

**THE FAMILY INSTITUTION AND ITS GOVERNING LAWS
IN MALAYSIA AS A VANGUARD IN PROTECTING THE
SOCIETY FROM SOCIAL AILMENTS: A SHARI'AH
PERSPECTIVE**

Normi Abdul Malek*

ABSTRACT

The family is the basic unit of society that if damaged, will have a direct impact on the society at large. The increase in social problems and criminal activities are among the direct results of the decay of the family institution. Various matters within the family institution contribute to the strengthening or its weakening it. The failure of a man in carrying out his duty as the head of the family is one of the main issues addressed in this article. If he neglects his responsibilities such as non-payment of maintenance or fails to act as a guardian who protects the interests of his children, the direct victim will be the wife and the children. Sufficient evidence show that children brought up in an unhappy or broken family would have a higher tendency to be involved with evil activities outside their homes. This creates a new ailment or adds up to the existing ailments in the society. The role of the wife and mother in ensuring the stability of the family institution is also examined. Issues pertaining to polygamy also have a direct impact on increasing ailments in society, and this is also discussed. Finally, suggestions and recommendations are made in order to improve the current legislations and policies with regard to family matters so as to optimise their efficiency and contribute to minimise the ailments in the society. This article concentrates on the Islamic law as well as the legislation relating to family matters which are applicable to Muslims in Malaysia.

Keywords: family institution, Islamic family law, ailments, marriage, parental responsibilities.

* Associate Professor, Islamic Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.

**INSTITUSI KELUARGA DAN UNDANG-UNDANG
BERKAITAN DI MALAYSIA SEBAGAI PENJAMIN DALAM
MELINDUNGI MASYARAKAT DARIPADA
PERMASALAHAN-PERMASALAHAN SOSIAL: SATU
PERSPEKTIF SHARI'AH**

ABSTRAK

Keluarga adalah satu unit asas kepada sesebuah masyarakat di mana apabila sesebuah institusi kekeluargaan itu mengalami keruntuhan, maka masyarakat secara amnya akan turut terkesan. Peningkatan gejala sosial dan kadar jenayah adalah antara kesan langsung keruntuhan sesebuah rumah tangga. Terdapat pelbagai faktor dalam sesebuah keluarga yang mampu menyumbang kepada kekuatan atau kelemahan sesebuah institusi kekeluargaan tersebut. Kegagalan seorang suami dalam melaksanakan tanggungjawabnya sebagai ketua keluarga adalah isu utama yang akan diketengahkan makalah ini. Isteri dan anak-anak yang akan menjadi mangsa sekiranya beliau mengabaikan tanggungjawabnya seperti tidak membayar nafkah atau gagal dalam memainkan peranannya sebagai penjaga yang seharusnya melindungi kepentingan mereka. Terdapat pelbagai bukti yang menunjukkan bahawa anak-anak yang dibesarkan dalam keluarga yang bermasalah akan mengalami kecenderungan yang lebih tinggi untuk terlibat sama dalam kegiatan dan aktiviti tidak berfaedah di luar rumah. Perkara ini pastinya akan mencetuskan permasalahan baharu atau mengeruhkan lagi permasalahan yang sedia ada dalam masyarakat. Peranan seorang isteri dan ibu dalam memastikan kestabilan institusi keluarga akan turut dikaji. Isu berkenaan poligami yang mempunyai impak dalam mengurangkan permasalahan dalam masyarakat turut juga dibincangkan. Sebagai pengakhiran, cadangan diutarakan untuk menambahbaik undang-undang dan berkenaan hal ehwal rumahtangga yang sedia ada bagi memaksimumkan keberkesannya di samping meminimakan permasalahan dalam masyarakat. Makalah ini akan memberi tumpuan kepada Undang-undang Islam beserta undang-undang keluarga yang berkaitan dan terpakai kepada umat Islam di Malaysia.

