

**JUST AND EQUAL TREATMENT IN
POLYGAMOUS MARRIAGE:
THE PRACTICE IN THE SHARIAH
COURTS IN MALAYSIA**

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ABSTRACT

In Islam, a man may marry more than one woman, provided, as mentioned in the Qur'ān, some conditions are observed. The requirement of equal and fair treatment of the women is clearly emphasised, and it has to be based on just and equitable principles as laid down by Islamic Law. Muslim jurists have laid down specific conditions for a man to take more than one wife. The man should have enough financial capacity to look after the needs of the women and they should be treated equally in fulfilling their rights such as maintenance and accommodation. If a man feels that he will not be able to treat the women with equality and justice, he should restrict himself to marrying only one woman. In Malaysia, the Shariah Court can only grant permission for a polygamous marriage if a man has satisfied the court that he has fulfilled the required conditions.

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Section 23 (4) of the Islamic Family Law Act in Malaysia provides that the husband must have sufficient means to support his wives and dependants, that he would be able to accord equal and fair treatment to them. There are many cases in the Shariah Court where applications to practise polygamy by men were dismissed for fear justice would not be served to the women. This paper is an observation on the practice of the Shariah Court in Malaysia in granting permission to applications for polygamous marriage, and examines briefly to what extent this requirement of equal and fair treatment is adhered to by the courts.

INTRODUCTION

Polygamy is not a new phenomenon. The Arabs were polygamous before the advent of Islam. Polygamy was an accepted way of life of peoples of other religions such as the Jews and the Christians. In Pre-Islamic Arabia, there was the practice of limitless polygamy. The institution of polygamy was recognised among Babylonians, Abyssinians, and Persians. Polygamy is a custom practised among the tribes of Africa, Australia and the Mormons of America and also in India. In Islam, a man is allowed to marry more than one wife with the condition that he is able to treat his wives with equality. It is provided in *sūrah al-Nisā'* (4): 3 that, as translated “and if you fear that you cannot act justly towards orphans, then marry such women as seem good to you but if you fear that you will not do justice between them, then marry one only...” The above verse relates to situations arising out of wars in the early years of Islam when countless Muslim girls were left orphans and women became widows. It clearly shows the existing fear that orphaned girls and widows may be unjustly treated or exploited. However, should this marriage to more than one wife lead to injustice in family relations then the man is advised to only have one wife. At present, there are various legislative measures that have been introduced to restrict or even prohibit the practice of polygamy in several Muslim countries. In Morocco, for example, the new law states that polygamy is forbidden when there is a risk of inequality

between the wives or when the wife stipulates in the marriage contract that her husband will not take another wife. The court will not authorise a polygamous marriage if the man does not prove an exceptional and objective justification, and if the man does not have sufficient resources to support the two families and guarantee all maintenance rights, accommodation and equality in all aspects of life. In Malaysia, with the aim of further improving the law and ensuring justice to family members, the Dewan Rakyat passed the Islamic Family Law (Federal Territories) (Amendment) Bill 2005. The Bill, which was passed by 12 states, is also aimed at streamlining the Islamic Family Laws. The need for standardising the law is strongly felt, as there have been many problems and complaints about it, especially problems relating to the procedures of application for polygamy. In some states, such as Perak, Terengganu and Kelantan, the specific conditions for polygamy had been deleted, leaving the Syarie judge to use his own discretion to decide on whether a husband is eligible to take another wife. There have also been complaints on the registration of polygamous marriages. Under the current law, a polygamous marriage may be registered even though it was contracted without the permission from the syari'e judge. Men, instead of applying for the special permission, find it much easier to pay a fine when applying for the registration of their polygamous marriages. This article, thus, examines the law in Malaysia in restricting the practice of polygamy in view of the interest and welfare of the family.

