marriage and Divorce) Act 1976 deals with polygamous marriages and the relevant sections are sections 5, 6 and 7. Section 5 deals with disability to contract marriages otherwise than under the Law Reform (Marriage and Divorce) Act 1976, while section 6 provides for avoidance of marriage by subsisting prior to Law Reform (Marriage and Divorce) Act 1976 marriages and section 7 is for offences. Section 5 of the LRA states:

- (1) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.
- (2) Every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouse and who subsequently ceases to be married to such spouse or all such spouse, shall, if he thereafter marries again, be incapable during the continuance of that marriage with any other person under any law, religion, custom or usage, whether the second mentioned marriage or purported third mentioned marriage is contracted within Malaysia or outside Malaysia.
- (3) Every person who on the appointed date is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia.
- (4) After the appointed date, no marriage under any law, religion, custom or usage may be solemnized except as provided in Part III.

Section 6 provides:

- (1) Every marriage contracted in contravention of section 5 shall be void.
- (2) If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage contract another union with any woman; such woman shall have no right of succession on inheritance on the death of such male person.
- (3) Nothing in this section shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law.

Section 7 provides:

- (1) Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of section 5 shall be deemed to commit the offence of marrying again during the lifetime of husband or wife, as the case may be, within the meaning of section 494 of the Penal Code.
- (2) Where an offence under section 494 of the Penal Code is committed by virtue of subsection (1) by any person in any place outside Malaysia he may be dealt with in respect of that offence as if it had been committed at any place within Malaysia at which he may be found or to which he may have been brought in consequence of any proceeding for his extradition to Malaysia from any place outside Malaysia, provided that any proceeding against any person under this subsection which would be bar to subsequent proceedings against him for the same offence if the offence had been committed in Malaysia shall be bar to further proceedings against him under the Extradition Ordinance 1958 or Commonwealth Fugitive Criminals Act 1967, in respect of the same offence outside Malaysia.

A customary marriage conducted after the LRA was held to be void in *Tam Ley Chian v Seah Heng Lye*⁵³. After the appointed date, no marriage under any law, religion, custom or usage may be solemnized. However, this does not prohibit religious or customary marriage ceremonies so long as the marriage is registered in accordance with Act.

⁵³ (1993) 3 MLJ 696, at p. 700.

2.4 MONOGAMOUS MARRIAGE UNDER THE ACT.

The law relevant to non-Muslim marriage in Malaysia is the Law Reform (Marriage and Divorce) Act 1976⁵⁴ (LRA). It was gazette in 1976 but only enforced throughout Malaysia from 1st March 1982. Even before it was enforced, it was amended once in 1980⁵⁵. Its long title states that the Law Reform (Marriage and Divorce) Act 1976 provides for *inter alia* monogamous marriages and the solemnization and registration of such marriages and matters incidental thereto. The Law Reform (Marriage and Divorce) Act 1976 applies to the whole of Malaysia and it should be noted that the English text is the authoritative text⁵⁶.

It is provided that every person who on the date of the coming into operation of the Act is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the first marriage or the purported second marriage is contracted within Malaysia or outside Malaysia. Every person who on the date of the coming into operation of the Act is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or to all such spouses, shall, if he thereafter marries again be incapable, during the continuance of such marriage, contracting a valid marriage under any law, religion, custom or usage, whether the first marriage or the purported second marriage is contracted within Malaysia or outside Malaysia.

Every person who on the date of the coming into operation of the Act is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable, during the continuance of such marriage, of contracting a valid marriage or the second mentioned marriage is contracted within Malaysia or outside Malaysia. It is provided that after the effective date, no marriage under any law, religion, custom or usage may be solemnized except in accordance with the provisions

⁵⁴ Act 164.

⁵⁵ Vide Act A498/80.

⁵⁶ See PU (B) 127/1976.

of the Act⁵⁷. It is also provided that every marriage contracted in contravention of section 5 shall be void⁵⁸.

Any person lawfully married under any law, religion, custom or usage who during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of section 5 of the Act shall be deemed to commit the offence of marrying again during the lifetime of the husband or wife, as the case may be, within the meaning of section 494 of the Penal Code⁵⁹.

Where such an offence under section 494 is committed by any person in any place outside Malaysia he may be dealt with in respect of that offence as if it had been committed at any place within Malaysia in which he may be found or to which he may have been brought in consequence of any proceeding for his extradition from any place outside Malaysia. This is subject to the proviso that where any such proceedings against him for the same offence if the offence had been committed in Malaysia, it shall be a bar to further proceedings against him under the Extradition Ordinance 1958 or the Commonwealth Fugitive Criminal Acts 1967 in respect of the same offence outside Malaysia⁶⁰.

Section 5(1) of the Law Reform (Marriage and Divorce) Act 1976 provides that every person who on the appointed date is lawfully married under any law, religion, custom, or usage to one or more spouses shall be incapable, during the continuance of such marriage or marriages, of contracting a valid marriage under any law, religion, custom or usage with any other person, whether the mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia. This means that if a man has say two wives from two customary marriages prior to 1 March 1982. Those two marriages, if valid, would render him incapable of marrying a third woman after that date.

⁵⁷ Law Reform Act (Marriage and Divorce) Act 1976, s. 5, as amended by Act A650 of 1986.

⁵⁸ Ibid, s 6(1).

⁵⁹ Ibid s 7(1).

⁶⁰ Ibid s 7(2).

Section 5(2) of the Act also provides that every person who on the appointed date is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to such spouse or all spouses, shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the second mentioned marriage or purported third mentioned marriage is contracted within Malaysia or outside Malaysia. This subsection refers to situations where a man may have, say two wives X and Y from marriages contracted prior to 1st March 1982. X passed away, while Y was divorced.

The man then marries Z after 1st March 1982. He is now prevented from marrying another woman P because his marriage to Z is a monogamous marriage in accordance with the Law Reform (Marriage and Divorce) Act.

Section 5(3) provides that every person who on the appointed date is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage, whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia. This subsection would be relevant to those people who were unmarried on 1st March 1982. If they marry, it would be in accordance with LRA, and such marriages would be monogamous. Although the subsection appears to allow marriages 'under any law, religion, custom or usage' after 1st March 1982, those marriages must necessarily be in accordance with part III of the LRA or they would be void marriages. Section 5(4) emphasizes this further when it provides that after the appointed date, no marriage under any law, religion, custom or usage may be solemnized except as provided in Part III⁶¹.

Section 6(1) of the Law Reform (Marriage and divorce) Act 1976 reiterates that every marriage contracted in contravention of section 5 shall void. If any male person lawfully married under any law, religion, custom or usage shall during the continuance of such marriage contract another union with any other woman, such

⁶¹ Mimi Kamariah Majid, 1999, *Family Law in Malaysia*, Malayan Law Journal, p.86.

woman would only be his mistress, and shall have no right of succession or inheritance on the death intestate of such male person⁶². Nothing in section 6, however, shall affect the liability of any person to pay such maintenance as may be directed to be paid by him under this Act or any other written law⁶³. Although the woman might only be a mistress, if she has children with the man, the children would be illegitimate children, the man may be ordered to do so.

Section 7(1) makes it an offence for any person lawfully married under any law, religion, custom or usage that during the continuance of such marriage purports to contract a marriage under any law, religion, custom or usage in contravention of section 5. The offence is one of marrying again during the life-time of a husband or a wife, as the case may be, within the meaning of section 494 of the Penal Code⁶⁴. Section 7(2) of the Law Reform (Marriage and Divorce) Act 1976, which was added in 1986, states that where an offence under section 494 of the Penal Code is committed by virtue of subsection (1) by any person in any place outside Malaysia, he may be dealt with respect of that offence as if it had been committed at any place within Malaysia at which he may be found or to which he may have been brought in consequence of any proceeding for his extradition to Malaysia from any place outside Malaysia. Any proceeding against any person under subsection (2) which would be bar to subsequent proceedings against him for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under Extradition Ordinance 1958 or the Commonwealth Fugitive Criminal Act 1967, in respect of the same offence outside Malaysia.

Every marriage solemnized in Malaysia after the appointed date, other than a marriage which is void under the Law Reform (Marriage and Divorce) Act 1976, shall continue until dissolved:--

- a. By the death of one of the parties;
- b. By order of court of competent jurisdiction; or

⁶² Law Reform (Marriage and Divorce) Act 1976, section 6(2).

⁶³ Ibid section 6(3).

⁶⁴ It should be noted that the Penal code was amended vide Act A651/86 to be in line with the amendment to section 5 of the Law Reform (Marriage and Divorce) Act 1976.

- c. By a decree made by a court of competent jurisdiction that the marriage is null and void⁶⁵.

This provision in section 8 is slightly different from section 4(3) because the latter refers to marriages under any law, religion, custom or usage solemnized prior to the date of enforcement of the Law Reform (Marriage and Divorce) Act 1976, that is, 1st March 1982. Those marriages must be valid under those laws, religious, customs or usages. Section 8 refers to marriages solemnized in Malaysia 'after date' and those marriages must be valid under the Law Reform (Marriage and Divorce) 1976.

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⁶⁵ Law Reform (Marriage and Divorce) Act 1976, section 8.

2.5 CASES IN MONOGAMOUS MARRIAGE.

PP v RAJAPPAN⁶⁶

Section 5 and 7 of the Law Reform (Marriage and Divorce) Act 1976 was amended as set out above by the Law Reform (Marriage and Divorce) (Amendment) Act 1986⁶⁷ as a result of the decision in the case of *PP v Rajappan*. The facts in that case were that the respondent was married according to Hindu custom in India to the complainant, Pelaniyammal. In 1954, the respondent, complainant and their children migrated to Malaysia. Their marriage was subsequently registered in the Register of Marriages, Malaysia. In March 1984, the respondent married one Saraswathi in India and brought her back to Malaysia. The respondent was charged in the magistrate's court at Klang, Selangor, for an offence under section 494 of the Penal Code. The learned magistrate refused to hear the case on the ground that he had no jurisdiction to do so. The public prosecutor thereupon applied to the High Court under section 127(1) of the Criminal Procedure Code to determine whether the magistrate's court had jurisdiction to hear and try the case. The learned judge of the High Court held that the courts in Malaysia have no jurisdiction to hear and try proceedings in bigamy committed outside the limits of Malaysia. The public prosecutor referred the following questions for the determination of the Supreme Court:

- (1) Whether or not in law a person who is domiciled in Malaysia and marries again during the lifetime of his wife or her husband at a place outside Malaysia and thereafter returns to Malaysia with the second spouse has committed an offence punishable under section 494 of the Penal Code.; and
- (2) If the answer to question (1) is in the affirmative whether or not in law a magistrate's court has jurisdiction to try such person for an offence punishable under section 494 of the Penal Code.

⁶⁶ (1986) 1 MLJ 152.

⁶⁷ Act A650.

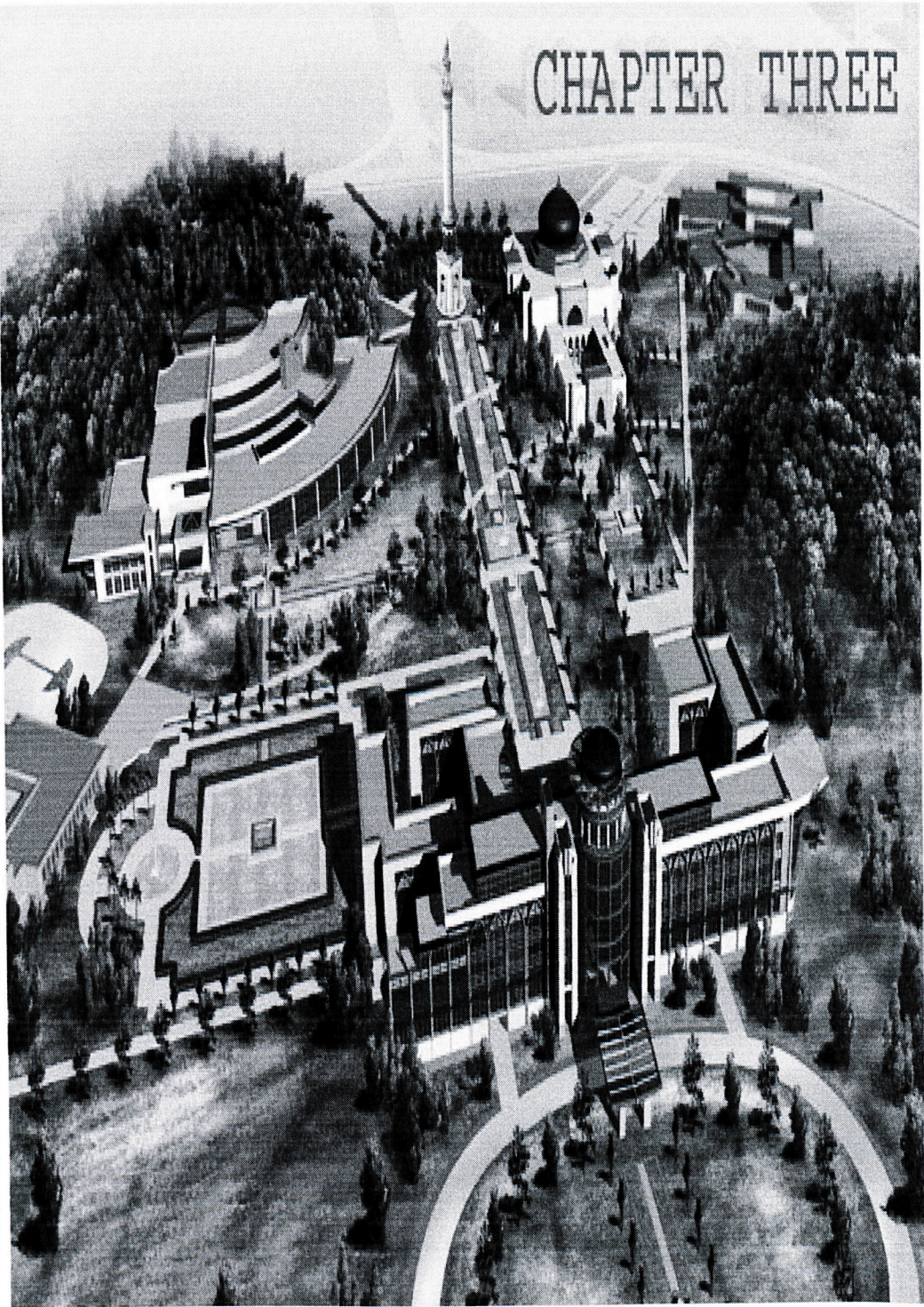
It was held by the Supreme Court:

- (1) A bigamous marriage committed abroad by a Malaysian citizen or a permanent resident notwithstanding that such marriage is in contravention of section 5(1) of the Law Reform (Marriage and Divorce) Act 1976, is not punishable under section 494 of the Penal Code. Section 7 of the Law Reform (Marriage and Divorce) Act 1976, does not make the offence under section 494 of the Penal Code an extra-territorial offence. The offence under section 494 is not extra-territorial and it could not be made extra-territorial by the reason of sections 5, 6 and 7 of the Law Reform (Marriage and Divorce) Act 1976. The answer to question (1) is therefore in the negative.
- (2) Even assuming that a bigamy committed outside Malaysia is an offence punishable under the Penal Code, in the absence of any statutory provision conferring jurisdiction in the court of the area where the offender is found, no magistrate court can have jurisdiction to try the offence. There has to be a statutory provision to fix the venue of trial and thus give jurisdiction to the court where the trial is to be heard. In the absence of any such statutory provision the answer to question (2) is in the negative.

As stated above, the law has since been amended by the Law Reform (Marriage and Divorce) (Amendment) Act 1986 and the decision in *PP v Rajappan*, *supra* will no longer apply.

With the amendments, it may be said that for the future, all marriages under the Act (other than Muslim marriages and native customary marriages) will be monogamous.

CHAPTER THREE



BANGUNAN PENTADBIRAN



KOLEJ UNIVERSITI ISLAM MALAYSIA
جامعة العلوم الإسلامية بماليزيا
ISLAMIC UNIVERSITY COLLEGE OF MALAYSIA

CHAPTER THREE

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CHAPTER THREE

3.1 ISLAMIC PERSPECTIVE ON POLYGAMOUS MARRIAGE.

The practice of polygamy has been a controversial issue as there is always ample room for debating the necessity of such practice. Polygamy is feared by the woman due to the negative effects it has on their lives. This issue has evoked heated debates among legal scholars, *ulama's*, non-government organizations and concerned individuals. The argument put forward by the proponents and exponents arise from various perspectives such as social, political and religious perspective.

Islam as a way of life provides solutions to the human being to deal with complex situations and avoiding extremes. One of the solutions is the permission of practicing polygamy. Polygamy is a very ancient practice found in many human societies. In simple words, all people have recognized the institution of polygamy nowadays.⁶⁸

Many religions and nations, before the advent of Islam had allowed the man to marry unlimited numbers of wives. With the emergence of Islam, the maximum numbers of wives are limited to four under the strict conditions of treating the wives equally and justly.

Many people believe that polygamy is no longer justified in present days. The Quranic provisions supporting polygamy has been taken out of context. However, Allah allows the practice of polygamy among men because it will help the marriage institution in the sense that it provides chances for widows, other women who failed to conceive any children from the previous marriages, to prevent adultery and many more.

⁶⁸ Abdur Rahman I.Do, , 2002, Shariah The Islamic Law, A.S. Noordeen, p.144

Unfortunately, those who practice polygamy tend to abuse the right, which has been given to them. Therefore, although some people believe that polygamy is a lifesaver, in contrast, the women think that it would affect them negatively.

... more than that with, but not to use them for... Muslim...
 by a man's hands, though it is...
 ...

During the Abbasid period, the Arabs used to marry a large number of women and considered that as a normal. With the coming of Islam, polygamy is limited up to four wives and at one time, with special circumstances and that the total number of wives allowed is 4.

The background of the Islamic limitation of polygamy was...
 ... of the Holy Quran and had that had with Quranic...
 ...

"If you fear that you shall not be able to deal justly with the women, marry what you wish of your wives, two or three or four; but if you fear that you shall not be able to deal justly (with them), it is only one. That will be more equitable if you fear not to be able to do so."

... the scholars in order to...
 ...

- 1) When the wife is suffering from a chronic disease, e.g. cancer, epilepsy or a mental illness, it is allowed for the husband to marry another wife.
- 2) When the wife is proved barren by medical experts, it is better for the husband to marry a second wife to ensure him to have children.
- 3) When the wife is unfaithful.
- 4) When the husband reached the old age and does not have capability to look after his wife and the property of the husband.

3.2 DEFINITION OF POLYGAMOUS MARRIAGE.

In Islam, polygamy can be defined as an act referring to a man that is married to more than one wife, but not more than four. Muslim has been allowed to polygamy by Allah's words, though its permissibility is conditional depending on the circumstances.⁶⁹

During the *Jahiliyyah* period, the Arabs used to marry a large number of women and considered them as a chattel. With the coming of Islam, polygamy is limited up to four wives and at one time under special circumstances and that too with a number of rules attached to it.

The backbones of the Islamic definition of polygamy are derived from the verses of the Holy Quran and deal that deal with Quranic verse of polygamy. Allah says to that effect:

“If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly (with them) then only one. That will be more suitable to prevent you from doing injustice”.⁷⁰

Hence, the scholars made a conclusion that polygamy is made permissible based on certain reasons. Among the factors that make it permissible are:

- 1) When the wife is suffering from a serious disease, e.g. paralysis, epilepsy or a contagious disease and to the effect that she cannot serve her husband well.
- 2) When the wife is proved barren by medical report. It is better for the husband to marry a second wife to enable him to have children.
- 3) When she is of unsound mind.
- 4) When the woman reached the old age and does not have capability to look after the house and the property of the husband.

⁶⁹ Zaleha Kamaruddin, 2000, *Polygamy: A Concession to Necessary Social Conditions*, IIUM, p.99

⁷⁰ *Surah An-Nisa': 3*

- 5) When the husband finds out that his wife has a bad character and cannot be reformed.
- 6) When she moved from the husband's house and become disobedient and all the effort has been taken to solve the problem.
- 7) During the period of war when men are killed and women are left in a very large number, polygamy can be the best solution.
- 8) If the man feels that he cannot do without a second wife in order to satisfy his natural desire, which is very strong, and when he has enough means to support her, he should take another wife.

Upon the above circumstances, the practice of polygamy is made permissible and it is reasonable that the wife should permit their husbands practicing polygamy to avoid the husband from commit any wrongful acts or sinful things.

3.3 ISLAMIC LAW ON POLYGAMOUS MARRIAGE IN MALAYSIA.

In Malaysia, a Muslim man may have four wives provided that he fulfills certain requirements. After the enactment of the Islamic Family Law for the states in Malaysia was enacted in the early 1980s, more comprehensive provisions, which controlled polygamy, were enforced. However this provision slightly differs from state to state. This paper will go into details of the law controlling polygamy in Selangor, which falls under the jurisdiction of Selangor Islamic Family Law Enactment 1984.

3.3.1 PROCEDURES BEFORE APPLYING POLYGAMY

Before we discuss into detail pertaining polygamy, which is provided by section 23 of Selangor Islamic Family Law Enactment, which give the guidance of practicing polygamy, we will roughly go to the procedures that someone has to go through. In this circumstance, the party has to pass at the first level of the procedure at the Islamic Religious District Office first. The following are the procedures before applying polygamy:

- a) The applicant has to file for the application by fulfilling the prescribed form at Islamic Religious District Office (PAID).
- b) Then, one counseling session will be held between the applicant and the religious officer. The purposes of the meeting are discussing, advising, and giving information about the application of polygamy.
- c) The applicant then has to fill in 1B form, i.e. the form of polygamy as provided by PAID.
- d) After that, the taking oath session will take place before the Chief Registrar, or Vice Registrar, or Assistant Registrar in his *Kariah Masjid*, accompanied by 2 male witnesses.
- e) The registration for the application will be conducted, and the applicant should attach together the following items;
 - Ω 1B Form (an application of polygamy)

- Ω The copy of his income slip or the approval letter of his salary.
- Ω Marriage certificate with his existing wife or wives
- Ω Birth certificate of all the children.
- Ω All the prescribed form of Syariah Court.
- Ω Court's fees.
- Ω The report of application letter of Religious Office.
- Ω Other related documents.

- f) Then, the applicant will be called for trial at the Syariah Subordinate Court.
- g) The judgment will be given. If his application has been permitted, he can proceed with the application by fulfilling another polygamy form, which is subjected to **section 23**.
- h) Finally, if the Court allows the application, it will be referred back to PAID, and the applicant himself can determine the date of the marriage and the appointment with *Imam Kariah* for solemnization of the marriage.

3.4 SECTION 23 OF SELANGOR ISLAMIC FAMILY LAW ENACTMENT 1984.

The provision which governs on matters of polygamy, is provided in section 23 of Selangor Islamic Family Law Enactment 1984, where we can simply say that this Act required that an application to polygamy should fulfill at least five conditions, i.e. the proposed marriage is “just and necessary”, the applicant has the financial means to support his existing wife and future dependant, the consent of the existing wife, the applicant’s ability to accord equal treatment to his wives as required by *Hukum Syara’*, and that the proposed marriage does not caused “*darar syarie*” (harm under Syariah) to the existing wife or wives.⁷¹

The law also stipulates that the proposed marriage does not directly or indirectly lower the standards of living of the existing wife and dependant. In other words, the Syariah Court, in allowing a person to practice polygamy, must look into certain criteria that have to be fulfilled by the applicant.

Section 23 of Selangor Islamic Family Law Enactment provides that:

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

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

- (2) Subsection (1) applies to the marriage in the Federal Territory of a man who is resident within or outside the Federal Territory of a man resident in the Federal Territory.
- (3) 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

⁷¹ Mohammad Hashim Kamali, 2000, *Islamic Law In Malaysia*, Ilmiah Publisher, p.64

financial obligations and liabilities, the number of his dependants, including person 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 had been obtained.

(4) 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 it 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 infirmity, physical unfitness for conjugal relations, willful 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 Syara'* 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 Syara'*; and
- d) That the proposed marriage would not caused *darar syarie* to the existing wife or wives.
- e) [Deleted]

(5) 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.

(6) 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.

(7) Any persons who contract 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 revocable as a debt.

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

By referring to this section, we can say that subsection (3) gives an exact requirements or true colors for polygamy application form. Every person who makes an application for polygamy must fulfill all the necessary requirements as stated in subsection (3). For instance, the application of polygamy in Selangor required the following points to be satisfied:

- a) Personal data of the applicant and his future wife.
- b) The reason why his marriage should be allowed.
- c) His financial background.
- d) Amount of expenses which to be given to his existing wife or wives and to his children, also the amount of expenses that will be given to his wife to be.
- e) Whether his intention to contract another marriage has been communicated to his existing wife or wives.
- f) Whether his existing wife or wives consented to his intention of contracting another marriage.⁷²

In order to obtain permission for a second or subsequent marriage a man must be able to show that there are exceptional circumstances, which would justify the grant of permission in his case. Further, he must show that he is able, if he marries, to do justice and give equal treatment to each of the wives and his children.⁷³

After the Syariah Court receives an application of polygamy, the court will issue a summons to the existing wife or wives, to be present before the Court. The

⁷² Raihanah Haji Abdullah, nd, *Poligami Di Malaysia*, n.pb, np.

⁷³ Ahmad Ibrahim, 2003, *Family Law In Malaysia*, Malayan Law Jurnal Sdn. Bhd., p.200

purpose is to hear her or their husband's application of polygamy. It is to be done in accordance with section 23 (4) of the Act.

Regarding this subsection, i.e. (4), the Act clearly saw the necessity of consultation with the existing wife. Her experience of married life and cohabitation with her husband would inform and assist the court in ascertaining the character of the husband and his ability, or lack of it to fulfill the stipulated conditions. After all of those conditions are fulfilled and the Court satisfied with all of the requirements, only then he will be granted permission to polygamy.