Kata Kunci: institusi keluarga, undang-undang keluarga Islam, permasalahan, perkahwinan, tanggungjawab ibu bapa

INTRODUCTION

The family institution is a vital segment of the society. It is submitted that if the family institution functions effectively, it may act as a vanguard to protect the society from various ailments. When the family institution collapses, it will leave a direct impact on the society at large. This leads to an increase in social problems and criminal activities and are among the direct results of the decay of the family institution. There are various matters within the family institution that may contribute to its strength or weakness. The failure of a man in carrying out his duty as the head of the family is the main highlight in this article. When a man neglects his responsibilities such as non-payment of maintenance to his wife and children or failure to act as a guardian who protects the interests of his children, the direct victim will be the wife and the children. Sufficient evidence show that children brought up in unhappy or broken families have a higher tendency to be involved in unhealthy, immoral or illegal activities outside their homes. These may be considered as ailments in the society.

This article concentrates on the legal mechanisms put in place to ensure that every member of the family unit plays their role. The primary role of the father as the head of the family will first be highlighted and discussed. Subsequently, the role of the wife and mother in ensuring the stability of the family institution is also examined. Issues pertaining to under age marriages and polygamy, which have a direct impact in lessening ailments in the society, are also discussed. Finally, suggestions and recommendations are made in order to improve the current legislations and policies with regard to family matters so as to optimise their efficiency and contribute to minimise the ailments in the society. There is also a need to ensure effective enforcement measures are made available. This article highlights the importance of the family institution in Islam and the consequences of not supporting it. In doing so, it concentrates on the Islamic law as well as the legislation relating to family matters which are applicable to Muslims in Malaysia.

THE IMPORTANCE OF THE FAMILY INSTITUTION IN ISLAM AND EFFECTS OF SHUNNING MARRIAGE

Islam has always viewed the family institution as the most important unit of the society. From the time of the Prophet Adam a.s., one of the earliest rules that had been prescribed by Allah (s.w.t) was to govern the relationship between siblings in order to allow the expansion of the family unit. At that time, Allah had allowed the marriage between opposite twins.¹ Since then, Islam encourages marriage, prohibits celibacy and cohabitation. In the Qur'an, Allah ordains:

And marry those among you who are single and (also marry) your good slaves and maid servants. If they be poor, Allah will enrich them out of His Bounty. And Allah is All-Sufficient for His creatures' needs, All Knowing.²

Many ahadith of the Prophet (*peace be upon him*) show how Islam encourages marriage. For example:

Those of you who can support a wife should marry for it keeps you from looking at strange women and preserve from unlawful sexual intercourse but those who are not able (to support) should devote himself to fasting for it is a means of suppressing sexual desire.³

Whoever is married, he has indeed perfected half of the religion. He should fear Allah for another half.⁴

One of the important reasons why Islam encourages marriage is to sustain the progeny of mankind and for the survival of human civilisation. Allah says:

¹ "IslamWeb," accessed March 18, 2011, <http://www.islamweb.net/emainpage/index.php?page=showfatwa&lang=E&Id=87711&Option=FatwaId>.

² Al-Qur'an, *Surah An-Nur*, 24:32; See also *Surah An-Nisa*, 4:3.

³ "Bukhari and Muslim," World of Islam, accessed February 28, 2011. http://hadith.worldofislam.info/index.php?page=500_ahadith.

⁴ "Imam Bayhaqi," DakwahInfo, accessed February 28, 2011, www.dakwah.info/utama/wp-content/plugins/download.../download.php?id=5.

O mankind! Be careful of your duty to your Lord, Who created you from a single soul and from it created its mate and from them has spread abroad a multitude of men and women.⁵

Another significance of marriage is the wholesome effect it provides to human beings. Through marriage one attains spiritual, physical, emotional and psychological companionship. This companionship generates and sustains love, kindness, compassion, mutual confidence and solace. It is a legitimate outlet for procreation and happiness as stated in the Quran:

And of His signs is this: He created for you mates from yourself that you might find rest in them, and He ordained between you love and mercy. Lo, therein indeed are portents for folk who reflect.⁶