THE TEST OF JUST AND EQUAL TREATMENT

The main condition, which Islam states for permitting a man to have more than one wife, is evidence on his part that he will be able to treat his wives justly and equitably. The verse mentions that, as translated "...if you fear that you will not be able to do justice then marry only one..."¹ The meaning of justice referred to in the above verse only relates to the humanly possible equitable treatment. It refers to justice in outward matters such as justice in providing maintenance (*nafkah*), justice in conjugal relationships that is, taking turns with the wives and justice in the place of dwelling. In the case of love and affection, even if

¹ The Qur'ān, Al-Nisā' (4): 3.

one really wants to do equal justice with sincerity, he will not be able to do so, being human.² The Qur'ān refers to this human weakness in the following words, as translated “You are never able to be fair and just as between women, if ever it is your ardent desire: but turn not away from a woman altogether so as to leave her as it were hanging in the air.”³ However, man is encouraged to be just also in love and affection and to be just to all of them.⁴

According to Professor Dr. Hamka in his book *Tafsir Al-Azhar*, verse three of Sūrah Al-Nisā' should be read as a whole and one should not leave out the beginning or the end of the verse. If read as a whole, it is clear that the first limb of the verse allows a husband to contract another marriage but the second limb of the verse prohibits him from doing so if he cannot deal justly with the wives. Islam permits polygamy to be practised, but makes it obligatory that justice is accorded to all the wives in absolute equality not only in visible matters such as food, shelter, clothing, fair distribution of cohabitation between the wives but also in other matters. Where a man intends to practise polygamy but it is feared that he is incapable of according fair treatment and fulfil his obligations to all his wives, it is forbidden (*ḥarām*) for him to do so because, to cause injustice is prohibited and therefore it is forbidden (*ḥarām*) in Islam, as mentioned in verse 3 of *sūrah al-Nisā'*.⁵

Shaikh Mohammad Abduh emphasized that the verse relating to polygamy laid down two basic conditions, firstly, if by contracting the would be second marriage it is feared that the husband might be unjust in

² See, Muṣṭafa Al-Khin, 'Fiqh al-Manhajī 'Alā Madhhab Imām al Shāfi'ī, (trans), Juanda Jaya, *Kitab Fikah Mazhab Syafie*, vol. 4, Pustaka Salam, Kuala Lumpur, 2005, p. 760; Wahbah al-Zuhailī, 'Fiqh al- Islāmī wa Adillatuhu', (trans), Ahmad Shahbari Salamon *et al.*, *Fiqh dan Perundangan Islam*, vol. 7, Kuala Lumpur, DBP, 2001, p. 231.

³ The Qur'ān, Al-Nisā' (4): 129.

⁴ There is a Ḥadīth of the Prophet Muhammad saw, which says; “Oh Allah (s.w.t.), this is the allocation that I made on what I have and please do not wrong me for what you have but I do not have.” The word, “what you have it but I do not have” refers to love and affection. The Prophet Muhammad (s.a.w.) loved Aishah (r.a.) more than his other wives.

⁵ The opinion of Prof Dr Hamka was referred to by the court in the case of *Aishah binti Abdul Rauf v Wan Mohd Yusof bin Wan Othman* [1990] 3 MLJ lx, p. lxiii.

distributing his favours, he must content himself with a single wife, and secondly, that he must be in a position to support a plurality of wives in addition to fulfilling his existing family responsibilities. The conditions for polygamy should not only be regarded as binding on the individual's conscience but also enforced by the courts as a condition precedent to the registration of a second marriage. Shaikh Abduh thus proposed that a man who already has one wife should be forbidden to marry another unless the courts are satisfied that he would be able to fulfill those two conditions.⁶

Dr. Mustafa al-Khin views that Islam does not allow polygamy for it to be used as a weapon to hurt or give unjust treatment to the wife. Polygamy is permissible to fulfill the social needs and to protect the society and the individuals. It is also to prevent immorality (*ma' siyah*) and immoral activities in the society.⁷

