

THE EFFICENCY OF LEGAL PROVISION ON POLYGAMY IN MALAYSIA, A CRITICAL ANALYSIS FROM QUR'ANIC PERSPECTIVE

Raudlotul Firdaus binti Fatah Yasin

Assistant Professor, Department of Qur'an and Sunnah Studies,
Kulliyah of Islamic Revealed Knowledge and Human Sciences,
International Islamic University Malaysia.
rawda73@gmail.com, rawda@iium.edu.my (corresponding author)

Mohd. Shah Jani

Assistant Professor, Head of Department, Qur'an and Sunnah Studies,
Kulliyah of Islamic Revealed Knowledge and Human Sciences,
International Islamic University Malaysia.

Abstract

Islam permits polygamy to preserve women's dignity and to safeguard the social, moral and economic well-being of wives and their children. Unfortunately, a number of polygamous marriages among Muslims in Malaysia registered at the local 'Shariah Courts' are problematic and "misleading" as they do not reflect the teachings of Islam and its Sharī'ah intents on polygamy. As a consequence, polygamy has become a very controversial issue among its critics and supporters. It has invited serious criticisms on the credibility of the legal provision namely Islamic Family Law Act 1984 (IFLA) in curbing the abuse of polygamy. As a short term measure to overcome the problem, it has been suggested that IFLA should be reformed in order to address the current problems faced by Muslims. The IFLA has been amended twice, in 1994 and 2005, and yet the Act has not been gazetted, as some states in Malaysia are not ready to enforce the new enactment due to certain restricting provisions, which according to them are not fully compliant with the true intents of polygamy as stated in the Qur'an and Sunnah. This paper seeks to examine the efficiency of the current provision, and the compatibility between the law of polygamy in the Islamic Family Law Act 1984 with the revelation of Allah (SWT) in the Qur'an and Sunnah of the Prophet (PBUH). It will focus its analysis on the textual sources (*nuṣūṣ*) of IFLA provisions on polygamy, as well as the effectiveness and the compatibility of the provisions with the sources. The paper comes with recommendations to improve the current provisions on polygamy so that it may not be abused or misused for objectives contrary to its original Sharī'ah intents.

Keywords: Efficiency, Legal Provision, Polygamy, Curbing the Abuse

1. INTRODUCTION

In Malaysia, to polygamy is permissible under the special provision of Islamic Family Law Act 1984 (IFLA), Section 23, Part II. The provision consists of eight sub sections generally focus on administration, management of polygamy application, registration, as well as general conditions of the proposed marriage that applicants must fulfil to obtain the court's permission. It is compulsory for every Muslim in Malaysia to gain the permission from the Syariah Court, before the proposed marriage takes place. Failure to do so is considered as against the regulation, and therefore sentenced for penalty. Meanwhile, the latest amendment of the IFLA that was introduced under the Amendment of 2005 has enabled the first wife to claim her share of the matrimonial property upon her husband's polygamy. Another amendment that requires the husband, the current wife, the prospective wife and her guardian to appear before the court was appreciated for its being "just" to women, because it allows the judge to determine the suitability of the polygamy application and the eligibility of the applicant (Raudlotul, 2010).

Another amendment involved the text of the provision related to the condition of polygamy application that was read "*just and necessary*", which is stipulated under Section 23 of the IFLA Act, 1984, is now amended to "*just or necessary*" (Raudlotul 2010). This amendment has further widened the gate of flexibility for polygamy applications to get approved, for the applicant is only required to provide justification that his polygamous marriage is "necessary", and he does not need to prove that it is also "just", or vice versa.

It has to be pointed out that there is no sufficient information about the jurisprudential mechanism as a logical background of how this IFLA's provision on polygamy was formulated, especially those related with the textual sources (*nuṣūṣ*) of the polygamy legislation and its conditions as stated in the Qur'an, and the authentic *ḥādīth* of the Prophet (PBUH) that may enlighten us about the historical background for the revelation of Qur'anic verses on the legislation of polygamy and the reactions of the Prophet's Companions towards the legislation. Moreover, the stringent conditions, stipulations and the divine reprimands as reflected in the sources upon those who are not qualified to practice polygamy and those who have failed to treat their wives with justice and fairness, are nowhere to be found in the IFLA. The absence of this information might bring about misinterpretations and misconceptions about the Shari'ah intents or objectives (*maqāṣid al-Shar'īyyah*) on polygamy.

The legal provision is also exposed to administrative abuses by husbands who preferred a shortcut strategy to conduct their polygamous matrimony outside Malaysia with the objective to get their polygamy application approved by the Shari'ah court—namely those marriage registered at Songkhla, Narathiwat and Satun. Those provinces near the border of Malaysia and Thailand. This "illegal" marriage is mostly committed by those who realized that they might not fulfill certain conditions stipulated therein by the provision, especially in terms of financial ability or failure to obtaining wife's consent. It is believed that these were the cases of problematic polygamous marriages that might be one of the causes of family breakdowns, domestic violence against women and children, wives' and children's abandonment, etc. The penalty against husbands found guilty of having failed to treat their wives with justice is merely related to financial and physical deterrence. They are either imposed with fines or imprisonment, which is believed to be effective enough to educate the guilty to become a responsible husband to the wives and children. This paper is aimed at analyzing the current legal provision and its efficiency in curbing the abuse of polygamy, from Qur'anic and Sunnatic perspective.

2. AN OVERVIEW OF THE PERMISSIBILITY OF POLYGAMY IN ISLAM

In Islam, men are allowed to take up to four women for wives. This permission of polygamy is sanctioned by the command of Allah as stated in the Qur'an,

And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those right hand possessors. That is more suitable that you may not incline [to injustice] (Surah al-Nisa': 4).

