



GOOD GOVERNANCE IN MARRIAGE FROM ISLAMIC
FAMILY LAW PERSPECTIVE WITH SPECIAL
REFERENCE TO MALAYSIA

BY

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degree of Doctor of Philosophy in Laws

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ABSTRACT

This study explores the truth of the claim that the issue of good governance has been largely overlooked in regulating Muslim marriages in Malaysia. Despite the rules laid down in Islam, governance mechanisms of marriages in Malaysia remain weak. This is seen in the increasing number of marriage problems that can potentially destroy the marriage institution. By way of remedy, this study proposes solutions for good governance by strengthening the regulations of Muslim marriages in Malaysia from legal and administrative perspectives. It focuses on four very pertinent and unresolved issues, i.e., the procedure and formalities before the solemnisation of marriage, runaway/syndicate marriage, abuse of polygamous marriage, and underage marriage. In the conceptual phase, this study analyses marriage in Islam in the context of good governance. In this regards, our theoretical discussion examines the relationship of marriage in Islam and the concept of good governance by highlighting the right of the state to intervene in family matters. This study employs two types of methods, library research, and field research. Library research is used as the first method to collect data for examining governance mechanisms for regulating Muslim marriages. The finding is supported by field research in which semi-structured interviews are conducted with certain related respondents. This research found that the absence of good governance has resulted in various unresolved issues such as inefficiency in the procedures and formalities before the solemnisation of marriage, unsuccessfulness in governing the runaway/syndicate marriage and child marriage, and the increasing number of abused cases of polygamous marriages. This research has identified both legal and administrative perspectives which contribute to those weaknesses.

خلاصة البحث

تبحث هذه الدراسة دعوى قلة الإهتمام بمبدأ الحوكمة الرشيدة في تنظيم زيجات المسلمين في ماليزيا. فعلى الرغم من المبادئ التوجيهية الشاملة الواردة في شريعة الإسلام، لا يزال هناك قصور في عميلة تنظيم الزواج. من هنا جاءت هذه الدراسة لتفعيل مبدأ الحوكمة الرشيدة في تنظيم زواج المسلمين في ماليزيا من خلال الدراسة القانونية والادارية لأربع قضايا أساسية وهي: الإجراءات والشكليات قبل إقامة الشعائر الدينية للزواج، والزواج الهارب والنقابة، وسوء استعمال تعدد الزوجات و الزواج دون السن القانونية. كما سيتناول هذا البحث بالمناقشة و التحليل العلاقة بين الزواج في الإسلام ومفهوم الحكومة الرشيدة لتحديد مدى أحقية الدولة في التدخل في الشؤون العائلية وخاصة في القضايا الأربعة السالفة الذكر. وقد استخدمت الباحث منهج المقابلة شبه المنظمة والتي تم من خلالها اختيار العديد من المؤسسات ذات الصلة. و قد أظهرت نتائج هذه الدراسة أن غياب مبدأ الحوكمة الرشيدة ساهم في ظهور قضايا مختلفة صعب حلها مثل: عدم الكفاءة في الإجراءات و الشكليات قبل إقامة الشعائر الدينية للزواج وعدم الفعالية في حكم الزواج الهارب والنقابة وزواج الأطفال والعدد المتصاعد من حالات سوء المعاملة في تعدد الزوجات. وقد أبرز هذا البحث المسائل القانونية والإدارية التي اسهمت في ظهور هذه القضايا.

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degrees at IIUM or other institutions.