THE PRACTICE OF POLYGAMY IN THE SHARIAH COURT OF MALAYSIA

In Malaysia, efforts to improve legislation in the administration of polygamy began in the early 80s, with specific and detailed provisions on polygamy enacted under the Islamic Family Law Enactments. The provisions are basically similar to that of the legislations of other Muslim countries and are primarily based in their substance upon the classical Islamic Law of the Shafie School. There has been however, some modification of Islamic rules on matters pertaining to polygamy, child marriage and also divorce, for the purpose of their better application to the present society.⁸ Under the Malaysian law, a husband has to submit a specific form to the Shariah Court and the Court, upon receiving the application form from the husband, shall summon the existing wife or wives to be present at the hearing, which shall be in camera.⁹ The purpose

⁶ Quoted in Ahmad Ibrahim, *Family Law in Malaysia*, MLJ, 1997, p. 198.

⁷ Muṣṭafa Al-Khin, 'Fiqh al-Manhajī 'Alā Madhhab Imām al Shāfi'ī (trans),' p. 760.

⁸ Raihanah Abdullah, "Polygamy as a cause of divorce in Malaysia," *International Conference on Divorce: Causes and Consequences*, Beijing, July 19-20, 2004, p. 354.

⁹ Section 23 of Islamic Family Law (Federal Territories) Act, 1984.

of this summon is to notify the wife of the intention of her husband and also to avoid any false allegation being made by the husband.¹⁰

The husband is required to state in the form the reasons why the proposed marriage is fair and necessary.¹¹ The court, in determining whether the proposed marriage is fair and necessary, has to take into consideration certain circumstances such as sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives.¹² According to Raihanah the most popular reason a man gives in contracting a polygamous marriage, is that, he (the man) and the woman have fallen in love and therefore the proposed marriage will prevent them from committing adultery.¹³ Furthermore, some men claim that they enter into polygamous unions to emulate the practice of Prophet Muhammad s.a.w. She referred to a statement by Monir who observed that, “most men entered polygamous marriages not out of emulating the Prophet’s *sunnah* (example) but for personal interest.” It seems that this *sunnah* of the Prophet i.e., polygamy is well received or eagerly quoted by interested parties, more than other *sunnah*.

To take another wife, the husband must have financial means to enable him to support all his wives and dependants. To prove these two conditions, the husband is required to submit evidence to support his

¹⁰ Raihanah Abdullah, “Polygamy as a cause of divorce in Malaysia,” *International Conference on Divorce: Causes and Consequences*, Beijing, July 19-20, 2004, p. 354.

¹¹ Under the new amendment 2005 the words “just and necessary” have been amended to “just or necessary.” It has been criticised that this amendment makes it easier for men to practise polygamy, as the husband will only need to show to the court that the proposed marriage is “necessary,” and it is not required for the husband to prove whether it is “just” or not for him to practise polygamy. However, according to another opinion this amendment will not give great impact to the practice of polygamy in Malaysia as the husband who wants to practise polygamy will still be subjected to strict law on polygamy as provided for under Section (4)(a)–(d) of the Act.

¹² Section 23 (4) (a) Islamic Family Law Act, 1984.

¹³ Raihanah Abdullah, “Polygamy as a cause of divorce in Malaysia,” *International Conference on Divorce: Causes and Consequences*, Beijing, July 19-20, 2004, p. 354.

claim. The husband has to produce a medical report concerning the unfit condition of the existing wife and also his financial statement that indicates his permanent or supplementary income. In *Re Ruzaini bin Hassan*,¹⁴ the applicant had filed the application for polygamy under section 23 of the Islamic Family Law Enactment (Negeri Sembilan). The applicant claimed that his financial condition was stable for him to support two families. However, the first wife has objected to it. The applicant explained in detail to the Syariah Court of his financial capability. The Court after considering the evidence from the applicant decided that the applicant did not have the financial ability to have a second wife. Therefore the application was rejected.