The reason for the revelation of this verse is recorded in authentic *hadi<th* narrated by Bukhārī, in which 'Ā'ishah (r.a) was asked by her nephew 'Urwah bin Zubair about this verse. She replied, "O my nephew! (This verse was revealed in connection with) an orphan girl under the guardianship of her guardian. The guardian was attracted by her wealth and beauty and intended to marry her with a *mahr* (dowry) less than what other women of her calibre deserve. So they (such guardians) have been prohibited to marry them (the orphan girls) unless they do justice to them and give them their full *mahr*, and in its stead, they were ordered to marry other women of their choice" (Al-Bukhārī, no. 4574). Another reason, quoted at length by al-Ṭabarī in his *tafsi<r*, is again related to "an orphan girl under the guardianship of a man who was interested in her properties only, but had no desire in her. He then married her, but then offended her (to justify misappropriation of her wealth), indeed this verse was revealed to condemn such action" (Al-Ṭabarī, 2000).

Sayyid Qutb is right when he suggested that 'Ā'ishah's tradition has provided a clear picture of unfair worldviews and customs, which were prevailing during *ja<hiliyyah* and continued to prevail after the advent of Islam. These norms were continually practiced in the Muslim community until the Qur'an came with the above verses prohibiting the Muslims to comply with these *ja<hiliyyah* customs. Although the Qur'ānic text, *al-Nisā'* 4:3, was addressed to eliminate the specific issue of injustice in dealing with female orphans as clearly stated in the *hadi<th* of 'Ā'ishah, but the legislative nature of the text is general (*mut<laq*) and it is not confined to any specific area of justice that Muslims are commanded to establish in dealing with the affairs of the female orphans. The requirement is that Muslims must do justice in dealing with the female orphans no matter what kind of issues they are dealing with, whether it is related with the amount of dowry or anything else that is related with welfares of the orphans. This may include for instance issues related with the desire of a guardian to marry a female orphan for no other motives except to after her wealth, not because he loves her or because of his intention to look after her welfares. There is another issue, which is no less intriguing, that is, the wider gap in age between the old guardian and the young orphan in such a way that the marriage will not be fruitful for it will not serve the welfares of the orphan nor will it be worthy of life fulfilling. In the end, such a marriage will only incur injustice to the young female orphans. Due to this reason, the Qur'an has warned the guardians if they are assured of not being able to do justice in dealing with female orphans if they married them, they should then find other women for wives (Sayyid Qutb, 1996).

These traditions, and many other authentic narrations of similar meaning, are sufficient to inform the Muslims about the social context for the legislation of polygamy in Islam. This Shari'ah provision came into existence at the right time in which men were free to take ten women or less as wives. In fact, there was neither limit nor precondition set for them to take as many as possible women as wives, as there was also no law preventing them to dump the wives as they arbitrarily wished. With this provision, the number of wives for Muslims was limited to four only, and they were strongly admonished if they could not do

justice in dealing with their wives, they should be contented with one wife only, or take their unmarried female slaves as wives. The revelation of *al-Nisā'* 4:3 does not aim to sanction polygamy without restraints but, on the contrary, to limit (*li yuh{addid*) its practice. To prevent men from exploiting this provision arbitrarily, Islam has imposed the ability to uphold justice (*'adl*) in dealing with the wives as a fundamental prerequisite for them to practice polygamy (Sayyid Qut{b, 1996).

Sayyid Qut{b considered polygamy as a *rukhs{ah* (alternative provision) of the Shari<'ah. It is therefore not a general rule, but an exceptional rule that Allāh has laid down to be an alternative option for those Muslim men who are able to meet the precondition stated above because of necessity, not for pleasure and fancies. If polygamy is looked at from this perspective, there should be no reason for people to oppose this Shari<'ah provision in the first place. Moreover, there is another fact that must be taken into account when one discusses the issue of polygamy (Sayyid Qut{b, 1996). Controversy concerning this issue arises when it was addressed out of its context in isolation of the integral whole of Islam being a comprehensive and all-embracing social order (*niz{a<m*) for Muslims. The critics of polygamy must be aware that,

“Islam is a positive and realistic social order, a system of life that is compatible with the innate nature (*fīṭrah*) of man and his natural constitution (*takwīn*); compatible with his true state of affairs (*wāqīṇ*) and needs, requirements or necessities (*darūrāt*); compatible with his conditions (*mulābisāt*) that are constantly changing due to the change of contexts, times and circumstances (*aḥwāl*). As a positive and realistic social order, Islam has treated man according to what his true affairs is, and never placed him out of his true ontological position. This social order is to enable man to move forward from a lower ranking (creature) to a noble position without ignoring his true innate nature (*fīṭrah*), neglecting his true state of affairs (*wāqīṇ*), or depriving him of his necessities....Islam is a social order that seeks to preserve human good morality and dignity, and the purity of society. In order to achieve this objective, Islam does not tolerate the existence of a materially advanced society, capable of fulfilling the necessity of men, but at the expense of good morality, or the community is severely contaminated. On the contrary, Islam seeks to generate a condition that is always conducive for the development of excellent moral conduct and clean society and this can be easily realized without exerting much effort at both the individual and collective levels”(Sayyid Qut{b, 1996).

It is not an exaggeration to suggest, therefore, that law legislation on the administration of polygamy must be made in consideration of the spirit and objectives for the revelation of the Qur'anic verse, *al-Nisā'* 4:3, quoted above. They can be summarized as follows:

1. Polygamy is not a general rule, but an alternative provision of the Shari<'ah that is permissible because of necessity and with strict conditions
2. Islam does not prohibit polygamy. Its legislation is to limit the number women to be married as wives, There are several traditions reported that the Companions who had more than ten wives were impacted by the revelation of this restriction such as Wāḥab al-Asadī, Ghailān bin Aslam, Ibn 'Umar and Hārith bin Qays. They went to the Prophet Muḥammad (SAW) to sought his advice, and thus the Prophet replied, “Choose (and keep) only four of them (as wives)” (Abū Dāwūd, no. 2244), and this maximum limit of four is meant to avoid the possibility of injustices, unfairness and

any form of exploitation against women (Al-Rifa'i, 1987, Al-Zuhaili, 1997, Al-Zuhaili, 1998, Abu Shaqqah, 2002, Al-Kurdistan, 2004).