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FAMILY LAW PERSPECTIVE WITH SPECIAL REFERENCE
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Practice Code of Marriage, Divorce, and Ruju', JAKIM

Personal Data Protection Act (PDPA) 2010
Qatari Code of Personal Status 2006
Shariah Criminal Offences of Federal Territories Act 1997
Syrian Code of Personal Status 1953 (as amended 1975)
Tunisian Code of Personal Status, 1956 (amended in 1993)
Turkish Family Law, 1959
UAE Law of Personal Status, 2008
Universal Declaration of Human Rights, (UDHR) 1948
Universal Islamic Declaration of Human Right, (UIDHR) 1981

LISTS OF ABBREVIATIONS

ADB	Asian Development Bank
CDHRI	Cairo Declaration of Human Rights in Islam
CEDAW	Convention On Elimination Of All Forms of Discrimination Against Women
CLJ (SYA)	Current Law Journal (Shariah)
CLJ	Current Law Journal
ICCPR	International Covenant on Civil and Political Rights
IDB	Islamic Development Bank
IUM	International Islamic University Malaysia
IMF	International Monetary Fund
JAIN	Jabatan Agama Islam Negeri (States Islamic Religious Department)
JAKIM	Jabatan Kemajuan Islam Malaysia (Department of Islamic Development Malaysia)
JH	Jurnal Hukum
JKSM	Jabatan Kehakiman Syariah Malaysia (Shariah Judiciary Department Malaysia)
LPPKN	Lembaga Penduduk dan Pembangunan Keluarga Negara (National Population and Family Development Board)
MAIS	Majlis Agama Islam Selangor (Selangor Islamic Religious Council)
MLJ	Malayan Law Journal
MLJ	Malayan Law Journal
NGO	Non-Governmental Organisation
OECD	Organization for Economic Cooperation and Development
SAW	Şalla Allah alaihi Wasallam
ShLR	Shariah Law Report
UDHR	United Nations Universal Declaration of Humans Rights
UNAIDS	Joint United Nations Programme on HIV and AIDS
UNDEF	United Nations Democracy Fund
UNDP	United Nations of Development Program
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNPAN	United Nations Public Administration Network
UN	United Nation

TRANSLITERATION TABLE

ء	'	خ	kh	ش	sh	غ	gh	ن	n
ب	b	د	d	ص	ṣ	ف	f	ه	h
ت	t	ذ	dh	ض	ḍ	ق	q	و	w
ث	th	ر	r	ط	ṭ	ك	k	ي	y
ج	j	ز	z	ظ	ẓ	ل	l		
ح	ḥ	س	s	ع	‘	م	m		

SHORT VOWELS

َ	a
ِ	i
ُ	u

LONG VOWELS

ا	a
ي	i
و	u

DIPHTHONG

اي	ay
او	aw

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND OF STUDY

Good governance implies good order and good policies.¹ The issue of governance is a crucial concept and an important emerging issue in the 21st century pre-occupying the international community. It is considered an essential element for peace and development of societies and a fundamental ingredient of sustained human and economic development.²

Generally, good governance can be defined as the process of decision-making or policy formulation and its implementation with the aim of improving the overall living quality of all citizens. Such a process should be essentially free of abuse and corruption, and with due regard to law.³ In the broadest sense, governance can be thought “as the way the community of a nation manages its affairs. It is the process through which the institution, businesses and citizen groups articulate their interests, exercise their rights and obligations and regulate all the different aspects of their

¹ Wagener, H.J, “Good Governance, Welfare and Transformation”, *The European Journal of Comparative Economic*, vol. 1, no. 1 (2004): 132, Gisselquist, R.M, “Good Governance as a Concept and Why This Matter for Development Policy”, Working Paper No. 2012/30, *World Institute for Development Economic Research*, United Nation University, 21, www.wider.unu.edu, (retrieved Mac 1 2014), Andrew, M., “Good Governance means Different Things in Different Countries”, *Governance*, vol. 23, no. 1 (2010): 7.

² Graham J, Amos B, Plumtre T, “Principles for Good Governance in 21st Century”, Policy Brief No. 15, *Institute on Governance*, http://iog.ca/sites/iog/files/policybrief15_0.pdf, (retrieved Dec 22 2009), Kulshreshtha, P., “Public Sector Governance Reform: the World Bank’s Framework”, *International Journal of Public Sector Management*”, vol. 21, no. 5 (2008): 556, Boon Siong Neo and Geraldine Chen, *Dynamic Governance*, (Singapore, World Scientific Publishing 2007), 53, *International Fund For Agricultural Development (IFAD)*, “Good Governance: An Overview”, (1999), Doc. no. EB 99/67/INF.4, 2, <http://www.ifad.org/gbdocs/eb/67/e/EB-99-67-INF-3.pdf>, (retrieved Dec 22 2009).

