

Engage to Polygamy As An Act of Taklik: Off Islamic Law and Islamic Family Law in Malaysia

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Abstract

Islam has set a marriage law comprehensively to ensure the survival of a family institution by verifying the rights and responsibilities of spouses. Islam also permits couples to append any conditions (*syarat*) in marriage contracts as long as within the Islamic law. However, Malaysia has practice conditions that approved merely on contracts of divorce which outlined in the Islamic Family Law. Accordingly, the objective of this study is to analyst the views of the majority of scholars (*fuqaha*), then to compare marriage contract of Malaysia practices and to evaluate its implications. This is a qualitative study, focusing on collection of data related to setting conditions in marriage by analyzing the views of the *fuqaha*, and analyzing the applications inductively in Islamic Family Law in Malaysia. The study finds that *fuqaha* collectively has consent to contracts should not conflict with Islamic law, indeed the Hanabilah is considerable to allow all conditions in marriage except that opposed to the Quran and Sunnah. The law in Malaysia practically do not implement all the views of the *fuqaha* in terms of conditions in marriage. Furthermore, the debate between views of *fuqaha* and the Islamic Family Law in Malaysia pertaining to conditions of marriage however address to the requirements on *talak* (divorce) of its impact to marriage. According to Malaysia Islamic Family Law, only the taklik read during the marriage ceremony is allowed without the addition of other taklik. If the taklik related to preventing this polygamy is mentioned by the husband after the marriage contract, then it will be considered as a normal divorce. The significant of this study is the Legislative Body had to re-enact the law by incorporating the provision that gave the couple the option to include any conditions does not conflict with Islamic law in order to secure the interests of their marriage.

Keywords: Marriage, Conditions, Woman Right, Polygamy

Introduction

Islam is a religion, absolute to all revelations. Allah says that He has perfected and recognized Islam as a religion or way of life for human conduct. In chapter al-Maidah verse 3, He says:

Means

Forbidden to you (for food) are: the dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than God; that which hath been killed by strangling, or by a violent blow, or by a headlong fall, or by being gored to death; that which hath been (partly) eaten by a wild animal; unless ye are able to slaughter it (in due form); that which is sacrificed on stone (altars); (forbidden) also is the division (of meat) by raffling with arrows: that is impiety. This day have those who reject faith given up all hope of your religion: yet fear them not but fear Me. This day have I perfected your religion for you, completed My favor upon you, and have chosen for you Islam as your religion. But if any is forced by hunger, with no inclination to transgression, God is indeed Oft-forgiving, Most Merciful.

The marriage system in Islam has successfully develops qualities of the individuals and societies by producing high standards of morality, values, thoughts and so on. According to *Maqasid Syar'iyah* (the objectives of law), marriage is aim to preserve the genealogies listed in the *dharuriyyat al-khams*. Therefore, certain regulations, conditions and laws are created in Islamic marriage. A legitimate marriage will be formed upon compliance with the regulations and fulfills the principal requirements that have been set on the contract. *Akad* (covenant) in Arabic means a bond or knot whether visible or not. While to shariah, the contract is a collective agreement either oral, cue and also text conducted between two parties that will bring the implication to the law, and will tie the parties involved in responsibilities. The word covenant, contract and agreement generally deliver similar understanding. The contract nevertheless must be free from all difficulties and shortcomings, if not actually the contract considers as void and invalid, hence affect the contractual demands. Contractual demands are the fundamental laws established by the law for each covenant whether through *nas* (textual evidences) or *ijtihad* (independent opinion) of the *mujtahid*, with concerns to complement the rights between parties (Al-Zuhayli 1989, 4: 203)

There are, however requests that are not based on contractual demands of a marriage. The request is determined and constructed by both parties in the frame of *syara'* indeed additional requests are agreed upon them. As an example, a husband requests his wife on certain conditions like instead a wife wills to work, she needs to be a fulltime housewife and so on. Meanwhile, the wife through her representative (*wali*) also impose certain conditions as her husband could not practice polygamy as long as she is a good wife, not stay out at night and so forth. Hence, both parties agreed to accept the terms or requests then, submitted into agreements and visibly mentioned during their marriage contract (*akad*). Ibn Qayyim states that the contract and requests were originally valid and permissible, unless if the requests contradicts to *syara'*. Any requests shall not be implemented if certainly a prohibition in *syara'*.

