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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

STEMMING THE TIDE: A CRITIQUE OF THE
REFORM OF POLYGAMY LAWS IN MALAYSIA

BY

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INTERNATIONAL ISLAMIC UNIVERSITY
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requirement for the degree of Master of Islamic
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ABSTRACT

The coming of western civilization to the Muslim lands and the encroachment of its social and cultural standards had a profound impact on the *Sharī'ah*. Law reform spread like wildfire throughout the Islamic heartland with many countries imposing judicial controls on the practice of polygamy. This represented a radical departure from the traditional consensus of both Sunni and Shī'ī schools of law on the unfettered right of the man to have up to four wives at any one time subject to certain conditions. Malaysia's wave of reform in the 1980s also resulted in significant restrictions in this field, taking away the unilateral prerogative of a married man to contract another marriage and imposing stringent restrictions. These reforms are controversial and problematic based as they are on non-traditional legal doctrine. Further complications arise from the involvement of reformist groups that are intent on greater legal change. It appears that the law has not achieved its intention and has created other problems instead, however, those associated with polygamy are no less valid and demand effective solutions. The complexity of these challenges requires in-depth studies and credible statistics to foster a better understanding of this marital institution and to formulate successful solutions that include comprehensive education, extensive counseling and an effective marital dispute resolution system.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Civilization.

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Supervisor

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This dissertation was submitted to the Kuliyyah of ISTAC and is accepted as a partial fulfilment of the requirements for the degree of Master of Islamic Civilization.

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DECLARATION

I hereby declare that this dissertation 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 other degrees at IIUM or other institutions.

Soraya Khairuddin

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Date

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CHAPTER 1

INTRODUCTION

The fortress of the traditional law has been breached beyond repair, but the complex structure that has taken its place does not as yet rest upon the same solid foundations, and the substance is almost volatile by comparison. (N.J. Coulson, A History of Islamic Law, 1964, p.222)

The *Sharī'ah* is independent of man. It shapes and orders society and places the challenging duty of conforming to it on each generation of Muslims. Unlike other legal systems, law reform is not intrinsic to its nature. However, for the past one and a half centuries it has been subjected to change in most countries in the Muslim world. Initially, civil and criminal laws were replaced by codes of European origin or inspiration that paved the way for major changes in areas of family law such as marriage, divorce, succession, custody of children and religious endowments (*waqf*). Of these, polygamy has attracted feverish legal activity as it is considered incongruent¹ with the full equality of women and has either been prohibited or restricted. This is the legal situation in Malaysia where substantial reforms were enacted in this area. As a result, polygamy is no longer the unilateral prerogative of the man but a judicial decision of a *Qāḍī*. These reforms are controversial and problematic based as they are on non-traditional legal doctrine. Therefore, this dissertation is interested in proposing a re-evaluation of the current legal reforms of polygamy, exploring the possible direction that future changes might take and looking at alternatives to reform in solving the problems of multiple marriages.

¹ See J.N.D. Anderson, (1958), "The Tunisian law of personal status", ICLQ vol. 7, 262-279, at 269. John L. Esposito, (1982). *Women in Muslim family law*, (Syracuse University Press, 1982), 108.

BACKGROUND

Polygamy

Under the classical interpretation of the *Shari'ah*, a Muslim man can have up to four wives at any one time subject to certain conditions.² These relate to equity and fairness between wives and financial capability, though not all scholars agree upon the latter.³ He need not seek out the permission of any authority nor subject himself to any form of inquiry regarding his ability to fulfill these conditions. Ultimately, the decision depends upon his conscience and nothing else. This was the prevailing position in most Muslim countries prior to the 20th century.