It is required that the man must be able to accord equal treatment to all his wives as required by *hukum Syara'*; and that the proposed marriage would not cause *ḍarar shar'i* to the existing wife or wives.¹⁵ *Ḍarar shar'i* means harm, according to what is normally recognised by Islamic Law, affecting a wife in respect of religion, life, body, mind, or property. In the case of *Aishah binti Abdul Rauf v Wan Mohd Yusof bin Wan Othman*¹⁶ the husband had applied to the Syariah Court for permission to contract another marriage. The learned judge gave the permission asked for. The trial judge held that the respondent had the means to support more than one wife. He also stated he feared that the respondent and his proposed second wife would commit *zinā* (adultery) if they were not allowed to marry. The existing wife appealed against the decision of the Syariah Court to the Appeal Board Committee. The Board of Appeal allowed the appeal. The Board stated that the burden of proof is on the husband to show that he has satisfied all the conditions stipulated in the law. The learned judge only gave serious consideration on the question of financial means under condition (b). The judge ignored conditions (a) (c) and (d) of section 23(4) of the Selangor Islamic Family Law Enactment 1984. Condition (a) provides "That the proposed marriage is just and necessary, having regard to such circumstances as among others, the following, that is to say, such as sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife

¹⁴ (2002) 15 JH 79.

¹⁵ Section 23 (4) (d) of Islamic Family Law (Federal Territories) Act, 1984.

¹⁶ [1990] 3 MLJ lx; (1990) 7 JH 152.

or wives.” Conditions (c) mentions “That the applicant would be able to accord equal treatment to all his wives as required by Hukum Syara” and (d) states “That the proposed marriage would not cause *darar syarie* to the existing wife or wives.” by merely accepting the husband’s bare statement without proof and authority under Hukum Syara’.

The Board stressed that all the four conditions were equally important and should be considered separately. The Board after deliberation held that the husband had failed to satisfy condition (a) and this failure alone would be sufficient ground to reject his application. It also held that the four conditions imposed are not in conflict with the Qur’ān, as they are aimed at securing justice to wives and justice is mandatory in the Qur’ān. The Board explained that the object of section 23 (4) is not to abolish polygamy, but merely provides constructive requirements in the hope that justice in the Muslim family may be better achieved.

The couple, being denied permission to marry in the State of Selangor, went to the State of Terengganu and got married there. The respondent could not be charged at that time for the offence under the Selangor Islamic Family Law, as the Shariah Court in Selangor had not been given jurisdiction to deal with the offence.¹⁷ This happened due to existence of separate State jurisdiction in Malaysia, which enable men to take advantage of the most convenient law for personal gain.¹⁸ In some States, a judge is given absolute discretion regarding application for polygamous marriages.

It is worth discussing two cases that have been decided by the Shariah Court of Singapore on the issue of polygamy. In *Re Salleh bin Suati*¹⁹ the appellant initially filed an application to practice polygamy to the judge, however it was rejected. The judge stated that the appellant has insufficient means to support two wives. The court also found out that the appellant was being unfair to his present wife as he neglected his duties as a husband and caused emotional pressure on the wife. The appellant, on appeal against the judge’s decision, contended that his

¹⁷ Ahmad Ibrahim, *Ahmad Ibrahim, Family Law in Malaysia*, MLJ, 1997, p. 198.

¹⁸ Nik Noraini Nik Badli Shah, *Islamic Family Law and Justice for Muslim Women*, Sisters in Islam, 2003, pp. 28-29.

¹⁹ [1990] 2 MLJ xxix.

application should be allowed because his relationship with his potential wife was very intimate and wished to legalise it. The Shariah Court of Appeal dismissed his appeal on the ground that his reasons were unsound and not concrete enough to counter the fact that he would be unjust to his wives. He had failed to satisfy the Board that he had the requisite ability to discharge his outward duties. Neither had he shown that he would be able to be just and fair nor can he treat his wives equitably.