³ *United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP)* ” What is Good Governance”, <http://www.unescap.org/pdd/prs/ProjectActivities>, (retrieved Dec 22 2009). For further reading on the various definitions of good governance refer to Chapter Two pp. 35-41.

collective life”.⁴ Most importantly, good governance is based on all good values such as equality, tolerance, dignity, justice, accountability and trustworthiness.⁵

Despite the great emphasis given on good governance, no serious action has been appropriated in terms of governance in sustaining the family institution. Therefore, the researcher opines that since the family institution is crucial for the growth and continuity of human civilisation, any notion of good governance must embrace the family institution as a priority. Family stability should be maintained and developed because a stable family would lead to a successful nation. This position posits that the family institution determines the future of society. There is no substitute for the role of family in the building of lives and communities.

The question is why of governance in the family? It is of grave importance that governance of the family institution needs to be addressed. If governance is concerned with the management of human affairs, then the family institution must be governed and managed with equal treatment. This is because the family institution has its unique purpose and direction in the creation of human civilisation. Like other organisations, the family institution has members or stakeholders involved in all activities concerning the family. Matters such as powers, rights, duties and responsibilities should be addressed in light of the specific roles of each member.

As far as Islamic family laws are concerned, it has provided comprehensive rules and guidance in regulating family in order to preserve both the institutions of

⁴ Louise Frechette, (Deputy Secretary General of United Nations), *World Conference on Governance*, Manila, 31 May 1999, <http://www.un.org>, (retrieved Dec 22 2009), for further elaboration on the concept of governance, refer to Boon Siong Neo and Geraldine Chen, 49-53, Pradhan R.D., “Engendering Good Governance in Practice”, *Development Bulletin*, no. 51 (2000): 6-9, Abdul Halim Ali, “Leadership and Good Governance” in *Good Governance Issues and Challenges*, edited by Samsuddin Osman et al. (Kuala Lumpur: INTAN, 2000), 3-5.

⁵ *United Nations (Global Issues)*, ”Governance” <http://www.un.org/en/globalissues/governance/>, (retrieved 22 Jan. 2010), Gisselquist, R.M, 6-8, Andrew Taylor, “The Strategic Impact of the Electoral System and the Definition of “Good Governance,” *British Politics*, vol. 2, no. 1 (2007): 20, etc.

marriage and family. In addition, these Islamic laws⁶ answer to detailed principles of *maqāṣid Sharīʿah* (objectives of *Sharīʿah*) concerning the family institution. Thus, to implement those rules and guidance and to realise the *maqāṣid*, Muslims are entrusted with the responsibility to establish a good governance system in accordance with the guidelines of *Sharīʿah*.

With regard to the *maqāṣid* of Islamic law, Muslim jurists have explained that Islamic law aims at preserving the public interest (*maṣlaḥah*) and preventing harm (*mafsadah*) in this world and the hereafter. The most important *maṣlaḥah* is the protection and advancement of the five essentials (*al-darūrīyyāt al-khamsah*), namely life, religion, property, intellect, and family.⁷ It is worth noting that the most important method of preserving the progeny and lineage is by upholding the institution of marriage. There are a good number of verses from the *Qurʾān* which stress on this, for instance, Allah says to the effect:

“It is He who created man from water⁸: then has He established relationships of lineage and marriage: for your Lord has power (over all things)”⁹

“And God has made for you mates (and companions) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best...”¹⁰

⁶ Islamic law originates in two major sources, namely divine revelation (*waḥy*) and reason (*ʿaql*) which is reflected in the two expressions, *Sharīʿah* and *fiqh*. For the details, refer to ‘Abd al-Karīm Zaydān, *Al Madkhal li dirāsah al Sharīʿah Islāmiyyah*, (Bayrūt: al- Risālah, 2002), 35, Abdullah Yusuf Ali, *The Meaning of The Holy Quran*, (Kuala Lumpur: Islamic Book Trust, 2006), 511, Mohammad Hashim Kamali, *Sharīah Law: An Introduction*, (Oxford: Oneworld Publication, 2008), 40, C.E Bosworth, et al (eds.), *The Encyclopaedia of Islam*, (Leidin Brill, 1997), vol ix.