However, when the applicant fulfills the entire requirement in section 23(4), and it is satisfied by the Court, even his existing wife or wives did not consent to the husband's application; the written permission still will be granted by the Court. In contrast, the Court can also reject the application, if, all the conditions provided in that section cannot be fulfilled by the applicant, although his existing wife or wives consented to it. This situation shows that actually, the permission or rejection of the existing wife or wives towards the husband's application does not really rely to by the Court. As mentioned before, the information given by the existing wife is only to assist the Court in determining the judgment.⁷⁴

⁷⁴ Raihanah Haji Abdullah, n.d, *Poligami di Malaysia*, n.pb,n.p.

3.4 ILLEGAL POLYGAMOUS MARRIAGE UNDER ISLAMIC FAMILY LAW IN SELANGOR ENACTMENT 1984

The law plays an important part in restraining uncontrolled polygamy. That is why; every application for polygamy must be accompanied with, aside from written consent of the Syariah Court, reasons as to why such marriage is needed.

Persons contracted into a polygamous marriage without the consent of the Syariah Court will be liable to a fine or an imprisonment. Aside from that, a wife is entitled to a *fasakh* if it is proved that her husband has not been able to act fairly in a polygamous marriage.⁷⁵

Failure to comply with the provisions relating to polygamy is made an offence under this Act. For Selangor, it is provided in section 123 of Selangor Islamic Family Law Enactment:

“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 Ringgit Malaysia one thousand or with imprisonment not exceeding six months or with both such fine and imprisonment”.

Before, the law is, any polygamy contracted without Court’s permission will make the marriage cannot be registered. Section 12 (1) of Selangor Islamic Family Law Enactment denotes:

“A marriage in contravention of this Act shall not be registered under this Act.”

As polygamy outside the Court is one type of matrimonial offence as stated in section 123, hence whoever entered into polygamous marriage without the permission of the Court, his marriage will not be registered although it is valid under *Hukum Syara*. The consequence is, any claim such as maintenance or registration of divorce

⁷⁵ Ahmad Ibrahim, 1999, *Family Law in Malaysia*, Malayan Law Jurnal Sdn. Bhd., p. 200

under that Act will not be allowed. It is because the marriage was never been recognized under that Act.

Nevertheless, subject to section 12 (1), because of this unrecognized marriage will affect the future of the wife and her children from that marriage, hence the provision has been amended due to the people's complaints. The new enactment is that any polygamous marriage which did not obtain the Court' written permission have the right to be registered, but it is subjected to the penalty imposed by the Court.

The state of Selangor is the second state amended the provision, which was in the year of 1989, after Kelantan, which was in the year of 1985. Then; the rule was followed by Negeri Sembilan, in 1991, Federal Territory and Penang in the year of 1994. Other state like Malacca, Kedah, Perak, Pahang, Johor and Sabah, seems like they never allow the marriage to be registered, even though the party paid the penalty for the offence of contracting the polygamous marriage outside the Court.

Other than above offence, the Selangor Islamic Family Law Enactment also imposed penalty to the husband who failed to provide equal justice to all his wives when practicing polygamy. However it will come to our mind that the penalty which to be imposed is not severe. The amount of the penalty is not exceeding RM1000 or imprisonment not exceeding six month or both.

In Selangor, in case of failure to provided equal justice by the husband, the Act provides the right of dissolution of marriage for that particular wife through *fasakh*. Section 52 (1) (vi) clearly provides:

“ A woman married in accordance with *Hukum Syara'*, shall be entitled to obtain an order for the dissolution of marriage or *fasakh* if he has more wives than one, does not treat her equitably in accordance with the requirements of *Hukum Syara'*”.

Unfortunately not all states in Malaysia provide such right. The states, which have same stand with Selangor, are Negeri Sembilan, Federal Territory, Penang, Terengganu, Johor, Sarawak, Sabah and Perlis. The other states, such Malacca, Perak

and so on, only provide the general provisions regarding *fasakh*, by saying: “whatever matrimonial offence which is recognized by the court for dissolution of marriage or *fasakh* according to *Hukum Syara*”.

However, although the provision is stated in general meaning, it also can be used by the wife to dissolve the marriage on the ground of non-justice by the husband.

3.6 POLYGAMOUS MARRIAGE'S CASES UNDER JOURNAL HUKUM IN SELANGOR.

Below are several decided cases regarding polygamy, which falls under the jurisdiction of Selangor Islamic Family Law Enactment 1984.

3.6.1 AISHAH BT. ABDUL RAUF v WAN MOHD YUSOF B. WAN OTHMAN⁷⁶

This case was concerning an application for polygamy. At the first instance, the application for polygamy made by the husband, Wan Mohd Yusof Wan Othman was granted by the Syariah Court, Shah Alam.

In this case, the facts disclose that the Applicant and the Respondent are spouses, living together in Subang Jaya, Selangor. Both of them are working and having with them two children, which are six and twelve years of age. The income of the Applicant is in the amount of RM 6120 per month, and the Respondent with the salary of RM 3500 per month. Beside the Applicant salary per month, he is also having with him additional sources of income, which are:

- a) Allowance in the amount of RM 1200
- b) Dividend of RM 5900 per year, which in ration to be RM 500 per month

Therefore the total of his amount is amounted to RM 7800 per month. In addition to that, he also gets the bonus for RM 2000 per year.

Although the relationship between the Applicant and Respondent are in a good condition, and there are no weaknesses on the part of the Respondent, the Applicant was in the thought that he has the ability to maintain the future wife.

The learned judge allows the application in the view that the Applicant the sufficient means to practice polygamy. The Court relies on the *Hadith* recounted by Abdullah Ibn Mas'ud, which legally allows a man with sufficient means to practice

⁷⁶ [1990] 3 MLJ 1x: (1990) 7 JH 152

polygamy to prevent him from committing sins. The judge is in the opinion that the Applicant can have another wife.

The existing wife, Aishah Abdul Rauf who was not satisfied with the judgment, appealed against the decision.

The Appeal Committee allowed the appeal, holding that the burden of proof is on the husband to show that he has satisfied all the conditions stipulated in the law. The learned judge only gave serious consideration on the question of financial means under condition (b), but ignored conditions (a), (c) and (d) by merely accepting the husband's bare statement without proof and authority under *Hukum Syara'*.

The Appeal Committee stressed that all the four conditions are equally important and should be considered separately. In his evidence, the husband had advanced his reason for wanting to contract another marriage to be for the purpose of legitimizing his love for the other woman. The Appeal Committee observed that while this maybe sufficient ground to show why the proposed marriage is "just". As a Muslim, he should be in control of his desires and be able to restrain himself from committing adultery. The husband in this case conceded that his wife has no physical defects and has adequate sexual feelings and has never objected to sexual relations.

The Court held that the husband had therefore failed to satisfy condition (a) and this failure alone would be sufficient ground to reject his application. With regard to conditions (c) and (d), at the very minimum, the husband should show by evidence that he is a husband responding to Allah's commands in regard to obligatory prayers, the obligatory fasting and so on.]

In addition, the Appeal Committee contended that the four conditions imposed are not in conflict with the Quran as they are aimed at securing justice to wives, and justice is mandatory in the Quran- the first limb of *Surah An-Nisa'* verse 3 allows a husband to contract another marriage (that is permissive) but the second limb of the verse prohibits him from doing so if he cannot deal justly with the wives (that is prohibitive).

3.6.2 RAJAMAH BT. MOHAMED v. ABDUL WAHAB B. LONG⁷⁷

In this case, the Applicant, Abdul Wahab b. Long, 42 had made the application for polygamy. He is working as a Laboratory Assistant and with the salary of RM 1300 per month. He is having a wife named Rajamah Bt. Mohamed, 45 and two children. He applied to marry another woman, named Hasinah Bt. Ahmad Kuti, 34 years of age. In his application, he claim that after the payment of all his debt and expenses, the balance of RM 800 from the salary can be used to maintain his first and future wife. He had listed all the expenses that will be given for every month, as below:

- a) Maintenance for the first wife, RM 150.
- b) To his children, RM 150.
- c) Cloth expenses for the first wife, RM 25.
- d) Cloth expenses for the two children, RM 60.
- e) School expenses of the children, RM 75.
- f) School expenses for the second wife's child, RM 20.
- g) The accommodation for the first wife and children is at Shah Alam.
- h) Maintenance for the second wife, RM 150.
- i) Cloth expenses for the second wife, RM 25.
- j) Accommodation of the second wife is at Taman Sri Muda, Shah Alam.
- k) Night turn is one day for each wife.

At the commencement of the trial, his wife did not agree with his application, by saying that the maintenance's rate for her and the children is not sufficient. Therefore she is in the view of opposing her husband's intention.

At first instance, the learned judge allows the application, on the ground that:

- 1) The rate of maintenance suggested by the husband is sufficient and reasonable enough to support his family.
- 2) The assurance of equal justice by the husband. The court also relies on the wife's contention, which stipulated that the relationship between the husband and the family are in a good condition, and both of them are known as an ideal couple.

⁷⁷ [1992] JH 171

- 3) The decision by the husband to practice polygamy would not cause *darar* to the wife. The Court contended that if this application was not being granted permitted, it is afraid that they would commit adultery, as it is already known that their relationships are very close. In addition, both of them are working at the same place.

The wife expressed her dissatisfaction and appealed against the decision. On appeal, the Appeal Committee overruled the Syariah Subordinate Court's decision, by looking at several factors:

- a) Although the husband claimed that his wife is having asthma and it lead him to the reason of practicing polygamy, he did not mentioned about this matter during the first trial. The Syariah Subordinate also silence on this fact. Even the wife admitted the husband's claim, but she argued that her disease never affect their relation.
- b) Whether the husband had the financial capacity in supporting the family. In the suggested rate of maintenance by the husband, he did not include the expenses payment for all bills, which is under the responsibility of the husband, i.e. electricity, water and telephone bills, the payment of rented house for every month, and also some amount, which have to be given to the husband's mother. With all the above matters, it is clear that it had exceeded the husband's capacity.
- c) The Appeal Committee observed that the future wife did not give her explanation during the trial. The Court therefore was in hesitant whether she is really intend to marry the husband, and agreed with the suggested maintenance per month.

Therefore, by relying on the above factors, the Court unanimously allowing the appeal and held that, polygamous marriage is merely permissible in Islam. A Muslim therefore not required as a matter of religious obligation to take upon more than one wife.

3.6.3 JOAN MARRY SULAIMAN v. SULAIMAN B. HAJI MUSA⁷⁸

This case is concerning the application of dissolution of marriage by *fasakh* by the said wife, Joan Marry Sulaiman @ Joannah Mariam towards her husband, Sulaiman b. Haji Musa. The fact contended that the parties got married while both of them were studying in Sydney, Australia in 29th November 1961. They remain in Sydney for over one year, before the husband sent the wife to live in Pasir Mas, Kelantan after the got their first child. The husband continued his study abroad.

In the year of 1963 the husband graduated his study and back to Malaysia to live with his wife and child permanently. In 1988, the husband caught a work with MAS and while working with that company; he contracted a second marriage. He lives with the second wife at Damansara Height, Kuala Lumpur, and the first wife remain in Kelantan.

The husband got four children with the first wife and while this application was made, all of his children have already ceased from the father's obligation of maintenance. The husband started to neglect the first wife after contacting the second marriage. As a result, the first wife was dissatisfied and the question of equal justice was raised.

With that matter, she brought an action for *fasakh* on the ground:

- a) That the husband had neglected or failed to provide for her maintenance for a period of over three months, and;
- b) That the husband had failed to perform, without reasonable cause, his marital relations for a period of more than one year, and;
- c) That the husband having more wives than one did not treat her equitably in accordance with the requirement of *Hukum Syara'*.

The judge of the Syariah Subordinate Court found in favour of the wife and made an order for *fasakh*, on the ground that:

- a) The husband failed to provide equal justice.
- b) From the fact of non- maintenance by the husband from October 1990 until the case being triad, and it was admitted by the husband.

⁷⁸ [1993] 10 JH 86

- c) Based on *Surah An-Nisa'*: 3. “*Adil*” in this verse denotes to provide maintenance, night turn and accommodation. The husband failed to provide an accommodation to the wife from the date of her job’s transference to Kuala Lumpur.
- d) The Court rely on the *Hadith* of the Prophet, narrated by Abi Hurairah, which the Prophet said, “in the case of the husband cannot maintain the wife, the husband should divorce the wife”.
- e) By referring to one decided case, which is the case of Cik Pah @ Aulah bt. Ahmad v. Abdul Azizi bin Ahmad, which can be said to have the same fact.