The coming of western civilization to the Muslim lands and the encroachment of its social and cultural standards had a profound impact on traditional family practices. What was once acceptable and divinely sanctioned became an embarrassment to the colonized people. Western repugnance of polygamy contributed to much soul-searching among the Muslim intellectuals of the time; modernists like Muhammad Abduh were blunt in their criticisms and called for reforms.⁴ However, this was not to happen for more than half a century.⁵

Reform in the Middle East

Once initiated, the reforms on polygamy spread rapidly throughout the Middle East. The first country to enact changes was Syria in 1953, followed by Morocco in 1958,

² See Jamal J. Nasir, *The Islamic law of personal status*, (London: Graham & Trotman, 1990a), 66;

³ See Mohammad Hashim Kamali, 1985, *Law in Afghanistan. A study of the constitutions, matrimonial law and the judiciary*. Leiden: Brill, 132

⁴ In 1899, Shaykh Muhammad Abduh submitted a report to a government ministry asking for polygamy to be regulated. There was no response and in 1926 his students took up the challenge by campaigning for legal restrictions, see Dawoud S. El Alami, *The Marriage contract in Islamic law in the Shariah and Personal Status Laws of Egypt and Morocco*, (London: Graham and Trotman, 1992), 129. Also, see Kiran Gupta, "Polygamy – Law reform in modern Muslim states: A study in comparative law", XII ICLR [1992], 114-154, at 114.

⁵ The first reforms in relation to polygamy appeared in Syria not Egypt.

Iraq in 1959, Pakistan in 1961 and Iran in 1967.⁶ These were accomplished by a re-interpretation of the Quranic verses on polygamy that concluded that perfect justice was impossible and that monogamy was the preferred marital model in Islam.⁷ Therefore restrictions were necessary to safeguard the needs of modern society. This was a radical departure from the traditional consensus of both Sunni and Shī‘ī schools of law on the unfettered right of the man to have up to four wives at any one time subject to certain conditions. On the other hand, Tunisia used this interpretation outright to prohibit polygamy.⁸

Reform of Polygamy in Malaysia

Malaysia’s wave of reform in the 1980s resulted in significant efforts to “clarify, reform and codify”⁹ the *Shari‘ah* and to improve its administration. Various high-level committees were set up to look into this and some traveled to other countries to study the implementation of *Shari‘ah* there. The result was two-pronged: one, the *Shari‘ah* judicial system was standardized, upgraded and expanded throughout the country as well as given a high level of independence¹⁰ and two, a number of family law enactments were passed at the federal and state level.¹¹ These laws placed various restrictions on the practice of polygamy.

⁶ See Syrian Law of Personal Status 1953, Moroccan Code of Personal Status 1958, Iraqi Law of Personal Status 1959, Muslim Family Laws Ordinance 1961 (Pakistan) and Family Protection Act 1967 (Iran).

⁷ Muhammad Abduh and Muhammad Rashid Rida, *Tafsīr al-Qur’ān al-Hākīm*, 12 vols., (Cairo: Manar Press, 1912) as seen in 4.349 ff in John L. Esposito, *Women in Muslim family law (Contemporary issues in the middle east)*, (Syracuse: Syracuse University Press, 1982), 50-51.

⁸ Anderson, *Tunisian law...*, 262, 268.

⁹ Ahmad Ibrahim, “The Shariah and codification: Malaysia experience”, *Syariah Law Journal* [1987], 47-60, at 56.

¹⁰ Kikue Hamayotsu, *Politics of Syariah reform: The making of the state religio-legal apparatus*, in Hooker, Virginia & Norani Othman. (2003), (eds). *Malaysia: Islam, society and politics*. Singapore: ISEAS, 55-79, at 56.

¹¹ A. Ibrahim, *Shariah and Codification*, 57.

However, prior to the 1980s polygamy was lawful¹² and free of any statutory restrictions except in the states of Selangor and Negeri Sembilan.¹³ These were relatively minor whereby a man who intended to take another wife had to declare his present marital status and if he were already married the *Qāḍī* would have to make further enquiries.¹⁴ Future reforms imposed restrictions that were more stringent and numerous.