Research Objectives

As to complete this study, the author lists several research objectives

- i. To scrutinize the thoughts of the four schools of law (*fiqh*) regarding the conditions in marriage and the affected law.
- ii. To investigate the implications of the law in Malaysia pertaining to the condition of; disallowing their spouse to practice polygamy in marriage.

Research Methodology

The methodology used is a document analysis. The design of this research is a qualitative research. This research aims to examine the position of oral ta'liq divorce pronouncement according to the perspective of fiqh and the Islamic family law in Malaysia. The data collection process involves existing sources such as language dictionary, law dictionary, book of jurisprudence, theses, dissertations, articles, journals, paper works, statutes ie acts and enactments as well as the law manual as an important document in obtaining data related to informal ta'liq divorce pronouncements. All this data is analyzed conceptually to explain the position of ta'liq divorce from from a jurisprudential point of view and the Islamic family law. The researcher relates the relationship between jurisprudence and legislation and leads to the effects and initiatives that need to be taken

Definitons of *Syarat*

Syarat is a clear, consistent and depends to the existence of a law (*hukm*) where the latter will not imply the former. According to al-Zuhayli (1986), the absence of *syarat* will lead to the absence of the law. Nevertheless, the presence of the conditions does not necessarily constitute a law or the absence of any law. Also, *syarat* is an additional element out of the law.

The *syarat*, as example for *solat*, taking ablution (*wuduk*) is a requirement where the prayer is considered invalid if one skipped to take ablution. Nevertheless, it is not necessarily thru ablution one attends to perform prayers, indeed to read the Quran, either he taking ablution not to pray earlier or later. The situation also applies to demonstrate the marriage witnesses. The presence of two witnesses in the marriage contract is a condition for the validity of the marriage and it is an additional element that is beyond the nature of a marriage. To specify the type and the price of goods sold is also a legal requirement for sale and purchase agreement, and is not an internal part of a contract (Al-Zuhayli, 2010)

Definition of Polygamy

Polygamy is permissible in Islam. This is an undeniable provision that based on the Quranic verses and the Prophetic traditions concerning just, turn interchange and so on, hence polygamy have been elaborated precisely by shariah. Polygamy is defined as a marriage involving more than one wife. It is divided into two divisions, namely polyandry and polygyny. Polyandry is the condition of a woman having more than one man at a time while polygyny is defined as a condition in which a man has more than one woman at a time. The appropriate term is 'polygyny' but the society commonly prefers 'polygamy' which means a man can have more than one wife (Kasim, 1985)

Polygamy means the practice of marrying more than one person at a time. The Arabic term is *ta'addud al-zawjat* which is multiple wives. While Islam defines polygamy as a marriage practice by enacting more than one woman in fact not more than four women at a time, according to certain conditions in marriage (Kasim, 1985).

Background of Polygamy

According to *fiqh* writings, polygamy is known as *ta'addud al-zawjat* or multiple wives and this is one of the common practices by the Arab community before the arrival of Islam. The traditional Arab community allowed polygamy without limiting the number of wives that can

be married at one time (Kassim, 1985). In addition, they are allowed to have unlimited wives at one time, and are also free to treat and manage the wives. The act, however, downgraded the dignity of women. When the arrival of Islam, Allah has decreed the law of polygamy where the tradition of malpractice polygamy adopted by the Arabs is modified, so that polygamy practice can fulfill the general principle of the Quran and increase the nobility of women. Women nobility also can be seen in the aspect of inheritance distribution which recognizes them as one of the eligible beneficiaries. Similarly, the payment of dowry submitted to the wife during the marriage, while *talak* is still in the hands of men but the number of divorce is limited to two as to keep the wives not to be mocked by husbands. Relating to the permitted women's to be married at time, it is bound by certain regulations as stated in chapter an-Nisa' verse 3:

If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice.

The aforementioned *surah* has clearly and set a specific rule for those who want to practice polygamy. Polygamy is no longer justified arbitrarily unlimited as practiced by the *Jahiliyyah* but prior to certain conditions according to the revealed law. In addition, polygamy practices by Arabs are contrary to the principles of Islam where it requires justice, equality and well-being.