⁷ Al-Shātibi, *Al-Muafaqat fi-Usul Al-Ahkam*, (Dar-al-Fikr. n.d), vol: 9, 4, Abu Hamid al-Ghazali, *al-Mustasfa min ‘ilm al-Usul*, (1997), vol.1, 379, Ibn Qayyim, *I’lam al-Muwaqi’in*, (Al-Qāhirah: Dar-al-Hadith, 1993), vol. 3, Yusuf al-Qardhawi, *Madkhal li dirasatul Sharīʿah Islāmiyyah*, (Bayrūt.: Al-Resalah, 1997), 5, etc., some jurists including al-Shatibi added one more essential i.e. protection of honour (*‘ird*).

⁸ cf. with Muhammad Tahir-ul-Qadri, who translates it as sperm drop resembling water, refer to Muhammad Tahir-ul-Qadri, *Irfan-ul-Quran*, http://www.irfan-ul-quran.com/quran/en.php?contents=search&do=1&ar_text1=&en_text=&ar_text_rm=&id_sura=25&id_para=&cols=0, (retrieved 3 June 2014).

⁹ Qurʾān, al Furqān (25):54, for the English translation of Holy Qurʾān, this research referred to Abdullah Yusuf Ali, *The Meaning of The Holy Qurʾān Text, Translation and Commentary*, (Kuala Lumpur: Islamic Book Trust, 2006).

¹⁰ Qurʾān, al-Naḥl (16): 72

Islamic law has prescribed numerous detailed rulings for the purpose of managing familial affairs. Ibn ‘Ashūr¹¹ stated that Islamic law has instituted the most just and sound rules for the regulation and functioning of the family.¹² Furthermore, the purpose of Islamic law (*maqāsid*) in regulating marriage is to confine relations between the genders within a single, organised framework, namely that of marriage. Islamic laws have established detailed rulings relating thereto, elucidating the rights and responsibilities of all parties to this relationship. In order to achieve this objective a number of legal rulings have been instituted, including those which encourage marriage, sanction polygamy and divorce and prohibit a sexual relationship outside marriage.¹³

Islamic law has also issued rulings concerning living together as a couple in kindness and tenderness.¹⁴ This is to realise one of the objectives of marriage that is to achieve harmony, affection and compassion, as Allah says to the effect:

“And among his signs is that, he created for you mates from among yourselves, that you may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are signs for those who reflect.”¹⁵

In another verse, it is stated that:

“...they are your garments and you are their garments...”¹⁶

Islamic legal rulings also impose the responsibility on the head of the family to preserve personal piety within the family. This responsibility is imposed from the very

¹¹ He is one of the great Islamic scholars of the 20th century who proposed *maqāsid* as a methodology for the renewal of the theory of Islamic law, which has not undergone any serious development since the era of the great imams, refer to <http://www.meccabooks.com/744--ibn-ashur-treatise-on-maqasid-al-shari-ah-9781565644236.html>, (retrieved 3 June 2014).

¹² Ibn ‘Ashūr, *Maqāsid al-Sharī‘ah al-Islāmiyyah*, (Tunisia: Dār al-Salām, 2001), 430.

¹³ Jamāluddīn Attia, *Nahwa Tafī‘il Maqāsid al-Sharī‘ah*, (Dār-Fikr: al-Ma‘had, al-‘Ālamī, li al-Fikr al-Islāmī, (2001), 149, Muhammad Abdul Rauf, *Marriage in Islam*, (Bayrūt: Al-Saadawi, 1995), 16.

¹⁴ Abdul Rahman I.Doī, *Shāri‘ah, The Islamic Law*, (Kuala Lumpur: A.S. Noordeen, 1984), 116, Mat Saad Abd Rahman, *Undang-Undang Islam Aturan Perkahwinan*, (Shah Alam: Hizbi, 1993), 74-80.