The above guidelines have been bestowed upon us by Almighty Allah who has created the whole universe including mankind. As the Creator, He knows what is best for human beings. Thus, those who shun the prescribed way of life exemplified by Islam and practice cohabitation, same sex marriage and sex outside marriage commit acts that are contrary to what has been ordained. This will affect the personal relationship with Allah and strips away all forms of *barakah* or blessings in the person's life.⁷ Such acts are also considered as crimes under the Shari'ah. Aside from that, these acts will leave a negative impact on the society, leading to a total disregard for the laws of Allah (s.w.t.) In case of cohabitation for example, should there be any resulting child, and there will be more complications in terms of establishing legal relationships.⁸ Not only that, the embodiment of a Muslim family will not be realised and this will have a detrimental effect on the formation of a God loving society.

The effects of shunning marriage can be divided into three, namely, sociological, psychological and legal aspects. Sociologically, cohabitation, for example, leads to a higher rate of separation and divorce. Psychology today reported that women who cohabited were

⁵ Al-Qur'an, *Surah An-Nisa*, 4:1; See also *Surah Al-A'raf*, 7:189.

⁶ Al-Qur'an, *Surah Ar-Rum*, 30:21.

⁷ See for examples, Al-Qur'an, *Surah At-Talaq*, 65:8-10 and *Surah An-Nahl*, 16:112-113.

⁸ The importance of genealogical relationship in Islamic family law is discussed in Mohamad Sujimon, *The Problems of the Illegitimate Child (Walad Zina) and Foundling (Laqit) in the Sunni Schools of Law*, IIUM Press (2010).

eighty percent more likely to separate than those who did not live together before marriage.⁹ Those who cohabit before marriage have unhappier marriages¹⁰ and their depression rates are more than three times than those who married.¹¹ As for children who are living with cohabiting biological parents, the likelihood that they might be abused is twenty times more than children living with married parents. The percentage increased another ten percent if the mother's boyfriend is not the biological father.¹² The usual reason given by the cohabitees on why they live together without marriage is that sooner or later their relationship will end up in marriage. However, this notion seems to have no basis as the survey shows that those who cohabit are the least likely to marry each other.¹³

As for psychological effects, many studies show that physical abuses are more common and severe among cohabitees compared to married couples.¹⁴ Important values in a successful relationship such as commitment and trust also tend to be diminished.¹⁵ Legally, cohabitees may not enjoy rights accorded to married couples in terms of maintenance, property, custody and inheritance.

Another important effect of a stable marriage is the benefit received by the children who are the future of the society. In 1998, the Green Paper on Supporting Families, the government of United Kingdom states that:

⁹ "Twenty Good Reasons Why Not Cohabit Before Marriage," Physician For Life, accessed April 20, 2011 <http://www.physiciansforlife.org/content/view/242/27>.

¹⁰ Stets and Jan E, "The Link Between Past and Present Intimate Relationship", *Journal of Family Issues* 14. (1993), 236, accessed April 16, 2011. www.jfi.sagepub.com/content/14/2/236/refs.html.

¹¹ Popenoe, David, Whitehead and Barbara Dafoe "Should We Live Together? What Young Couples Need To Know About Cohabitation Before Marriage," *National Marriage Project* (1999):9-10, accessed April 14, 2011. <http://www.virginia.edu/marriageproject/pdfs/swlt2.pdf>.

¹² Popenoe, David, Whitehead and Dafoe, "Should We Live Together?," 8.

¹³ Weston and Don, *All About Cohabiting Before Marriage*, as cited by Franck, Dennis, "No Marriage? No Ring? No Problem! An Ethical Essay Concerning Unmarried Cohabitation" (Members aol.com/soc, 2001), accessed March 27, 2011, 1, http://singles.ag.org/files/cohabitation_issues.pdf.

¹⁴ Weston and Don, *All About Cohabiting Before Marriage*, 6.

¹⁵ Smith and Harold Ivan, *Singles Ask-Anwers to Questions About Relationships and Sexual Issues* (Minneapolis, Augsburg Publishing House, 1988), 125, as cited by Franck, Dennis.