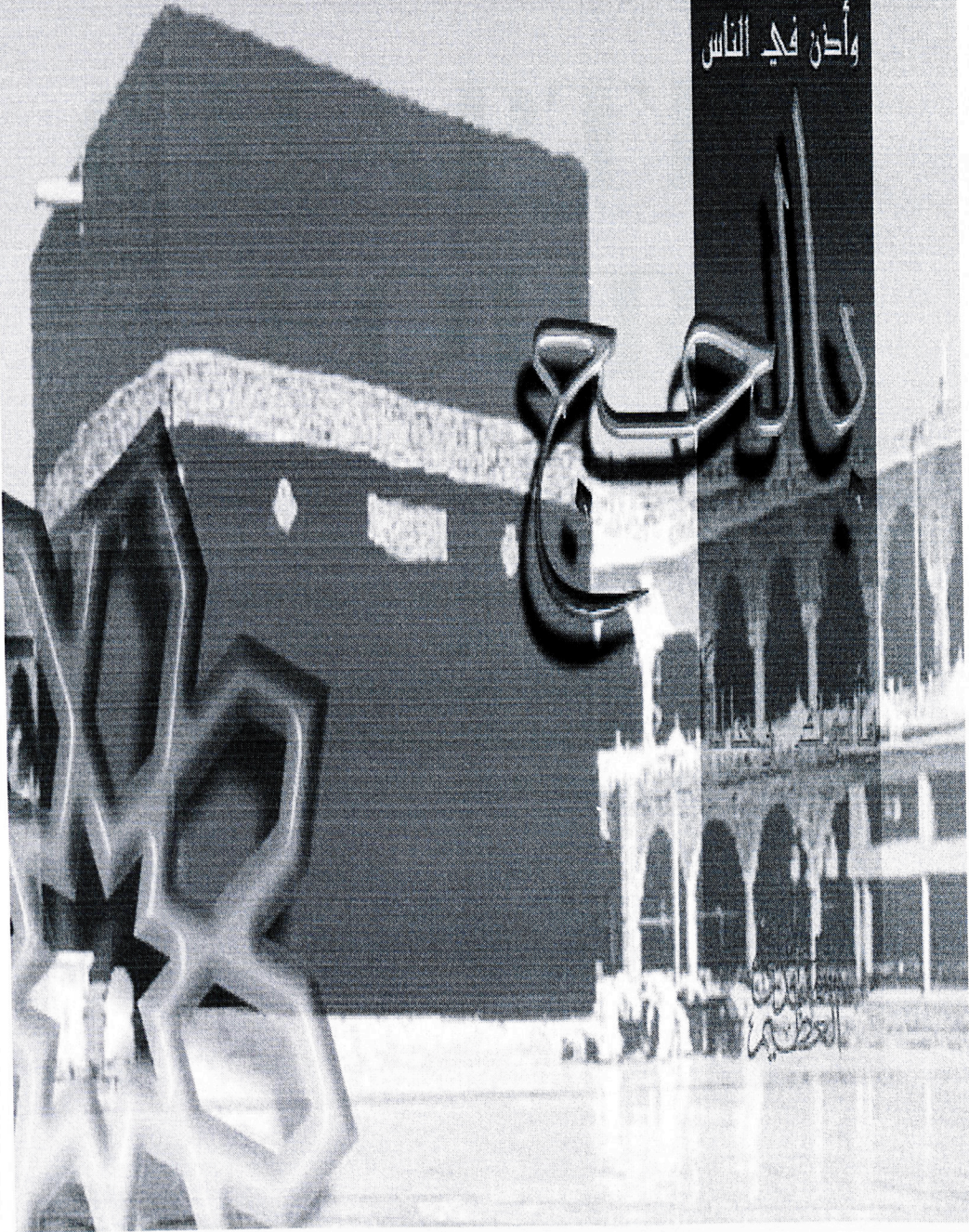
With all the above grounds, the Syariah Subordinate Court come into conclusion by saying that the application by the wife should be granted and therefore, the court dissolve the marriage between Joan Marry Sulaiman @ Joannah Mariam with her husband Sulaiman b. Haji Musa starting from the date of 8th January 1993.

CHAPTER FOUR

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

وأذن في الناس

الجمعة



CHAPTER FOUR

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CHAPTER 4

4.1 THE CASE STUDY ON MONOGAMOUS MARRIAGE IN SELANGOR.

Based on my research in monogamous marriage in Selangor, there are several conflict of cases concerning that type of marriage was happen right now. After, the government enforced the Law Reform (Marriage and Divorce) Act 1976. This fact was proven by the statement gave by the Chief Registrar of Shah Alam High Court⁷⁹. Accordingly, all cases which had been recorded in Malayan Law Journal were rarely happened in Selangor. All the provisions provide in the Law Reform (Marriage and Divorce) Act 1976 had been applied in all those cases which occurred over all states in Malaysia.

It is already known that the purpose of the Law Reform (Marriage and Divorce) Act 1976 is to guide all matters pertaining monogamous marriage of non-Muslim. For instance, the act provides the rules regarding the procedure of registration and solemnization of the marriage, and so on. The Chief Registrar for the second time stressed his words by repeating the statement that a conflict on monogamous marriage happened only in a small number in Selangor.

I also extended my research by looking at several cases through the newspaper⁸⁰. It was explained that a marriage which was solemnized according to the custom without registering it will be considered as invalid in the eyes of laws.

This is because, after the amendment of the Law Reform (Marriage and Divorce) Act 1976 which take effect on 1st March 1982, any solemnization of the marriage although it had been done according to the law, religion, custom or usage, but if the party failed to make a registration for that particular marriage, the Federal Court considered the marriage as not valid.

⁷⁹Tuan Amernudin bin Ahmad, 2004, "*Monogamous Marriage In Selangor*", Interview, 9 January.

⁸⁰Nor Zainah bt Nordin, 2004, "*Perkahwinan Ikut Adat Tanpa Daftar Tidak Sah*". Utusan Malaysia, Malaysia. 30 January. p. 26.

The decision was made unanimously by Dato' Rajan Singh Gill, the judge of the Federal Court, Datin Paduka Rahmah Hussain, the judge of the Appeal Court, Dato' Richard Malanjum. This is as a result from their disagreement on the previous decision on the High Court and Appeal Court.

It should be noted that section 34 of the Law Reform (Marriage and Divorce) Act 1976, cannot be read alone. It should be read together with another related section of the same act. Had the section be read alone, the purpose of the amendment of this act would not be reached. Section 34 denotes that;

"Nothing in this act or the rules made there under shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered".

In the appeal case of *Chai Siew Yin*, the Appeal Court held that the decision made by the High Court was confirmed. In this case, the fact disclose that at the first instance of the trial, the High Court was in the decision that the marriage between Lau Yen Yoon with the respondent, Leong Wee Shing, on 19th November 1995 which was solemnized according to Chinese Customary Law deemed to be valid although the parties didn't register the marriage. The Federal Court allowed the appeal on the ground that the question which arose in this case was concerning general principles and need further detail explanation.

In the statement made by Dr. S. Bala Sekeran; he said that the registration for a marriage which had been solemnized according to the law, religion, custom or usage is mandatory. It is subjected to the provision provides in the Law Reform (Marriage and Divorce) Act 1976, which takes effect on 1st March 1982, that the marriage will be considered to be invalid.

To conclude, it can be said that all matters pertaining marriage, whether its solemnization is under religion or custom. If it is done after 1st March 1982, without being registered in according with the Law Reform (Marriage and Divorce) Act 1976, that particular marriage will be deemed to be invalid in the eyes of laws.

4.2 THE CASE STUDY ON POLYGAMOUS MARRIAGE IN SELANGOR.

This research paper is regarding my research on polygamy which was made in several districts in the state of Selangor. The information regarding that matters was provided by Gombak Timur, Hulu Langat and Shah Alam Subordinate Court. As a result, through the research, I've got 2 cases on polygamy for each district in obtaining the information. At the same time, I've also go through interview session with the Vice Registrar of each court.

In Selangor, the provision that govern the matter on polygamy is provided under section 23 of Selangor Islamic Family Law Enactment. The section required that for those who intend to polygamy, the party should get the permission from his existing wife or wives. However, the most important thing is that he should obtain a written permission from the Syariah judge. Instead, section 123 on the Selangor Islamic Family Law Enactment imposed a penalty for those who contracted polygamy without court's permission.

It should be noted that the application for polygamy should have together with it the permission from the Syariah Subordinate Court and they have to undergo several procedures. The party should attach together all the reasons why should the marriage be permitted. The income of the applicant for that time being, the detail information about the dependants, the suggested expenses or maintenance for dependants, the number of his existing dependants, included the further wife. The necessary things are the permission from the existing wife or wives besides her view, whether the marriage should be permitted or not.

When the applicant fulfills the entire above requirement, his application will be triad at Syariah Subordinate Court. The trial will be held "in camera". A written permission will be granted if the court satisfied with the statement gave by the applicant. The court will take into consideration several matters in allowing the application; the court will observe whether there's any defect on the part of the wife; whether she is barren or having physical weakness or incompetence in performing sexual intercourse or suffering unsoundness of mind. Besides that the applicant should

also has the means to provides equal justice in accordance with *Hukum Syara'*. Moreover, the intention of contracting polygamy should not cause *darar syarie* to his existing wife or wives.

Any party which dissatisfied with the decision of the court can appeal against the decision. The appeal will be triad according to the appeal procedure under the "Administration Enactment" of appeal for civil matters. The decision is upon the judge, whether the appeal should be allowed or to maintain with the decision made by Syariah Subordinate Court.

If the applicant precede the marriage and failed to follow the procedures provides by Syariah Subordinate Court, he should immediately pay the sum of *maskahwin* and the gift to the existing wife or wives. If he cannot provides the sum at that time being, it can be advanced as a debt to the applicant. It is just like an obligation or exchanged to his intention of practicing polygamy with existing wife or wives.

A written permission will be granted if the court satisfied with the information gave by the applicant. Then he can proceed with the registration and solemnization of the marriage. The proceeding should be in line with the provision provides by Selangor Islamic Family Law Enactment.

Should any party contract a polygamous marriage without obtaining a written permission from the act; section 123 of the same enactment provides the penalty of doing so. Section 123 indicates that;

"Any man who, during the subsistence of a marriage, contracts another marriage in any place without 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 with both such fine and imprisonment".

The above provision comes into meaning that those who practice polygamy without court's permission will be entitled to the fine amounted to RM 1000 or with 6 month imprisonment or with both.

Whether someone has a capacity for contracting polygamous marriage or not, it is under the jurisdiction of the Syariah Judge to determine it. The burden of proof is lies on the concerned party to proof whether he has the capability accordance to *Hukum Syarie* or not.

4.2.1 SHAH ALAM SUBORDINATE SYARIAH COURT.⁸¹

FIRST CASE.

The plaintiff is a businessman, applying for polygamy on the reasons that his wife, the defendant has some weaknesses. This was made as the strongest argument by the plaintiff to practice polygamy. Unfortunately, he made the second marriage without obtaining permission from the court and he is having with him two children with the second wife.

Therefore in this case, the court ordered the plaintiff to pay a fine of RM 1000 for his failure to comply with the procedures provides by the provision in the judgment. The court also unanimously agreed that the maintenance for both of the first and second wives is in the amount of RM400 each. The house for both wives are to be provide separately regarding the night turn, the first wife is in the period of 3 days , while the second wife are 4 days.

SECOND CASE.

The plaintiff, who is a chairman in one shipping company, with an income of RM 12,000 per month. He made the application of polygamy on the grounds that; he had sufficient means; he does like the woman and intend to make her to be the second wife. The woman also consented to the marriage.

In his application, he claimed that he can provide equal justice for both wives. Regarding the maintenance, he had allocated RM 2000 for the first wife and RM 1200 for the second wife. Concerning night turn, he had provides two days for each wives.

⁸¹ Ustaz Muhammad Fuad bin Abdul Latip, 2004, "*Polygamous Marriage in Shah Alam*", (interview), 9th January.

4.2.2 HULU LANGAT SUBORDINATE SYARIAH COURT.⁸²

FIRST CASE.

The plaintiff had applied for polygamy with the permission from his existing wife. After both of them went a "*sulh*" session. His reasons for practicing were that; he had fallen in love with his future wife and his first wife had consented to his second marriage. The plaintiff, who is working as a film editor and production manager, contended that he had a sufficient financial capacity, with the income of RM 10,545 per month.

He had agreed to provide RM 500 of maintenance for each of his wives and RM 50 for each of his children. The entire amounts are to be divided to all of his dependants every month.

In term of night turn, the period of two days is in the agreement of each of his wives.

The judge came into conclusion of allowing the application made by the plaintiff and it has to be done in accordance with section 23 under Selangor Islamic Family Law Enactment.

⁸² Ustaz Abdul Hakim bin Mohd Bisri, 2003, "*Polygamy Marriage in Hulu Langat*", (interview), 18th December.

SECOND CASE.

The plaintiff and his second wife had solemnized their marriage without the plaintiff obtaining a permission of polygamy from the court. They got married in South of Thailand and by Wali Hakim. At the time of the trial, the couple had already having with them one child.

Therefore in this case, the party had committed matrimonial offence and should be imposed a penalty as provided by section 123 of Selangor Islamic Family Law Enactment 1984.

The decision was made by the judge and ordered by the plaintiff to pay for the fine of RM 900 and his second wife have to pay RM 800 for contravening the Selangor Islamic Family Law Enactment 1984.

4.2.3 GOMBAK TIMUR SUBORDINATE SYARIAH COURT.⁸³

FIRST CASE.

The plaintiff and defendant had married for almost 20 years, from 1983-2003. Along the marital relationship, they didn't get any child and it lead to the intention of the plaintiff to contract second marriage.