The administration of *Sharī'ah* is a state matter.¹⁵ This creates tension within the legal system from forum shopping and the lack of enforcement of court orders between states. A model family law act was drafted at the federal level to address these problems and circulated to the other states for their consideration. Eventually, it was enacted as the Islamic Family Law (Federal Territories)¹⁶ Act, 1984, [IFLA (FT) 1984] and came into effect on April 29, 1987¹⁷. The Federal Territories draft bill was proposed as a model for other states to follow.¹⁸ However, it had two major problems; first, parts of it were based on non-Shāfi'ī legal doctrine¹⁹ and second, it set out a series of restrictions on polygamy not found in classical *fiqh*²⁰. The drafters had

¹² "The validity of polygamous marriages amongst Mohammedans has been put beyond question by Ordinance V of 1880....," see Ahmad Ibrahim, *Towards a history of law in Malaysia and Singapore*, (Kuala Lumpur: Dewan Bahasa & Pustaka, 1992), 57.

¹³ Ahmad Ibrahim, *Islamic Law in Malaya*, ed. Shirle Gordon, (Singapore: Malaysian sociological research Institute Ltd, 1965), 187-188.

¹⁴ Selangor Administrative Rules issued by the Religious Department in 1962; Negri Sembilan Marriage, Divorce and Reconciliation (Rujo) Rules, 1963 (N.S.L.N. No.3 of 1963), *ibid.*, 187, footnote 79.

¹⁵ Malaysia is made up of 14 states, 12 in the Peninsula and 2 in East Malaysia. The Ruler of each state is the head of Islam in his respective state except in Malacca, Penang, the Federal Territories, Sabah and Sarawak where the King holds that position. The Sovereign is chosen from amongst the state Rulers every 5 years. See Ahmad Ibrahim, *The position of Islam in the constitution of Malaysia*, in Ahmad Ibrahim, Sharon Siddique, Yasmin Hussain. (eds.) (1985), *Readings on Islam in Southeast Asia*. Institute of Southeast Asian Studies (ISEAS), 213-220, at 214.

¹⁶ The Federal Territories are Kuala Lumpur, Labuan and Putrajaya.

¹⁷ See Ahmad Ibrahim, "Islamic law in Malaysia since 1972," in *Developments in Malaysian law- Essays to commemorate the 20th anniversary of the faculty of law, UM.*, (Kuala Lumpur: Pelanduk Publications, 1992), 298.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See Donald L. Horowitz, "The Qur'ān and the common law: Islamic law reform and the theory of legal change", *AJCL* vol. XLII, 1994, no. 2, part 1 of 2, 233-293, at 269.

borrowed heavily from the Pakistan Muslim Family Laws Ordinance 1961.²¹ This is problematic as evidenced by the denouncements and protests of the Pakistani ‘*ulamā*’ at that time.²² Some of the Malaysian ‘*ulamā*’ responded similarly but in a more subtle and effective way.²³

Shari‘ah is mainly the purview of each state, therefore they were free to accept fully the FT model, amend or reject it. All of the states accepted it but some of them²⁴ rejected the detailed provisions on polygamy and proceeded to draft their own version that was more acceptable to the classical Shāfi‘ī doctrine.²⁵ As an example, the Perak Islamic Family Law Enactment 1984 on polygamy merely requires that “no man, during the subsistence of a marriage shall except with the prior certification in writing of a Kadi that he has made a declaration that he shall be fair towards his wives contract another marriage nor shall the marriage contracted without such certification be registered under the enactment.”²⁶ The remaining states either adopted the FT legislation or made minor amendments to it. However, the end result was the same - a married man who wanted to contract another marriage had to go through the courts.

²¹ On polygamy, see s.6 of the Ordinance, in Md Abdul Momen, 1993. The Muslim family Laws Ordinances 1961 (with commentaries), New Didar Publishing House: Dhaka, at 13. A committee was set up to “examine whether the existing laws governing the marriage, divorce, maintenance and ancillary matters among Muslims require any modification in order to give women their proper place in society according to (the) fundamentals of Islam”, at 1.