Marriage does provide a strong foundation for stability for the care of children. It also sets out rights and responsibilities for all concerned.¹⁶

Marriage is also considered as the greatest weapon to combat poverty among children.¹⁷ It is reported that if a child is brought up in a married family, the probability that the child is living in poverty is reduced by about eighty percent. This is because the survey in the USA found out that the percentage of poverty rate for single parents with children in 2008 was at 36.5 percent while the rate for married couples with children was only 6.4 percent.¹⁸ Poverty among children may lead to truancy and this certainly leads to many other social problems.

THE ROLE OF ISLAMIC FAMILY LAW IN PROMOTING MARRIAGES

There is no clear provision in the Islamic family law legislations in Malaysia with regard to promoting marriage. The reason perhaps is due to the clear encouragement that has been provided by Islamic law as has been explained above. Nonetheless, there is no harm to specifically provide in the legislation a provision with regard to promoting marriage in order to show that the government is serious and concerned with regard to this matter. For example, in England, section 1 of the Family Law Act 1996 expressly mentions: “(a) that the institution of marriage is to be supported.”

It would also be timely to introduce a similar provision into the Islamic Family Law Enactments of every state. The provision is also timely, taking into account the current situation in the modern Malaysian society where young people might not prioritise marriage for various reasons including career, leisure and fear of commitment.

Apart from encouraging marriage as the catalyst to the formation of a family and thus acting as a vanguard of society, it is submitted

¹⁶ Potter and Mark, *The Family in the 21st Century*, (High Court Quarterly Review, 2006) 2, accessed March 29, 2011, <http://www.highbeam.com/doc/IGI-189958111.html>.

¹⁷ Robert Rector, “Marriage: America’s Greatest Weapon Against Child Poverty,” *The Heritage Foundation* (2010): 2, accessed March 25, 2011. www.heritage.org/.../marriage-america-s-greatest-weapon-against-child-poverty.

¹⁸ *Ibid.*, 1.

that the marriage institution should be cared for. As such, although divorce is allowed in Islam, it should not be used loosely to escape from responsibilities. If practiced too rampantly, divorce might also lead to many ailments in society. Much has been said about the effects of divorce to the wellbeing of the children. It is reported that children with divorced parents commonly experience poorer grades in academic performance and this is attributed to their behaviour, which are adversely affected after the divorce, rather than their intellectual abilities¹⁹ Poor performance usually leads to other problems such as truancy, criminal activities, drug addiction and alcoholism.

Thus, Islam does not only encourage marriage but also discourages divorce. Islam views marriage not only as a civil contract between two individuals, but more importantly as a form of *ibadah* (worship). The bond created by marriage is very sacred and special in the eyes of Islam. The Quran regards it as a firm and strong covenant.²⁰ Thus, as far as possible, marriage should be protected from all kinds of destructive and damaging factors. In the event of conflict, parties should try to resolve their problems with the aim to save the marriage and only resort to divorce as the final way out. This is in line with the hadith of the Prophet which provides that “*the most detestable of lawful things in the eyes of Allah is divorce*”²¹. Islam has prescribed in detail the steps that should be taken by parties of the marriage as well as other relevant parties connected to the marriage in dealing with any conflict that might arise.

Instead of resorting immediately to divorce as the only means to solve the problem, the Quran has provided ways to deal with marriage crisis, whereby family members from each party who are well respected by both parties may do their very best to reconcile the parties.²²

If the above attempts are futile, before the parties apply for a divorce, they are required to attend counseling sessions at the religious offices. In some states in Malaysia, before any application for a divorce can be made, parties must produce evidence to the court

¹⁹ Chan, Samuel Hsin Chlen, Mustafa and Mohamed Sharif, “Divorce in Malaysia” (paper presented at the Family Counseling Seminar, University of Technology, Malaysia, Johor Bahru, Johor, Malaysia, August 30th, 2008).

²⁰ Al-Qur’an, *Surah An-Nisa*, 4:21.

²¹ Ibn Majah, *Sunan Ibn Majah*, trans. Muhammad Tufail Ansari, (New Delhi: Kitab Bhavan, 2003) 2nd edn., Vol.3, 210.