3. One of the fundamental conditions of polygamy is the ability to treat the wives with justice and fairness. Contracting a polygamous marriage should not cause harmful consequences to the current wife and children, for that is contradictory to the general purpose of marriage in Islam, i.e., mutual tranquility, compassion and love between spouses (Suhrah Al-Rum, 21).
4. Any law legislation about polygamy should not be treated in isolation from the general intents of the Islamic Shari'ah as a comprehensive code of life for the benefit of human beings, both the individuals and society

As a conclusion, the underlying spirit of the Qur'anic verse, *al-Nisā'* 4:2 and the Prophet's traditions on polygamy is that Islam does not promote polygamy as an essential practice in family building. It is not mandatory for men to practice it. It is a clear-cut misconception to certain group of Muslims who considered polygamy as a privilege for men due to their gender superiority recognized by the religion. Islam has prescribed polygamy with the spirit and objectives stated above to protect women from all sorts of injustice and exploitation of those who misused this Shari'ah provision not because of necessity, but for pleasure and fancies.

3. THE ISLAMIC FAMILY LAW (IFLA) PROVISIONS ON POLYGAMY

It is an undeniable fact that the IFLA provision on polygamy currently practised in Malaysia does not address the original spirit of the verse in its codification. The reason of revelation of the verse and the interpretation is neither stated in general, nor slightly mentioned in the IFLA as an introduction to the polygamy provisions so as to give the general idea of divine origin of the legislation. It is important to state the reason of the revelation so as to provide a deep understanding on the stringent conditions that make it eligible to practice polygamy. The urgency of making this information available in IFLA is justified due to the fact that many polygamous marriages practised nowadays are profoundly indifferent against the spirit and objectives of the divine sources. Unfortunately, the lack of understanding has resulted in the abuse of polygamy, which consequently ended in violation of women's basic rights as wives and the rights of their children. Indeed, a large number of Muslim men nowadays have mistakenly viewed polygamy as 'the right of men' sanctioned by the Shari'ah legislation rather than as a Shari'ah exceptional provision that is allowed because of religious necessity and with strict conditions. As a matter of fact, in the IFLA codification, it is stated immediately under Part II, Marriage, section 23 (1) 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 according to Hukum Syara' order it to be registered subject to section 123 (Islamic Family Law Act, 1984).

The provision has stipulated that a man is allowed to contract another married with other woman with a condition that he must have obtained a written approval or permission from the court. This provision focuses on the importance of getting the court's permission, and obtaining it is possible when the court has satisfied with the fact that the man has fulfilled

the conditions to contract a polygamous marriage and this is because of necessity, not for pleasure and fancies. The term “Hukum Syara’” in IFLA legal provision means “Islamic law according to any recognized *Mazhab*” (Islamic Family Law Act, 1984), including the four jurisprudential schools of thought, *Shafi’^{yyah}*, *H^{ana}^{bilah}*, *H^{anafiyyah}* and *Ma^{likiyyah}*.

It is important to highlight “possible discrepancy” resulted of this provision that “*No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission..*” conveys the idea that polygamy without court’s permission is a kind of ‘crime’ that deserves appropriate penalty. Such a provision is not compatible with the spirit of the Qur’anic legislation of polygamy. To contract a polygamous marriage is not an offence, but it can be a Sharī’ah offence when the man is unable to treat the wives with absolute justice and fairness. Therefore, it is suggested that the provision to be rephrased so that it can eliminate the preconceived idea about “criminalization” of contracting a polygamous marriage without court’s permission. Such a rigid stipulation could be an obstacle for applicants to contract a polygamous marriage because of necessity and they are truly eligible in view of their financial, educational, moral and religious credentials.

From juristic point of view, asking permission from the court in order to practice polygamy is neither a stipulation stated directly in the Qur’an nor in the authentic *h^{adi}th* of the Prophet (PBUH). It is thus simply permissible so long as it is compatible with, and fulfills, the general intents of the Sharī’ah (*maqāṣid al-Shar’iyyah*). It must be noted, however, the stipulation of Court’s permission in IFLA legal provision is still relevant as this can be applied as part of the legal instrument to determine the ability of the applicant in fulfilling the condition of being ‘just’ in the verse, “but if you fear that you will not be just” (Sura al-Nisa’, 3). Some classical and modern scholars agree, namely some jurists from all schools; *Shafi’^{yyah}*, *H^{ana}^{bilah}*, *H^{anafiyyah}* and *Ma^{likiyyah}*- that it should be a judge (*qāḍī/hākim*) who can determine the justice requirement ability of polygamy applicants. The technical approaches and the process in the court may differ from one place to another, but the purpose is in line with the Qur’anic teaching. This is to ensure that only such men who are capable enough physically, mentally, ethically and financially, and can treat their wives with justice and fairness be given permission by the court.

Another important point to be highlighted here is that although the provision of section 23(1) states “*Provided that the Court may if it is shown that such marriage is according to Hukum Syara’ order it to be registered subject to section 123*” (Islamic Family Law Act, 1984), the conditions and principles relating to Hukum Syara’ are not clearly indicated in the enactment. Through the relevant cases recorded, the contract of polygamous marriage is considered valid “according to Hukum Syara’” when the application followed the stipulated procedures for making the marriage valid. The main figure in the Court is a *wali* (guardian). If the *wali* himself conducts the marriage, then the marriage is valid. However, if a *wali* is *wali Hakim*, then, the court will determine whether the *wali Hakim* is qualified or not” (Raudlotul, 2010).