²² Ibid., 2. The lone ‘*ālim* (pl. ‘*ulamā*’) on the committee voted against the recommendations of the majority who were six lay people and “published a vigorous dissenting report taking issue with virtually every major recommendation of his colleagues. There then ensued an extended debate between the modernists and traditionalists.” “It appears as a result of countrywide protest of the Ulema the said report remained laying (sic) dormant with (the) government for several years.” Eventually, the Ordinance was imposed under martial law on 2nd March 1961; at 1.

²³ The Pakistani ‘*ulamā*’ were unable to stop the Ordinances from being passed. However, in Malaysia, three states, Kelantan, Terengganu and Kedah, rejected the polygamy provisions of IFLA(FT)1984 and enacted laws different from the FT model. It may be that the opinions of the ‘*ulamā*’ of those states had an influence on their State Legislators.

²⁴ Namely, Kelantan, Terengganu and Perak. The enactments of these states did not contain the detailed restrictions and conditions for approval as in IFLA (FT) 1984.

²⁵ A.Ibrahim, *Islamic Law in Malaysia since 1972*, 298.

²⁶ This is part of s.21 in the Act; see Ahmad Ibrahim, *The administration of Islamic laws in Malaysia*, Institute of Islamic Understanding, Malaysia, 2000, 244. Also, compare this with s.23 of IFLA (FT) 1984, see appendix in this thesis.

IFLA (FT) 1984 was amended in 1994 and this watered down some of the reforms, raising the ire of many women's organizations. Since then, a further amendment, the Islamic Family Law (Federal Territories) (Amendment) Act 2006, was proposed to unify Islamic family laws in all the states. This Act eases some of the restrictions while tightening others. Since 2002 and progressively thereafter, all the states have accepted the amended version except for the Federal Territories, Terengganu and Kedah.²⁷ Therefore, the 1984 Act remains relevant to this research.

Research Objectives

First, this dissertation would like to consider whether there should be a re-examination of the reforms of polygamy. It will analyze the methods that have affected substantive change and offer arguments against these. Consideration will also be given to the motivation for reforms.

Second, this dissertation would like to explore the future direction of polygamy laws in Malaysia. Will future amendments continue to ease restrictions? Can the *Shari'ah* be restored to approximate its traditional position on polygamy? Or is the reverse likely - will there be a further tightening of the current restrictions? Might polygamy eventually be prohibited like in Tunisia and Turkey?

Third, this dissertation aims to explore other avenues of dealing with problems associated with polygamy. How should such problems be addressed? Apart from legislation, what other approaches may be adopted to minimize them?

²⁷ The FT legislation has yet to be gazetted because of concerns stridently voiced by women's interest groups that feel the Amendment Act 2006 will make it easier for men to practice polygamy; Terengganu is waiting to see what amendments may be made to the Amendment Act 2006 before it proceeds and Kedah has not accepted it because its Ruler has exercised his prerogative to decline it, based on an interview with Dr. Raihanah Abdullah, Akademi Islam, University Malaya, 24 September 2007.

Justification for this research

This study is important for several reasons. It aims to add to the body of research on an issue that has far-reaching consequences for Muslims in Malaysia and elsewhere.

There is insufficient research of a critical nature on Islamic legal reform in Malaysia. More needs to be done on various aspects related to this, including historical, theoretical and empirical. The substantive reforms of the 1980s Enactments did not encounter significant resistance²⁸ except in the cases of Kelantan, Terengganu and Perak and have never been challenged.²⁹ Therefore, a thorough examination of the reform of polygamy laws is necessary and it is hoped that this dissertation will contribute to that endeavor.

Furthermore, this research will add to the academic debate on the permissibility of Islamic law reform, considering the immutable nature of the *Shari'ah*.