In *Ayisha Begum v Hajiah Maideen*²⁰ it was held by the Syariah Appeal Board that the test to be applied as to ‘*whether the husband is competent to support more than one wife and will be able, if he marries more than one wife, to treat them with equality in accordance with the Muslim law*’ is an objective one i.e., the standard of equitable treatment is what reasonable Muslims would deem to be equitable, and not a subjective one i.e. what the particular husband would consider to be equitable.

It is further provided under the Islamic Family Law Act that any party aggrieved by or dissatisfied with any decision of the Court may appeal against the decision in the manner provided for in the Administration Enactment for appeals in civil matters.²¹ In the case of *Rajamah v Abdul Wahab b Long*,²² the Selangor Syariah Appeal Board Committee allowed the wife’s appeal. The Court said that the burden of proving is on the husband to show that he is capable of supporting more than one wife. In this case the court after looking at the evidence of the husband’s financial means decided that he would not be able to support two wives financially.

In *Ramona Juita Abdullah v Engku Nazarudin b Engku Muhamed*,²³ the appellant aged 61 and the respondent aged 74 got married in 1973 in Kuala Lumpur. The couple did not have any children. The respondent was from the State of Pahang Royal Family and the appellant was originally from France and already obtained Malaysian citizenship. The respondent had filed an application for polygamy at the Shariah Court of Pekan, Pahang. At the hearing of the application, the appellant did not show up although a summons was already served on her by the court. The court in the absence of the appellant, granted

²⁰ [1988] 3 MLJ xlv.

²¹ Section 23 (6) of the Islamic Family Law (Federal Territories) Act, 1984.

²² (1990) 7 JH 171.

²³ (1999) 13 JH 215.

permission to the respondent to practice polygamy. The appellant appealed against the decision of the Shariah Court of Pekan to the Syariah High Court of Kuantan (Pahang State capital). The ground of appeal was that the judge was wrong in allowing the application for polygamy to the respondent without hearing any evidence from the appellant. The appellant claimed that she did not attend the hearing at the Shariah Court of Pekan as she was in Australia for medical treatment, and her lawyer had yet to qualify to practise in Pekan, Pahang.

The following were the decisions of the Syariah High Court of Kuantan:

1. The case had to be sent for retrial before another judge.
2. The permission for polygamy that was granted earlier to the respondent was suspended pending the decision by the court.
3. The court ordered that *sulh* (mediation) has to be arranged between the parties.

As a remedy for the wife, she can apply for the dissolution of the marriage if the husband fails to treat her equitably. Section 52 (1) of Islamic Family Law Act provides “A woman married in accordance with *Hukum Syara*’ shall be entitled to obtain an order for the dissolution of marriage or *fasakh* on any one of the following grounds...

(h) (vi) If he has more wives than one, does not treat her equitably in accordance with the requirements of *hukum Syara*’.

In the case of *Mohd Alwi bin Sari v Faizah Mohd Ghazali*,²⁴ the wife applied for *fasakh* on the ground that the husband had married again without her knowledge and he subsequently failed to treat his two families fairly. The husband claimed that he was a single man when he married the second wife. As a result, the first wife suffered depression and tension. The husband however, denied all the allegations of the wife. The Shariah Court after hearing the evidences from both parties granted *fasakh* to the first wife on the ground the husband did not treat the applicant equitably in accordance with the requirements of *hukum syara*’.

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(1999) 13 JH, 77.

In the case of *Joan Mary Sulaiman v Sulaiman bin Haji Musa*²⁵ the applicant that is the first wife applied for *fasakh* under section 52(1) of the Islamic Family Law Act on the ground that the husband has neglected in providing maintenance for more than one year. According to the evidence, the husband did not have any valid reasons for not fulfilling his duties in providing the maintenance and in giving fair and just treatment to his first wife according to *hukum syarak*. The Court had granted *fasakh* on the ground that the husband neglected his responsibilities and has not been providing adequate maintenance to his first wife, and also failed to observe the night's turn between his wives as required under the Islamic Law. All these have caused the first wife to suffer difficulties and depression and consequently it was difficult for her to continue to live with the husband.