As an example, in the case of Zainal Abidin bin Mohamed’s (Raihanah, 2006) application for polygamy, the *Shariah* High Court in Terengganu has rejected his application to re-register a polygamous marriage that he and his new wife have solemnized in Narathiwat, Thailand. The *wali Hakim* in that marriage was considered as unqualified by the court, and consequently, the marriage was pronounced invalid because “it was not in accordance with the principles of Hukum Syara’”. Although there are legal provisions for the registration of polygamous marriages that have been conducted without court’s consent, the court should undertake a thorough examination of the background of the marriage before it is pronounced

valid or invalid not on arbitrary interpretation of the court “*according to Hukum Shara*” but on clear guiding principles derived from the Qur’an and authentic h{adi<th (Raihanah, 2006).

It is believed that the term Hukum Syara’ used in this codification is very general in concept and has a deeper meaning. Different interpretations and description may emerge from different judges or marriage registrars on determining whether such marriage is in line with the Hukum Syara’, as it often depends on the judge’s discretion and decision upon hearing the applications. Therefore, it is very important to establish the guiding principles that highlight in detail the description of what is the meaning of “*according to the Hukum Syara*” and what issues it does cover under polygamy cases and what are the issues not covered by it. These guiding principles can be referred to by the judges or registrars while deciding or considering polygamy applications, not only limiting their assessment on financial ability of the applicants as currently practiced, but to include also some other conditions such as religious and moral credentials, educational qualifications, psychological fitness and leadership skills that can determine his ability in handling his polygamous family. These conditions not arbitrary but are reflected in the spirit of Qur’anic verse on polygamy, such as husband’s piety and God-Consciousness (*taqwā*), faith (*imān*), good moral and ethical conducts (*husn al-khulq*), fulfillment of Allah’s commands (This can be observed through his Friday prayers attendance, congregational prayers, honesty and responsibility in his working place and among his neighborhood etc.), capability of dealing justly with wives (*‘adil*). Other scholars and jurists (From the four schools of *Shafi’iyah*, *H{ana<bilah*, *H{anafiyah* and *Ma<likiyyah*) have a tendency to include also in the conditions the financial ability of the applicants to provide the wives and children a good home, food, clothes, kind treatment (Baydhu<n & Al-Mawdu<di, 1985, Badawi<& Al-Rifa<’i, 1987) and allotment of equitable time to each and every wife (Al-‘Imra<ni<, 2009).

4. THE CONDITIONS OF POLYGAMY IN IFLA

The above discussion mentioned that the IFLA enforces all applicants who tend to contract polygamy to obtain the court’s permission. There are certain conditions to be fulfilled by the applicant or husband, before their applications approved. The conditions are codified under section 23 clause (3),

(3) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the ground on which the proposed marriage is alleged to be just or necessary, the present of the applicant, particulars of his commitments and his ascertainable financial obligations liabilities, the number of his dependents, including persons who will be his dependents 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 (Islamic Family Law Act, 1984).

Pursuant to this provision, there are requirements to be fulfilled by the applicant which are as follows:

1. The proposed polygamy marriage is alleged to be just or necessary.
2. The presence of the applicant in the court.
3. The particulars of the applicant’s financial income, commitments and liabilities.
4. The number of his existing and future dependents. This includes his existing wife/wives and children, as well as prospective wife.
5. Whether consent of existing wife/wives has been obtained.

These requirements should be disclosed by the applicant who is the husband, upon submitting his application for polygamy marriage. Failure to fulfill one of the conditions may cause rejection of the application. Generally, these requirements are meant to seek and investigate whether the polygamy application complies with the Hukum Syara' or not (Raudlotul, 2010). Certainly, all these requirements may be used to determine the ability of the applicants to obtain the court's permission to contract a polygamous marriage, but none of them can be used to determine with certainty whether they shall be able to be just and fair ('*adl*') in dealing with the wives or not. In a *h{adi<th* narrated on the authority of Abū Hurairah, the Prophet (SAW) is reported to have reprimanded Muslim men who have intention to contract a polygamous married to be true and honest with their ability to deal with their wives with justice and fairness. He says;

When a man has two wives and he is inclined to one of them [does not deal equitably between them], he will come on the Day of Resurrection with an unbalanced posture (Abu< Da<wu<d, no. 3394).

As a mechanism of investigating applicant's possibility in fulfilling the requirement of being able to do just, it is significant for the husband to be present in court during the hearing of his application as stated in the section 23 clause (3). It is very crucial for the husband to provide his financial details pertaining to the existing dependents and liabilities, so that the judge or registrar (Senior Registrar of Muslim marriages, divorces and re-marry (*ruju<*')) may analyze his capability on sponsoring prospective 'new' family resulting from the proposed marriage. Apparently, the IFLA codification on this matter is indeed following the Qur'an and Sunnahprovisions in a formal and systematic way. Similarly, the provisions in sub section (4) clause (b) and (c) requires the court to be satisfied with the applicant's financial ability as well as equality of treatment to support both the existing and the future family before approving any application" (Raudlotul, 2010),

(b) that the applicant has such means as to enable him to support as required by Hukum Syara' all his wives and dependents 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'; (Islamic Family Law Act, 1984)

The provision in this codification is in line with the requirements stated in *Sūrah al-Nisā'* 4:3 in which "being just" is stipulated as an essential condition in polygamous marriage. In this modern situation, the court is considered as the eligible institution that can ensure due process and judge the applicant's qualification through proper investigation and formal interview. If the court discovers that the applicant may somehow not be able to treat the wives equally due to his attitude, behavior and character, or unable to finance more than existing family, then the court has all the grounds to disapprove the application. This is safer, not only for the welfare of the existing wife and children, but also in the husband's interest and advantage in this world and more importantly on the Day of Resurrection.