Not Submitted to Polygamy: The Views of *Fuqaha*

The conditions contained in an agreement are not all taken into account and binding on the parties involved. This is because the conditions that are not contrary to Islamic law are being recognized. However, the subject of scholars' discussion is the determination of a condition whether it is legal or illegal. Some scholars suggest relative terms in determining the legal requirements, while some are quite strict in accepting a condition. However, the scholars believe while determining the law pertaining to set the conditions, it is based on and aligned the demands of *akad* and the requirements of *syarak*. The discussion by *fuqaha* can be divided into four categories (Ibn Qudamah, 1969; Al-^cAyniyy, 1980; Al-Kandahlawiy, 1974; al-Mardawiy, 1956; ^cAli, 1979): -

- a) *Syarat* as are part of the *akad* and thru reinforcement. Among the conditions that are in line with the requirements of the contract are; *syarat* of the wife to her husband is to provide *nafkah*, eat and drink, a proper shelter, to take good care, not to reduce her rights in turn interchange, and of which the husband is responsible. Examples of reinforcement of conditions in *akad* like wives requiring a guarantor in dowry. All such conditions are valid in the agreement agreed by scholars. The condition of not practicing polygamy is incompatible to the demands of the contract (*akad*) indeed adulterate.
- b) *Syarat* that affect the validity and invalidity of the covenant (al-Mardawiy, 1956) *Syarat* pertaining to the period of marriage as an example. The condition spoils the perfection of *sighah akad* because the goal of marriage contract is to perpetuate permanently, without clarification of time limitation. The majority of scholars withdraw the stated condition referred to their discussion of *akad* or *mut'ah*.

- c) *Syarat* conflicting to the terms of the contract, or prohibited by law. Examples of conditions contrary to the terms of the contract are; the husband requires in the contract that he does not responsible to his wife expenses, or that she will not inheritance after his death. Example of condition in the contract that prohibited by *syarak* is that the wife requires her husband to divorce other wives. The condition is prohibited by *syarak* based on hadith (al-Bukhari, 7:26): "It is not permissible for a woman to ask her husband to release divorce (of his share) to take her place, in fact she will have the rights.

To Hanafi school, the requirement of her husband not to espouse or marry others is fallen under a condition of *fasid* because incompatible to the will and demands of the contract, not an affirmation to the contract, nor is it based on *syarak* and not certified by *uruf*; on the other hand, is a value added and benefit of either a party or another party.

Shafie school also agreed to the respective school by saying that it does not comprehend the benefits to the contract, and is contrary to Islamic law. Polygamy is permitted by *syarak*, however such a condition is contrary to Islamic law.

- d) *Syarat* that are inconsistent but reinforce to the contract. Also, there are no contradictions or prohibition from *syarak*, in fact it has clear and true objectives from the parties. For example, a wife requires her husband in the marriage to not marry others, or to take her out of her home or country. (al-Kandahlawiyy, 1974)

Although the Hanafis and Shafi'te agreed in this category, but to them, it is a condition contrary to the contract. The Maliki school, on the other hand, clearly states that the condition of not practice polygamy is in this category, but they considered the practice as *fasid*. The Hanabali school states that the conditions of espouse others are the valid conditions, thru the same grounds as the Malikis i.e. the condition is not consistent with the demands of the contract but it does not have the absolute reason.

The condition of the latter is debated by scholars and they are divided into two groups

The majority of scholars believe the act is consider as *fasid* and must not be implemented. The requirement does not affect the contract, yet the *syarat* become corrupted although the contract remains valid. It is based on the principle the condition is unnecessary and does not constrain until there is a legitimate law that suggests the requirement. Apart from the previous hadiths, they also argued that among the fundamental goals of marriage is to escape marriages from disorder and prevent people from obeying lust. Therefore, it is not possible to include conditions that are not allowed by the law. Furthermore, the husband or wife is likely to deny certain conditions in the future and this can lead to conflict (Aliyy, 1979).

Meanwhile, the Hanabalite affirms that the condition is valid and need to obey. If any party refuses to comply with the condition, then the other party reserves the right to amend (*fasakh*) the contract. Accordingly, they holds to the conditions of marriage is valid unless there are evidences that against the Islamic law (Ibn Qudamah, 1969). They also argue that such conditions are of particular benefit to those who require it. The spouse submits to the covenant where the conditions were fulfilled, and the decision did not disprove by explicit text (*syarak*), then the conditions must be adhered to (Aliyy, 1979,).