Malaysia embarked on substantive legal change after the Muslim nations in the Middle East and Indian sub-continent had done so. This dissertation aims to question the “sources of inspiration and the motivation for the reforms”³⁰ and suggest other measures as alternatives to law reform in tackling the problems of multiple marriages.

Structure of the Dissertation

Chapter 1 is an introduction to the whole dissertation and sets out the background to the reform of polygamy in Malaysia and elsewhere. It explains the justification for this

²⁸ See above on page 5. However, the new Islamic Family Law Enactments of Kelantan and Perak, passed in the first few years of the new century, are substantially more restrictive than the older ones.

²⁹ Mohammad Hashim Kamali, *Islamic Law in Malaysia: Issues and Developments*, (Kuala Lumpur: Ilmiah Publishers, 2000), 318. It is submitted that Prof Kamali might be referring to a legal challenge such as occurred in Pakistan. See chapter 2 of this thesis for details on this.

³⁰ See Aharon Layish, “The transformation of the *Shari'ah* from Jurists’ law to statutory law in the contemporary Muslim world,” *Die Welt Des Islam*, Int’l Journal for the study of modern Islam, vol. 44, no.1 (2004): 85-113, at 95.

research and the methodology used. It briefly outlines the scope and limitations that are applicable. This is followed by a short literature review.

Chapter 2 looks at the history of reform of polygamy in Malaysia and other parts of the Muslim World. It begins by looking at the traditional approach to polygamy followed by that of the reformists. It briefly reviews the different methodologies of reform used in some countries before shifting its focus to Malaysia. The chapter proceeds to discuss the various Islamic Family Law Enactments in relation to polygamy. Subsequently, it discusses some of the objections to reform and questions their validity. The chapter ends with an analysis of the criticisms.

Chapter 3 discusses the future direction of the laws on polygamy. It begins with a review of some of the general predictions on law reform and polygamy made by writers such as Anderson, Coulson, Layish, Bonderman and Kamali. This is followed by a survey of developments that may influence the future course of law reform. Then, the chapter proceeds to discuss the views of some of the people interviewed for this dissertation on the direction of the polygamy provisions in the Islamic Family Law Enactments. Finally, the chapter ends with an analysis of the research presented.

Chapter 4 explores alternative options to law reform in finding solutions to the problems of polygamy. It begins by discussing the challenges of polygamous marriages, those that have arisen as a result of law reform and those relating to polygamous marriages themselves. Then, the chapter proceeds to look at ways of solving such problems.

The final chapter is the conclusion. It begins with a restatement of the dissertation followed by a recap of the salient points in the preceding chapters. This is

followed by suggestions for future research and concludes with detailed recommendations.

Research Methodology

This dissertation will use two methods.

1. Library-based research using primary and secondary sources.
2. Interviews with various individuals involved in the development, administration, research and teaching of Islamic law.

Scope and limitations

The term *Sharī'ah* will be used throughout the dissertation except where variations such as *Syariah*, *Shariah*, *Sharia* and *Shari'a* have been used by others. The same goes for *Qādi*, *Kadhi*, and *Kadi*. The term polygamy will be used in the dissertation to refer to the Islamic practice of one man who is married to more than one wife at the same time.

Literature Review

The reform of Islamic law in the Middle East is expertly covered in J.N.D. Anderson's *Islamic law in the modern world*.³¹ However, it does not cover Malaysia as the book precedes the wave of reform in this country.

³¹ See J.N.D. Anderson, *Islamic law in the modern world*, (New York: New York University Press, 1959).

Esposito's *Women in Muslim Family Law*³² is an excellent treatment of reform in Egypt and Pakistan while touching briefly on other countries in the Middle East and North Africa. However, there is nothing substantial on reforms in Malaysia.

*A History of Islamic law*³³ by N.J. Coulson looks at the methodology of reform in several Muslim countries and its future direction. It is a well-researched pro-reform book that champions the liberal use of *ijtihad*. There is hardly anything on Malaysia.