¹⁵ Qur’ān, al-Rūm (30):21.

¹⁶ Qur’ān, al-Baqarah (2): 187.

beginning by requiring him to choose a wife with religious sensibilities¹⁷ and to instruct his wife and children in matters of rules, worship and morals. As stated in the Qur'ān:

“Enjoin prayer on your people (family), and be constant therein...”¹⁸

Besides that, Islamic law also contains detailed rulings pertaining to emotional and social relationships, including the rights of husband and wife, the rights of parents and children, and the rights of relatives. Not limiting itself to ordering the family's social and emotional affairs, Islamic law goes beyond these to encompass the most explicit, detailed financial aspect as well, for example rules on *mahr*, various types of maintenance to be provided for wives, daughters, divorced women, relatives and others.¹⁹

In view of the great importance and excellence of marriage in Islam, special attention should be directed to preserving its significance. In this case, governance is crucial as one of the means to materialise the noble concept and purposes of marriage and directly assist in the preservation of the marriage institution.

Family governance should also be established as a mechanism for current challenges relating to marriage and other social transformation. Good governance is therefore indispensable with regard to the recent transformations in marriage and

¹⁷ In one of his hadīth, the Prophet said: "A woman is married for four things, i.e., her wealth, her family status, her beauty and her religion. So you should marry the religious woman (otherwise) you will be a losers" Al-Bayhaqī, *Sunan al-Bayhaqī al-Kubra*, (Makkatul Mukarramah: Maktabah Dār al Baz, 1994), vol. 7, 79, ḥadīth no. 13244.

¹⁸ Qur'ān, al-Tāhā (20): 132

¹⁹ A number of writings focus on this, for the classical text, refer to for e.g. Al-Kasānī, *Bada'i al-Ṣanā'i fī Tartīb al-Sharā'i*, (Bayrūt: Dār al-Kitāb al-'Arabī, n.d), vol.2, Muḥammad Sharbīnī, *Al-Iqnā'*, (Bayrūt: Dār al-Fikr, n.d), vol. 1, Al-Shīrāzī, *Al-Mahzab fī Fiqh al-Imām Al-Shāfi'i*, (Bayrūt: Dār al-Fikr, n.d), vol.2, Al-Shīrāzī, *Al-Mahzab fī Fiqh al-Imām al-Shāfi'i*, (Bayrūt: Dār al-Fikr, n.d), vol. 2, etc., for non-classical text, refer to 'Abd al-Karīm Zaydān, *Al-Mufaṣṣal fī Aḥkām al-Mar'ah wa al-Bayt al-Muslim fī al-Sharī'ah al-Islāmiyyah*, (Bayrūt: Al-Risālah, 2000), vol. 6, Muḥammad Abū Zaḥrah, *Al-Aḥwāl al-Shakhsiyyah*, (Al-Qāhirah: Dār al-Fikr al-'Arabī), Maḥmūd 'Alī Shartāwī, *Sharḥ Qānūn al-Aḥwāl al-Shakhsiyyah*, (Aman: Dār al-Fikr, 2007), Muḥammad Yūsuf Mūsā, *Aḥkām al-Aḥwāl al-Shakhsiyyah fī Fiqh al-Islāmī*, (Al-Qāhirah: Dār al-Fikr al-'Arabī, 1956), Maṣṣūr Muḥammad, *Dirāsah fī Aḥkām al-Uṣrah fī Fiqh Islāmī*, (Al-Qāhirah: Matba'ah al-Amānah, 1989), 'Abd al-Raḥmān al-Jazāirī, *Kitāb al-Fiqh 'alā al-Mazāhib al-'Arba'ah*, (Bayrūt: Dār al-Fikr, 1986) vol.4, etc.

family problems such as the increasing rate of divorce cases, cohabitation without marriage, same-sex marriages, family dysfunctions and domestic violence in most of the societies.²⁰ The rise of Western liberal philosophy, with its emphasis on rational thought, individualism and individual freedom in addition to the impact of modernisation, globalisation and secularisation are said to be the main factors mentioned by researchers for these family problems that makes the legal marriage as sanctioned by religion and government becomes less important.²¹ To tackle these issues, there is a need for a good system of governance that addresses prevention, intervention and rehabilitation strategies.