In the case of *Zarina*,²⁶ a housewife, she had filed a petition for annulment of marriage through *fasakh* under section 52(1)(h)(i) of the Islamic Family Law Act 1984 on the grounds that she was habitually assaulted by her husband's unequal treatment between co-wives. In another case a wife, *Anum*,²⁷ filed for *fasakh* on the same grounds that her husband had failed to maintain herself and her children. Her husband had contracted another marriage. The Shariah Court granted her petition.

It is also provided that any party who contracts a marriage in contravention of subsection (1) shall pay immediately the entire amount of the *mas kahwin* and the *pemberian* due to the existing wife or wives, which amount if not so paid, shall be recoverable as a debt.²⁸ In the case of *Abdul Kadir v Fatimah*²⁹ the wife claimed payment of her *mas kahwin*, which she said, had not been paid by the husband. The judge

²⁵ (1993) 10JH 86.

²⁶ Civil case No. 385/96, this unreported case was quoted from Raihanah Abdullah, "Polygamy as a cause of divorce in Malaysia," *International Conference on Divorce: Causes and Consequences*, Beijing, July 19-20, 2004, p. 357.

²⁷ Civil case No. 300/98, this unreported case was quoted from Raihanah Abdullah, "Polygamy as a cause of divorce in Malaysia," *International Conference on Divorce: Causes and Consequences*, Beijing, July 19-20, 2004, p. 357.

²⁸ Section 23 (7) of the Islamic Family Law (Federal Territories) Act, 1984.

²⁹ (1970) 2JH 99.

who heard the case gave judgment in her favour and this was confirmed by the Syariah Court of Appeal.

The Syariah High Court of Negeri Sembilan, in the case of *Shariff bin Jamaludin v Kuning binti Kassim*,³⁰ said that in the State of Negeri Sembilan the application for polygamy will be processed by the court. The Court will call the present wife or wives to give her or their opinion before the application for polygamy may be granted. The court will only give the permission if the following are satisfied:

- a. That the application for polygamy is just and necessary;
- b. The applicant can financially support his wives;
- c. The applicant will be able to provide equal treatment to all his wives;
- d. The new marriage will not cause *ḍarar sharʿi* to the existing wives;
- e. The new marriage will not lower the standard of living that the existing wife or wives and dependants had been enjoying and would reasonably be expected to enjoy, if the marriage were not to take place.

In this case the husband applied for permission from the court to practise polygamous marriage. The existing wife did not agree to it and asked for divorce from the husband. However, the husband did not want to divorce the wife, as he still loves her. The wife applied to the court that if the husband married again she should be entitled to the maintenance of RM500.00 and maintenance for the children worth RM1,000 and the money in the saving account to be divided between them. The husband must also return the money worth RM50,000 the husband borrowed from the wife to pay for the deposit of the house. The court decided that the application for polygamy was granted. However, the husband was ordered to pay maintenance to the wife and children.

In Malaysia, failure to comply with the provisions relating to polygamy is made an offence. For example, in the Federal Territories, it is provided in the Islamic Family Law Act that 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

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(2002) 15 JH, 173.

be punished with a fine not exceeding RM1,000 or with imprisonment not exceeding six months or with both such fine and imprisonment.³¹

It has been commented that the statutory penalties provided are insufficient to serve as an effective deterrence for men who contravene the law as husbands who contract polygamous marriages without the proper permission of the Court are usually merely ordered to pay a small fine. In practice, men are usually fined with only RM300. The marriage however, may still be registered even though it is contracted without the permission of the court. Men may also escape the restrictions on polygamy in a particular state or jurisdiction, simply by moving to another State or jurisdiction.