We have no objection of the conditions stipulated by IFLA above, but there must be other conditions that reflect the fundamental condition of polygamy stated in *Sūrah al-Nisā'* 4:3, "*but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice*". The question is that what kind of principal characteristics that constitutes the '*adālah*' credentials of a human being that every polygamy applicant should have possessed so

that to make him qualified to contract a polygamous marriage. Some argued that only the applicants know about their *'adālah* credentials as a person and, thus their written confession to be just in dealing with the wives is satisfactory to make them qualified to contract a polygamous marriage. Any action that violates this confession shall be immediately dealt with under other relevant legal provisions stated in IFLA. Others insisted that there must be verified conditions to determine the integrity of the applicants, as scholars of *ḥadīth* laid down certain conditions that *ḥadīth* transmitters should fulfil to make their narration acceptable, most importantly their proved religious, moral and intellectual integrity (Koya, 1996). If these conditions were applied to determine the acceptability of one's *ḥadīth* transmission, the same could be applied to determine the *'adālah* credentials of every applicant to contract a polygamous marriage. This is in fact in agreement with the opinions of Muslim scholars who insisted that if the applicants are not confident of their being just and fair with the wives, they should be strongly advised to remain with one wife and the permission should be withdrawn (Muhammad Iqbal & Al-A'ali, 2008, Al-Mawdu'ī Baydūn, 1987) under the injunction, *"But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]"* (Sūrah Al-Nisa, 3).

Muhammad Iqbal, in commenting the concept of justice in polygamous marriage said that it is "incumbent upon every husband to do full justice to his wives in treatment and provision of economic sustenance, but he is helpless as far as natural inclination of his mind is concerned" (Muhammad Iqbal, 2008). After all, the justice required in the verse excludes the emotional attachment and affectionate feelings which are beyond one's control. This is enshrined in another verse from the same of Qur'anic verse,

And you are never able to be fair and just as between women, even if it is your ardent desire: but turn not away [from a woman] altogether, so as to leave her [as she was] hanging [in the air]. If you come to a friendly understanding, and practise self-restraint, Allah is Oft-forgiving, Most Merciful (Sūrah Al-Nisa, 129).

In view of that inability, the Prophet (SAW) was recorded to have often prayed to Allah asking for His forgiveness after trying his best possible to discharge his duty toward his wives with justice and fairness, but his heart remains divided as far as his love and affection to particular wives is concerned;

Oh Allah, that is my division with respect to what I have control over. Do not blame me for what You control over which I have no control (Abu Da'ūd, no. 2134 & Al-Nasa'ī, no. 3395).

The form of justice in the Qur'an and Sunnah refers to the practical deeds within human's ability, which is related to being fair in division of time, treatment of each wife equitably with regard to their financial maintenance because perfect justice is out of human capability. In this regard, the Prophet Muḥammad (SAW) also mentioned the glory and honor that a husband may enjoy in the Day of Judgment due to his possible effort to deliver his duty towards his wives with justice and fairness. In a *ḥadīth* narrated on the authority of 'Abdullāh bin 'Amrū, the Prophet (SAW) is reported to have said;

Meaning: Behold! The Dispensers of justice will be seated on the pulpits of light beside God, on the right side of the Merciful, Exalted and Glorious. Either side of the Being is the right side both being equally meritorious. [The Dispensers of justice are] those who do justice in their rules, in matters relating to their families and in all that they undertake to do (Muslim, no. 1827).

This tradition is Almighty Allah's praise towards His servant who is fair and exercises justice in ruling and discharging his responsibilities as a judge, a head of a family and a leader of his people and in whatever that is assigned to him. At the same time, Allah (SWT) acknowledges that perfect fairness and justice is very difficult and impossible in human capability. Therefore, the reward is very big and the appreciation is very honorable if they struggle to do so, as mentioned in this *h{adi<th*. The Prophet (SAW) himself in another *h{adi<th* was recorded to highlight the obligation of fulfilling one's responsibility and that those responsibilities will be questioned on the Day of Resurrection (Raudlotul, 2010),

All of you are guardians and responsible for your wards and the things under your care. The Imam [i.e. ruler] is the guardian of his subjects and is responsible for them and a man is the guardian of his family and is responsible for them. A woman is the guardian of her husband's house and is responsible for it (Bukha<ri<, no. 5200).

5. CONSENT OF EXISTING WIVES

According to the spirit of divine revelation on polygamy, it is incumbent upon the man to evaluate his ability to do just among his wives before taking any decision to marry another woman. Based on the verse in surah al-Nisā' 4:3, the wife's consent is not mandatory as long as the husband has sufficient religious, educational, moral and financial qualification, and wise enough to rationally assess his eligibility in leading a polygamous family. While in IFLA codification, the court, upon receiving the applicant's application to contract polygamous marriage, the provision provides that both husband and existing wife should attend the proceeding or court hearing,

(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 if satisfied-

(a) that the proposed marriage is just or 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; (Islamic Family Law Act, 1984)

Generally, the above codification has identified the wife's sterility and sickness, which may have affected conjugal relations such as conjugal relationship between husband and wife, to be the main reasons to constitute "the necessity" that makes it qualified for a man to contract a polygamous marriage, even though without the consent of the existing wife. However, the wife's physical fitness and productivity conditions as stated in the provision are not directly stipulated in the Qur'an and *h{adi<th* of the Prophet (SAW). By taking into consideration of being just in dealing with the wives, there should be another condition that must be fulfill by the husband, such as a verbal or written confession not to neglect his duty

towards the existing unhealthy and barren wife. In this case, instead of divorce, the existing wife should recognize the wisdom of polygamy in Islam and voluntarily express her consent for the husband to contract a polygamous marriage (Muh{ammad Fuad, 1994, Sayyid Qut{b, 1996, Al-S{a<bu<ni<, A'bdullah Na<s{ih{ & 'Abd Nas{r, 1999).