In Malaysia, studies²² have revealed some of the major emerging trends of Malaysian families, among others are the increased number of divorce,²³ family

²⁰ The transformation of marriage is happening in most societies, for further reading, refer to Rebeck, M., and Ayuni Takeneka, (eds.), *The Changing Japanese Family*, (London and New York: Routledge, 2006), Hull, K. E., *Same – Sex Marriage, The Cultural Politics of Love and Law*, (Cambridge: Cambridge University Press, 2006), Jagger, G., and Wright, C., (eds.), *Changing Family Values*, (London and New York: Routledge, 1999), McDonald, P., “Family and Change in the Asia-Pacific Region: An Overview”, in Jamilah Ariffin and Adeline Louise, (eds.) *Family Well-Being: Learning From the Past for the Betterment in the Future*, 2001, 1-10, Ahmad Sarji Abdul Hamid, “Cabaran Semasa Dalam Membentuk Keluarga Islam Berkualiti” in *Keluarga Islam, Kemahiran Keibubapaan dan Cabaran Semasa*, edited by Azrina Sobian, (Petaling Jaya: MPH Group, 2007), 1-14, Jalaludin Abd Aziz, “Senario Keluarga di Malaysia Masa Kini” in *Keluarga Islam, Kemahiran Keibubapaan dan Cabaran Semasa*, edited by Azrina Sobian, (Petaling Jaya: MPH Group, 2007), 15-27, Therborn, G., “Is There a Future for the Family”, *Public Policy Research*, (March – May 2007): 41-46, etc.

²¹ Dau-Schmidt, et al, “Protecting Families in a Global Economy”, *Indiana Journal of Global Legal Studies*, Winter, vol. 13, no.1 (2006): 165-205, Perrons, D., *Globalization and Social Change, People and Place in a Divided World*, (London and New York: Routledge, 2004), 22, Rosnah Ismail, “Changing Family Patterns and Impacts on Adolescents: Role of The Counsellor”, in *Family Well-Being: Learning From the Past for the Betterment in the Future*, edited by Jamilah Ariffin and Adeline Louise, (Skudai: ISI Publication, 2001), 270-271, Noraini Mohd Nor, *Work, Family and Well-Being: Challenges of Contemporary Malaysian Women*, IIUM, Kuala Lumpur, 2001 at 7, Abdul Ghani Othman, *International Conference on Family Well-Being: Learning From the Past for the Betterment in the Future*, Organised by The Asia Pasific Forum on Families (APFAM), Mandarin Oriental Hotel, Kuala Lumpur, November 2, 1999.

²² Jamilah Ariffin, “Perubahan-Perubahan Dalam Keluarga Di Malaysia, Suatu Analisis Berlandaskan Kajian Ilmiah, *Jurnal IKIM*, vol. 10. no. 1 (2002), Fatimah Saad, “The Family in The 21st Century, Country Perspective: Malaysia”, *The International Family Conference*, organised by Ministry of Women and Family Development, Kuala Lumpur, 25-28 October 2001, Aminah Abdul Rahman, “Profil Keluarga Di Malaysia Dan Kesannya Kepada Masyarakat” *Seminar Institusi Keluarga Mendepani Cabaran Semasa*, organised by Institute of Islamic Understanding Malaysia (IKIM), 26-27 May 2009, Zeenath Kausar, *Social Ill in Malaysia, Causes and Remedies*, (Kuala Lumpur: IIUM, 2005), 19-46, Jamilah Ariffin, “The Changing Malaysian Family: Tracing its Change Through Trend Data and Research Findings” in *Family Well-Being: Learning From the Past for the Betterment in the Future*, edited by Jamilah Ariffin and Adeline Louise, (Skudai: ISI Publication, 2001), 13-45, etc.