RECENT AMENDMENT OF SECTION 23

Amendment has been made to the Islamic Family Law Act, 1984 whereby Parliament had passed the Islamic Family Law (Federal Territories) (Amendment) Bill 2005. It is aimed at improving the Act and to ensure that justice will be upheld. Section 23 of the Act inserted after subsection (8) the following subsection:

“(9) Every Court that grants the permission or orders a marriage to be registered under this section shall have the power on the application by any party to marriage-

- a. To require a person to pay maintenance to his existing wife or wives; **or**
- b. To order the division between the parties of the marriage of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division of the proceeds of the sale.”

The above proposed amendment allows the existing wife to claim for maintenance or *Harta Sepencarian* upon her husband’s contracting

³¹ Section 123 of the Islamic Family Law (Federal Territories) Act, 1984.

a polygamous marriage. Under the new amendment the existing wife, or wives, prospective wife and her guardian are required to be present in Court. It is hoped that these amendments will protect the rights of women. Prior to the amendment, Nik Noraini in her book stated that, “claims for *Harta Sepencarian* should be allowed to be made by an aggrieved existing wife upon the husband’s contracting a polygamous marriage. It is very unjust to an existing wife who married the husband at a time when he was comparatively poor, and, after struggling through difficulties and hardships to enable him to accumulate property, if after he becomes wealthy, he marries another woman. After all, Islam emphasizes upon justice to the wife in a polygamous marriage, and polygamous marriage is permitted only when there is no injustice to the wife. A provision giving the wife a share in the property accumulated prior to the husband’s new marriage would at least mitigate some injustice from the financial point of view.”³²

On the new amendment, the Joint Action Group on Gender Equality commented that it is not fair if the husband will also be able to claim *harta sepencarian* from his existing wife or wives as the proposed provision may be abused by irresponsible husbands. Thus, the Group suggested that claims for *harta sepencarian* upon a husband’s polygamous marriage be specified that only the wife can apply for *harta sepencarian* from the husband.³³ The Group also claimed that under the new amendment, a wife is forced to choose either maintenance or division of *harta sepencarian* upon a husband’s polygamous marriage. According to them, the use of the word ‘or’ in the provision forces a wife to choose either one. Kulliyah of Laws of the International Islamic University Malaysia in its response to the new amendment states that in general the recent amendment to the Islamic Family Law Act can be accepted. However, there are some parts of the provisions that need to be clarified and clearly defined. For example, the definition of *harta sepencarian* has to be amended to make it clearer and comprehensive. It has been suggested that only the wife should be given the right to apply for the division of *harta sepencarian*. This is to protect the interest of the existing wife from being abused when the polygamous marriage

³² Nik Noraini Nik Badli Shah, *Marriage and Divorce under Islamic Law*, International Law Book Services, Kuala Lumpur, 1998, p. 40.

³³ See <http://www.sistersinislam.org.my/memo/>. Viewed on 4/7/2007.

takes place whereas; there will be no significant implication on the husband who is practicing polygamy. It is also proposed that the court when granting the permission to the application for polygamy and before allowing registration of the polygamous marriage under section 23, should make orders as to the arrangements for the provisions of maintenance for the wife and children. These orders should be made immediately without the first wife having to make any application for maintenance to the court. This is to protect the rights and welfare of the wife who does not know that she needs to make an application for maintenance, in a situation where the husband, when contracting another marriage neglects payment of maintenance; whereas in Islam it is obligatory upon the husband to provide maintenance to his wife.

CONCLUSION

Polygamy is a human institution that existed in various communities throughout the world. Islam introduces guidelines and conditions to ensure that polygamy is justly practised. In Malaysia, to ensure justice towards women is served, the Shariah Court can only grant permission for polygamous marriage if the man has satisfied the court with conditions that require the husband to have sufficient means to support his wives and dependants and he would be able to accord equal and fair treatment to them. The cases discussed above show that a number of applications to practise polygamy by men were dismissed by the Shariah Court for fear that justice would not be served to the women. The Shariah Court in Malaysia has managed the practice of polygamy to the best possible by emphasising on the importance of just and equitable treatment to be given to the wives not only from the aspect of finance, but also the manner of conduct and interactions (with each of the wives) as well.