²² Al-Qur’an, *Surah Al-Baqarah*, 2:35.

that their case has been referred to the counselling unit at the religious office. If all the efforts to reconcile the parties as explained above are to no avail and it seems that separation is the best way out, then only at this stage, the husband or wife may make an application for divorce to the court. According to the law in Malaysia, the husband should pronounce *talaq* (divorce) in the court.²³

Even when parties have filed an application to the court for a divorce, if the court finds out that the possibility for reconciliation is still there, the court will appoint a committee for that purpose. In the case of *Razimah Haneem v Yusuf Hasbullah*,²⁴ the petitioner applied for permission to divorce his wife under section 47 of the Islamic Family Law (Federal Territories) Act 1984 (IFLA). In this case, a conciliatory committee was appointed to effect reconciliation. Section 47(6) further provides that when appointing two persons to act for the husband and the wife respectively, the court will give preference to close relatives of the parties who have knowledge about the circumstances of the case. The committee is usually given a period of six months to try and reconcile both parties.

The fact that divorce is only allowed to be made in the court is actually another mechanism to make sure that divorce is not so easily pronounced. For example, Section 124 of the IFLA also prescribes punishment for failure to abide by the procedure. In the case of *Pendakwa Mahkamah Syariah Melaka v Ismail bin Jaafar*,²⁵ the husband was charged with the offence of divorcing his wife without the permission of the court. He was found guilty and sentenced to a fine of RM80 or in default three weeks imprisonment. Nevertheless, divorce pronounced outside of the court will still be effective and must be registered within seven days of its pronouncement.²⁶

²³ IFLA, Section 47.

²⁴ (1993) 9 JH 237.

²⁵ (1989) 7 JH 100.

²⁶ IFLA, Section 55A.

PARENTAL RESPONSIBILITIES AND RIGHTS

Another important aspect of the marriage institution that delivers significant impact to the development of a successful society is the fulfilment of parental responsibilities. Various responsibilities are entrusted to men, especially, as the head of the family.²⁷ This includes providing maintenance to the wife and children and becoming the guardian of the children which means that the father will be the first person obliged to protect the wellbeing and interests of the children, including the right to give consent to marriage. It is believed that if these responsibilities are implemented well, the ailments in the society would be greatly decreased. This will be further discussed and detail below.

Providing Maintenance

According to Islamic law, men as the head of the family have been obliged to fulfil certain responsibilities including providing maintenance to the wife and children. Allah says:

Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend from their means.²⁸

Section 72 of the IFLA provides that:

(1) Except where an agreement or order of Court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as are reasonable having regard to his means and station in life or by paying the cost thereof.

²⁷ According to Islamic law, the husband is the leader of the family due to several factors including financial (the husband is obliged to maintain the wife and also to pay *mahr* (dower) but he will be entitled to get more proportion in the case of inheritance), physical strength and broad mind. See Al-Qur'an, *Surah An-Nisa*, 4:34. See also Al-Qur'an *Surah Al-Baqarah*, 2:228, where Allah mentions: "... but men have a degree (of responsibility) over them. See also Al-Qurtubi, *Al-Jami' li Ahkam al-Quran*, Vol. 5, (Kaherah: Dar al-Hadith, 2002),153; Syaikh Imad Zaki Al-Barudi, *Tafsir Wanita*, trans. Samson Rahman, (Jakarta: Pustaka Al-Kautsar, 2004), 511-516.

²⁸ Al-Qur'an, *Surah An-Nisa*, 4:34. See also *Surah Al-Baqarah*, 2:233.

Children who have not been provided adequately by the parent with regard to their basic needs will not grow up well as opposed to those who have been catered well by their parents. Lacking in their basic needs such as food, clothing and education fees can lead to the children performing poorly in their studies. Performing poorly in their studies might result in other ailments in the society such as dropping out of school, getting involved with gangsters and drug addiction.