In his statement, the plaintiff gave several reasons to practice polygamy. According to the plaintiff, the defendant was disable and incapacitated in giving child. Furthermore, the defendant had given her permission and he want to prevent him from committing any sinful things. He also contended that polygamy is the practice of the Prophet and it is one of the ways in seeking Allah pleasure.

Concerning the financial capacity, he is working at one of the government institution with the salary of RM 1000 per month. Besides, he also have an additional income amounted to RM 1500 as a taxi driver.

The Syariah Judge gave the decision in favour of the plaintiff on the ground that all the reasons gave by the plaintiff are reasonable according to *Hukum Syara'*. The court also relies on regular absence to the court because of her sickness.

⁸³ Ustaz Haji Harun bin Haji Hashim, 2003, "*Polygamy Marriage in Gombak Timur*", 19th December.

SECOND CASE.

The strongest reason for the plaintiff of practicing polygamy in this case is to pro-long his lineage. The plaintiff and defendant had already married for 7 years from 1996-2003.

The plaintiff claimed that he had a sufficient capacity. He is working with an insurance company and his salary for every month is RM 3,459. At the time application was made, the defendant is still in her *iddah* period.

The Syariah Judge came into conclusion of allowing the application of polygamy made by the plaintiff.

4.3 CASES STATUS ON POLYGAMOUS MARRIAGE IN SELANGOR

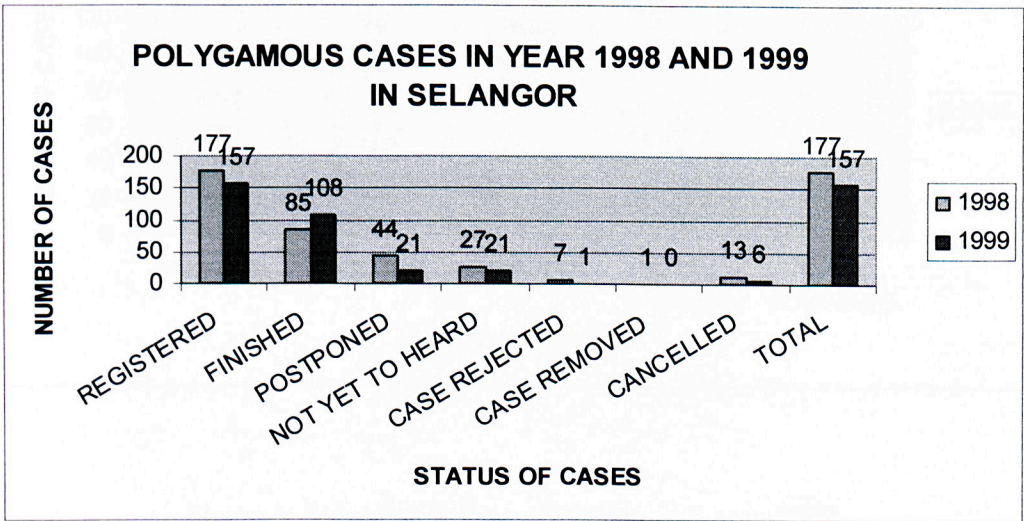


Figure 1: Polygamous Cases in Selangor in year 1998 and 1999.

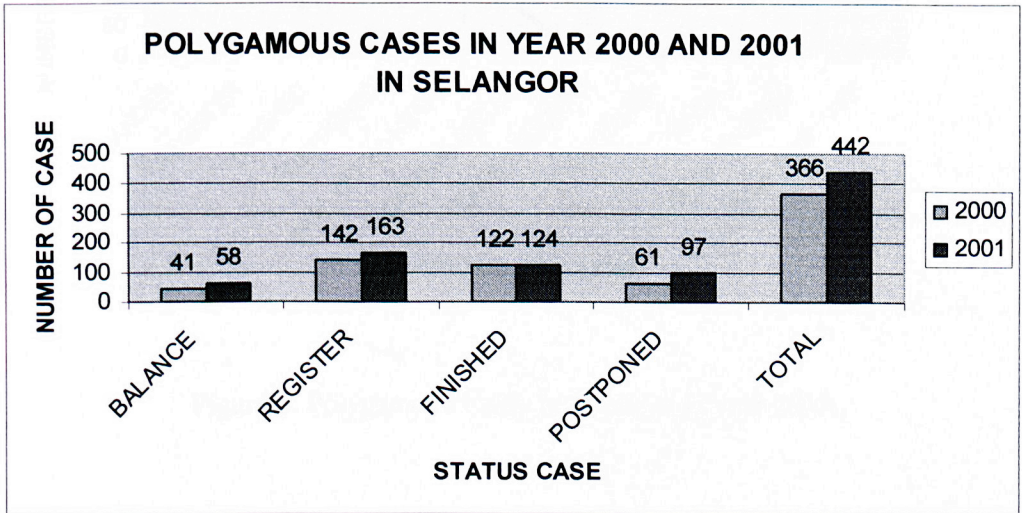


Figure 2: Polygamous Cases in Selangor in year 2000 and 2001.

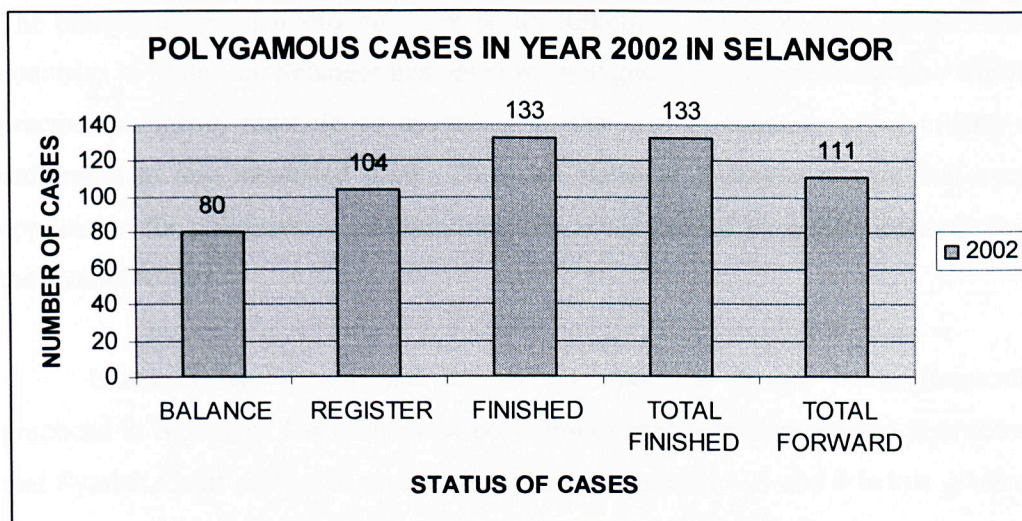


Figure 3: Polygamous Cases in Selangor in year 2002.

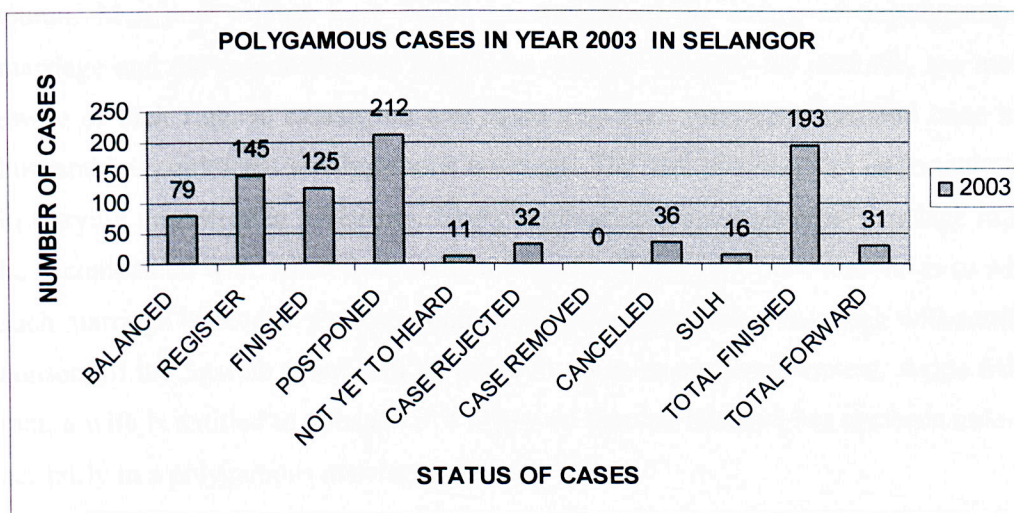


Figure 4: Polygamous Cases in Selangor in year 2003.

Sources: Nasrullah bin Husen, Statistic Unit in Syariah High Court, Shah Alam, Selangor.

The practice of polygamous marriage is not foreign in Selangor. Like other Islamic countries in Malaysia, Selangor has opted for polygamy. However, those who wish to practice polygamy must do so according to the law, in order to avoid cruelty or unfairness to any interested party. Thus, all states in Selangor require that every application for polygamous marriage must be accompanied by written consent from the Syariah Court.

Statistics has shown that polygamous marriage is not being frequently practiced in Selangor. The number of polygamous marriage from year to year shows that Syariah Court prefers to procedure in court. Figure 1, 2, 3 and 4 below gives an overview of practices of polygamous marriage status cases in Selangor from year 1998 to 2003.

The above fact could be contributed to the high level of awareness of Muslims in Selangor as to the strict requirements for polygamous marriage as stated in the Holy Quran. Men and women have begun to understand the nature of a polygamous marriage and the responsibilities that come with it. Women, for instance, are more aware of their right to expect fair and equal treatment from their husband once her husband has contracted a polygamous marriage. The law also plays an important part in retrying uncontrolled polygamy. Every application for polygamous marriage must be accompanied with, aside from written consent of Syariah Court, reasons as to why such marriage is needed. Persons contracted into a polygamous marriage without the consent of the Syariah Court will be liable to a fine or an imprisonment. Aside from that, a wife is entitled to a *fasakh* if it is proved that her husband has not been able to act fairly in a polygamous marriage.

The Syariah Court, in allowing a person to practice polygamous, must look into certain criteria that have to be fulfilled by the applicant. There are instances where polygamy applications are being rejected by the Syariah Court on grounds that the applicant did not fulfill the expected requirements. Figure 1-4 will show the numbers of polygamy application rejected from the years 1998-2003.

That figures shows although there are instances where a polygamous application is rejected, the possibility for an application to be rejected are minimal compared to the possibility of an application to be accepted. This fact has give rise to another area of concern as Syariah Court judges are known to be too lenient in allowing a polygamy application. Although part of the requirement for a man to practice polygamous marriage is that he must be financially sound, the Syariah Court has been known to allow an application where the applicant made less than RM 1000 a month. This is not a sound practice as with that amount of money, much less the large family that will probably result. Several reasons forwarded by these judges in allowing such application range from: to avoid adultery, to provide care for a widow or to avoid disaster in the present marriage. It is true that the reasons forwarded by these judges have merit but justice will not be served in this situation, especially on the wife. Justice is only served on the part of the husband for the benefit of his personal interest, which is usually the case.

Decisions of Syariah Court judges in this regard will bring more harm rather than harmony. This practice will expose women and children to abuse and cruelty. Thus something has to be done to condone this practice. In order to that, the law that governs polygamous in Selangor must be reviewed.

CHAPTER FIVE



Derived from the book " Farewell khutbah of the Prophet " [5]
" Ashhadu 'anna lâ ilâha illâ Allâh .. "

CHAPTER FIVE

5.1 Conclusion and Suggestion.

87-88

CHAPTER FIVE

5.1 CONCLUSION.

Under the Law Reform (Marriage and Divorce) Act 1976, the court has the power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any of such assets and the division between the parties of the proceeds of sale. In exercising such power the court shall have regard to:

- (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
- (b) any debts owing by either party which were contracted for their joint benefit;
- (c) the welfare of the minor children, if any, of the marriage

And subject to those considerations, the court shall incline towards equality of division.

The court shall also have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds the sale. In exercising such power the court shall have regard to:

- (a) the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
- (b) the needs of the minor children, if any, of the marriage

And subject to those considerations, the court may distribute the assets or the proceeds of sale in such proportions as the court thinks reasonable, but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

It is provided that references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

From what we have discussed so far it is proven that polygamy in Islam is, both in theory and in practice, an exception rather than a rule, and as an exception it is a remedy for many of the evils of modern civilization.

The weakness of the laws on polygamy is a point of interest in section 12(2) of the Islamic Family Law Enactment 1984. The section allows the registration of a marriage which is in contravention of the Act, but valid according to Islam. This section is seen as a easy way out for those who wish to practice polygamy. Those whose applications were rejected by the Syariah Court can still practice polygamy by solemnizing the marriage elsewhere, and then register the marriage in accordance to the Act. So long as the marriage is solemnized according to Islam, and after paying the fine for contracting polygamy without the permission of the Syariah Court, the marriage can still be registered and considered valid. This section has to be given due consideration by the legislature if they were to achieve a controlled practice of polygamy.