Islamic law reform in relation to polygamy is well covered in Pearl and Menski's *Muslim Family Law*.³⁴ It extends to the reforms in South Asian countries, which are covered in depth mainly because of the large numbers of immigrants from that region living in the United Kingdom. There is no treatment of law reform in Malaysia.

The development of Islamic law in Malaysia is covered in *Islamic Law in Malaya*.³⁵ It outlines the early modernist movement and legal reforms in most parts of the Muslim world. However, the section on polygamy in Malaysia is brief and sketchy. This research will contribute to a deeper understanding of the reform of polygamy.

M.B. Hooker's *Islamic Law in South-East Asia*³⁶ covers the development of the Islamic courts and law in Malaya during colonial times and until more recently. It has a brief section on future developments and reform but lacks depth and detail.

Ahmad Ibrahim's *Islamic Law in Malaysia Since 1972*³⁷ looks at the various Malaysian states' enactments on Islamic Family law as well as the model Act of the

³² See John L. Esposito, *Women in Muslim family law. (Contemporary issues in the middle east)*, (Syracuse: Syracuse University Press, 1982).

³³ See N.J. Coulson, *A history of Islamic Law*, (Edinburgh: Edinburgh University Press, 1991).

³⁴ D. Pearl and W. Menski, *Muslim family law* (3rd edn.), (London: Sweet & Maxwell, 1998).

³⁵ A. Ibrahim, *Islamic Law in Malaya*.

³⁶ M. B. Hooker, *Islamic law in South-east Asia*, (Singapore: Oxford University Press, 1984).

³⁷ A. Ibrahim, *Islamic law in Malaysia since 1972*.

Federal Territory. It provides brief summaries of each state's controls of polygamy. However, it lacks depth in relation to the issue of reform.

Ahmad Ibrahim's *The Administration of Islamic Laws in Malaysia*³⁸ looks at the relevant case law and statutes regulating polygamy and briefly surveys other state legislation that differs from IFLA (FT) 1984. It is a good overview but limited in its treatment of polygamy.

Kamali's *Islamic law in Malaysia: Issues and Developments*,³⁹ is more detailed in relation to the reform of polygamy in Malaysia. It discusses the issues at length and adopts a liberal approach to reform.

³⁸ A. Ibrahim, *Administration...*

³⁹ Kamali, *Islamic law in Malaysia*.

CHAPTER 2

POLYGAMY IN MALAYSIA

INTRODUCTION

Polygamy is the practice or custom of having more than one wife or husband at the same time. It is divided into two: polygyny, which is the practice of one man married to several women simultaneously, and polyandry, where a woman has more than one husband. The former is relatively common whereas the latter isn't and is almost always found amongst tribal people where several men, usually brothers, share a wife. The term polygamy will be used in this research to mean the Islamic practice of a Muslim man who has more than one wife at the same time.

THE TRADITIONAL APPROACH TO POLYGAMY

The traditionalist and modernist approaches towards the *Qur'ānic* verses on polygamy diverge sharply and produce conflicting interpretations. The former permits it without any legal conditions while the latter restricts it as much as possible.

The traditional consensus of the various schools is that a Muslim man is allowed up to four wives at any one time subject to certain conditions. These relate to equity and fairness between wives and financial capability, though not all scholars agree upon the latter.¹

The foremost consideration is that he must be certain² that he can treat his wives equally in the important areas of affection, inclination, time and material

¹ Mohammad Hashim Kamali, *Law in Afghanistan: A study of the constitutions, matrimonial law and the judiciary*, (Leiden: Brill, 1985), 132.

² Al-Qurṭubī, Abu Abd Allah Muhammad Ibn Ahmad al-Anṣārī. (1965). *Al-Jāmi' li aḥkām al-Qur'ān* (vol.5). Beirut: Dār Aḥyā al-Turāth al-'arabī, 12-13.