Even though the law above seems to provide adequately with regard to the need for fathers to maintain their family, there are many problems with regard to the enforcement of maintenance orders.²⁹ For example, in 2010, there were more than 12,300 ex-husbands or fathers who failed to pay maintenance.³⁰ In order to solve this problem, the Family Support Division (*Bahagian Sokongan Keluarga* or 'BSK') was established by the Department of Syariah Judiciary Malaysia (JKSM) in 2008. Among the important aims of BSK is to become the first help centre for the ex-wives and single mothers to tackle and solve their maintenance problems. BSK will also try to alleviate their problems by providing immediate financial assistance.³¹ It is hoped that BSK will really meet its objective to at least reduce the problems and difficulties faced especially by single mothers. Its success will also contribute to reduce the ailments in society, as the affected children may possibly be involved in criminal activities such as theft and other crimes if their basic needs are not been catered to sufficiently. Further research is required in order to look at the efficacy of this division.

²⁹ See Jazilah M. Saad, et.al. "Mechanism of Enforcement and Execution of Muslim Maintenance Order: Court-Based System" (2013) *IUM Law Journal* Vol. 21 No. 2, 183. On the mechanism to enforce maintenance orders and issues arising.

³⁰ *Berita Harian*, March 20, 2010 as quoted by Nora A. Hak, *Selected Issues in Family Law* (IIUM Press, International Islamic University, Malaysia, 2011) 168. Nora A. Hak, *Selected Issues*, 169-170. Immediate financial assistance means that the amount of maintenance due will be advanced to the receiver using the money from the Trust Fund. This amount must be repaid by the debtor husbands/fathers. This mechanism will really help the women and children to get immediate relief from their financial difficulties.

Guardianship of Children

Another important aspect of the responsibility of the father is to ensure that children are brought up as good individuals and are beneficial to the society later. The jurists mention that it is the duty of the father to make sure children get proper education and skills for their future living. This responsibility of the father, however, is not confined to the children's wellbeing in this world only but extends to the life in the hereafter. Thus, besides providing the children with knowledge and skills for good living in this world, the children also need to be equipped with all kinds of knowledge and practices which will save them from the hellfire. Al-Quran ordains:

O you who believe! Save yourselves and your families from a fire whose fuel is men and stones, over which are (appointed) angels stern (and) severe, who flinch not (from executing) the commands they receive from Allah, but do (precisely) what they are commanded.³²

The responsibility of the father as guardian of his children does not stop even though *hadhanah*³³(custody) is given to the mother in the case of divorce or separation. The jurists have discussed in detail the rules pertaining to the law of *hadhanah* in order to make sure that the right and responsibility of the father as the guardian is not disturbed even though there is separation between the parents of the child.³⁴ The father, in his capacity as guardian, has the duty to carry out his responsibility towards the child including to educate, control, discipline and have general supervision over the child.

From the child's perspective, it is important to ensure that the child's needs are met regardless of whether his parents are living together or separately. This is especially true in the case of some parents who seem to forget the fact that they actually have children who are not living with them and these children are waiting and longing for their attention, supervision and love. Failure to fulfil this duty will lead to neglect and despondency of the children. This has a

³² Al-Qur'an, *Surah At-Tahrim*, 66:6.

³³ The right to have physical care of the child.

³⁴ Ibn Qudamah and Ahmad bin Muhammad, *Al-Mughni*, (Maktabah al-Riyad Al-Hadithah, Riyadh) n.d., Vol.9, 143; Al-Nawawi, Muhyee al-Din Abu Zakariyya Yahya ibn Sharaf, *Minhaj al-Talibeen*, Trans E.C. Howard, (Law Publishing Company, Lahore, Pakistan), n.d., 392.

direct impact on their development into adulthood and shows how the failure of parents' fulfilling their responsibilities results in the crippling of the family which can no longer act as a vanguard.

Unfortunately, in Malaysia the responsibilities of the parents have not been mentioned clearly in the legislation. In England, for example, English Children Act 1989 defines parental responsibility as "*all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*". A better version, perhaps, can be seen in Scottish law as unlike English law, it distinguishes parental responsibilities from parental rights. Section 1(1) of the Children (Scotland) Act 1995, outlines four main responsibilities of parents including to safeguard and promote child's development, to provide direction and guidance, to maintain contact and to act as the child's legal representative. With regard to parental rights, the same Act provides that a parent has the right to have the child living with him, to control the child's upbringing, to maintain contact and to act as the child's legal representative.