It is not only the preponderance of females over males that necessitates polygamy in certain places, but the variety of other circumstances which require polygamy to be adopted under exceptional circumstances, not only for the moral but also physical welfare of the society. However, the permission to enter into polygamous marriages has been abused by certain quarters in every Muslim society. Thus, some Muslim countries have gone further than merely controlling the practice of polygamy and have attempted to abolish it.

To avoid injustice in the practice of polygamy, it must be ensured that a woman who is willing to accept her husband's polygamous marriage to another woman should at least not be made to suffer any financial or material injustice due to it and no woman should be compelled to accept her husband's polygamy or be forced to live in a polygamous marriage. What is called for here is that a better understanding of polygamy and the responsibilities that would arise as a result of such practice should be well broadcast to every layer of the Muslim society, men especially.

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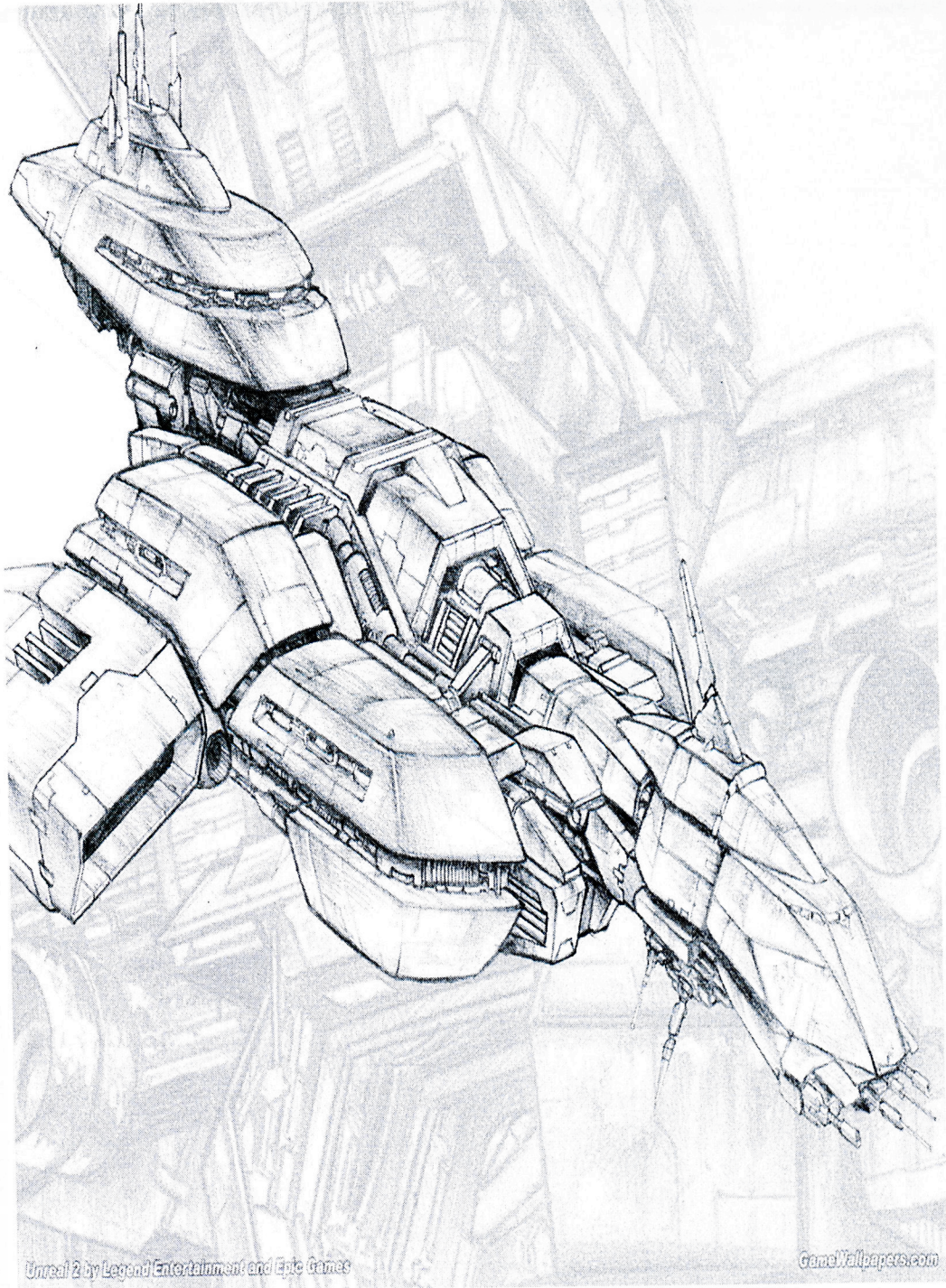
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APPENDICES

APPENDICES

ENAKMEN UNDANG-UNDANG KELUARGA ISLAM SELANGOR
No. 4 TAHUN 1984

BORANG 1B/FORM 1B
(Seksyen 16 dan 23/Section 16 and 23)

PERMOHONAN OLEH LELAKI YANG BERISTERI UNTUK BERKAHWIN

1. Nama.....
2. No. Kad Pengenalan.....Warna.....
No. Pasport.....Warganegara.....
Tarikh Lahir.....Bangsa.....
Alamat Rumah.....
.....
Alamat Pejabat.....
.....
Pekerjaan.....Pendapatan.....
Tarikh Muallaf (jika berkenaan).....
3. Saya memohon berkahwin dengan.....
No. Kad Pengenalan.....Warna.....
No. Pasport.....Warganegara.....
Tarikh Lahir.....Bangsa.....
Alamat Rumah.....
.....
Alamat Pejabat.....
.....
Tarikh Muallaf (jika berkenaan).....
4. Saya memohon untuk melangsungkan perkahwinan (akad nikah) ini pada $\frac{H}{M}$
di tempat (alamat).....
.....
Kariah Masjid.....Dacrah.....
5. Saya ialah seorang yang masih beristeri.
 - (i) Nama isteri pertama.....
No. Kad Pengenalan.....Warna.....Tarikh Lahir.....
Bilangan anak.....
Alamat.....
 - (ii) Nama isteri kedua.....
No. Kad Pengenalan.....Warna.....Tarikh Lahir.....
Bilangan anak.....
Alamat.....

(iii) Nama isteri ketiga.....
 No. Kad Pengenalan.....Warna.....Tarikh Lahir.....
 Bilangan anak.....
 Alamat.....

6. Saksi-saksi saya ialah:

(1) Nama.....
 No. Kad Pengenalan.....Tarikh Lahir.....
 Alamat (Rumah).....
 Alamat (Pejabat).....

(2) Nama.....
 No. Kad Pengenalan.....Tarikh Lahir.....
 Alamat (Rumah).....
 Alamat (Pejabat).....

PERHATIAN:

Mengikut Seksyen 23 (3), permohonan ini hendaklah disertai dengan suatu akuan menyatakan alasan-alasan mengapa perkahwinan yang dicadangkan itu dikatakan patut dan perlu, pendapatan pemohon pada masa itu, butir-butir komitmennya dan kewajipan dan tanggungan kewangannya yang patut ditentukan, bilangan orang tanggungannya, termasuk orang-orang yang akan menjadi orang tanggungannya berikutan dengan perkahwinan yang dicadangkan itu dan sama ada izin atau pandangan isteri atau isteri-isterinya yang sedia ada telah diperolehi atau tidak terhadap perkahwinan yang dicadangkan itu.

PERAKUAN PEMOHON

Saya mengaku segala butir-butir yang terkandung di dalam borang ini adalah benar dan sekiranya butir-butir itu palsu maka saya melakukan satu kesalahan dan boleh dikenakan hukuman mengikut seksyen 38, Enakmen Undang-Undang Keluarga Islam, Selangor No. 4 Tahun 1984.

Tarikh $\frac{H}{M}$

.....
 Tandatangan/Cap Jari Pemohon

PERAKUAN SAKSI-SAKSI

Adalah kami yang menurunkan tandatangan di bawah ini naik saksi bahawa segala butir-butir di atas adalah benar.

Tarikh $\frac{H}{M}$

.....
 (1) Tandatangan/Cap Jari Saksi

.....
 (2) Tandatangan/Cap Jari Saksi

(Keterangan Ketua Pendaftar atau Pendaftar atau Timbalan Pendaftar atau Penolong Pendaftar bagi Kariah Masjidnya atau pihak berkuasa yang sebenar bagi negerinya jika pihak lelaki adalah bermastautin di Kariah Masjid yang berlainan dari Kariah Masjid pihak perempuan atau di negeri lain).

Keterangan yang tercatat oleh pemohon di atas ini adalah benar dan dia adalah seorang yang *beristeri/ sudah bercerai hidup pada..... dan tidak rujuk kepadanya dan mempunyai anak seramai.....orang.

Lain-lain keterangan:

.....
.....
.....

Tarikh $\frac{H}{M}$

Tandatangan

NAMA

ALAMAT

Catatan oleh Pendaftar:

.....
.....

Tarikh $\frac{H}{M}$

Tandatangan Pendaftar

(UNTUK KEGUNAAN RASMI SAHAJA)

Permohonan diterima pada.....
Bilangan Permohonan.....
Catatan Pendaftar.....
Permohonan *diluluskan/tidak diluluskan.....
Bilangan Kebenaran Kahwin.....

Tarikh $\frac{H}{M}$

Tandatangan Pendaftar



Bil Aduan:

BORANG ADUAN

1. **YANG MENGADU**

Nama : _____ No. K.P.: _____

Umur : _____ Berasal: _____

Alamat dlm. K.P.: _____

Alamat sekarang: _____

Lama tinggal di daerah ini _____ bulan/tahun

No. Kad Tukar Alamat: _____ Pekerjaan: _____

Pendapatan: RM _____ sebulan. Alamat tempat kerja _____

No. Tel. Rumah _____ Pejabat _____

Taraf Pendidikan: _____

No. Sijil Nikah/Cerai/Rujuk bil: _____

Pejabat Kadi: _____ Negeri: _____ Pada: _____

Bil. anak dengan kena adu: _____ orang. Lelaki _____ Perempuan _____

2. **YANG KENA ADU**

Nama : _____ No. K.P.: _____

Umur : _____ Berasal: _____

Alamat sekarang: _____

Lama tinggal di daerah ini _____ bulan/tahun

No. Kad Tukar Alamat: _____ Pekerjaan: _____

Pendapatan: RM _____ sebulan. Alamat tempat kerja _____

No. Tel. Rumah _____ Pejabat _____

Taraf Pendidikan: _____

3. **ADUAN DAN MASALAH YANG DIKEMUKAKAN.**
(Sila buat nombor dan perenggan)

**PERATURAN DAN BUTIRAN PENDAFTARAN YANG DIPERLUKAN SEMASA MEMFAILKAN KES
(PERMOHONAN POLIGAMI)**

1.	Saman dan Penyata Tuntutan	1 asal & 2 salinan
2.	Borang Permohonan Lelaki Berpoligami (1B)	1 asal & 2 salinan
3.	Salinan Surat Nikah / Rujuk	3 salinan
4.	Salinan Kad Pengenalan Pemohon	3 salinan
5.	Salinan Kad Pengenalan Isteri	3 salinan
6.	Salinan Kad Pengenalan Bakal Isteri	3 salinan
7.	Salinan Sijil Kelahiran anak – anak	3 salinan
8.	Slip gaji (Penyata Pendapatan Terkini)	1 asal
9.	Tambahan salinan diperlukan mengikut bilangan isteri yang ada	
10.	Bayaran Pendaftaran	RM 49.00

- Sila pastikan alamat pemastautin anda adalah seperti di alamat pada kad pengenalan, jika tidak sila dapatkan surat pengesahan tempat tinggal daripada ketua Kampung / Penghulu / Pengerusi JKKK / Ketua Kesatuan Penduduk atau kemukakan bil air / bil elektrik atas nama pemohon send
 - Sila pastikan setiap salinan borang hendaklah disahkan.
 - Setiap urusan pendaftaran hanya boleh dibuat sehingga jam 3.30 petang sahaja.
 - Sila semak semula borang anda dan pastikan ia mengikut kehendak butiran di atas untuk mengelakkan sebarang kesulitan semasa pendaftaran.
-

ENAKMEN TATACARA MAL MAHKAMAH SYARIAH
(NEGERI SELANGOR) 2003

(Seksyen 8(a))

SAMAN

DALAM MAHKAMAH RENDAH SYARIAH GOMBAK TIMUR
JALAN AU 2A/17, TAMAN SRI KERAMAT, 54200 KUALA LUMPUR.
TINDAKAN KES MAL BIL.....(1)TAHUN 2003

DI ANTARA

.....(2) PLAINTIF/PEMOHON

DAN

.....(3) DEFENDAN/RESPONDEN

Kepada :.....(3) Defendan / Responden yang
dinamakan di atas iaitu seorang.....(4) yang tinggal (atau mempunyai
tempat urusannya atau bekerja) di.....
.....
.....(5)

KAMU ADALAH DENGAN INI DISAMAN supaya hadir sendiri atau diwakili oleh peguam syarie kamu di hadapan Mahkamah yang tersebut di atas pada pukul (6) pagi / petang pada(6) haribulan(6) 2003 untuk menjawab suatu tuntutan terhadap kamu oleh pihak Plaintiff / Pemohon yang tersebut di atas dan butir – butir mengenai tuntutan ada dinyatakan dalam pernyataan tuntutan yang diendorskan di sini.