Previous studies conducted to justify the condition that the applicant must obtain the consent of the existing wife to contract polygamous marriage as stipulated in the section 23 (3) is based on the interpretation of an authentic *h{adi<th* in which the Prophet (SAW) is reported to have refused the request of his son in-law, 'Al{ bin Ab{T{alib to contract a polygamous marriage with Ab{ Jahl's daughter.

From Miswar bin Makhramah reported that the messenger of Allah (PBUH) said while he was on the *mimbar* [pulpit]: "Verily, the relative of Ban{H{ashim ibn al-Mugh{irah had asked my permission to marry their daughter with 'Al{ bin Ab{T{alib, and I do not allow them, I do not allow them, I do not allow them, unless and until he divorces my daughter, for surely she is part of me, and what troubles and agitates her, troubles and agitates me too; and what harm befalls her befalls me too" (Al-Bukha<ri<, no. 5230 & Ibn Ma<jah, 2596).

According to Ibn H{ajr al-'Asqala<ni<, there is another longer *h{adi<th* narrated on the authority of al-Zuhr{ that can be used to explain why the Prophet (SAW) refused to give his consent over 'Al{ 's request to marry another woman. In the *h{adi<th*, he (SAW) is reported to have said "...I am not forbidding what is permitted, and I am not permitting what is forbidden, but Allah will never combine the daughter of Allah's messenger with the daughter of His enemy (Ab{ Jahl) at all" (Ibn H{ajar, 1996). The Prophet (SAW) delivered such a speech on the *mimbar* after he discovered that 'Al{ insisted to continue his plan to marry Ab{ Jahl's daughter although he had already been informed about the Prophet's disagreement before, while F{atimah (r.a) as his wife was not aware of the matter at all (Ibn H{ajar, 1996). It has to be pointed out that marrying Abu Jahl's daughter was not judicially prohibited, and it was not the sole reason of the Prophet's disagreement, but his refusal to give his consent was driven by his determination to protect the welfare and psychological wellbeing of his daughter, F{atimah (Al-Nawawi<, 1492H). This concern is stated clearly in another narration by Suwayd bin Ghaflah and Sar{r bin 'Aqlah, in which 'Al{ is stated to have consulted the Prophet (SAW) of his intention and the Prophet (SAW) replied,

He [The Prophet (SAW)] said, "No, F{atimah is part of me, I do not think except that she will be sad and hurt!", therefore 'Al{ said, "I am not doing something she hates" (Burha<n al-Fawri, 1981, Ibn H{ajar, 1996, Al-Mana<wi<, 2007).

Another interpretations derived from various *h{adi<th* narrations stated above can be summarized as follow (Rafiullah, 1986);

First	The wife's consent or view is neither mandatory nor advocated in contracting a polygamous marriage, as F{atimah was not informed about 'Al{ 's plan until the Prophet (SAW) announced his disagreement in his sermon publicly, narrated by al-Zuhri (Ibn H{ajar, 1996).
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Second	From another narration recorded by Ibn Hibbān, it can be interpreted that Fāṭimah view and consent regarding the proposal was taken into consideration for ‘Ali’s request to marry another woman. It was stated by Ibn Hajar in his book, that ‘Fāṭimah was informed about the plan and she refused to give her consent’(Ibn H{ajar, 1996), she approached the Prophet (SAW) to share her feelings and asked his support (Ibn H{ibba<n). Therefore the Prophet (SAW) stood up on the <i>mimbar</i> and delivered his message of strong disagreement.
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Considering the current lifestyle and the reality of Muslim societal structure in Malaysia, it would be a positive step forward to seek the wife’s consent and view by both the husband and the Court prior to the conclusion of a polygamous marriage. There are several positive social and psychological reasons for letting the existing wife being informed about the proposal. Among the notable reason is because of the average of Malaysian woman contributes substantially to the family institution, economically and financially in addition to be responsible for all the chores at home. According to statistics, 46.4% Malaysian females are employed (Chart 1.1: Female Labour Force 2007). Both parties should discuss the matter rationally with regards to their individual personal interests for the betterment of their family institution. Failure to inform the existing wife of the proposed marriage according to a study (Zaharuddin, 2007), is an early signal of the husband’s failure to deal wisely in his future polygamous life (Zaharuddin, 2007). A wise man will most of the time be able to persuade his wife to accept his decision to marrying another woman with acceptable reasons without any need of cheating her. Furthermore, it has been concluded that ‘the successful polygamous marriages are those where there is extensive communication between the husband and his existing wife’ (Raihanah, 2006& Rohayah, 2008). This is due to the fact that ‘the existing wife’s experience of married life and cohabitation with her husband would provide information and assist the court in ascertaining the character of the husband and his ability or lack of it to contract another marriage’ (See Ramona Julia bt Abdullah v. Engku Nazrudin b. Engku Muhamed, *The importance of the wife’s view or witness’s evidence in polygamy application*. Vol. xiii, part ii, 1999).

Considering all these justifications, the role of the court is very crucial in deciding whether the proposed marriage is according to Hukum Syara’ or not. It will be difficult to achieve happiness and justice in a polygamous marriage if the existing wife does not know, or worse than that, was not consulted at all, unless in very exceptional cases where the wife’s consent may not be needed, such as the wife is abnormal, unconscious for a long period of time, paralyzed etc. In these cases, the wife’s view is not necessary especially if she will disagree, although her condition renders her religiously incapable of serving the husband according to juridical provision. Therefore, it is strongly suggested that the selection of Shariah judges to be appointed at Shariah Courts must be strictly observed, especially in relation to their religious awareness, moral conducts and Shariah knowledge in order to fulfill the criterion of a wise judge so that will not cause harm to any party by his discretion. The judges are also recommended to strictly observe the rule stipulated in IFLA by not approving any application before considering existing wife’s consent so as to avoid any possibility of polygamy abuse. This is also an important element to be improved by the Shariah Courts in Malaysia so as to eradicate the wide spread assumption that there are unjust and in bias with men.