Thus, it is timely for Malaysia to provide a clear provision in the law pertaining to what constitutes rights and responsibilities of parents. This will help to clarify to the parents what their rights and responsibilities are with regard to their children. Consequently, it is hoped that their commitments toward fulfilling their duty will increase. This will also send the message that the government is serious in ensuring that parents fulfil their responsibilities. The best that can be expected from this is that the interests of the children are well taken care of and at the end of the day, the society at large will benefit from this development.

Thus far, concentration has been made on the responsibilities that needs to be played by the man in maintaining a healthy and happy family. The next part of the discussion highlights the equally important role of the woman in ensuring the well-being of the family so as to allow it to become a form of protection for the society from various social ailments.

The Role of Woman as a Wife and Mother

Although the main responsibility of caring for the family lies with the father, the role of a woman is also crucial in ensuring that the family is well cared for. The tender touch of a woman allows the husband and children to feel content and develop what is referred to as

“*mawaddah wa rahmah*” which means felicity and affection. In order to sustain a marriage relationship, two important criteria of a woman as a wife are obedience to Allah and chastity. Allah’s injunction is:

Therefore the righteous women are devoutly obedient (to Allah and to their husband), and guard in the husband’s absence what Allah orders them to guard (their chastity).³⁵

In one hadith the Prophet Muhammad (*peace be upon him*) mentions:

A believer does not get more benefit of the good he possesses, after God-consciousness, than a righteous wife. If he commands her, she obeys him, if he casts a glance at her, she pleases him and if he takes an oath against her, she fulfills it and if he is absent from her, she is sincere to him regarding her person and his property.³⁶

Section 129 of the IFLA provides:

Any woman who willfully disobeys any order lawfully given by her husband according to Hukum Syarak commits an offence and shall be punished with a fine not exceeding one hundred ringgit or, in the case of a second or subsequent offence, with a fine not exceeding five hundred ringgit.

A woman should also play her role as a parent effectively, that is to help her husband in raising their children and to educate them to become good and responsible persons later. A mother who is too busy with her career and therefore does not have enough time to spend with the children may bring about negative implications in their upbringing.

However, it is also submitted, it is only possible and fair for a woman to be obedient to her husband only if he too fulfills his role as a husband and father. As such, the application of Section 129 of the IFLA should also take into consideration the reason behind the disobedience and thus should not be used too liberally to punish women for no apparent reason.

³⁵ Al-Qur’an, *Surah An Nisa*, 4:34; See also *Surah At-Tahrim*, 66:5.

³⁶ Ibn Majah, 119.

POLYGAMY

Islam permits polygamy for its followers. Al-Quran mentions:

Marry women of your choice, two, three, or four but if you fear you shall not be able to deal justly, then only one.³⁷

It is an undeniable fact that the institution of polygamy provides antidotes to certain problems in certain marriages. For example, in the case of *Sharif bin Jamaluddin v Kuning binti Kasman*,³⁸ the application of the husband who was capable of practising polygamy was granted. In this case, the wife was suffering from some illness which made her incapable to fulfil her responsibility as a wife. This case is a good example of polygamy becoming a remedy to certain types of difficulty that can happen in a marriage. By practising polygamy, the husband can fulfil his sexual needs and at the same time fulfil his responsibilities to maintain and take care of his sick wife. Unlike in civil law,³⁹ where polygamy is prohibited, if a husband faces a similar problem like what happened in *Sharif's* case, the husband must divorce the first wife before marrying another one in order to fulfil his sexual needs. Even though the husband is willing to take care of his sick wife and at the same time marry another wife, this is not allowed by the civil law. This certainly creates difficulty to a husband, what more a wife, who is not only sick but has to be divorced by the husband at a time where she really needs the care and love from him.