Ambil perhatian bahawa sekiranya kamu ingkar hadir di Mahkamah ini pada hari dan masa yang ditetapkan, penghakiman boleh diberikan terhadap kamu.

Dan ambil perhatian bahawa jika kamu ingin membela diri terhadap tuntutan tersebut, kamu mestilah, tidak kurang daripada dua hari sebelum tarikh yang tersebut di atas memfailkan di Mahkamah ini dan menyampaikan kepada pihak Plaintiff / Pemohon suatu pembelaan mengikut cara – cara yang sepatutnya.

Bertarikh.....haribulan.....2003.

Pendaftar / Hakim

Alamat penyampaian bagi pihak Plaintiff ialah.....
.....(7)

- (1) Di isi oleh Mahkamah
- (2) Masukkan nama pihak Plaintiff / Pemohon
- (3) Masukkan nama pihak Defendan / Responden
- (4) Masukkan pekerjaan Defendan / Responden
- (5) Masukkan alamat lengkap pihak Defendan / Responden
- (6) Di isi oleh Mahkamah

PERNYATAAN TUNTUTAN
POLIGAMI

1. SayaNo.K/P:.....

beralamat di

adalah Plaintiff dalam kes ini .

2. Isteri sayaNo. K/P:.....

beralamat di

adalah pihak Defendan .

3. Kami telah bernikah padaDi

.....

Hasil perkahwinan dikurniakan Anak iaitu :-

1) Tarikh lahirLelaki /perempuan

2) Tarikh lahirLelaki /perempuan

3) Tarikh lahirLelaki /perempuan

4) Tarikh lahirLelaki /perempuan

5) Tarikh lahirLelaki /perempuan

4. Saya ingin bernikah lagi dengan

No. K/P: beralamat di

.....

dengan alasan – alasan berikut :-

1)

2)

3)

4)

5)

5. Saya bekerja sebagai Dengan pendapatan sebanyak RM sebulan dan mempunyai pendapatan lain iaitu sebanyak RM sebulan .(Sesalinan slip gaji dilampirkan)

6. Tanggungan saya seramai orang termasuk orang yang menjadi tanggungan berikutan perkahwinan yang dicadangkan .

7.Saya berjanji akan memberi :-

- 1) Nafkah kepada isteri yang sedia ada sebanyak RM
- 2) Nafkah kepada anak – anak sebanyak RM
- 3) Nafkah kepada bakal isteri sebanyak RM

8. Saya mohon kepada Mahkamah agar meluluskan permohonan saya dan sekiranya Mahkamah meluluskan permohonan saya ini , saya berkikrar dan berjanji akan perkara – perkara berikut:-

- 1) Berlaku adil terhadap isteri – isteri saya
- 2) Menjalankan tugas dan tanggungjawab terhadap isteri dan anak – anak .
- 3) Menyediakan tempat tinggal yang berasingan antara isteri – isteri saya .
- 4) Cara giliran
- 5) Lain – lain (Jika ada).....

9. Isteri pertama / kedua / ketiga saya bersetuju / tidak bersetuju dengan perkahwinan yang dicadangkan .

10. Dengan ini saya mohon Mahkamah meluluskan permohonan saya untuk berpoligami selari dengan peruntukan di bawah Seksyen 23(3) Enakmen Undang – undang Keluarga Islam Selangor 1984 .

Bertarikh pada haribulan 200....

(5)

Tandatangan Plaintiff /
Peguam Syarienya

Penyata Tuntutan ini difailkan oleh yang beralamat di

.....
.....

PERINGATAN :- * Potong yang tidak berkenaan

- 1) Diisi oleh Mahkamah
- 2) Diisi oleh Mahkamah
- 3) Isikan nama pemohon
- 4) Isikan nama penentang
- 5) Hendaklah ditandatangani oleh Pihak Plaintiff atau Peguam Syarienya

PENYATA TUNTUTAN PERMOHONAN POLIGAMI

1. Saya _____ (Nama Penuh) No K/p: _____
yang tinggal di _____
_____ dan telah beristeri _____ (nama penuh)
dan tinggal di _____

2. Kami telah bernikah pada _____ (tarikh) di _____ (tempat)
dan dikurniakan _____ (bil.anak),orang anak iaitu:-

nama anak	tarikh lahir
a. _____	_____
b. _____	_____
c. _____	_____
d. _____	_____
e. _____	_____

3. Saya bercadang bernikah lagi dengan _____ (nama bakal isteri)
No. K/p: _____ atas alasan-alasan seperti berikut:-

a. _____
b. _____

4. Sekiranya permohonan ini diluluskan saya sanggup untuk melaksanakan
tanggungjawab dan menyediakan peruntukan-peruntukan berikut:-

a. Isteri Pertama	
I. Makan/ Minum	RM.
II. Tempat Tinggal	RM.
III. Pakaian/Perubatan dll	RM.
b. Anak-anak.	
I. Makan/Minum	RM.
II. Tempat Tinggal	RM.
III. Pakaian/Perubatan dll	RM.
C. Bakal Isteri.	
I. Makan/Minum	RM.
II. Tempat Tinggal	RM.
III. Pakaian/Perubatan dll	RM.

5. Sekiranya diluluskan saya akan memberi gili an antara isteri seperti
berikut:-

a. Isteri Pertama :
b. Bakal Isteri:

6. Saya mengharapkan agar permohonan saya ini diluluskan oleh pihak
mahkamah ini.

.....
/tangan Pemohon
Tarikh:

KEPADA SESIAPA YANG BERKENAAN

Tuan/Puan,

**PENGESAHAN SEBAGAI MAHASISWA / MAHASISWI KOLEJ UNIVERSITI ISLAM MALAYSIA
(KUIM)**

Dengan segala hormatnya pihak saya ingin memaklumkan bahawa mahasiswa/mahasiswi berikut adalah pelajar daripada Universiti kami. Sehubungan itu kami memohon kerjasama daripada pihak tuan/puan untuk membantu pelajar berkenaan bagi mendapatkan maklumat akademik yang diperlukan oleh mereka.

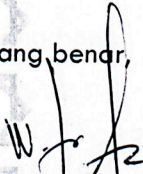
NAMA PELAJAR : MOHD. HAIRUDDIN NIZAM B. KAMARUDDIN
NO. I/C : 800922-14- 5317
MATRIK : P010267
TAHUN : AKHIR
**PROJEK ILMIAH : POLYGAMOUS MARRIAGE AND MONOGAMOUS
MARRIAGE IN SELANGOR (CASE STUDY)**

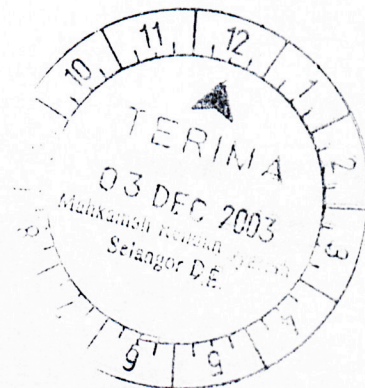
Segala kerjasama dan perhatian daripada pihak tuan/puan di dahului dengan ucapan ribuan terima kasih.

Sekian, terima kasih.

“BERILMU, BERDISIPLIN DAN BERTAKWA”

Yang benar,


WAN FAURIAH BT. WAN SAMAD
Penolong Pendaftar
b.p: Dekan
Fakulti Syariah dan Undang-undang



KEPADA SESIAPA YANG BERKENAAN

Tuan/Puan,

**PENGESAHAN SEBAGAI MAHASISWA / MAHASISWI KOLEJ UNIVERSITI ISLAM MALAYSIA
(KUIM)**

Dengan segala hormatnya pihak saya ingin memaklumkan bahawa mahasiswa/mahasiswi berikut adalah pelajar daripada Universiti kami. Sehubungan itu kami memohon kerjasama daripada pihak tuan/puan untuk membantu pelajar berkenaan bagi mendapatkan maklumat akademik yang diperlukan oleh mereka.

NAMA PELAJAR : MOHD. HAIRUDDIN NIZAM B. KAMARUDDIN
NO. I/C : 800922-14- 5317
MATRIK : P010267
TAHUN : AKHIR
**PROJEK ILMIAH : POLYGAMOUS MARRIAGE AND MONOGAMOUS
MARRIAGE IN SELANGOR (CASE STUDY)**

Segala kerjasama dan perhatian daripada pihak tuan/puan di dahului dengan ucapan ribuan terima kasih.

Sekian, terima kasih.

"BERILMU, BERDISIPLIN DAN BERTAKWA"

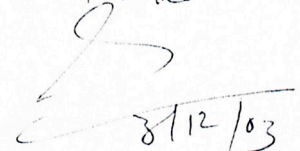
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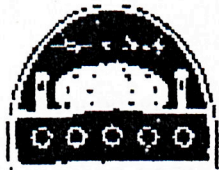

WAN FAURIAH BT. WAN SAMAD

Penolong Pendaftar

b.p: Dekan

Fakulti Syariah dan Undang-undang

Diluluskan

8/12/03
NORSHILA BT. DATO' HJ. KAMARUDDIN
MAJISTREY
MAHKAMAH MAJISTREY
AMPANG SELANGOR



KOLEJ UNIVERSITI ISLAM MALAYSIA
جامعة العلوم الإسلامية بماليزيا
ISLAMIC UNIVERSITY COLLEGE OF MALAYSIA

Fakulti Syariah dan Undang- Undang
Tel: 03-42892007/2009 Fax 03-42892197

12 Januari 2004

TUAN PENGARAH
JABATAN PENDAFTARAN NEGARA
TINGKAT 7, PLAZA MASALAM, SEKSYEN 9,
40150, SHAH ALAM,
SELANGOR DARUL EHSAN.

MELALUI

ABD. HAMID ABD. MURAD
TIMBALAN DEKAN
FAKULTI SYARIAH DAN UNDANG-UNDANG
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ABD HAMID ABD MURAD
Timbalan Dekan
Fakulti Syariah dan Undang-undang
Kolej Universiti Islam Malaysia (KUIM).

Assalamualaikum warahmatulallahii wbt,

Tuan/Puan,

MEMOHON KEBENARAN UNTUK MENJALANKAN KAJIAN(PROJEK ILMIAH) DI
INSTITUSI TUAN/PUAN.

Dengan segala hormatnya merujuk perkara diatas.

2. Adalah dimaklumkan bahawa, saya dikehendaki menyiapkan satu Projek Ilmiah yang bertajuk "Monogamous marriage and Polygamous marriage in Selangor" bagi memenuhi sebahagian daripada keperluan Kursus KA 3063 (Projek Ilmiah) untuk melayakkan saya mendapat Ijazah Sarjana Muda Syariah dan Kehakiman.

3. Sehubungan itu saya ingin mendapatkan maklumat mengenai institutuan tuan/puan, antaranya ialah, **borang-borang yang berkaitan mengenai monogami, prosedur dalam membenarkan untuk berkahwin, statistik perkahwinan yang berdaftar di negeri Selangor bagi tahun 1998-2003 dan sebagainya.** Untuk pengetahuan pihak tuan saya ingin menjalankan kajian tersebut pada tarikh berikut :

Hari : **Jumaat**
Tarikh : **13 Februari 2004**
Masa : **Pagi**

4. Bersama-sama ini dilampirkan surat pengesahan pelajar untuk makluman dan tindakan lanjut pihak tuan/puan.

Segala kerjasama dan perhatian dari pihak tuan di dahului dengan ucapan ribuan terima kasih.

Sekian.

“BERILMU, BERDISPLIN DAN BERTAQWA”

Yang Benar

Mohd.Hairuddin Nizam bin Kamaruddin (PO1O267)
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Fakulti Syariah dan Undang-undang,
Kolej Universiti Islam Malaysia.

s.k ~

Penyelia Projek Ilmiah,
Tuan Sheikh Salim Sheikh Salleh

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PEN. PENDAFTAR : UST. ABD HAKIM BIN MOHD BISRI

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PERSIARAN PERBANDARAN,
40000 SHAH ALAM, SELANGOR.

HAKIM : TN. ABU BAKAR BIN HJ. MOHD DAUD

PEN. PENDAFTAR : UST. MUHAMMAD FUAD BIN ABDUL LATIF

MAHKAMAH TINGGI SYARIAH SELANGOR,
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SULTAN SALAHUDDIN ABDUL AZIZ SHAH,
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KETUA HAKIM : Y.A.A DATO' HJ. ZOHDI BIN HJ. TOHA

HAKIM MTS : Y.A HJ. MUKHYUDDIN BIN HJ. IBRAHIM

PENDAFTAR : PN. NOR HADINA BINTI AHMAD ZABIDI

**PEN. PENDAFTAR KANAN : UST. SHAHRUDIN BIN HANIN
HAMJAH**

PEGAWAI STATISTIK : EN. NASRULLAH BIN HUSEN

Perkahwinan ikut adat tanpa daftar tidak sah

Oleh NOR ZAINAH NORDIN

PUTRAJAYA 29 Jan. — Mahkamah Persekutuan di sini hari ini memutuskan bahawa perkahwinan yang diupacarakan mengikut undang-undang, agama atau adat tanpa didaftarkan selepas 1 Mac 1982 dengan Pendaftaran Perkahwinan adalah tidak sah di sisi undang-undang negara ini.