6. ḌARĀR SHAR‘Ī

DararSharie is defined in IFLA as, “harm, according to what is normally recognized by Islamic Law, affecting a wife in respect of religion, life, body, mind, moral or property” (Islamic Family Law Act, 1984). According to the Sunnah source, the term *darar shar’i* is originated from a tradition of the Prophet (SAW) which stated, “*lāḍarara wa lāḍirār*” (Ibn Maḍjah, no.2340), which means harmful or revengeful acts towards others, whereby it may benefit the actor but harms others, or it may not even bring any benefit to either of the parties at all. As such it has been prohibited (Al-‘Aini, 2001).

As enshrined in the *hādīth*, that Muslims are prohibited to commit any act or carry out any deed which may cause harm to others. As mentioned earlier, there are cases where the court’s permission to contract a polygamy marriage is abused by irresponsible Muslims in Malaysia that has brought about harmful consequences to the wives and children. Therefore, it is believed that the court has to carefully examine whether the proposed polygamous marriage is free from the possibility *darār shar’i* to the existing family or not due to the failure of the husband to discharge his duty to the wives and children with justice and fairness. The same investigation also aims to protect the proposed wife from any possibility of being harmed by ineligible man. This is stipulated in section (4) clause (d):

- (d) that the proposed marriage would not cause *darar syarie* to the existing wife or wives (Islamic Family Law Act, 1984).
(e) [Deleted].

Examining this codification, again the matter of terminology should be discussed. The term *darār shar’i* in this provision apparently very broad and may lead to different argumentations on its meanings. Further written explanation in the light of polygamy issues is better in order to provide the clear guiding principles for the judges, so as to determine what can be regarded as “affecting a wife in respect of religion, life, body, mind, moral or property”. This will contribute somehow, to the uniformity in judging polygamy applications in all states and provinces.

According to the divine revelation, *darār shar’i* that may be from a mistreatment of a husband upon entering polygamy marriage can be examined from the following points:

1. Affecting the wife’s religion: The source of this provision is related to the *hādīth* of ‘Alī bin Abī Ṭālib’s request to marry the daughter of Abū Jahal, whereby the Prophet (SAW) disagreed with the proposal because he was worried the marriage will affect Fāṭimah’s faith due to her uncontrolled jealousy and hatred that are not suitable of her status being a daughter of the Prophet (SAW) (In Hajar, 1996). This was stated clearly in another tradition narrated by al-Zuhrī in which the Prophet (SAW) is reported to have said,
“I fear that this (marriage) might be seditious to her faith” (Al-Bukhārī, no. 3310)
2. Affecting the wife’s life: The source is the same *hādīth* as above, that the Prophet (SAW) mentioned, “...for surely she is part of me and what troubles and agitates her, troubles and agitates me too; and what harm befalls her befalls me too” (Al-Bukhārī, no. 3310).
3. Affecting the wife’s body. This provision is in line with the command of Allāh in surah al-Nisā’ 4:129,
“But turn not away [from a wife] altogether, so as to leave her [as she was] hanging [in the air]” (Surah Al-Nisā’, 129).

The verse has strongly reprimanded the husband not to neglect his existing wife's physical, emotional, financial well-being if he decided to contract a polygamous marriage. Such negligence is considered a grave sin in Islam.

4. Affecting the wife's mind: There was a tradition recorded after the *Hijrah* event, that a polygamous man from the Anṣār tribe offered either one of his wife to be married with the Muhājir and he was willing to divorce her (Al-Bukhārī, no. 5167). This event according to Ibn Hajar was a proof that it is permitted to avoid 'jealousy' between two wives (Ibn Hajar, 1996) (which affect their minds), to divorce her and let her marry with other good man. The *ḥadīth* quoted earlier, according to Nawawī is also another evidence to demonstrate that serious jealousy among wives could be used by the court to reject polygamy proposal (Al-Nawawī, 1392H).
5. Affecting the wife's moral: In a *ḥadīth* in which the Prophet (SAW) is reported to have praised the Quraishite wives as "the kindest women to their children during their childhood and the most caring women of the property of their husbands" (Al-Bukhārī, no. 5079). Many Malaysian women have this positive attitude, but if the proposed polygamy will cause changes to the wife's behavior towards negative attitude, then polygamy in this situation not beneficial and can cause *ḍarār sharʿī* to the existing wife and family.
6. Affecting the wife's property: Inability of a husband to conveniently finance a new family will definitely affect his existing wife's financial well-being. She might not just being deprived of her maintenance rights but also has to sacrifice her own property for the survival of the other family in the making. The Prophet (SAW) has once required 'financial ability of a man' as a prerequisite for marriage. In a famous *ḥadīth* recorded by Muslim, he said to his male Companions and followers that, "those among you who can support a wife should marry" (Muslim, no.1). It is understood that those who cannot support more than one wife, should not marry a second wife as this would be beyond his financial ability and may be a cause of *ḍarār sharʿī* to the existing family and another family in the making. In this case, the court may reject a polygamy application.

Nevertheless, Allah (SWT) through His revelation has warned and at the same time reminded polygamous husbands from the very beginning, to be just and fair at all times. It is undeniable that perfect equality in relation to love and passion is impossible, but he must try his best to be just at all times. His failure to be equally fair in matters of financial expenses, allotment of time, and conjugal relations among his wives will result in harmful consequences (*ḍarār sharʿī*) upon the welfare and wellbeing of the wives. The Qur'an has described this negligence of the husband to discharge his duty towards the wives as 'hanging them in the air' (*mu'allaqah*):

And you are never able to be fair and just between women, Even if it is your ardent desire: but turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air) (Al-T{abari, 2000).

Mu'allaqah according to Al-T{abari means 'a wife who is like neither having a husband (though she's married), nor divorced since her marriage still exists' (Al-T{abari, 2000). Nevertheless, Clause (5), (6) and (8) are mainly administration and management related process of polygamy that do not need analytical studies from Qur'an and Sunnah perspective.