Nevertheless, the practice of polygamy needs to be regulated in order to avoid misuse in its practices. There are cases where even though the husband does not fulfil the required financial ability, he still wants to practise polygamy.⁴⁰ This certainly will have an impact on the wellbeing of the existing wife as well as the children, especially in terms of maintenance. In order to avoid this, the law provides that in order for a man to practise polygamy, prior permission must be obtained from the court. Section 23 of the IFLA provides that:

³⁷ Al-Qur'an, *Surah An-Nisa*, 4:3.

³⁸ (2002) 15 JH 173.

³⁹ See Law Reform (Marriage and Divorce) Act 1976, Sections 5, 6 and 7.

⁴⁰ See *Rajamah bt Mohamad v Abdul Wahab b. Long* [1412] JH 171, *Re Salleh Suati* [1990] 2MLJ xxix, In *Re Ruzaini bin Hassan* (2002) 15 JH 79.

(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.

According to section 123, it is an offence for a person to practise polygamy without permission of the court:

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 both.

The law also provides in great detail, the factors that need to be fulfilled before a husband is permitted to practice polygamy. Section 23 provides:

(4) On receipt of the application, the Court shall summon the applicant and his existing wife or wives, the woman to be wedded, the *wali* of the woman to be wedded and any other person who, in the opinion of the Court, may provide information relating to the proposed marriage to be present at the hearing of the application, which shall be *in camera*, and the Court may grant the permission applied for is 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, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;

(b) that the applicant has such means as to enable him to support as required by Hukum Syarak all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage;

(c) that the applicant would be able to accord equal treatment to all his wives as required by Hukum Syarak; and

(d) that the proposed marriage would not cause *darar syarie* to the existing wife or wives.

In order to ensure the rights of the existing wife or wives are protected, the law also provides that the existing wife may apply for the division of matrimonial property that have been acquired by the

parties before the polygamous marriage takes place.⁴¹ Those who fail to accord proper justice to his wife while practising polygamy will also be subject to punishment under section 128.

Similar challenges as discussed with regard to the requirement of consent of *wali* also exists in the case of polygamy, that is parties in Malaysia often elope to Thailand in order to contract a polygamous marriage.⁴² Thus, even though they might not have fulfilled all the requirements stipulated above, they still contract the marriage in Thailand. This certainly is not good for the wellbeing of the existing wife and children as their rights, especially with regard to maintenance are affected. As highlighted before, the recognition of marriage contracted in Thailand needs further research in order to protect the interests of all the parties involved.

CONCLUSION

The family institution must be defended for the survival of human civilisation. Without this important nucleus in the society, the wellbeing of human civilisation will be at stake. Children as the future of the civilisation will be most at risk. Without a proper contract of marriage, the sense of duties, responsibilities, commitments and belonging cannot be achieved and without all these important elements, a high quality and noble future generation cannot be expected. Thus, it is not at all an exaggerated statement to say that the family institution and the laws governing it may act as a vanguard to protect the society from many ailments.

Generally, Malaysia has provided many related provisions in order to ensure that the wellbeing of the family is cherished and protected. The laws with regard to maintenance, polygamy, guardianship of marriage are already in existence and to a certain extent, these laws help to reduce the ailments in the society. Before polygamy may be practiced for example, the husband needs to get the approval from the court in order to ensure that his practice will not impact the existing family negatively.

⁴¹ IFLA, Section 23(9).

⁴² A good account of such issues can be found in Noraini M. Hashim et. al. "Legal Development of Cross-Border Marriages Among Muslims in Malaysia" (2015) *IJUM Law Journal* Vol. 23 No. 2, 226.

Nevertheless, there are still areas of laws which still need improvement. The provision pertaining to parental rights and responsibilities are not clearly provided by the Islamic family legislation in Malaysia. Finally, it is hoped that all relevant parties including individuals, parents, authorities and society as a whole work hand in hand in order to ensure that the ailments in the society can be at least reduced. It is believed that if all relevant parties fulfil their roles and responsibilities as provided by Islamic teachings and the legislations, a better future of Malaysia can be anticipated.