Hakim Datuk Pajan Singh Gill yang bersidang bersama Hakim Mahkamah Persekutuan Datin Paduka Rahmah Hussain dan Hakim Mahkamah Rayuan Datuk Richard Malanjam membuat keputusan itu dengan sebulat suara.

“Setelah mendengar hujah-hujah dan membuat pertimbangan terhadap peruntukan dalam Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 serta keadaan kes ini, kami sebulat suara memutuskan untuk membenarkan rayuan ini,” katanya.

Menurut beliau, mahkamah tidak bersetuju dengan alasan-alasan penghakiman yang diputuskan dalam Mahkamah Tinggi dan Mahkamah Rayuan yang mendengar rayuan itu sebelum ini.

Ini kerana, katanya, Seksyen 34 akta berkenaan tidak boleh dibaca secara bersendirian, sebaliknya perlu dibaca bersama peruntukan-peruntukan lain dalam akta itu.

Katanya, jika seksyen berkenaan dibaca secara berasingan, maka ia telah mencatatkan tujuan dan niat perundangan dalamewartakan Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976.

“Akta itu diwujudkan semata-mata untuk perkahwinan monogami dan upacara serta pendaftaran perkahwinan seumpama itu,” tegasnya.

Keputusan

Seksyen 34 akta berkenaan memperuntukkan bahawa tiada sebarang peraturan di dalam akta itu yang mengesahkan atau membatalkan sebarang perkahwinan dengan alasan semata-mata ia tidak didaftarkan.

Chai Siew Yin, 73, memfailkan rayuan terhadap keputusan Mahkamah Rayuan pada 21 Jun 2000 yang mengekalkan dan mengesahkan keputusan Mahkamah Tinggi.

Pada 22 September 1999, mahkamah tersebut telah mengisytiharkan perkahwinan mengikut adat resam Cina antara Lau Yen Yoon (telah meninggal dunia) dengan responden, Leong Wee Shing, 30-an, pada 19 November 1995 adalah sah. Perkahwinan itu telah tidak didaftarkan.

Mahkamah Persekutuan membenarkan permohonan bagi rayuan terhadap keseluruhan keputusan tersebut atas satu alasan prinsip bahawa wujudnya persoalan utama dan prinsip am untuk kali pertama yang mana memerlukan penghujahan selanjutnya.

Dalam penghujahannya, peguam Dr. S. Bala Sekaran berkata, pendaftaran perkahwinan yang diupacarakan di bawah undang-undang, agama atau adat adalah mandatori mengikut peruntukan di dalam Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 yang dikuatkuasakan mulai 1 Mac 1982.

“Walaupun diterima dan diakui, perkahwinan mengikut upacara agama atau adat resam selepas 1 Mac 1982 adalah tidak mencukupi dari segi perundangan yang sah dan tidak diiktiraf sebagai perkahwinan selepas tarikh itu.



**Permohonan Berpoligami Mengikut
Peruntukan Enakmen Undang-Undang
Keluarga Islam Negeri Selangor
No. 4 Tahun 1984 Pindaan 1988**

Muqaddimah

Surah An Nissa' ayat 3:

Terjemahan:

Dan jika kamu takut tidak dapat berlaku adil terhadap (hak-hak) perempuan yang yatim (bila mana kamu mengahwininya), maka kahwinilah wanita-wanita (lain) yang kamu senang; dua, tiga atau empat. Kemudian jika kamu takut tidak akan berlaku adil, maka kahwinilah seorang sahaja, atau budak-budak yang kamu miliki (hamba sahaya). Yang demikian itu adalah lebih dekat kepada tidak berbuat aniaya.

Sabda Rasulullah S.A.W ertinya:

“Mukmin yang paling sempurna imannya ialah orang paling baik pekertinya dan sebaik-baik kamu adalah orang yang paling baik terhadap isterinya.”

**Peruntukan Seksyen 23 Enakmen Undang-Undang Keluarga Islam Selangor
No. 4 1984 Pindaan 1988.**

23. (1) Tiada seseorang lelaki boleh berkahwin dengan seorang lain dalam masa ia masih beristerikan isterinya yang sedia ada kecuali dengan terlebih dahulu mendapatkan kebenaran secara bertulis daripada Hakim Syar'iah, akan tetapi dan tertakluk kepada Seksyen 123, jika ia berkahwin sedemikian tanpa kebenaran tersebut maka perkahwinan itu boleh didaftarkan di bawah Enakmen ini dengan perintah Mahkamah.

(2) Seksyen kecil (1) adalah terpakai bagi pernikahan dalam Negeri Selangor, seseorang lelaki yang bermastautin dalam atau di luar Negeri Selangor dan perkahwinan di luar Negeri Selangor, seseorang lelaki yang bermastautin dalam Negeri Selangor.

(3) Permohonan untuk kebenaran hendaklah dikemukakan kepada Mahkamah Rendah Syariah mengikut cara yang ditetapkan dan hendaklah disertai dengan suatu akuan menyatakan alasan-alasan mengapa perkahwinan yang dicadangkan itu patut dan perlu, pendapat pemohon pada masa itu,

butir-butir komitmennya dan kewajipannya dan tanggungan kewangan yang patut ditentukan, bilangan orang tanggungannya, termasuk orang-orang yang menjadi tanggungannya berikutan dengan perkahwinan yang dicadangkan itu, dan sama ada izin atau pandangan isteri atau isteri-isterinya yang sedia ada telah diperolehi atau tidak terhadap perkahwinan yang dicadangkan itu.

(4) Apabila menerima permohonan itu, Mahkamah hendaklah memanggil pemohon dan isteri atau isteri-isterinya yang sedia ada supaya hadir apabila permohonan itu didengar, yang hendaklah dilakukan dalam Mahkamah tertutup, dan Mahkamah boleh memberi kebenaran yang dipohon itu jika berpuashati:-

(a) bahawa perkahwinan yang dicadangkan itu adalah patut dan perlu, memandang kepada antara lain, hal-hal keadaan yang berikut; iaitu, kemandulan, keuzuran jasmani untuk persetubuhan, sengaja ingkar mamatuhi perintah untuk pemulihan hak-hak persetubuhan, atau gila dipihak isteri atau isteri-isteri yang sedia ada;

(b) bahawa pemohon mempunyai kemampuan yang membolehkan ia menanggung, sebagaimana dikehendaki oleh Hukum Syara', semua isteri dan orang tanggungannya, termasuk orang-orang yang akan menjadi orang-orang tanggungannya berikutan dengan perkahwinan yang dicadangkan itu;

(c) bahawa pemohon akan berupaya memberi layanan sama rata kepada semua isterinya mengikut kehendak Hukum Syara’;

(d) bahawa perkahwinan yang dicadangkan itu tidak akan menyebabkan darar Syar’i kepada isteri atau isteri-isteri yang sedia ada.

(5) Satu salinan permohonan di bawah seksyen kecil (3) dan akuan berkanun yang dikehendaki oleh seksyen kecil itu hendaklah disampaikan bersama dengan surat panggilan ke atas tiap-tiap isteri yang sedia ada.

(6) Mana-mana pihak yang terkilan atau tidak puashati dengan apa-apa keputusan Mahkamah boleh merayu terhadap keputusan itu mengikut cara yang diperuntukkan dalam Enakmen Pentadbiran bagi rayuan dalam perkara sivil.

(7) Seseorang yang berkahwin bersalahan dengan seksyen kecil (1) hendaklah membayar dengan serta merta semua jumlah mas kahwin dan pemberian yang kena dibayar kepada isteri atau isteri-isteri yang sedia ada, dan jumlah itu, jika tidak dibayar sedemikian, boleh dituntut sebagai hutang.

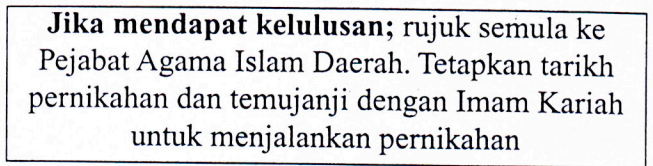
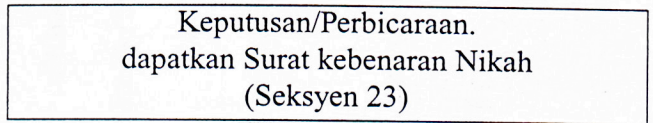
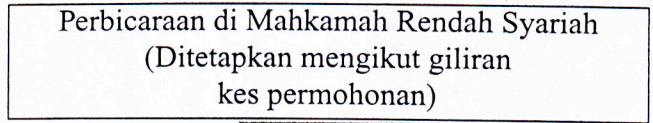
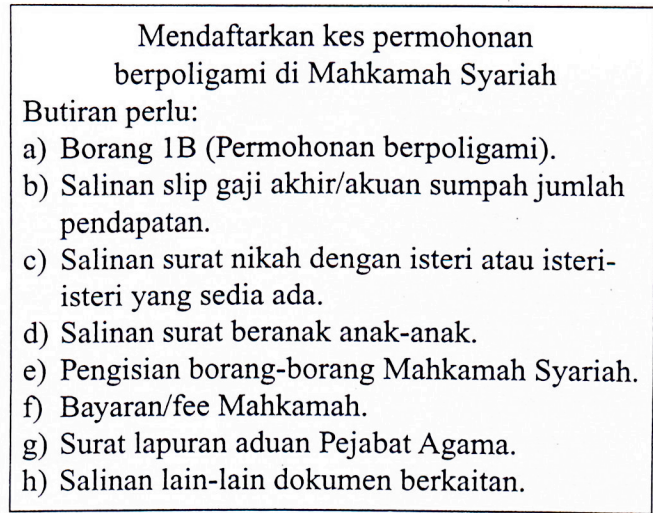
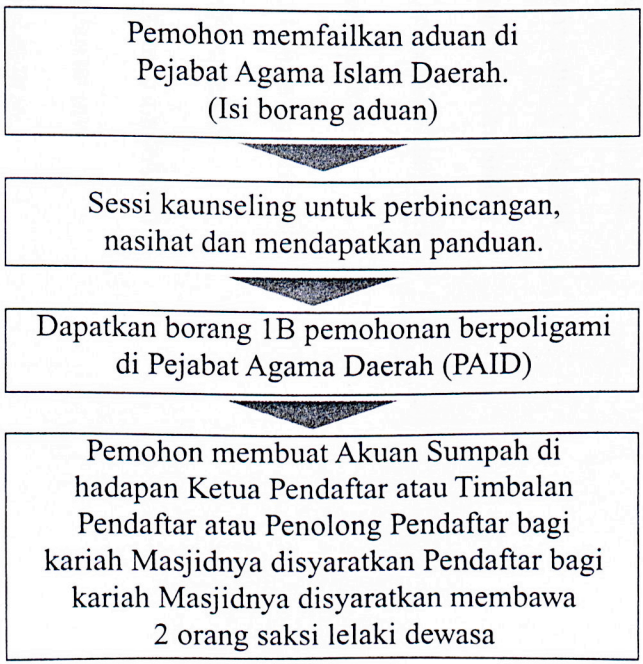
(8) Acara bagi akad-nikah dan pendaftaran sesuatu perkahwinan di bawah seksyen ini adalah serupa dalam serba perkara dengan yang dipakai bagi perkahwina lain yang perkahwinan-perkahwinan lain yang diakadnikahkan dan didaftarkan dalam Negeri Selangor di bawah Enakmen ini.

PENALTI

Sek. 123 (Kesalahan berhubung dengan berpoligami tanpa kebenaran)

Jika seseorang lelaki berkahwin lagi di mana-mana jua pun dalam masa perkahwinannya yang sedia ada masih berterusan tanpa mendapat kebenaran secara bertulis terlebih dahulu dari Mahkamah maka ia adalah melakukan suatu kesalahan dan hendaklah dihukum dengan denda tidak lebih daripada satu ribu ringgit atau dengan penjara tidak lebih dari enam bulan atau dengan kedua-duanya denda dan penjara itu.

CARTA PROSEDUR PERMOHONAN



Disediakan oleh:
Bahagian Pentadbiran Perundangan Keluarga
Jabatan Agama Islam Selangor

Ku Cari Damai Abadi

Aku cari bukan harta bertimbun-timbun

Untuk hidup kaya

Aku cari bukan wang berjuta-juta

Untuk hidup bergaya

Aku cari bukan kawan-kawan

Untuk sekadar berfoya-foya

Aku cari mana dia Al Ghazali

Aku cari mana dia As Shafie

Kita bongkar Rahsia Kitab Suci

Cari panduan

Kita bongkar Rahsia Sunnah Nabi

Cari pedoman

Aku hidup kerana dia RABBI

Dialah teman

Dialah Wali

Dia mencukupi

Aku hidup beerti

Menikmati damai abadi

Dato'Seri Abdullah Ahmad Badawi
Malam Puisi Utusan, 9hb. Mei, 2003.
(Utusan Malaysia, Jumaat 31hb. Okt, 2003)