7. PENALTIES

The IFLA provision provided that if the applicant contravenes the procedures provided in section 23 (1), and thus failing to obtain written permission from the court to contract polygamy, yet he contracted it somewhere else illegally, or outside Malaysia, such marriage is known in Malaysia as 'runaway marriage' where the applicant and the prospective wife contract their marriage outside the region, mostly at the Religious Affair in Southern Thailand, he will be liable to the penalties provided in section 123:

Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or with both such fine and imprisonment (Islamic Family Law Act, 1984).

This provision has stipulated that any polygamous marriage without court's written permission is considered an offence deserved of appropriate penalty. Originally, polygamy in divine revelation has never been considered an offence unless the husband was found guilty of failure to discharge his duty to the wives with justice and fairness. However, this provision in juridical concept may be justified due to preventive measurement from any type of possible unjust treatment by the husband in his prospect polygamous life. This is based on the legal maxim *sadd al-dharā'i* - prohibition of evasive legal device (Hafidh, 1990) by avoiding any possible abusive act resulted from polygamy. Ironically, only unqualified or irresponsible husband will commit illegal marriage outside Malaysia to avoid court's investigation or obtaining wife's consent.

Comparing the reality and the trend of modern penalties, it is believed that this penalty is relatively low. According to some researchers, 'the penalty has not served as a deterrent because until now, no husband has been imprisoned for contravening these rules' (Raudlotul, 2010). Referring back to the divine sources, either from the Qur'an or *hādīth*, there is no penalty imposed on husband contracting polygamous marriage without the permission of the court. In principle, it is the duty of the court to examine and verify the religious, moral, educational and financial qualifications of the applicants in order to determine that they are eligible to contract a polygamous marriage.

The spirit of the verse is actually a reminder to the husband to be truthful and honest towards his own ability and integrity as a responsible human being. He should play the role of a judge, thus to conduct his own self-appraisal about his qualifications to contract a polygamous marriage. Unfortunately, such a proposal of self-appraisal remains a platonic reality. Consequently, the court bears a heavy burden, religiously and contextually, in carefully determining the validity of the applicant's qualifications to have more than one wife." (Raudlotul, 2010) And its implication is ethically intriguing as the Prophet (SAW) is reported to have said;

Judges are of three [categories]; two in the hellfire, one in the heaven, [firstly] a man who judges unfairly and he is realized of that unfair decision, shall be in the hellfire, [secondly] a judge who does not know while pronouncing a judgment on a case, but it has consequently violated the rights of other people, shall be in the hellfire, [thirdly] the judge who decides justly, and he shall be in the heaven (Abu Dawūd, no. 3573).

From the above *hādīth*, it can be understood that a Shari'ah judge who unduly approves any unqualified applicant to contract polygamy, will have to share part of the sins

committed by the husband while being unfair, negligent or oppressive to the existing wife and children. Looking at this responsibility held by a Shari'ah judge, it is strongly recommended that the Shari'ah judges in Malaysian Courts be given more authority in monitoring the polygamous families after the conclusion of polygamous unions. They should be given the authority to advise or warn (if necessary) the irresponsible husband to improve his performance in dealing with all his wives with justice and fairness. If the husband is still stubborn or unable to act justly, then he should be sentenced to educative rehabilitation, such as attending all five obligatory prayers congregationally in the mosques every day, participating in seminars and talks about Family in Islam gradually, or serving the nearby mosques or writing book reviews on the role of polygamous husband and etc, which may help to improve his religious awareness of his responsibilities as well as family management skills.

As a matter of fact, the so-called offence provided in section 123 of IFLA has no basis either in the Qur'an or the Sunnah. More importantly, a stiffer penalty should be prescribed for those who failed to be fair in polygamous marriage or abandoned his family. The Prophet (SAW) himself often inspected the family life of his Companions. It was narrated by Jābir bin 'Abdullāh that he was asked by the Prophet (SAW) about his progress with his wife and was given some advices by him (Al-Bukhari, no. 5079). This event according to Ibn Baṭṭāl is a guiding principle for Shari'ah judges to continually monitor the performance of polygamous family life as a preventive mechanism to avoid any Shari'ah offence that could be a *fitnah* (sedition) for non-Muslim to oppose Islam (Ibn Baṭṭāl, 2003).

8. CONCLUSION

This study concludes that the current legal provision on polygamy practiced by Syariah Courts in Malaysia is insufficient in curbing the abuse of polygamy. Further details on the reason of the permissibility of the practice from Divine revelation is strongly recommended to provide a clear picture on its advantages for the *ummah*. The legal provision is suggested to be amended in several aspects such as:

1. The introduction on the purpose of polygamy according to *maqasid al-shari'ah*
2. The details on the condition of being able to do 'just' from every aspects required in Islamic law, including justice in treatment, children's education and care, religious educational background and awareness, not just merely rely on financial ability as required in existing provision
3. The existing penalty that required man to pay a sum of money to the Court or sentenced to prison are both to be eliminated in its totality. Such penalties are proven to be insufficient in curbing the abuse or at least provide a positive impact on the man being sentenced. In contrast, they are found to be reluctant and unsatisfied with such conditions where they finally express their dissatisfaction to the wives and children.
4. The real victims in polygamy penalties are actually the wives and children, not the husband. Therefore, an educational penalty is strongly suggested to be introduced in order to ensure that man who is irresponsible or unjust in handling his polygamous family will be able to improve his attitude after being discharged from his penalty.
5. In Islam, penalty or punishment is sentenced to an individual for the purpose of improving his moral attitude and God-consciousness so as to be a better slave of Allah. Such penalty is strongly encouraged to be enshrined in the legal provision on polygamy so as to provide an effective solution to the ignorance individuals in the society.

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