Thru believing that all conditions should not contrary to the explicit text, Hanabalite however has create uncommon *akad* when the conditions are not complied by the party who imposed themselves, and hereby have the right to withdrawn the agreement and disobeying the conditions, indeed not to force the other party to do so. If a woman, for example requires a marriage that she should not be paired and her husband marry others, then the second marriage is valid but the first wife is entitled to *fasakh*.

Analysis of Fuqaha Views

Based on the aforementioned views from the scholars concerning the categories of not submitted to polygamy or not to marry other than a spouse, it can be summarized as follows:

The Hanafis states that requiring the husband to not paired or marry other women is a *fasid* because it is not in line with the requirements and claims of the contract, neither not an affirmation to him, nor is it restrained by *syarak* and, is not endorsed by *uruf*, nonetheless the polygamous has the added value either to one of the parties or to another party.

In addition, the conditions assess as *fasid* or void by law, as expressed by the Shafi'te, where it is not significant to the contract and is contrary to Islamic law. Polygamy is permitted by *syarak*, whereas such a condition is contrary to Islamic law.

The Malikis composes a lenient interpretation compared to the previous schools because the condition of not submitting to polygamy was classified in the category of *fasid*, but it did not invalidate the *akad*. Even the condition is incompatible to the contractual demands, though not absolute because it benefits to the other party, hence does not invalidate the agreement.

On the other hand, the Hanabalite argues the condition of not being paired is valid thru the same reason of Malikis, i.e. the condition is not in line with the contract, but it is not an absolute reason.

It is arguable that the opinions of the Hanafis, Malikis and Shafi'te in terms of conditions in the agreement are almost similar. They have slight differences in interpretations the states and conditions but their position is almost identical. Instead, the Hanabalite more tolerate by allowing all forms of conditions except conditions that are expressly prohibited by *syarak* and contrary to the goal of the contract.

Considering the opinions and propositions presented, contemporary scholars tend to adhere to Hanbali's opinion as it enables *fiqh* to deal with current problems and suits the public. It also coincides with the freedom of *akad* which is supported by the Islamic law (Musa, 1958; Al-Zuhayli, 1989).

Polygamy in Islamic Family Law

The law on polygamy was created on the basis to prevent the failure of polygamous practices especially persecution against wives and family members. The sense of responsibility regarding malpractice of polygamous act is taken frivolous because the society are unable to ponder verse 3 in the chapter an-Nisa' as it merely deals with admonition, reward and punishment, indeed no retribution shall be imposed on them if they oppress wife and family

members. There are no rules that allow man to be acted upon if they do not execute justice and so forth, like in Malaysia the offenses imposed on criminal offenders can be referred to in the penal code.

To the end of 19th century, Sheikh Muhammad Abduh suggested that polygamy shall be controlled under the power of the court. This is a revival course where the Quran does not precisely impose conditions for the husband to ask permission from the wife before practicing polygamy and so on. Sheikh Muhammad Abduh projects his attention in order to observe the needs and complexity of the society. His view of re-interpreting the provisions on polygamy began when he saw polygamous institutions under the jurisdiction of the *fuqaha* failed to secure women.

Numerous rules are developed and restructured from time to time to avoid misconduct in polygamous marriage. The Moroccan government has used the method of *takhayyur* in polygamy. The Moroccan family law has permitted a wife to form a marriage condition in order not to allow her husband to polygamy. When a husband violates the rules or conditions and mutually agreed upon, the wife in this context reserves the right to dissolve the marriage through the provision of *talak taklik*. The method of determining the current conditions of marriage is adopted in the Hanabalite School, but not for the other schools.

The Taklik Does Not Allow Polygamy According to Islamic Law in Malaysia

The Muslim community in Malaysia is synonymous with the taklik. This case is one of the most frequent cases among Malaysians (Ammar & Che Maryam, 2014) because it is the second highest case in the number of pending cases discussed in court (Abdullah, 2009). The reality of the number of unofficial divorce cases can also be seen through the case statistics of divorce verification claims (Department of Syariah Justice Malaysia, 2019 JKSM) shows a large amount on the register and deferred. In general, taklik is a topic that has been discussed by many jurists and it is categorized as a sarcastic pronouncement of divorce using any attribute. It also contains conditional words (Al-Muwasiyy, 2009; Al-Hanbaliyy, 1997; Al-Majajiyy, 2010; Al-Syarbiniyy, 2004; Al-Samarqandiyy, 1984). In Malaysia, this condition of non-combination is a type of taklik statement spoken by the husband apart from the content of the taklik letter on certain matters (Aznan, 2014; Zin, 2007; Lembut 2006). Based on Aznan's (2014) research in Perak, informal taklik can also be known as additional taklik.

According to Islamic law in Malaysia, the formal taklik pronouncement as read during the contract or the ordinary taklik pronouncement that is pronounced with the husband's will cannot be withdrawn because it includes conditions in a pronouncement and will have an effect on a marriage if the matter stipulated in the taklik has occurred unless the taklik is made by specifying a specific period and the period has expired. This is because Muslims are bound by promises that must be kept and cannot retract those words. If the word has been pronounced by the husband then the husband cannot delay the wording of the taklik. This is based on the hadith

Translation: It was narrated to us by Sulaiman bin Daud al-Mahriy, it was narrated by Ibn Wahab, it was narrated by Sulaiman bin Bilal, it was narrated by Ahmad bin Abdul Wahid al-Damsyiqi, it was narrated by Marwan, i.e. Ibn Muhammad – it was narrated by Sulaiman bin Bilal or Abdul Aziz bin Muhammad - has suspected the sheikh - on the authority of Kathir bin Zaid, on the authority of al-Walid bin Rabah, on the authority of Abu Hurairah, has said that Sulaiman bin Daud added that the

Messenger of Allah, may God bless him and grant him peace, said: The Muslims are bound by its conditions. (Hadith no: 3594, Sunan Abu Daud with Hasan Sahih status also narrated by Tirmidhi hadith no: 1352)

However, there is no specific provision in the Shariah Law Enactment related to additional taklik as the official taklik that is recited after the marriage contract has taken place, but there is Practice Instruction No. 8 related to Confirmation of Divorce Pronouncement other than Taklik Marriage Certificate and Penalty Effect under Section 124 of the Islamic Family Law which states:

[I would like to draw the attention of Y.A.A. to the decision of the 2006 Syariah Court Practice Guidelines Meeting of the Year 2006 on 12 to 14 April, 2006 corresponding to 13 to 15 Rabiulawwal, 1427H in Shah Alam, Selangor which has agreed and confirmed to adopt the practice guidelines that the proceedings for the confirmation of Taklik Pronounce Divorce cases apart from Taklik Marriage Certificate cannot be used as an effect for penalty action under section 124/125 - Penalty for Divorce outside the Court and without the permission of the Court under the Islamic Family Law Act/Enactment/Ordinance".]

This means that the additional taklik divorce pronounced by the husband is considered as a normal divorce even if it is named as an additional taklik, The Department of Islamic Religion does not allow such taklik to be written officially in the marriage certificate as the official taklik has been set. If the taklik violation occurs outside the court without the permission of the court, this is subject to punishment as in section 124: Penalty of Divorce outside the Court and without the permission of the Court. The Islamic Family Law (Federal Territories) Act 1984, which states:

[A man divorces his wife by pronouncing talaq in any form outside the Court and without the permission of the Court then he commits an offense and shall be fined not more than one thousand ringgit or imprisoned not more than six months or both.]

The provision of "pronouncing divorce in any form" includes taklik divorce.

Conclusion

The conditions in marriage are certainly not prohibited because there is no evidence that specifically refers to it. In addition, scholars recognize the conditions of marriage even they classify the terms to certain categories. The conditions mentioned in a contract are not all valid and binding on the parties involved. This is because only conditions that do not conflict with the demands of syarak are recognized. However, what is discussed by scholars is the determination of a condition whether it is authentic or otherwise. Some scholars express relatively loose conditions in determining authentic conditions and some of them are quite strict in accepting certain conditions. Nevertheless, scholars in determining the law of a condition are based on its position by looking at its alignment with the demands of the contract and the requirements of the syarak. However, in Malaysia, the condition is known as taklik. The provisions of Islamic family law in Malaysia are limited only to a few subjects which has been determined by Islamic religious officials. Regarding the issue of does not allow a husband to practice polygamy; the Islamic family law in Malaysia has no specific provision to the enactment. However, if the both parties agree to this taklik after marriage and the husband breach the taklik, Syariah Court will consider this issue as a normal talak, not taklik.

The most important is, society should aware by not requiring conditions that are merely based on desires because if the conditions were breached, then there will be legal implications to the marriage. This should be emphasized and addressed to the couples who want to get married, so they do not harm the marriage.

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